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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN BORDER FORCE BILL 2015

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Border Protection,
the Honourable Peter Dutton MP)

AUSTRALIAN BORDER FORCE BILL 2015

OUTLINE

The purpose of this Bill is to establish the role of the Australian Border Force Commissioner, to enable the operation of the Australian Border Force, and introduce provisions to support the management of a professional and disciplined workforce that exercises its powers and functions with the highest standards of integrity.

The Australian Border Force Commissioner, a statutory officer, will have control of the operations of the Australian Border Force and is directly accountable to the Minister in relation to those operations. The Australian Border Force Commissioner will have a dual role as Comptroller-General of Customs with responsibility for enforcement of customs laws and collection of border related revenue.

The Australian Border Force will be a single, integrated, frontline operational border entity within the Department that is charged with enforcing customs and immigration laws and protecting Australia's borders.

Immigration and Border Protection workers will make decisions that affect the safety, rights and freedoms of individuals 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 powers under the *Customs Act 1901*, *Migration Act 1958* and *Maritime Powers Act 2012* and other Commonwealth law, such as detention, arrest, boarding a vessel, entry, search, questioning, seizure, use of force and removal from Australia. The community and government trust Immigration and Border Protection workers to exercise these powers reasonably, lawfully, impartially and professionally.

The Bill, therefore, contains a number of integrity provisions to increase resistance to criminal infiltration and corruption and to enhance government and public confidence in Immigration and Border Protection workers, as well as the confidence of other partners including intelligence organisations and foreign governments. The Bill also includes provisions that enable the setting of standards for a highly trained, disciplined and flexible workforce.

FINANCIAL IMPACT STATEMENT

The amendments in this Bill have no financial impact.

Statement of Compatibility with Human Rights

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

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

Overview of the Bill

The Bill provides the legislative framework for the ABF, a single frontline operational border control and enforcement entity that will be formed within the Department from 1 July 2015. This follows the Government decision to integrate Department and the ACBPS into a single Department of State. Specifically, the Bill:

- establishes the statutory office and role of the ABF Commissioner who will have control of the operations of the ABF. The Commissioner will have a dual role as the Comptroller-General of Customs, with responsibility for the enforcement of Customs law and collection of border-related revenue;
- provides that the ABF Commissioner and APS employees in the ABF will be able to exercise powers under the Customs Act, Migration Act, Maritime Powers Act and other Commonwealth laws;
- provides for binding written directions to be issued by the ABF Commissioner and Secretary regarding the administration and control of the ABF and the Department respectively and in relation to the performance of functions or exercise of powers under laws of the Commonwealth;
- provides the ability to require immigration and border protection workers to undergo alcohol and prohibited drug screening tests;
- establishes secrecy and disclosure provisions; and
- provides for the management of serious misconduct, including resignation and termination provisions for employees involved in serious misconduct.

A separate Bill is being introduced to repeal the Customs Administration Act upon commencement of the ABF Act and make consequential amendments to other portfolio legislation. Repeal of the Customs Administration Act will abolish ACBPS as a statutory agency.

Human rights implications

The Bill engages a number of human rights; these are discussed below under each relevant measure of the Bill.

Powers to direct and set standards for the workforce

This Bill provides that the Secretary and ABF Commissioner can issue written directions to existing and new employees and other specified persons whose services are made available to Department (such as contractors, consultants, employees of State, Territory and other Commonwealth agencies and authorities), collectively known as “IBP workers”. These Directions are broadly modelled on section 4B of the Customs Administration Act, which provides the CEO can make orders with respect to the control of ACBPS.

The Secretary may give directions to IBP workers regarding the administration and control of the Department and in relation to the performance of functions or exercise of powers under laws of the Commonwealth. In practice, directions may be issued in relation to essential qualifications, organisational suitability and reporting of serious misconduct and criminal activity.

The ABF Commissioner may issue directions to IBP workers working in or providing services to the ABF regarding the administration and control of the ABF and in relation to the performance of functions or exercise of powers under laws of the Commonwealth. In practice, directions may be issued in relation to essential qualifications, reporting of serious misconduct and criminal activity, the performance of ABF functions and the exercise of powers under laws of the Commonwealth.

IBP workers must comply with directions issued by the Secretary or ABF Commissioner. Failure to comply with a direction may result in sanction or termination of employment of an APS employee under subsection 13(4) and sections 15, 28 and 29 of the Public Service Act.

Setting of essential qualifications

The setting of essential qualifications will ensure that employees in the Department have the necessary skills and attributes to undertake the duties that are required of them safely and professionally. It is intended that existing employees who lack an essential qualification will be given a reasonable period in order to achieve the relevant requirements or standard. Such qualifications may include components such physical or psychological health or fitness, professional or technical qualifications and/or learning and development requirements.

Rights of equality and non-discrimination

The rights to equality and non-discrimination are contained in article 26 of the *International Covenant on Civil and Political Rights* (ICCPR). This requires that the law shall prohibit discrimination and provide guarantees to all persons of equal and effective protection against discrimination on any ground. In General Comment 18, the UN Human Rights Committee stated that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the ICCPR. Employers can set particular qualifications, skills, experience or other necessary characteristics if legitimately required of a person to perform certain work and such distinction, exclusion or preference will not constitute discrimination.

Measures in the Bill permit the setting of essential qualifications in the performance of duties; this does not represent discrimination as these qualifications are legitimately required for the performance of work and are specific to the role. In terms of meeting the physical health and fitness component, this will be essential as some roles in the ABF will have a high physical component in the performance of everyday duties. This could include, for example, boarding a marine vessel, lifting or inspecting goods, driving vehicles, training detector dogs and carriage and/or use of personal protective equipment. At times, ABF officers may be required to perform extraordinary duties such as preserving the safety of life at sea through rescuing people from the water and use of force in response to a threat. Employees will require the physical attributes and training to be able to safely carry out these duties. In terms of the psychological health and fitness components which may include psychometric and

resilience testing, these assessments will be required to ensure the workforce has the emotional and mental disposition suitable for the performance of certain duties. This will require an individual to possess the abilities and innate qualities to confirm suitability for particular positions in the Department, such as employees in the ABF who are trained to carry weapons, or employees working overseas in hardship postings. These essential qualifications will not only ensure the safety in terms of suitability of employees performing roles in the Department, but also the safety of the wider general public, in terms of the suitability of employees authorised to utilise enforcement powers and activate firearms. These essential qualifications will complement the mandatory learning programmes that will also be linked to certain positions in the ABF and roles within the broader department.

Rights of people with disability

The *Convention on the Rights of Persons with Disabilities* (CRPD) recognises the barriers that people with a disability may face in realising their human rights. All human rights treaties apply to everyone, including people with a disability. The CRPD requires the full realisation of all human rights and fundamental freedoms for persons with disability without discrimination. This includes taking appropriate measures to eliminate discrimination by any person.

Under the Bill, the setting of essential qualifications serves a legitimate objective to ensure the workforce has the appropriate skills and abilities to be able perform functions in the Department, including roles that have a high physical component. These requirements will be implemented according to the requirements of the position and assessed by independent service providers.

The intention of requiring essential qualifications is connected to the objective of having access to a suitably qualified workforce that can be deployed to Government objectives of strong national security, a strong economy and a prosperous and cohesive society. The requirement to hold essential qualifications will be implemented consistently with the *Disability Discrimination Act 1992* in terms of ensuring persons with disabilities have the right to the same employment opportunities as a person without disabilities, provided the inherent requirements of the particular functions of a position are able to be met. The Department will apply requirements for essential qualifications according to an assessment of the physical, psychological, professional and technical requirements of a position and ensure that such requirements are reasonable in the circumstances.

The Department will continue to review, report and track progress against its *Disability Action Plan 2013-16*, in terms of building a Department where all employees have access to professional development, career progression and services.

Right to take part in public affairs and elections

Legislation that regulates eligibility for employment in the public service or appointment to public office must be considered under article 25 of the ICCPR which contains to the right to take part in public affairs and elections. Subparagraph (c) of article 25 deals with the right and the opportunity of citizens to have access in general terms of equality to public service positions. To maintain equality this requires the process for appointment, promotion, suspension and dismissal to be objective.

The proposed measures in the Bill relating to the holding and maintaining essential qualifications and the impact on eligibility to assume certain positions within the Department is consistent with requirements under article 25 and rely on existing provisions under the Public Service Act.

In terms of consistency with article 25, no unreasonable restrictions will be imposed on access and equality to or in the public service. All prerequisite essential qualifications will be specific to the role and linked to the requirements of the position. Only specific positions within the department will require officers to meet these requirements and demonstrate the additional capabilities depending on the type of duties to be undertaken. The requirement to meet certain physical and psychological health and fitness requirements and training will ensure employees are equipped to safely carry out the duties of a position. Psychometric and resilience testing assessments will ensure employees have the emotional and mental disposition suitable for the performance of certain duties. These requirements will be essential in safeguarding both the employee responsible for undertaking designated duties and public safety as a result of the employee carrying out their duties in the public domain.

Right to work and rights in work

Rights at work must be considered for legislation that deals with any aspect of employment or workplace relations including promotion and advancement at work and remuneration. The protection of worker's rights in the workplace is contained within articles 6 and 7 of the *International Covenant on Economic Social and Cultural Rights (ICESCR)*. The right to just and favourable work conditions encompasses a number of elements including the equal opportunity to be promoted in employment to an appropriate higher level, subject to no considerations other than those of seniority and competence. This Bill will allow the Secretary and the ABF Commissioner to issue directions relating to essential qualifications. These directions will require employees to meet specified qualifications in order to perform their duties within the Department. These qualifications will be linked specifically to the scope and requirements of a position and will be proportionate to the law enforcement functions the role will be expected to fulfil. This will ensure that the ABF and broader department has a workforce with appropriate skills and attributes for the roles required to be performed, proportionate to the significant enforcement powers available to employees.

Subscribe to an oath or affirmation

Provisions in the Bill will allow the ABF Commissioner to request an IBP workers who is in the ABF or whose services are made available to, or who are performing services for, the ABF, to make and subscribe an oath or affirmation before the ABF Commissioner or authorised person. This requirement will support a professional and ethical culture and provide a clear up-front marker about the standards of professionalism and conduct expected. An IBP worker who has subscribed an oath or affirmation must not engage in conduct that is inconsistent with the oath or affirmation.

Right to work and rights at work

Rights in work include the enjoyment of just and favourable conditions of work. The oath or affirmation will be similar to the kind of undertaking required of employees of the AFP under the AFP Regulations. The oath will require certain employees to subscribe to a level of professionalism and ethics, which is essential in an environment where roles involve the

exercise of significant enforcement powers. Should an employee engage in conduct inconsistent with the oath the Secretary will have the ability to sanction or terminate employment if the conduct is found to be in breach of the APS Code of Conduct. The importance of ensuring employees responsible for exercising significant enforcement powers, subscribe to behaviour that uphold public service professionalism and ethics, is essential to safeguard the reputation of the Department and the safety of the general public.

Right to take part in public affairs and elections

Subparagraph (c) in article 25 of the ICCPR requires that citizens have the opportunity, in general terms, to access and equality for public service positions. The requirement to undertake an oath or affirmation for some positions within the ABF may limit eligibility for these positions. However, this requirement will be implemented in a manner consistent with the functions of the role and with respect to the relevant enforcement powers the employee will be required to exercise.

Organisational Suitability Assessment

As part of measures to increase the Department's resistance to corruption, IBP workers will be directed to undertake an OSA. This will be implemented using the direction-making power contained in the Bill. The requirement to undertake an OSA reflects the Department's operating environment, this includes that information held and produced by the portfolio is classified or connected to information that is classified. The Department will be responsible for managing the integrity of the Australian border, a national strategic asset and this position requires significant trust. To retain the confidence of the Government and community the Department must maintain a culture resistant to corruption. The OSA will contribute to strengthening integrity by providing a screening process to assess if an individual is suitable, from an integrity and character perspective, to have access to non-public assets, information, systems or premises. The OSA is based on the *Australian Standards AS: 4811-2006: Employment Screening*.

OSA requirements are also in line with changes to the Australian Government's personnel security policy which seeks to reduce the risk of loss, damage or compromise of Australian Government resources by providing assurances about the suitability of personnel authorised to access resources. It is the responsibility of the agency to provide assurances of the suitability of personnel to access official resources, including classified information. OSAs seek to identify professional integrity risks based on a person's character and the detection of any criminal associations. This will help to ensure employees employed or engaged by the Department, are suitable to work in, or access information held by the Department.

Departmental instructions and guidelines will contain the policy advice for OSA screening processes to provide information on relevant procedures and protections in place for privacy and the right to respond to adverse outcomes. Strict protocols and procedures for conducting OSAs and rules of procedural fairness will apply. Under the screening process arrangements, employees with an adverse decision will be provided with the reason for the outcome and an opportunity to respond. Any responses will be reviewed by the decision maker prior to making the decision. The only exception to this is if it relates to a matter otherwise protected by law. Aftercare arrangements will also be in place to manage and mitigate any risks identified in the screening process. This will provide support to employees in terms of offering an alternative to issuing an adverse OSA in circumstances where risks can be

adequately and cost effectively managed. Personal information collected, used and stored and disclosed during screening processes will be in accordance with the Privacy Act.

Right to freedom of assembly and association: measures in the Bill require a person to disclose membership of a group or association

The rights to freedom of assembly and association are contained in articles 21 and 22 of the ICCPR, which also set out the reasons for which restriction of those rights may be permitted. Restrictions must be provided for by legislation (or imposed in conformity with legislation), must be necessary to achieve the desired purpose and must be proportionate to the need on which the limitation is based. The right to freedom of association protects the right of all persons to group together voluntarily for a common goal and to form and join an association.

The OSA may require IBP workers to declare any family, friends or associates whose activities, for example a criminal history or associations with organised crime or an Outlaw Motorcycle Gang, may be relevant to the assessment of the worker's organisational suitability and the assessment of the worker's honesty, integrity and trustworthiness. The rights in Article 21 and 22 may be subject to restrictions if imposed in conformity with the law and which are necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedom of others. The Government considers that the restrictions that may be subsequently imposed on IBP workers, such as having to cease an association or declare further contact with such persons, is proportionate to achieving the desired purpose in terms of protecting classified information obtained or held by DIBP and mitigating professional integrity risks. Appropriate arrangements would be considered on a case-by-case basis and take into account the individual circumstances of the case, including the nature of the association and the seriousness of the activities.

Right to privacy and reputation

The prohibition on unlawful or arbitrary interference with privacy and attacks on reputation is contained in article 17 of the ICCPR. The direction to complete an OSA will require an employee to provide personal information about themselves and their associates in the form of a questionnaire to enable screening processes to assess if an employee is suitable from an integrity and character perspective. The Department will be responsible for managing the integrity of the Australian border and in this position of trust it will be essential that employees performing duties at the border meet high standards in terms of integrity and character. This will be essential in adopting a preventative approach in terms of preventing infiltration of criminal entities that may seek to exploit employees that do not consistently meet integrity and character requirements. The Government considers the requirement to provide personal information, which may also impact on a person's reputation and that of other people, to be proportionate to these legitimate aims and hence not an arbitrary interference under Article 17.

Drug and alcohol testing

The Bill provides that an authorised person may direct an IBP worker to undergo an alcohol breath or screening test and/or provide a body sample for a prohibited drug test. The Secretary and the ABF Commissioner will be able to prescribe by legislative instrument what is included in the definition of "prohibited drugs". IBP workers can be randomly selected for

drug and alcohol testing. In addition, the Bill allows for testing to occur if an IBP worker is reasonably suspected of being under the influence of alcohol, after certain incidents resulting in a death or serious injury, and while performing duties on board an Australian Border Force vessel. An authorised person may give an IBP worker, who is in the course of performing his or her duties as an IBP worker, written direction to undertake an alcohol screening test, an alcohol breath test or provide a body sample of a specified kind in the direction for prohibited drug test. If testing indicates alcohol is present the worker may provide a sample of his or her blood for the purpose of an alcohol blood test.

Drug and alcohol testing arrangements will be administered under the Department's *Drug and Alcohol Management Program (DAMP)*. This program reflects policy settings commensurate to risks to the Department from employees violating Commonwealth drug laws and the resulting potential for employees to be manipulated and agency systems and information compromised. It is important the Department has mechanisms to provide an evidence based approach to either confirm allegations or clear an employee through drug and alcohol testing. The random drug testing component of this program complements targeted testing as it reinforces the Department's policy expectations at an appropriate profile throughout the workforce.

Drug and alcohol screening arrangements have been proven to operate effectively for ACBPS. Under the arrangements currently in place for ACBPS, drug use in the workforce has been identified, which has also revealed behaviours by officers that are misaligned to the ACBPS mission. These experiences support findings in the Australian Commission for Law Enforcement Integrity (ACLEI)'s 2014 investigation in relation to an ACC employee who avoided a drug test. This investigation identified several integrity principles that demonstrate risks to law enforcement organisations including the potential for officers involved in illicit drug use to be manipulated by organised crime groups, misplaced loyalty as a result of differing values between an agency and its employees, failure to fully understand risk factors associated with drug use through employees withholding information about past or present drug use and the emerging risk of employees who are not in frontline roles, but have access to sensitive information which may be vulnerable to compromise similarly to operational colleagues.

Rights at work

The protection of worker's rights in the workplace is contained within Article 22 of the ICCPR. This Bill will ensure that the Department's workplace is drug and alcohol free and thereby promotes this specific human right and as a result advances labour rights contained within the *International Labour Organisation Convention 1948*.

Right to privacy and reputation

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation. It provides that persons have the right to the protection of the law against such interference or attacks.

The drug and alcohol testing measures contained in the Bill will impact on the right to privacy, including through the collection and use of personal information within the Department, such as results from the testing, and the compulsory physical intervention, such

as observation or taking a blood sample, of a person for testing purposes. These measures do not limit the obligations of the Department under the Privacy Act.

In support of the Bill, it is intended that the Department will implement a drug testing process in line with the *Australian Standards – Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine* (AS/NZS 4308: 2008) and *Procedures for specimen collection and the detection and quantitation of drugs in oral fluid* (AS 4760-2006). These standards provide safeguards to minimise interferences with privacy. In relation to alcohol testing procedures, it is anticipated that the Department will use evidentiary breath analysing instruments which are recognised by Australian courts of law.

These controls will ensure the integrity of any results obtained and that retention of personal information will be directly related to the purpose of the intended testing arrangements. Any privacy limitations incurred as a result of these processes serve a legitimate objective and satisfy any reasonableness expectations attached to the right against arbitrary or unlawful interference with privacy. Additionally in terms of admissibility of test results in legal proceedings, this is limited to proceedings in relation to a decision of the Secretary to terminate employment, proceedings under the *Safety, Rehabilitation and Compensation Act 1988* and any proceedings in tort against the Commonwealth instituted by the worker.

The DAMP will serve both health and safety and integrity goals. The objective of drug and alcohol testing provisions is to ensure that IBP workers are not seen to condone drug importation. Organised criminal groups can seek to infiltrate law enforcement agencies and corrupt public officials. The drug and alcohol testing arrangements is an integrity measures designed to mitigate these risks.

In addition to maintaining a high standard of integrity for the workforce, drug and alcohol testing will also serve a purpose in terms of promoting a drug and alcohol free workplace, which will fulfil duty of care requirements under the WH&S Act. Drug and alcohol testing in this respect will minimise the risk of accident, incident and injury in the workplace resulting from the consumption of drugs or alcohol.

Administering the DAMP will be supported by an instruction and guidelines that will set out the Portfolio position on drugs and alcohol in the workplace. These guidelines will contain instruction to safeguard the privacy of individuals including specific responsibilities for managers and supervisors and support for workers, including those that voluntarily seek assistance associated with drug and alcohol use or misuse. Any requests for assistance for employees will be treated with appropriate confidentiality in accordance with the relevant privacy legislation. The guidelines will also provide instruction for instances where directions in the DAMP are not followed and will reaffirm that failure, neglect or refusal to comply may result in disciplinary action commensurate with the circumstances and the seriousness of the occurrence.

The interferences with the right to privacy contained in this Bill are considered to be proportionate to the legitimate aims of protection against corruption and unethical conduct in law enforcement and of workplace safety.

Termination of employment for serious misconduct

The Fair Work Act currently applies to all dismissals of APS employees employed under the Public Service Act and provides protection where the dismissal was harsh, unjust or unreasonable. While these protections are appropriate in most circumstances, in instances of serious misconduct, including corrupt conduct, the application of the Fair Work Act can impact on the ability of the Secretary to both quickly and decisively remove an APS employee from the Department. For example, a review of the dismissal that results in the person having to be reinstated may send a mixed signal to the community or workforce about the tolerance of serious misconduct within the Department.

The Bill provides that if the Secretary terminates the employment of an employee in the department and the Secretary or the ABF Commissioner reasonably believes the employee's conduct or behaviour amounts to serious misconduct, the Secretary or the Commissioner may make a declaration to that effect. The effect of the serious misconduct declaration removes the right of a terminated employee seeking remedy (in relation to their dismissal) through the Fair Work Act. The serious misconduct declaration power cannot be delegated by the Secretary or ABF Commissioner.

Right to an effective remedy

While Article 2(3)(a) of the ICCPR is based on the premise that any person, who has their rights or freedoms (as protected under the ICCPR) violated, shall have an effective remedy, Article 2(3)(b) qualifies this right more prescriptively. Article 2(3)(b) states that the right shall be "...determined by competent judicial, administrative or legislative authorities, or by any competent authority provided for by the legal system of the state and to develop the possibilities of judicial remedy".

A person may claim that their dismissal has involved a violation of their rights under the ICCPR, such as those relating to non-discrimination or freedom of association, as elaborated upon earlier in this Statement.

The proposed power to make a declaration of serious misconduct only applies once a person has been dismissed and is separate to the dismissal process. The new power provided in the Bill does not alter or reduce the obligation on the agency to accord the person fair process when determining whether or not they have breached the Code of Conduct, and if they have, whether they should be dismissed as a sanction for that breach.

The power to issue the declaration only applies in the 24 hours after dismissal. As part of the dismissal process the affected employee will receive notice of the ground(s) for his or her dismissal. Additionally, the employee receives written details of the allegations as part of the investigation process, the opportunity to respond to those allegations, as well as the opportunity to respond to the decision makers finding and the proposed sanction of dismissal – this is part of the existing procedural requirements mandated by the Public Service Act for determining breaches of the Code of Conduct.

The declaration does not impact legal rights provided by other legislation or the common law, such as a General Protections claim under Part 3-1 of the Fair Work Act, claims under anti-discrimination legislation or judicial review (including under the ADJR Act). The

written declaration of serious misconduct will be a reviewable decision under the ADJR Act. IBP workers are therefore provided an avenue to pursue a judicial remedy for their dismissal.

The Right to the enjoyment of just and favourable conditions of work

The right to work in the ICESCR includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts. Rights in work include the enjoyment of just and favourable conditions of work.

The consequence of making a serious misconduct declaration is that protections under the Fair Work Act relating to the payment of outstanding entitlements are removed as well as the ability of a person to challenge their termination on the grounds that it is an unfair dismissal. The investigation and review that will be undertaken by the Department, following reasonable belief of serious misconduct, will adhere to standard requirements in terms of procedural fairness. Policy guidelines to accompany provisions in the Bill will ensure measures are not implemented in arbitrary way. The ability to make a serious misconduct declaration is essential to underpin the Government's and the community's confidence in Australia's immigration, customs and border arrangements. Serious misconduct has the potential to put at risk the protection of the Australian border, and adversely impact the carriage of the Department's law enforcement responsibilities and damage the Department's reputation. It also places at risk the safety and welfare of Departmental employees and strategic partners. Therefore in instances where serious misconduct is reasonably suspected in terms of an employee's conduct or behaviour, swift action must be taken to both discipline those involved and to demonstrate such behaviour will not be tolerated. The Government therefore considers that the limitation on the right to work is necessary to achieve these aims.

Delaying the date of resignation where it is reasonably believed an employee has engaged in serious misconduct

Provisions in the Bill allow the Secretary or ABF Commissioner to defer an employee's date of resignation by up to 90 days from written notification of resignation by the employee where the Secretary or ABF Commissioner reasonably believe an employee has engaged in serious misconduct or is being investigated for such conduct. This enables the finalisation of any investigation, determination of breach of the APS Code of Conduct and consideration of whether to impose the sanction of termination of employment.

These provisions will only be able to be used in instances of serious misconduct, and the definition of serious misconduct is consistent with definitions used in the law enforcement integrity context. Specifically, serious misconduct will be confined to corruption, a serious abuse of power, a serious dereliction of duty, or any other seriously reprehensible act or behaviour by the person whether or not acting, or purporting to act, in the course of his or her duties.

Rights to work and rights at work

The right to work includes the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts. Rights in work include the enjoyment of just and favourable conditions of work.

The ability of the Secretary of my Department or the ABF Commissioner to substitute the date of effect of resignation in circumstances where it is alleged that an employee has engaged in, or is being investigated for serious misconduct and has provided notice of his or her resignation, is considered an important demonstration to both 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. The ability to substitute the date of resignation will not ordinarily require the employee to continue or resume duties during the period of investigation.

Reporting of serious misconduct

The Bill provides measures that allow the Secretary and ABF Commissioner to issue directions that would permit mandatory reporting of serious misconduct or criminal activity. This may require reporting by an IBP worker of serious misconduct by such a worker or criminal activity involving such a worker, where the criminal activity affects, or is likely to affect, the operations, responsibilities or reputation of the Department.

Right to freedom of assembly and association

The right to freedom of assembly and association is protected within Article 22 of the ICCPR. A direction issued under the relevant provisions of the Bill could include reporting associations or involvement with groups that facilitated activities contributing to serious misconduct or corruption. The measures in the Bill may discourage IBP workers from joining or associating with an organisation, such as an Outlaw Motorcycle Gang, that is subject to criminal investigative scrutiny. Article 22(2) of the ICCPR specifies the legitimate aims for which any legal restriction on this right must pursue. These include restrictions which are provided for by law or necessary for the interests of national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.

Given the importance of ensuring people with responsibility for the enforcement of Australian law are resilient to corruption and that the border is strengthened as a result of these measures, the mandatory reporting requirements of this Bill are considered to be important in the interests of national security, public order and public safety consistently with Article 22(2) of the ICCPR. The profile of the integrated Department will attract attempts from organised crime groups and others who seek to compromise IBP workers. By providing a requirement to declare associations and other relevant information assists the Department in adopting a pre-emptive approach to identifying risks in the workforce. This allows risks presented by IBP workers to be identified and managed in the interest of national security, public order and public safety, as opposed to being targeted by criminal groups.

Right to privacy and reputation

The prohibition on unlawful or arbitrary interference with privacy and attacks on reputation is contained in article 17 of the ICCPR. Directions issued by the Secretary that require mandatory reporting of serious misconduct or criminal activity may impact on the right to privacy and reputation. The Instruction and Guideline for Declarable Circumstances will provide the policy guidance for complying with a direction issued by the Secretary for mandatory reporting. This guideline will determine the types of information that must be declared and also in terms of protecting employee's privacy. The collection, use and

disclosure of such information will be in accordance with the Privacy Act and will be consistent with requirements for storing information relating to an individual's security clearance and/or OSA. The mandatory reporting requirement will assist the Department in adopting a preventative approach to circumstances that may compromise an employee's position of trust in the border environment and limitations on privacy are considered by the Government to be necessary to achieve this aim.

Right to minimum guarantees in criminal proceedings

Article 14 of the ICCPR protects the right to a fair trial or hearing, while also ensuring minimum guarantees in criminal proceedings for defendants. Article 14(2)(g) of the ICCPR protects the right of the person to not be compelled to testify against him or herself or to confess guilt.

The Bill contemplates that a direction issued by the Secretary of ABF Commissioner to report on serious misconduct or criminal activity may require an IBP worker to give information, answer questions and produce documents. Such information may be potentially self-incriminatory in nature and/or provide information that progresses an investigation against an IBP worker.

The Bill provides safeguards to protect the right of workers against self-incrimination in circumstances where they have been compelled to answer questions, by the provision of a use immunity preventing the self-incriminating evidence being used in most legal proceedings.

Secrecy and disclosure provisions

This Bill contains provisions making it an offence to record or disclose information obtained by a person in their capacity as an entrusted person. An "entrusted person" is the Secretary, ABF Commissioner and an IBP worker. There is a penalty of imprisonment for two years for breach of this provision. The Bill provides exceptions (authorised disclosure) in defined circumstances, including where a record or disclosure is in the course of employment, is required by another law, or a court or tribunal, or where authorised by the secretary (with or without conditions).

Right to privacy and reputation

Under the proposed measures, the unauthorised disclosures of information, including personal information will be punishable by imprisonment for two years. These provisions are necessary to provide assurances to law enforcement and intelligence partners in Australia and internationally and to industry that information provided to the Department will be appropriately protected. The provisions also enable authorised disclosure of personal information in a defined range of permitted purposes. Authorisation of disclosure is not arbitrary and is only permitted where the Secretary is satisfied that the disclosure is for a permitted purpose. Where personal information is provided to a foreign country, agency, authority or organisation, it is done so in accordance with agreements or as required or authorised by law. Additionally, the Secretary may impose conditions on the recipient of the information, such as requirements about ongoing use of the personal information disclosed. The application of the secrecy provisions across the integrated department will ensure the disclosure of sensitive information is appropriately regulated.

Conclusion

This Bill 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.

AUSTRALIAN BORDER FORCE BILL 2015

NOTES ON CLAUSES

Background

1. On 18 September 2013, a new Administrative Arrangement Order was made by the Governor-General of the Commonwealth of Australia which, among other things, includes customs and border control (other than quarantine and inspection) in the schedule of matters dealt with by the Department.
2. On 9 May 2014, the Government announced that, from 1 July 2015, the Department and the ACBPS will be integrated into a single Department of State and the ABF, an operational border control and enforcement entity will be established within the Department. The ABF is to be headed by the ABF Commissioner (a statutory officer holder) and will consist of IBP workers who are in the ABF, or whose services are made available to, or who are performing services for, the ABF. The term IBP worker is defined in subclause 4(1) below.
3. This Bill provides the legislative basis establishing the office of the ABF Commissioner, who is to have the control of the operations of the ABF.
4. The Bill also enables the ABF Commissioner and the Secretary of the Department to direct and set standards for IBP workers, and introduces certain measures to ensure that the highest standards of professional integrity are to be upheld. The Bill also introduces an information secrecy and disclosure regime in relation to protected information held by the Department, including the ABF.
5. Further details relating to the integration of the two agencies, and the establishment of the ABF Commissioner are set out in each Part of the Bill, which includes:
 - Part 1 (Preliminary);
 - Part 2 (ABF Commissioner);
 - Part 3 (Resignation from the Department);
 - Part 4 (Termination of employment in the Department for serious misconduct)
 - Part 5 (Alcohol and drug tests);
 - Part 6 (Secrecy and disclosure provisions); and
 - Part 7 (Other matters).

GLOSSARY

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| Acts Interpretation Act | <i>Acts Interpretation Act 1901</i> |
| Bill | Australian Border Force Bill 2015 |
| ABF | Australian Border Force |
| ABF Commissioner | Australian Border Force Commissioner |
| ADJR Act | <i>Administrative Decisions (Judicial Review) Act 1977</i> |
| ACC | Australian Crime Commission |
| ACC Act | <i>Australian Crime Commission Act 2002</i> |
| ACBPS | Australian Customs and Border Protection Service |
| AFP Act | <i>Australian Federal Police Act 1979</i> |
| AFP Regulations | <i>Australian Federal Police Regulations 1979</i> |

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|-----------------------------|---|
| AFP | Australian Federal Police |
| AFP Commissioner | Australian Federal Police Commissioner |
| APP | Australian Privacy Principle |
| APS | Australian Public Service |
| CEO of ACC | Chief Executive Officer of the Australian Crimes Commission |
| CEO of Customs | Chief Executive Officer of Customs |
| Customs Act | <i>Customs Act 1901</i> |
| Customs Administration Act | <i>Customs Administration Act 1985</i> |
| Department | Department of Immigration and Border Protection |
| Fair Work Act | <i>Fair Work Act 2009</i> |
| LEIC Act | <i>Law Enforcement Integrity Commissioner Act 2006</i> |
| Legislative Instruments Act | <i>Legislative Instruments Act 2003</i> |
| IBP worker | Immigration and Border Protection worker |
| Minister | Minister for Immigration and Border Protection |
| OSA | Organisational Suitability Assessment |
| PGPA Act | <i>Public Governance, Performance and Accountability Act 2013</i> |
| Privacy Act | <i>Privacy Act 1988</i> |
| Public Service Act | <i>Public Service Act 1999</i> |
| WH&S Act | <i>Work Health and Safety Act 2011</i> |

Part 1 – Preliminary

6. This Part contains machinery clauses and also sets out the meaning of key terms and phrases used frequently in this Bill.

Clause 1 – Short title

7. This clause is a formal provision specifying the short title of the Bill, which, when enacted, is to be cited as the *Australian Border Force Act 2015*.

Clause 2 – Commencement

8. This clause is a formal provision specifying the commencement date of this Bill, which is to commence on 1 July 2015.

Clause 3 – Simplified outline of this Act

9. This clause sets out a simplified outline of the Bill to assist readers. Other simplified outlines are also provided in each Part of the Bill.

Clause 4 – Definitions

10. This clause defines key terms and phrases used frequently in this Bill to support measures, including the reporting of serious misconduct, the alcohol and drug tests regime and the prohibition on the disclosure of protected information. The terms and phrases in subclause 4(1) are set out below in groups to demonstrate the relationship between them and assist readers.

Alcohol blood test, alcohol breath test, and alcohol screening test

11. The term “alcohol blood test” is defined as a test of a person’s blood to determine the amount of alcohol (if any) in the person’s blood.
12. The term “alcohol breath test” is defined as a test of a person’s breath to determine the amount of alcohol (if any) in the person’s blood.
13. The term “alcohol screening test” is defined as a test of a person’s breath to determine whether alcohol is present in the person’s breath.
14. These terms support the new alcohol and drug tests regime, in Part 5 (Alcohol and drug tests) below, that is to apply to all IBP workers.

Australian Border Force and Australian Border Force Commissioner

15. The term “Australian Border Force” is defined as that part of the Department known as the ABF. The ABF will consist of the ABF Commissioner who is to be appointed in accordance with Part 2 (ABF Commissioner) below and IBP workers who are in the ABF, or whose services are made available or who are performing services for the ABF.
16. The term “Australian Border Force Commissioner” is defined as the ABF Commissioner of the ABF. The ABF Commissioner shall also be the Comptroller-General of Customs (subclause 11(3) refers).
17. The ABF Commissioner shall, under the Minister, have control of the operations of the ABF, which is responsible for operational border control, investigation, compliance, detention, maritime security and enforcement functions of the Department.
18. Further details relating to the ABF Commissioner are set out in Part 2 (ABF Commissioner) below.

Authorised person

19. The term “authorised person” is defined as the Secretary, the ABF Commissioner, or an IBP worker who is authorised by subclause 4(2). The term IBP worker is defined below.
20. An authorised person may require or direct IBP workers to undertake alcohol and drug tests in accordance with Part 5 (Alcohol and drug tests) below.

Body sample

21. The term “body sample” is defined as any human biological fluid, human biological tissue (whether alive or otherwise) or human breath. This term is referred to in the term “prohibited drug test” and supports Part 5 (Alcohol and drug tests) below.

Corrupt conduct, engages in corrupt conduct and serious misconduct

22. The term “corrupt conduct” cross-refers to the phrase “engages in corrupt conduct”.

23. The phrase “engages in corrupt conduct” is defined as the circumstance where a person in his or her capacity as an IBP worker engages in:

- conduct that:
 - involves; or
 - is engaged in for the purpose (or for purposes including the purpose) of; the worker abusing his or her position as an IBP worker; or
- conduct that:
 - perverts; or
 - is engaged in for the purpose (or for purposes including the purpose) of perverting; the course of justice; or
- conduct that, having regard to the duties and powers of the worker as an IBP worker:
 - involves; or
 - is engaged in for the purpose (or for purposes including the purpose) of; corruption of any other kind.

24. The phrase “engages in corrupt conduct” is an element in the term “serious misconduct”.

25. The term “serious misconduct” by an IBP worker is defined as:

- corrupt conduct engaged in, a serious abuse of power, or a serious dereliction of duty, by the worker; or
- any other seriously reprehensible act or behaviour by the worker, whether or not acting, or purporting to act, in the course of his or her duties as an IBP worker.

26. The term “serious misconduct” is relevant to Part 3 (Resignation from the Department), Part 4 (Termination of employment in the Department for serious misconduct) and clauses 26 (Directions – administration and control of the operations of the ABF) and 55 (Directions by Secretary – administration and control of the Department). Prescribing “serious misconduct” was implemented as part of a suite of integrity measures introduced to law enforcement agencies including, the ACBPS, the ACC and the AFP, and is consistent with the definition under section 47A of the ACC Act and section 40K of the AFP Act.

Entrusted person

27. The term “entrusted person” is defined as the Secretary, the ABF Commissioner (including in his or her capacity as the Comptroller-General of Customs) and an IBP worker.

28. The purpose and effect of this definition is to set out a cohort of persons to which Part 6 (Secrecy and disclosure provisions) applies. The scope of protected information that could be obtained by an entrusted person is set out in subclause 4(4) below.

29. Further details about the purpose and the operation of secrecy and disclosure provisions are set out in Part 6 below.

Immigration and Border Protection worker

30. The term “Immigration and Border Protection worker” is defined as:

- an APS employee in the Department; or
- a person covered by paragraph (d), (e) or (f) of the definition of officer of Customs in subsection 4(1) of the Customs Act; or
- a person covered by paragraph (f) or (g) of the definition of officer in subsection 5(1) of the Migration Act; or
- a person who is:
 - an employee of an Agency (within the meaning of the Public Service Act); or
 - an officer or employee of a State or Territory; or
 - an officer or employee of an agency or authority of the Commonwealth, a State or a Territory; or
 - an officer or employee of the government of a foreign country, an officer or employee of an agency or authority of a foreign country or an officer or employee of an international organisation;
 and whose services are made available to the Department; or
- a person who is:
 - engaged as a consultant or contractor to perform services for the Department; and
 - specified in a determination under subclause 5(1); or
- a person who is:
 - engaged or employed by a person to whom paragraph (e) or this paragraph applies; and
 - performing services for the Department in connection with that engagement or employment; and
 - specified in a determination under subclause 5(2).

31. The term IBP worker is a key term of this Bill because it defines the range of workers who perform functions for or provide services to the Department. It is intended to capture APS employees of the Department as well as those persons outside the Department who exercise powers under Acts administered by the Department, such as officers from other Government agencies, as well as contractors or consultants that perform services for the Department from time to time. This definition is important as provisions within this Bill enable the Secretary and ABF Commissioner to give directions to IBP workers and establish obligations and requirements for IBP workers. The definition has been developed to cover the range of persons who exercise powers relating to immigration, customs and border protection functions and person who have access to sensitive information, systems and premises of the Department.

Paid work

32. The term “paid work” is defined as work that is undertaken for financial gain or reward (whether as an employee, a self-employed person or otherwise). The purpose and effect of this definition is to clarify the type of work to which the restriction in clause 18 (below) applies.
33. This term is necessary because clause 18 requires the ABF Commissioner to obtain Ministerial approval prior to engaging in paid work outside his or her capacity as Commissioner and is a ground for termination of his or her appointment as the ABF Commissioner (subclause 21(2) refers).

Personal information and protected information

34. The term “personal information” is defined to have the same meaning as in the Privacy Act.
35. The term “protected information” is defined as information that was obtained by a person or person’s capacity as an entrusted person. The scope for which the information could be obtained is provided for in subclause 4(4) below.
36. The purpose and effect of the two definitions above and subclause 4(4) is to facilitate the scope and operation in which Part 6 (Secrecy and disclosure provisions) below applies.

Prohibited drug and prohibited drug tests

37. The term “prohibited drug” is defined as a narcotic substance (within the meaning of the Customs Act or any drugs prescribed in an instrument under subsection 4(3)). Narcotic substances are defined in the Customs Act as border controlled drugs or border controlled plants - these drugs and plants are set out in Part 9.1 of the *Criminal Code*.
38. The term “prohibited drug test” is defined as a test of a body sample of a person to determine the presence (if any) of a prohibited drug in that sample.
39. In addition to the definitions relating to alcohol tests above, these terms support the operation to which Part 5 (Alcohol and drug tests) below applies.

Public international organisation

40. The term of “public international organisation” is defined to have the meaning given by section 70.1 in the *Criminal Code*. This definition is for the purposes of Part 6 (Secrecy and disclosure provisions) below.

Rules

41. The term “rules” refers to the rules made under clause 58 by the Minister. Further details relating to the Minister’s ability to set rules are set out in clause 58 below.

Secretary

42. The term “Secretary” refers to the Secretary of the Department.

Unauthorised maritime arrival

43. The term “unauthorised maritime arrival” is defined to have the same meaning as the Migration Act. This definition is for the purposes of Part 5 (Alcohol and drug tests) below.

Authorised person instrument

44. Subclause 4(2) supports the term “authorised person” above and enables the Secretary and the ABF Commissioner to authorise, by an instrument in writing, IBP workers to be authorised persons for the purpose of conducting tests under the alcohol and drug tests regime in accordance with Part 5 (Alcohol and drug tests) below.

Prohibited drug instrument

45. Subclause 4(3) supports the term “prohibited drug” above and enables the Secretary or the ABF Commissioner to prescribe, by an instrument in writing, the drugs that are prohibited for the purpose of the prohibited drug test under the alcohol and drug tests regime in Part 5 (Alcohol and drug tests) below. This subclause has the effect of ensuring that flexibility is provided to both the Secretary and the ABF Commissioner to deal with relevant matters.

Protected information

46. Subclause 4(4) supports the term “protected information” in subclause 4(1) and provides examples of the circumstances in which information obtained by an entrusted person is taken to be obtained by the person in the person’s capacity as an entrusted person. As IBP workers may perform functions under several Acts, this provision is intended to indicate that information can be obtained in whatever capacity the officer obtains the information. This provision supports Part 6 (Secrecy and disclosure provisions).

Clause 5 – Consultants and contractors etc.

47. This clause enables both the Secretary and the ABF Commissioner to specify, by written determination, contractors and other persons to be IBP workers. The determination is not a legislative instrument within the meaning of the Legislative Instruments Act.
48. The purpose and effect of this clause is to ensure IBP consultants, contractors and other persons, who are performing services for the Department, will also be subject to directions issued by the ABF Commissioner or the Secretary and the information secrecy and disclosure provisions in Part 6 of the Bill. Where directed to do so, this determination would extend to such workers the alcohol and drug tests regime in accordance with Part 5 (Alcohol and drug tests) below.
49. As the integrated Department will engage contractors and other persons in the delivery of its responsibilities in a high risk operational environment, it is important that consultants, contractors and other persons who are performing services for the Department are subject to the same standards and integrity framework as an APS employee within the Department. This will ensure that the highest level of integrity and professional standards are maintained in the Department.

Clause 6 – Act binds the Crown

50. This clause provides that the Crown, in each of its capacities, is bound by the Bill.
51. The purpose and effect of this clause is to require the Commonwealth, States and Territories to comply with any requirements that may be placed upon them, for example under Part 6 (Secrecy and disclosure provisions) of the Bill.

Clause 7 – Extraterritorial application

52. This clause provides that acts, omissions, matters and things done outside Australia are covered by the Bill.

Part 2 – ABF Commissioner

53. This Part contains provisions for the establishment, the term of appointment, the terms and conditions, of the ABF Commissioner and related matters.

Division 1 – Simplified outline of this Part

54. This Division provides a simplified outline of Part 2 of the Bill.

Clause 8 – Simplified outline of this Part

55. This clause sets out a simplified outline of this Part to assist readers.

Division 2 – Office and role of the ABF Commissioner

56. This Division contains provisions that establish the office and role of the ABF Commissioner. The Division also sets out the functions and powers that are conferred on the ABF Commissioner.

Clause 9 – Establishment

57. This clause provides for the establishment of the office of the ABF Commissioner.
58. Subclause 9(1) provides that there is to be an ABF Commissioner of the ABF, and notes that the ABF Commissioner is to be conferred many functions and powers by various laws of the Commonwealth. The term ABF is defined above in subclause 4(1).
59. Subclause 9(2) provides that the ABF Commissioner is to have, under the Minister, the control of the operations of the ABF. The ABF Commissioner is not, however, an Agency head within the meaning of the Public Service Act.

Clause 10 – Powers of ABF Commissioner

This clause provides that the ABF Commissioner has power to do all things necessary or convenient to be done for or in connection with the performance of Commissioner's duties.

Division 3 – Appointment of the ABF Commissioner

60. This Division contains provisions that set out the term of appointment of the ABF Commissioner and related matters.

Clause 11 – Appointment

61. This clause provides for the ABF Commissioner to be appointed by the Governor-General by written instrument (subclause 11(1) refers). The appointment is on a full-time basis. While the person holds office as ABF Commissioner, the person is also the Comptroller-General of Customs and is to be conferred related functions and powers by various laws of the Commonwealth (subclauses 11(2) and (3) refer).

62. The ABF Commissioner is also the Comptroller-General of Customs because the ABF Commissioner will be responsible for border-related revenue collection and trade functions under laws of the Commonwealth. The term “Comptroller-General of Customs” is an internationally recognised title for the officer responsible for customs functions.

Clause 12 – Term of appointment

63. This clause sets out the term of appointment of the ABF Commissioner to be a period, specified in an instrument of appointment, not exceeding five years (initial appointment). The note to this section clarifies that the ABF Commissioner may be reappointed for another period not exceeding five years, in accordance with section 33AA of the Acts Interpretation Act.

Clause 13 – Oath or affirmation by ABF Commissioner

64. This clause requires the ABF Commissioner to make and subscribe an oath or affirmation, in accordance with the form prescribed by the rules, before he or she is to begin discharging the duties of the Commissioner’s office (subclause 13(1) refers).

65. The oath or affirmation is to be made and subscribed before the Minister, and the ABF Commissioner must not engage in conduct that is inconsistent with his or her oath or affirmation (subclauses 13(2) and (3) refer). Inconsistent conduct engaged in by the ABF Commissioner may lead to the suspension or termination of his or her appointment (paragraph 21(2)(c) refers).

66. The oath or affirmation made and subscribed by the ABF Commissioner is intended to be similar to those required to be made by the Commissioner of the AFP under section 36 of the AFP Act).

Clause 14 – Acting ABF Commissioner

67. This clause enables the Minister to appoint a person to act as the ABF Commissioner during any vacancy of that office or any period in which the Commissioner is absent from or is unable to perform his or her duties in the capacity as the Commissioner (subclause 14(1) refers).

68. The acting ABF Commissioner may also be reappointed in accordance with sections 33AB and 33A of the Acts Interpretation Act.

69. Subclause 14(2) provides that a person appointed to act as the ABF Commissioner is taken, while the person is so acting, to also be the Comptroller-General of Customs.

Clause 15 – Application of finance law

70. This clause provides that, for the purposes of the finance law (within the meaning of the PGPA Act), the ABF Commissioner (including in his or her capacity as the Comptroller-General of Customs) is an official of the Department.

71. This clause is necessary to ensure that the ABF Commissioner is subject to the duties, functions and powers of an official under the PGPA Act to reflect the Commissioner's control of the operations of the ABF.

Division 4 – Terms and conditions for the ABF Commissioner

72. This Division contains provisions that set out the terms and conditions of the ABF Commissioner's employment.

Clause 16 – Remuneration and allowances

73. This clause sets the Remuneration Tribunal as the authority that is to determine the ABF Commissioner's remuneration and provides for the Commissioner to be paid the remuneration in accordance with the Tribunal's determination (subclause 16(1) refers). However, where the Tribunal has made no determination of remuneration, the ABF Commissioner is to be paid the remuneration prescribed by the rules.
74. In addition the, ABF Commissioner is to be paid the allowances that are prescribed in the rules (subclause 16(2) refers).
75. Subclause 16(3) provides for this clause to have effect subject to the *Remuneration Tribunal Act 1973*.

Clause 17 – Leave of absence

76. This clause provides that the Remuneration Tribunal is the authority that determines the ABF Commissioner's recreation leave entitlements and provides for the Commissioner to have the amount of recreation leave so determined (subclause 17(1) refers).
77. However, the Minister may grant the Commissioner leave of absences, other than recreation leave, on terms and conditions as to the remuneration or otherwise, that the Minister determines (subclause 17(2) refers).

Clause 18 – Outside work

78. This clause provides that the Commissioner must not engage in paid work outside the duties of his or her office without the Minister's approval.
79. Non-compliance by the ABF Commissioner with this requirement is grounds for the suspension or termination of his or her appointment as ABF Commissioner (paragraph 21(2)(d) refers). The term "paid work" is defined in subclause 4(1) above.

Clause 19 – Disclosure of interests

80. This clause requires the ABF Commissioner to disclose, by written notice to the Minister of any pecuniary interest (direct or otherwise) that he or she has or acquires and that conflicts or could conflict with the proper performance of the Commissioner's functions (subclause 19(1) refers). This is a mandatory requirement and non-compliance by the ABF Commissioner may lead to the suspension or termination of his or her appointment (subparagraph 19(2)(e)(i) refers).

81. Subclause 19(2) provides that subclause 19(1) applies in addition to the requirements under section 29 of the PGPA Act (which deals with the duty to disclose interests).

Clause 20 – Resignation of appointment

82. This clause enables the ABF Commissioner to resign from his or her office by giving the Governor-General a written resignation (subclause 20(1) refers).

83. Where the ABF Commissioner has specified a particular date for his or her resignation, the resignation will take effect on that date, otherwise the resignation will take effect on the date the Governor-General receives the Commissioner's notice of resignation (subclause 20(2) refers).

Clause 21 – Suspension or termination of appointment

84. This clause sets out the circumstances in which the ABF Commissioner's appointment may be suspended or terminated.

85. Subclause 21(1) enables the Governor-General to suspend or terminate the appointment of the ABF Commissioner for misbehaviour, or if the Commissioner is unable to perform the duties of his or her office because of physical or mental incapacity.

86. Subclause 21(2) enables the Governor-General to suspend or terminate the appointment of the ABF Commissioner if:

- the Commissioner:
 - becomes bankrupt; or
 - takes steps to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - compounds with one or more of his or her creditors; or
 - makes an assignment of his or her remuneration for the benefit of one or more of his or her creditors; or
- the Commissioner is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
- the Commissioner engages in conduct that is inconsistent with an oath or affirmation he or she made and subscribed under clause 13; or
- the Commissioner engages, except with the Minister's approval, in paid work outside the duties of his or her office (see clause 18); or
- the Commissioner fails, without reasonable excuse, to comply with:
 - clause 19; or
 - section 29 of the PGPA Act (which deals with the duty to disclose interests) or rules made for the purposes of that section; or
- the Commissioner fails, without reasonable excuse, to comply with a direction under clause 23.

87. An example where the ABF Commissioner may have his or her appointment suspended or terminated by the Governor-General is when the Commissioner engages in paid work outside his or her capacity as the Commissioner without obtaining approval from the Minister for the relevant work (paragraph 21(2)(d) refers).

88. Subclause 21(3) provides that the suspension or termination of the appointment of the ABF Commissioner under clause 21 does not affect any entitlement of the Commissioner to be paid remuneration, and allowances, in accordance with the Bill.
89. Subclause 21(4) sets the formal requirement that, if the Governor-General suspends or terminates the appointment of the ABF Commissioner, the Minister must cause a statement of the grounds of the suspension or termination to be laid before each House of the Parliament within 7 sitting days of that House after the suspension or termination.

Clause 22 – Other terms and conditions

90. This clause provides that the ABF Commissioner holds his or her office on other terms and conditions (if any) in relation to matter that are not covered by the Bill that are determined by the Minister.

Division 5 – Ministerial directions

91. This Division provides for the directions that may be given by the Minister under this Bill.

Clause 23 – Minister may give directions to the ABF Commissioner

92. This clause enables the Minister, after obtaining and considering advice of the ABF Commissioner and the Secretary, to give written directions to the ABF Commissioner about policies that should be pursued, or priorities that should be followed, in relation to the operations of the ABF (subclause 23(1) refers).
93. Subclause 23(2) sets a formal requirement that, if the Minister gives a direction under subclause 23(1), the Minister must cause a copy of the direction to be laid before each House of the Parliament within 15 sitting days of that House after giving the direction.
94. Where the Minister has given a direction to be pursued, the ABF Commissioner must comply with the directions so given as non-compliance is a ground for the suspension or termination of the Commissioner's appointment (see clause 23(3) and paragraph 21(2)(f)).
95. Subclause 23(4) is intended to assist the reader and provides that the direction is not a legislative instrument within the meaning of the Legislative Instruments Act

Division 6 – Oaths or affirmations by IBP workers

96. This Division sets out the circumstances in which oaths or affirmation may be made and subscribed by certain IBP workers.

Clause 24 – Oaths or affirmations by IBP workers

97. This clause provides that certain IBP workers may be requested by the ABF Commissioner to make and subscribe an oath or affirmation. Oaths or affirmations established in this Bill set a clear up-front marker about the standards of professionalism and conduct expected of persons in the ABF. It is intended that significant enforcement powers relating to the immigration, customs and border protection may only be exercised by officers who have made and

subscribed an oath or affirmation, subject to those officers meeting the essential requirements for the exercise of those powers.

98. 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.
99. Subclause 24(1) enables the ABF Commissioner to request a person who is covered by paragraph (a) of the definition of IBP worker in the ABF, or a person who is covered by paragraphs (b), (c) or (d) of the definition of IBP worker whose services are made available to, or who is performing services for, the ABF to make and subscribe an oath or affirmation in accordance with the rules.
100. The oath or affirmation must be made before the ABF Commissioner (subclause 24(2) refers) or a person authorised by the Commissioner.
101. Subclause 24(3) provides that an IBP worker, who has made and subscribed an oath or affirmation under this clause, must not engage in conduct that is inconsistent with the oath of affirmation. The note to this subsection indicates that the consequences of the conduct are set out in subsection 13(4), 15 and sections 15, 28 and 29 of the Public Service Act.
102. Failure to comply with this requirement is considered a breach of law and the APS Code of Conduct (see subsection 13(4) of the Public Service Act), and may attract sanctions for breach of the Code of Conduct under section 15 of the Public Service Act. Sanctions under section 15 include suspension under section 28 or termination under section 29 of the Public Service Act, reduction in classification, reassignment of duties, reduction in salary by way of a fine, or a reprimand.
103. This requirement not to engage with conduct that is inconsistent with the oath or affirmation also extends to IBP workers who have taken the oath or affirmation but who are longer in the ABF or whose services are no longer available to the ABF (see subclause 24(4)).
104. The purpose of this clause is to ensure that persons who are part of the ABF continue to hold the high level of integrity expected of a person performing duties and functions in that capacity. Persons who are no longer part of the ABF but who remain employed by the Department are also expected to continue to uphold high level standards of professionalism associated with the oath or affirmation.

Division 7 – Delegation and directions

105. This Division contains provisions that enable the ABF Commissioner to delegate certain functions and powers, and give directions in relation to certain matters. Similar provisions are also set out below in Part 7 (Other matters) in relation to the Comptroller-General of Customs and the Secretary.

Clause 25 – Delegation

106. This clause sets out the ABF Commissioner's power to delegate his or her functions and powers, and related power to make directions that must be complied with when performing that function, or exercising that power.
107. Subclause 25(1) allows the ABF Commissioner to delegate any of his or her functions and powers under a law of the Commonwealth to the Secretary, or a person who is covered by paragraph (a) of the definition of IBP worker in the ABF, or a person who is covered by paragraphs (b), (c), (d), (e) or (f) of the definition of IBP worker and whose services are made available to, or who is performing services for, the ABF.
108. Subclause 25(2) provides that the functions and powers that can be delegated under subclause 25(1) excludes the powers in clauses 30 (resignation in anticipation of termination of employment) and 32 (termination of employment for serious misconduct) below.
109. Subclause 25(3) sets the requirement that IBP workers must, in performing functions or exercising powers under a delegation, comply with any written directions given by the ABF Commissioner. Non-compliance to directions, given by the ABF Commissioner, by relevant IBP workers may amount to a breach of the APS Code of Conduct under the Public Service Act.
110. Subclause 25(4) provides that, if the Secretary is delegated functions and powers under subclause 25(1), the Secretary may then, by writing, delegate any of those functions or powers to any IBP worker.
111. Similar to the compliance requirement in subclause 25(3), IBP workers performing functions or exercising powers under subclause 25(4) must also comply with any written directions given by the Secretary (subclause 25(5) refers). Any directions given by the Secretary must not be inconsistent with the directions of the ABF Commissioner (subclause 25(6) refers).
112. A function that is performed or a power that is exercised by an IBP worker under a delegation under subclause 25(4) is taken, for the purposes of the law referred to in subclause 25(1), to have been performed or exercised by the ABF Commissioner (subclause 25(7) refers).

Clause 26 – Directions – administration and control of the operations of the ABF

Background

113. This clause enables the ABF Commissioner to give directions to certain persons in connection with the administration and control of the operations of the ABF. This clause enables the ABF Commissioner to give directions to certain persons in connection with the administration and control of the operations of the ABF. To underpin the Government and the community's confidence in Australian's immigration, customs and border arrangements, it is imperative that that the ABF is established as a professional, disciplined and flexible workforce that is resistant to corruption and capable of operating safely and effectively in a range of operations, enforcement, land and maritime environments.
114. To support the establishment of a professional, flexible and disciplined workforce, subclause 26(1) enables the ABF Commissioner to give written directions in connection with

the administration and control of the operations of the ABF to a person who is covered by paragraph (a) of the definition of IBP worker in the ABF, or a person who is covered by paragraphs (b), (c), (d), (e) or (f) of the definition of IBP worker whose services are made available to, or who is performing services for, the ABF. IBP workers must comply with the directions so given (clause 26(5) refers).

115. Subclause 26(2) enables the ABF Commissioner to issue a direction to set and vary the essential qualifications for IBP workers for performing their duties. Setting of essential qualifications will assist the ABF Commissioner to ensure the workforce has the necessary skills and attributes relevant to the roles being performed in the ABF. While not limiting the range of issues that may be covered, the essential qualifications may contain one or more of the following components: physical or psychological health and fitness, professional or technical qualifications, or learning and development requirements.
116. Physical and psychological health or fitness may include, for example, conducting tests in relation to aptitude, a medical or fitness standard, or a psychometric or resilience assessment.
117. The notes to this subclause indicate that failure to obtain or maintain an essential qualification may result in a reduction in classification, suspension or termination of employment under section 23, 28 or section 29 respectively of the Public Service Act.
118. Subclause 26(4) is consistent with section 4B of the Customs Administration Act. Subclause 26(4) provides that the ABF Commissioner may issue a direction that requires IBP workers to report serious misconduct and criminal activity, which affects or is likely to affect, the operations, responsibilities or reputation of the Department. This subclause is also similar to section 40A of the AFP Act in relation to the AFP Commissioner's power to issue orders under section 38 of that Act.
119. 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.
120. The ABF Commissioner's direction under subclause 26(4) will be aimed at exposing misconduct and possible corruption. It is intended to send a clear message that the Department is determined to promote a culture of high integrity in the workplace and will not tolerate conduct amounting to serious misconduct and criminal activity.
121. 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.
122. The reporting requirement includes a requirement for the IBP worker to report serious misconduct or criminal activity that he or she has engaged in. In this situation, the worker must comply with a direction under this clause to give information, answer questions and produce documents and is not excused from doing so on the grounds that such actions might tend to incriminate the worker or expose the worker to a penalty. It is important that the Department is able to act on and undertake further investigations in relation to information obtained under these powers.

123. However, the giving of information, production of a document or answering of a question is not admissible in evidence against the IBP worker in any proceedings (subclause 26(8) refers). This limitation is subject to clause 40, which sets out the circumstances in which results from an alcohol or drug test or other information, answers or documents relevant to conducting the tests can be used in certain legal proceedings.
124. Subclause 26(5) provides that an IBP worker mentioned in subclause 26(1) must comply with a direction under this clause. The notes to this subsection indicate that the consequences of not complying are set out in subsection 13(4) and sections 15, 28 and 29 of the Public Service Act.
125. Failure to comply with this requirement is considered a breach of law and the APS Code of Conduct (see subsection 13(4) of the Public Service Act), and may attract sanctions for breach of the Code of Conduct under section 15 of the Public Service Act. Sanctions under section 15 include suspension under section 28 or termination under section 29 of the Public Service Act, reduction in classification, reassignment of duties, reduction in salary by way of a fine, or a reprimand.
126. The notes to this subclause also refer to clause 57 of the Bill which provides for the termination of a person's engagement as a consultant or contractor, or for the arranging of a person to cease to perform services for the Department, if the person does not comply with subclause (5) of this clause.
127. Subclause 26(6) provides that directions under clause 26 are not legislative instruments within the meaning of the Legislative Instruments Act. This may amount to a substantive exemption from the Legislative Instruments Act in some circumstances. These directions will relate to the internal workings of the Department and not to the operation of the law. In particular, they will set out the standards required for workers to safely and effectively carry out their duties, and enhance the integrity of the workforce. The directions will be essentially internal in nature.
128. As the directions will specify internal procedures including requirements and procedures for ongoing investigations of misconduct, integrity and criminality, their publication could undermine the proper administration of justice and efforts to protect the public by compromising the ability of the ABF Commissioner and the Department to investigate allegations of misconduct, criminality and corruption. It is therefore not considered appropriate that the directions be subject to publication and possible disallowance and sunseting.
129. This approach is consistent with the exemption granted to orders made under section 38 of the AFP Act, which are exempt from the operation of the Legislative Instruments Act.
130. Subclause 26(7) provides that clause 26 does not limit any other power of the ABF Commissioner to give directions to any persons.

Clause 27 – Directions – performance of functions or exercise of powers under laws of the Commonwealth

131. This clause sets out the scope of the ABF Commissioner's direction in relation to the performance of functions or exercise of powers under laws of the Commonwealth.

132. Subclause 27(1) enables the ABF Commissioner to give written instructions in relation to the performance of functions or exercise of powers under a law of the Commonwealth to a person who is covered by paragraph (a) of the definition of IBP worker in the ABF, or a person who is covered by paragraphs (b), (c), (d), (e) or (f) of the definition of IBP worker whose services are made available to, or who is performing services for, the ABF.
133. Subclause 27(2) provides that subclause 27(1) does not apply in relation to the Migration Act. The note to this provision indicates that section 499 of that Act allows the Minister to give directions to a person or body about the performance of functions or the exercise of powers under that Act.
134. Subclause 27(3) provides that an IBP worker mentioned in subclause 27(1) must comply with a direction under this clause. The notes to this subsection indicate the consequences of not complying are set out in subsection 13(4) and sections 15, 28 and 29 of the Public Service Act.
135. Failure to comply with this requirement is considered a breach of law and the APS Code of Conduct (see subsection 13(4) of the Public Service Act), and may attract sanctions for breach of the Code of Conduct under section 15 of the Public Service Act. Sanctions under section 15 include suspension under section 28 or termination under section 29 of the Public Service Act reduction in classification, reassignment of duties, reduction in salary by way of a fine, or a reprimand.
136. The notes to subclause 27(3) also refer to clause 57 of the Bill which provides for the termination of a person's engagement as a consultant or contractor, or for the arranging of a person to cease performing services for the Department, if the person does not comply with a Direction.
137. Subclause 27(4) provides that directions under clause 27 are not legislative instruments within the meaning of the Legislative Instruments Act. This may amount to a substantive exemption from the Legislative Instruments Act in some circumstances. The directions will specify how powers should be exercised by IBP workers, and in most instances provide detail on internal operational activity. Many of the directions issued by the ABF Commissioner will cover activities that, if published, would undermine the effective operation of the Department in exercising its powers. Examples of activities that may be covered by directions include searching cargo for narcotics and other prohibited imports, exercising warrants related to immigration compliance activity, and recording biometric information. It would be prejudicial to the proper administration of the law and undermine good order if directions that relate to internal operational activity were made public. Doing so could compromise the safety and operational effectiveness of ABF officers by permitting organised criminal elements to access information about sensitive operational tactics and processes.
138. Subclause 27(5) provides that clause 27 does not limit any other power of the ABF Commissioner to give directions to any persons.
139. These directions are in addition to the directions that the ABF Commissioner can give under clauses 25 and 26.

Part 3 – Resignation from the Department

Background

140. This Part contains section 28, which sets out circumstances in which the employee's, intended date of resignation may be substituted, or employment may be terminated.
141. The issue of resignation by an APS employee is not specifically dealt with under the Public Service Act. This means that an APS employee may be able to resign immediately. Generally, the common law approach will apply to resignation by all APS employees from their Commonwealth employment. At common law, unless there are restrictions or conditions on resignation, an employee may resign on giving a valid notice of resignation to their employer. The requirements for resignation (including notification period) are usually set out in an enterprise agreement or a contract of employment. If not, the resignation notice must be reasonable and must actually be received by the person to whom it is directed.
142. This Part provides the Secretary and the ABF Commissioner the power to substitute the day on which an employee's resignation takes effect. However, this is limited only to where the Secretary or the ABF Commissioner reasonably believes that the employee has engaged in serious misconduct and is considering terminating their employment, or the employee is being investigated for serious misconduct and the Secretary is not yet in a position to decide whether to terminate the employee because the findings of the investigation are not yet known.
143. These provisions will only be able to be used in instances of serious misconduct, and the definition of serious misconduct is consistent with definitions used in other law enforcement integrity contexts.
144. The ability of the Secretary and ABF Commissioner to substitute the day on which resignation takes effect in circumstances where an employee has engaged in, or is being investigated for serious misconduct and has provided notice of his or her resignation, demonstrates that the Department expects all of its employees to be accountable for upholding the highest standards of professionalism and integrity and that serious misconduct will not be tolerated.
145. This mechanism provides the Secretary and the ABF Commissioner with time to properly investigate and, where warranted, take action in response to occurrences of serious misconduct, including corruption.
146. The Public Service Act requires each agency to establish written procedures for determining whether an APS employee has breached the Code of Conduct and the sanctions that may be imposed. Those procedures must comply with basic procedural requirements set out in Commissioner's Directions. This provision does not replace the APS and Department's usual processes for dealing with misconduct. Similarly it does not remove the procedural fairness associated with the investigation of the alleged misconduct or behaviour.

Clause 28 – Simplified outline of this Part

147. This clause provides a simplified outline of this Part, to assist readers.

Clause 29 – Resignation – general

148. This clause sets out a statutory requirement for APS employees within the Department to provide the Secretary written notice of their resignation (subclause 29(1) refers). The day specified in the employee's notice must not be earlier than 14 days or such shorter period as the Secretary allows, or later than 4 months, after the day on which the notice is given to the Secretary (subclause 29(2) refers).
149. Subclause 29(3) provides that this clause is subject to clause 30 below, which sets out circumstances in which the employee's, intended date of resignation is to be substituted, or employment terminated.

Clause 30 – Resignation in anticipation of termination of employment

150. This clause allows the Secretary and the ABF Commissioner to substitute a new date on which a notice of resignation given by an APS employee under clause 29 is to take effect.
151. Subclause 30(1) sets out the circumstances in which the Secretary or the ABF Commissioner may specify a new date and includes where:
- the Secretary or the ABF Commissioner reasonably believes that the employee has engaged in serious misconduct and the Secretary is considering terminating the employee's employment; or
 - the employee is being investigated for serious misconduct and the Secretary is not in a position to decide whether to terminate the employee's employment because the findings of the investigation are not yet known.
152. A reasonable belief that an employee has engaged in serious misconduct may include, for example, where an APS Code of Conduct investigation has concluded and there has been a finding of serious misconduct.
153. An investigation for the purposes of clause 30(1) may include, for example, the procedures, established under subsection 15(3) of the Public Service Act, for determining whether an APS employee in the Department has breached the Code of Conduct, or an investigation that is preliminary to these procedures.
154. Subclause 30(2) enables the Secretary or the ABF Commissioner to substitute, by written notice to the APS employee, a day no later than 90 days specified in the employee's notice of resignation, as the day on which his or her resignation is to take place. However, this subclause has effect subject to subclause 30(7).
155. The Secretary or ABF Commissioner may give more than one notice to an APS employee to substitute the date on which the employee's resignation is to take effect, but to be effective the first notice must be given to the employee before the day specified in the employee's notice of resignation (see subclauses 30(4) and (5)).
156. Subclause 30(6) explains that the Secretary must, on or before the day substituted in the most recent notice given under subclause 30(2) in relation to the notice of resignation, notify the APS employee that the employee's resignation takes effect, or terminate the employee's employment in accordance with section 29 of the Public Service Act. Where the Secretary

notifies the APS employee that his or her resignation takes effect, the employee's resignation takes effect on the day of that notification (subclause 30(7) refers).

157. The purpose of section 30, which is similar to section 30A of the AFP Act, is to address the circumstance where an APS employee is resigning in anticipation that their employment is likely to be terminated. In particular, this Part enables the Secretary and the ABF Commissioner to delay an employee's resignation in order to properly address incidences of serious misconduct, including corruption, through an investigation and subsequently to terminate an employee if serious misconduct is found to have occurred. This would also allow the Secretary or the ABF Commissioner to give a written declaration of serious misconduct under Part 4 below.

Part 4 – Termination of employment in the Department for serious misconduct

Background

158. The Secretary (in his capacity as the Agency head of the Department) has the power under section 29 of the Public Service Act to terminate the employment of APS employees within the Department on the following grounds:
- the employee is excess to the requirements of the Agency;
 - the employee lacks, or has lost, an essential qualification for performing his or her duties;
 - non-performance, or unsatisfactory performance, of duties
 - inability to perform duties because of physical or mental incapacity;
 - failure to satisfactorily complete an entry-level training course
 - failure to meet certain conditions under subsection 22(6) of the Public Service Act (for example, health or security clearance requirements);
 - breach of the Code of Conduct (this would include serious misconduct or corruption), or
 - any other grounds prescribed by the regulations (no other grounds are currently prescribed).
159. The Fair Work Act currently applies to all dismissals of APS employees employed under the Public Service Act and provides protection where the dismissal was harsh, unjust or unreasonable. While these protections are appropriate in most circumstances, in instances of serious misconduct, including corrupt conduct, the application of the Fair Work Act can impact on the ability of the Secretary to both quickly and decisively remove an APS employee from the Department. For example, a review of the dismissal that results in the person having to be reinstated may send a mixed signal to the community or workforce about the tolerance of serious misconduct within the Department.
160. This Part provides that the Secretary or the ABF Commissioner may make a written declaration of serious misconduct where the Secretary or the ABF Commissioner reasonably believes that an employee's conduct or behaviour amounts to serious misconduct. The serious misconduct declaration has the effect of excluding provisions of the Fair Work Act that deal with unfair dismissal and notice of termination or payment in lieu. This provision will only be able to be made in instances of serious misconduct that for example, have, or are likely to have a damaging effect on the professional self-respect, or morale, of APS employees in the Department.
161. The CEO currently has this power under section 15A of the Customs Administration Act and it is proposed to replicate its effect across the integrated Department. This power is similar to the powers of the AFP Commissioner and the CEO of the ACC in respect of their respective workforces. It is appropriate that such measures be applicable to all employees in the integrated Department, given the expanded law enforcement role, and that the workforce is exposed to increased attempts by criminal elements to penetrate, compromise and corrupt officers. The ability for the Secretary and ABF Commissioner to make a written declaration of serious misconduct where employees are found to have engaged in such behaviour is an important mechanism to combat corruption.

162. The declaration cannot be used for disciplinary matters involving behaviour that falls short of serious misconduct as defined in subclause 4(1).

163. The proposed power to make a declaration of serious misconduct may apply once a person has been dismissed. This Part is not intended to replace the Department's usual processes for dealing with misconduct or to remove the application of procedural fairness to the investigation of the alleged conduct or behaviour.

164. The declaration does not impact legal rights provided by other legislation or the common law, such as a General Protections claim under Part 3–1 of the Fair Work Act, claims under anti-discrimination legislation or judicial review (including under the ADJR Act). The written declaration of serious misconduct will be a reviewable decision under the ADJR Act. IBP workers will therefore have an avenue to seek judicial remedy of their dismissal.

Clause 31 – Simplified outline of this Part

165. This clause provides a simplified outline of this Part, to assist readers.

Clause 32 – Termination of employment for serious misconduct

166. This clause provides that, if the Secretary terminates the employment of an APS employee in the Department and the Secretary or the ABF Commissioner reasonably believes that the employee's conduct or behaviour or any part of it:

- amounts to serious misconduct by the APS employee; and
- is having, or is likely to have, a damaging effect on the professional self-respect or morale of some or all of the APS employees in the Department or the reputation of the Department with the public or any section of the public, with an Australian or overseas government or with a person or body to whom information may be disclosed under Part 6,

the Secretary or the ABF Commissioner may make a written declaration that he or she has the belief with respect to the APS employee's conduct or behaviour (see subclauses 32(1) and 32(2)).

167. A reasonable belief that an employee has engaged in serious misconduct may include, for example, where an investigation has concluded and there has been a finding of serious misconduct

168. This declaration power applies to circumstances where the Secretary has terminated the employment of the APS employee in accordance with section 29 of the Public Service Act. It does not provide an additional power of termination but relies on the Secretary's existing powers of a termination under section 29 of the Public Service Act (see note under subclause 32(1)).

169. Subclause 32(3) provides that a declaration under subclause 32(2) must be made within 24 hours of the Secretary's decision to terminate the APS employee's employment.

170. Subclause 32(4) provides that, if the Secretary or the ABF Commissioner makes the declaration for the APS employee, the Secretary or the Commissioner must give the APS employee a copy of the declaration. This is a safeguard to ensure the APS employee is made aware of the declaration that had 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.
171. Subclause 32(5) provides that the making of the declaration will mean that the Fair Work Act (except for Part 3-1 and Division 9 of Part 3-3 of that Act) does not apply to either the termination of the APS employee's employment, or the making of the declaration itself by the Secretary or the ABF Commissioner. This means that the provisions under the Fair Work Act relating to unfair dismissal and notice of termination, among others, do not apply to the termination of the APS employee's employment where a declaration has been made under subclause 32(5). Part 3-1 deals with general protections such as workplace rights. Division 9 of Part 3-3 deals with payments relating to periods of industrial action.
172. Subclause 32(6) provides that subclause 32(5) applies to an APS employee despite section 8 of the Public Service Act. Section 8 of the Public Service Act states that the Act has effect subject to the Fair Work Act. This subclause will make it clear that the Fair Work Act does not apply to a declaration made under subclause 32(2) despite the operation of section 8 of the Public Service Act.
173. Subclause 32(7) provides that the Secretary or the ABF Commissioner must give the Minister a written report as soon as practicable after making the declaration under subclause 32(2). The report must include the grounds for the belief in relation to the APS employee, the nature and findings of any investigation of, or inquiry into the APS employee's conduct or behaviour, and details of any other relevant matters. This will ensure there is appropriate oversight of the use of the power by the Secretary or the ABF Commissioner.
174. Subclause 32(8) provides that a declaration under subclause 32(2) is not a legislative instrument. This provision is to assist the reader as the declaration is not a legislative instrument within the meaning of the Legislative Instruments Act.

Part 5 – Alcohol and drug tests

Background

175. As a responsible employer, the Department must ensure that IBP workers achieve and maintain the highest possible work and personal conduct standards to meet the demands and community expectations of public service in the border environment. The Department recognises and upholds the fundamental duty of care to all of its workers who have a right to be safe from the risks of personal threat or compromise by the illicit drug trade and from workers affected by drugs or alcohol.
176. Implementation of drug and alcohol testing is an appropriate response to the significant consequences that could arise from an IBP workers acting under the influence of drugs or alcohol in the course of their duties. This regime also recognises the obligations owed to a worker by the Department under the WH&S Act.
177. The Department also recognises that corruption can have a significant detrimental effect on the ability to enforce the law, and the introduction of the drug and alcohol testing regime would provide another tool to detect corruption and misconduct in the Department.
178. To ensure a safe working environment and increase the corruption resistance, Part 5 provides that all IBP workers may be required or directed by an authorised person to undergo an alcohol screening test, an alcohol breath test, an alcohol blood test or a prohibited drug test.
179. This testing regime is similar to the regime that currently applies to Customs workers under the Customs Administration Act, and applies to all IBP workers in the integrated Department. It is appropriate that such measures be applicable to all IBP workers as, given the expanded law enforcement role of the Department, the workforce is exposed to increased attempts by criminal elements to penetrate, compromise and corrupt officers.
180. While the focus of the testing will be on operational and high risk areas, any IBP worker will be able to be selected randomly for testing. In addition, alcohol screening involving a breath or blood test or prohibited drug test may be required if an incident occurs such as a workplace injury involving a motor vehicle, the discharge of a firearm or the use of physical force in which another person is injured or killed in the course of his or her duties.
181. IBP workers found to be in non-compliance with the drug and alcohol provisions would face serious consequences including APS Code of Conduct investigations (where applicable) and may attract sanctions for breach of Code of Conduct under section 15 of the Public Service Act. Sanctions under section 15 include suspension under section 28 or termination under section 29 of the Public Service Act, reduction in classifications, reassignment of duties, reduction in salary by way of a fine, or a reprimand.
182. The drug and alcohol regime is similar to the regimes that currently apply to other law enforcement agencies, including the ACC and the AFP.

Clause 33 – Simplified outline of this Part

183. This clause provides a simplified outline of this Part, to assist readers.

Clause 34 – Alcohol screening test - suspicion that IBP worker under the influence of alcohol

184. This clause provides for the circumstances in which an alcohol screening test can be carried out. The term “alcohol screening test” is defined in subclause 4(1) above.
185. Subclause 34(1) enables an authorised person to require an IBP worker to undergo an alcohol screening test if the worker is in the course of performing his or her duties as an IBP worker and the authorised person reasonably suspects that the worker is under the influence of alcohol. The terms “authorised person” and “alcohol screening test” are defined in subclause 4(1) above (also see subclause 4(2) regarding IBP workers who are also authorised persons).
186. An IBP worker who is required to undergo an alcohol screening test must comply with that requirement (subclause 34(2) refers). If an IBP worker refuses to comply, the worker may be directed to undergo the alcohol screening test under clause 35 (see subclauses 34(4) and 35(1)). Non-compliance by an IBP worker with clause 34 may amount to a breach of the APS Code of Conduct on grounds of a failure to comply with an Australian law (see subsections 13(4) and sections 15, 28 and 29 of the Public Service Act for consequences relating to non-compliance). Clause 57 below provides for the termination of the worker’s engagement as a consultant or contractor, or for the cessation of the worker’s performance of services.
187. Subclause 34(3) provides that, if the result of the alcohol screening test shows that alcohol is not present in the worker’s breath, the worker may return to his or her duties immediately. If, however, the test indicates that alcohol is present in the breath, options may include suspension from duties (with or without pay) under section 28 of the Public Service Act. Where a worker is required to leave the workplace, reasonable care will be taken to ensure his or her safe travel to their place of residence.
188. Subclause 34(4) provides that clause 34 does not limit the operation of clause 35. It is not necessary to require a test under clause 34 before directing a worker to undergo a test under clause 35.

Clause 35 – Alcohol screening, breath or blood test or prohibited drug test - general

189. This clause sets out the circumstances in which an alcohol screening test, and alcohol breath test or a prohibited drugs test can be carried out. The relevant tests are defined in subclause 4(1) above.
190. Subclause 35(1) enables an authorised person to give a written direction to an IBP worker requiring the worker to do one or more of the following:
- undergo an alcohol screening test;
 - undergo an alcohol breath test;
 - provide a body sample of a kind specified in the direction for a prohibited drug test.
191. Subclause 35(2) provides that, if a worker undergoes an alcohol breath test that indicates the presence of alcohol, he or she may provide a sample of blood for the purpose of an alcohol

blood test, in accordance with the rules. The results of this test would confirm or rebut the results of an alcohol breath test.

192. Subclause 35(3) sets a mandatory requirement for IBP workers to comply with a direction given to him or her. Non-compliance by an IBP worker with clause 35 may amount to a breach of the APS Code of Conduct on grounds of a failure to comply with an Australian law (see subsections 13(4) and sections 15, 28 and 29 of the Public Service Act for consequences relating to non-compliance). Clause 57 below provides for the termination of the worker's engagement as a consultant or contractor, or for the cessation of the worker's performance of services.

Clause 36 – Alcohol screening, breath or blood test or prohibited drug test - certain incidents

193. This clause sets out the drug and alcohol testing regime that applies after certain incidents such as a death or serious injury involving a motor vehicle, detention, use of physical force, or the discharge of a firearm.

194. Subclause 36(1) enables an authorised person to give a written direction to an IBP worker if subclauses 36(2) and (3) apply, requiring the worker to do one or more of the following:

- undergo an alcohol screening test;
- undergo an alcohol breath test;
- provide a body sample of a kind specified in the direction for a prohibited drug test.

195. Subclause 36(2) applies if the incidents in that subclause applies and the worker mentioned in subclause 36(1) is directly involved in the incident in the course of performing his or her duties as an IBP worker. The incidents are:

- a person is killed or seriously injured as a result of an incident involving a motor vehicle or vessel;
- a person is killed or seriously injured while the person is held in custody in relation to an arrest under the Customs Act, the Migration Act or the Maritime Powers Act or otherwise detained under any of those Acts;
- a person is killed or seriously injured while the person is an unauthorised maritime arrival and is being taken to a regional processing country under section 198AD of the Migration Act.

196. At the time the direction is given, the IBP worker does not need to be in the course of performing his or her duties.

197. Subclause 36(3) applies in two circumstances. The first is where an incident occurs in which a person is killed or seriously injured as a result of the discharge of a firearm by a worker who is authorised to carry arms under section 189A of the Customs Act, and the incident occurs in the course of performing duties as an IBP worker. The second is a person is killed or seriously injured as a result of the application of physical force by a worker in the course of his or her duties.

198. Subclause 36(4) provides that an authorised person may give a direction regardless of whether or not the worker is still performing duties as an IBP worker. Such a direction must

be given as soon as practicable after the incident concerned, which may be given even when the worker is not performing work as an IBP worker.

199. Subclause 36(5) sets out the powers of an authorised person where a worker has been involved in an incident in subclause 36(2) or 36(3) and the worker attends or is admitted to hospital for examination or treatment because of the incident. In that circumstance, the worker may be given a written direction requiring the provision of a sample of his or her blood for an alcohol blood test, or to provide a body sample of a kind specified in the direction for a prohibited drug test.
200. Subclause 36(6) sets a mandatory requirement for IBP workers to comply with a direction given to him or her under this clause. Non-compliance by an IBP worker with clause 35 may amount to a breach of the APS Code of Conduct on grounds of a failure to comply with an Australian law (see subsections 13(4) and sections 15, 28 and 29 of the Public Service Act for consequences relating to non-compliance). Clause 57 below provides for the termination of the worker's engagement as a consultant or contractor, or for the cessation of the worker's performance of services.

Clause 37 – Performing duties on board a vessel

201. This clause explains that, if an IBP worker is on board a vessel throughout a period (the onboard period), and the vessel is under the command of an "officer of Customs" (within the meaning of the Customs Act), and at any time during the onboard period, the worker performs duties as an IBP worker, the worker is taken, for the purposes of this Part, to be in the course of performing his or her duties as an IBP worker throughout the onboard period.
202. These circumstances take account of the unique risk environment and safety issues associated with being onboard a vessel.

Clause 38 – Conduct of tests and provision of samples to be in accordance with the rules

203. This clause provides the power to make rules for the purposes of the conducting of tests and the provision of samples.

Clause 39 – Rules for purposes of this Part

204. This clause provides that the rules may make provision for and in relation to the following:
- the authorisation of persons:
 - to conduct alcohol screening tests, alcohol breath tests, alcohol blood tests or prohibited drug tests for the purpose of those sections; and
 - to operate equipment for that purpose;
 - the provision of samples of blood for the purpose of alcohol blood tests under those clauses;
 - the provision of body samples for the purpose of prohibited drug tests under those clauses;
 - the conduct of alcohol screening tests, alcohol breath tests, alcohol blood tests or prohibited drug tests under those clauses;

- the devices used in conducting alcohol screening tests, alcohol breath tests, alcohol blood tests or prohibited drug tests under those clauses, including the calibration, inspection and testing of those devices;
- in the case of alcohol blood tests and prohibited drug tests—the accreditation of persons to conduct analyses in connection with such tests;
- the procedure for the handling and analysis, storage and destruction of:
 - samples of blood taken in connection with alcohol blood tests under those clauses; or
 - body samples taken in connection with prohibited drug tests under those clauses;
 - the giving of the test results in certificates or other documents and the evidentiary effect of such certificates or other documents;
 - the confidentiality and disclosure of the test results; and
- the keeping and destruction of records in relation to tests conducted under the Part 5.

Clause 40 – Admissibility of test results etc. in legal proceedings

205. This clause prohibits the use of test results or other information, answers or documents relevant to conducting the test in a legal proceeding, and provides that a certificate or other document recording the results of a test conducted under clauses 34, 35 or 36, or any other information, answer to a question or document relevant to conducting such a test are not admissible in evidence against the worker in any proceedings other than in relation to the following:

- proceedings in relation to a decision of the Secretary to terminate the employment or engagement of the worker;
- proceedings under the *Safety, Rehabilitation and Compensation Act 1988*;
- proceedings in tort against the Commonwealth that are instituted by the worker.

206. This means the use of drug and alcohol test results as evidence against a worker in legal proceedings is limited to matters relating to discipline and probity. However, the test results may be also be used by the Commonwealth in a response to a workers' compensation claim.

207. **Part 6 – Secrecy and disclosure provisions**

208. This Part sets out the prohibition on recording, or disclosure, of protected information by an entrusted person. The prohibition on recording, or disclosure, of protected information is similar intent to section 16 (Prohibition of disclosure of certain information) of the Customs Administration Act, which is to be repealed.

209. This Part creates the offence which is punishable by imprisonment of up to 2 years for a person who breaches the prohibition, unless certain exceptions apply (see clause 42).

Clause 41 – Simplified outline of this Part

210. This clause sets out a simplified outline of this Part to assist readers.

Clause 42 – Secrecy

211. This clause creates an offence for the making of a record, or disclosure, of protected information (including protected information that contains personal information) by a person who is, or has been, an entrusted person (see subclause 42(1)). The terms “entrusted person”, “protected information” and “personal information” are defined in subclause 4(1) above. The maximum penalty for unauthorised making of a record, or a disclosure, of protected information is imprisonment for 2 years.

212. Subclause 42(2) sets out the exceptions to subclause 42(1) and provides that the subclause does not apply if:

- the making of the record or disclosure is authorised by clause 43, 44, 45, 47, 48 or 49; or
- the making of the record or disclosure is in the course of the person’s employment or service as an entrusted person; or
- the making of the record or disclosure is required or authorised by or under a law of the Commonwealth, State or a Territory; or
- the making of the record or disclosure is required by an order or direction of a court or tribunal.

213. In the circumstances where the making of the record or disclosure is in the course of the person’s employment or service as an entrusted person, an entrusted person must still comply with the obligations under the Privacy Act. Disclosure will be in the course of the person’s employment or service as an entrusted person where this action is undertaken in order to properly undertake the Department’s functions, fulfil duties or exercise of powers. Where the disclosure is not in the course of duties, the making of a record is prohibited, unless another exception under subclause 42(2) applies.

214. Consistent with subsection 13.3(3) of the *Criminal Code*, the note under subclause 42(2) clarifies that a defendant bears an evidential burden in relation to a matter in subclause 42(2).

215. Subclause 42(3) provides that section 15.2 of the Criminal Code (extended geographical jurisdiction – category B) applies to an offence against subsection (1). This will extend the offence to where, for example, an entrusted person makes a record of, or discloses, protected

information and these events occurs wholly outside Australia and at the time, the entrusted person is an Australia citizen or an Australian resident.

Clause 43 – Records or disclosure for the purposes of this Act etc or the LEIC Act

216. This clause authorises an entrusted person to make a record, or disclose, of protected information (including personal information) if:

- the making of the record, or disclosure, is for the purposes of this Act or a legislative instrument under this Act; or
- the making of the record, or disclosure, is for the purposes of the LEIC Act or regulations under that Act.

217. The making of a record or disclosure under this clause is also an exception to subclause 42(1). Also, for the purpose of APP 6 of the Privacy Act, use or disclosure under this provision constitutes use or disclosure that is authorised by law (see APP 6.2). See also clause 51 of the Bill.

Clause 44 – Disclosure of certain bodies and persons

218. This clause authorises an entrusted person who is authorised by the Secretary for the purpose of this clause (subclause 44(3) refers) to make a record or disclose protected information (that contains personal information), or a class of protected information, to a body or a person, if the Secretary is satisfied that the information will assist that person or body to perform or exercise any of their functions, duties or powers.

219. The making of a record or disclosure under this clause is an exception to subclause 42(1). Also, for the purpose of APP 6 of the Privacy Act, use or disclosure under this provision constitutes disclosure that is authorised by law. See also clause 51 of the Bill.

220. The disclosure of protected information that contains personal information is distinguished under this subclause from protected information that does not contain personal information.

221. Subclause 44(1) provides that an entrusted person authorised under subclause 44(3) may disclose protected information, or a class of protected information, that does not contain personal information to a body or person mentioned in subclause 44(4) if:

- the Secretary is satisfied that the information will enable or assist that body or person to perform or exercise any of the functions, duties or powers of that body or person; and
- if, under subclause 44(6), that body or person is required to comply with a condition before the disclosure of the information—the body or person has complied with that condition.

222. Subclause 44(2) provides that an entrusted person authorised under subclause 44(3) may make a record or disclose protected information (that contains personal information), or a class of protected information, that is personal information to a body or person mentioned in subclause 44(4) for a purpose mentioned in clause 46 if:

- the Secretary is satisfied that the information will enable or assist that body or person or exercise any of the functions, duties or powers of that body or person; and
- the Secretary is satisfied that the making or a record or disclosure of the information to that body or person is necessary for the purpose mentioned in clause 46; and
- if, under subclause 44(6), the body or person is required to comply with a condition before the making of a record or disclosure of the information—the body or person has complied with that condition; and
- in relation to a class of protected information—that body or person is prescribed in the rules and that class of information is prescribed in the rules as a class of information that may be disclosed to that body or person.

223. Subclause 44(3) provides that the Secretary may, by writing, authorise an entrusted person for the purposes of subclauses 44(1) and (2). An entrusted person may be authorised by reference to their inclusion in a class of persons.

224. Subclause 44(4) sets out the bodies and person for which protected information may be disclosed to in accordance with subclause 44(1) or (2) which are:

- a Department, agency or authority of the Commonwealth, a State or a Territory;
- the AFP;
- 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;
- any other body or person prescribed by the rules for the purposes of this paragraph (excluding a foreign country, an agency or authority of a foreign country or a public international organisation (subclause 44(5) refers), which is covered by clause 45 below).

225. The types of bodies or person prescribed by the rules may include non-government bodies such as advisory committees, peak bodies, industry representatives, commercial entities or community groups.

226. The Secretary may impose conditions in writing to be complied with by the body or person either before the protected information has been disclosed, or in relation to protected information that has been disclosed. Such conditions may relate to the handling requirements in relation to the information, for example to do with storage requirements or access being limited to certain persons, or an undertaking that the information would not be disclosed to overseas entities without prior consultation with the Department.

227. An instrument in writing to impose conditions or to authorise an entrusted person to make a record or disclose protected information is not a legislative instruments within the meaning of the Legislative Instruments Act (subclause 44(7) refers).

Clause 45 – Disclosure in accordance with agreements

228. This clause authorises an entrusted person who is authorised by the Secretary for the purpose of this clause (subclause 45(3) refers) to make a record or disclose protected information (including personal information), or 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.

229. The making of a record or disclosure under this clause is also an exception to subclause 42(1). Also, for the purpose of APP 6 of the Privacy Act, use or disclosure under this provision constitutes disclosure that is authorised by law. See also clause 51 of the Bill.

230. The disclosure of protected information that contains personal information is distinguished under this subclause from protected information that does not contain personal information.

231. Subclause 45(1) provides that an entrusted person authorised under subclause 45(3) may make a record or disclose protected information, or a class of protected information, that does not contain personal 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 to which subclause 45(4) applies; and
- that foreign country, agency, authority or organisation has undertaken not to use or further disclose the information except in accordance with the agreement or otherwise as required or authorised by law.

232. Subclause 45(2) provides that an entrusted person authorised under subclause 45(3) may make a record or disclose protected information, or a class of protected information, that contains personal information to a foreign country, an agency or authority of a foreign country or a public international organisation for a purpose mentioned in clause 46 if:

- the Secretary is satisfied that the information will be used in accordance with an agreement to which subclause 45(4) applies; and
- the Secretary is satisfied that the disclosure of that information to that foreign country, agency, authority or organisation is necessary for the purpose mentioned in clause 46; and
- that foreign country, agency, authority or organisation has undertaken not to use or further disclose the information except in accordance with the agreement or otherwise as required or authorised by law; and
- in relation to a class of protected information—that foreign country, agency, authority or organisation is prescribed in the rules and that class of information is prescribed in the rules as a class of information that may be disclosed to that foreign country, agency, authority or organisation.

233. Subclause 45(3) provides that the Secretary may, by writing, authorise an entrusted person for the purposes of subclauses 45(1) and (2). An entrusted person may be authorised by reference to their inclusion in a class of persons.

234. Subclause 45(4) provides that this subclause applies to an agreement that is in force between:

- the Commonwealth or an agency or authority of the Commonwealth; and
- one or more of the following:
 - a foreign country;

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

235. The Secretary may impose condition in writing to be complied with by a foreign country, an agency or authority of a foreign country or the public international organisation in relation to the protected information disclosed (subclause 45(5) refers). An instrument in writing to impose conditions or to authorise an entrusted person to disclose protected information is not a legislative instruments within the meaning of the Legislative Instruments Act (subclause 45(6) refers).

Clause 46 – Permitted purposes

236. This clause sets out the permitted purposes for which protected information containing personal information may be disclosed under clauses 44 and 45 to be the following:

- the administration or enforcement of a law of the Commonwealth, a State, a Territory or a foreign country that relates to:
 - criminal law; or
 - a law imposing a pecuniary penalty or providing for the forfeiture of property;
- in relation to a law referred to in paragraph 46(a), the prevention of crime, or the detection or analysis of criminal conduct, in respect of that law;
- assisting a coronial inquiry, coronial investigation or coronial inquest under a law of the Commonwealth, a State or a Territory;
- a purpose relating to the protection of public health, or the prevention or elimination of risks to the life or safety of an individual or a group of individuals;
- the collection and verification of statistics for the purposes of the *Census and Statistics Act 1905* or the performance of the functions of the Australian Bureau of Statistics as set out in section 6 of the *Australian Bureau of Statistics Act 1975*;
- the protection of the public revenue of the Commonwealth, a State, a Territory or a foreign country;
- a purpose relating to matters covered by the Customs Act, the Migration Act, the Maritime Powers Act, the *Australian Citizenship Act 2007*, the *Immigration (Guardianship of Children) Act 1946* or the *Education Services for Overseas Students Act 2000*;
- any of the following:
 - assisting in establishing the identity of a particular person; or
 - establishing whether or not a particular person is or was an Australian citizen at a particular time or in a particular period;
 - establishing whether or not a particular person is or was the holder of a particular kind or class of visa under the Migration Act at a particular time or in a particular period;
- a purpose relating to immigration, quarantine or border control between Australia and a foreign country;
- the provision of services to persons who are not Australian citizens;
- a purpose relating to the performance of functions under section 17 of the *Australian Security Intelligence Organisation Act 1979*;
- a purpose relating to the performance of functions under section 6 of the *Intelligence Services Act 2001*;

- the administration of the National Anti-Doping Scheme (within the meaning of the *Australian Sports Anti-Doping Authority Act 2006*);
- the administration or enforcement of laws with respect to commerce:
 - between a State and another State; or
 - between a State and a Territory; or
 - between a Territory and another Territory; or
 - between Australia and another country; or
 - within a State or Territory;
- a purpose prescribed by the rules.

Clause 47 – Disclosure with consent

237. This clause authorises an entrusted person to make a record or disclose protected information (including personal information) that relates to the affairs of a person or body if the person or body has consented to the disclosure, and the disclosure is in accordance with that consent.

238. The making of a record or disclosure under this clause is also an exception to subclause 42(1). Also, for the purpose of APP 6 of the Privacy Act, disclosure under this provision constitutes disclosure that is authorised by law. See also clause 51 of the Bill.

Clause 48 – Disclosure to reduce threat to life or health

239. This authorises an entrusted person to make a record or disclose protected information (including personal information) if the entrusted person reasonably believes that the making or a record or disclosure is necessary to prevent or lessen a serious threat to the life or health of an individual, and the making of a record or disclosure is for the purposes of preventing or lessening that threat.

240. Disclosure under this clause is also an exception to subclause 42(1). Also, for the purpose of APP 6 of the Privacy Act, use or disclosure under this provision constitutes disclosure that is authorised by law.

Clause 49 – Disclosure of publicly available information

241. This clause authorises an entrusted person to make a record of or disclose protected information (including personal information) if it has already been lawfully made available to the public. Examples of such information released to the public could include submissions to inquiries, media releases, speeches, or material available on the internet.

242. The making of a record or disclosure under this clause is also an exception to subclause 42(1). Also, for the purpose of APP 6 of the Privacy Act, use or disclosure under this provision constitutes disclosure that is authorised by law. See also clause 51 of the Bill.

Clause 50 – Exceptions operate independently

243. This clause provides that the disclosure of protected information by an entrusted person in accordance with clauses 43, 44, 45, 47, 48 and 49 do not limit each other.

Clause 51 – Interaction with Privacy Act

244. This clause provides that, for the purposes of the Privacy Act:

- the making of a record, in accordance with clause 43, of protected information, to the extent that the protected information contains personal information, is taken to be a use that is authorised by this Bill; and
- the disclosure, in accordance with clause 43, 44, 45, 47, 48 or 49, of protected information, to the extent that the protected information contains personal information, is taken to be a disclosure that is authorised by this Bill.

245. This means that an entrusted person, when making record of, or disclosing, protected information including protected information that includes personal information in accordance with these clauses, is authorised to do so by law, for the purposes of the Privacy Act.

Part[^] 7 – Other matters

246. This Part contains clauses which relate to the function and powers (including those conferred by this Bill) of the Minister, the Secretary and the Comptroller-General of Customs.

Clause 52 – Simplified outline of this Part

247. This clause provides a simplified outline of this Part to assist readers.

Clause 53 Delegation by Secretary

248. This clause sets out the Secretary's power to delegate his or her functions and powers, and related power to make directions that must be complied with when performing that function, or exercising that power.

249. Subclause 53(1) enables the Secretary to delegate any of his or her functions or powers under a law of the Commonwealth to the ABF Commissioner or an IBP worker.

250. Subclause 53(2) provides that powers under clause 30 (resignation in anticipation of termination of employment), clause 32 (termination of employment for serious misconduct), or pursuant to the Migration Act or an instrument under that Act, cannot be delegated by the Secretary (subclauses 53(1) and 53(2) refers). Section 496 of the Migration Act deals with delegation by the Secretary of his or her powers under that Act.

251. Subclause 53(3) sets the requirement that IBP workers must, in performing functions or exercising powers under a delegation under subclause 53(1), comply with any written directions given by Secretary. Non-compliance with these directions given by the Secretary, by relevant IBP workers may amount to a breach of the APS Code of Conduct under the Public Service Act.

252. Subclause 53(4) provides that, if the ABF Commissioner is delegated functions and powers under subclause 53(1), the Commissioner may then, by writing, delegate any of those functions or powers to a person who is covered by paragraph (a) of the definition of IBP worker in the ABF, or a person who is covered by paragraphs (b), (c), (d), (e) or (f) of the definition of IBP worker whose services are made available to, or who is performing services for, the ABF

253. Similar to the compliance requirement in subclause 53(3), IBP workers performing functions or exercising powers under subclause 53(4) must also comply with any written directions given by the ABF Commissioner (subclause 53(5) refers). Directions given by the ABF Commissioner must not be inconsistent with the directions of the Secretary (subclause 53(6) refers).

254. A function that is performed or a power that is exercised by an IBP worker under a delegation under subclause 53(4) is taken, for the purposes of the law referred to in subclause 53(1), to have been performed or exercised by the Secretary (subclause 53(7) refers).

Clause 54 – Delegation by Comptroller-General of Customs

255. This clause sets out the Comptroller General's power to delegate his or her functions and powers, and related power to make directions that must be complied with when performing that function, or exercising that power.
256. Subclause 54(1) enables the Comptroller-General of Customs to delegate any of his or her functions and powers under a law of the Commonwealth to the Secretary or an IBP worker.
257. Subclause 54(2) sets the requirement that IBP workers must, in performing functions or exercising powers under a delegation under subclause 54(1), comply with any written directions given by the Comptroller-General of Customs.
258. Subclause 54(3) provides that, if the Secretary is delegated functions and powers under subclause 54(1), the Secretary may then, by writing, delegate any of those functions or powers to any IBP worker.
259. Similar to the compliance requirement in subclause 54(2), IBP workers performing functions or exercising powers under subclause 54(4) must also comply with any written directions given by the Secretary (subclause 54(4) refers), which must not be inconsistent with the directions of the Comptroller-General (subclauses 54(5) refers).
260. A function that is performed or a power that is exercised by an IBP worker under a delegation under subclause 54(3) is taken, for the purposes of the law referred to in subclause 54(1), to have been performed or exercised by the ABF Commissioner (subclause 54(6) refers).
261. As the ABF Commissioner in his or her capacity as Comptroller-General of Customs will be conferred powers under various laws of the Commonwealth, this clause is necessary to facilitate the delegation of those functions and powers to the Secretary and IBP workers.

Clause 55 – Directions by Secretary - administration and control of the Department

262. This clause sets out the scope of the Secretary's direction making power in relation to the administration and control of the operations of the Department.
263. Subclause 55(1) enables the Secretary to give written directions to IBP workers in connection with the administration and control of the Department. IBP workers must comply with the directions so given (clause 55(7) refers).
264. A direction under this clause prevails over a direction under clause 26 issued by the ABF Commissioner to the extent of any inconsistency.
265. Subclause 55(2) enables the Secretary to issue a direction to set and vary the essential qualifications for IBP workers for performing their duties. Setting of essential qualifications will assist the Department to ensure the workforce has the necessary skills and attributes relevant to the roles being performed in the Department. While not limiting the range of issues that may be covered, the essential qualifications may contain one or more of the following components: physical or psychological health and fitness, professional or technical qualifications, learning and development requirements, or security clearances.

266. Physical and psychological health or fitness may include, but would not be limited to a range of tests or assessments on the screening mechanisms relating to aptitude, health, fitness, cognitive abilities or resilience.
267. Security clearances are required for individuals who, as part of their work for the Australian Government, need access to classified information or resources. The security clearance requirement reflects that the Department is operating in an environment where trade, traveller and intelligence information held and produced by the portfolio is classified or connected to information that is classified. The notes to this subclause indicate that failure to obtain or maintain an essential qualification may result in a reduction in classification under section 23, suspension under section 28 or termination under section 29 respectively of the Public Service Act.
268. As part of measures to increase the Department's resistance to corruption and establish a strong integrity framework, subclause 55(4) provides the Secretary with the ability to direct IBP workers to undertake and meet ongoing requirements associated with that OSA. The OSA is based on the Australian Standards AS: 4811-2006: Employment Screening. The OSA will contribute to strengthening integrity by providing a screening process to assess whether an individual is suitable, from an integrity and character perspective, to have access to non-public assets, information, systems or premises. Aftercare arrangements, such as contact reporting, will also be in place to manage and mitigate any risks identified in the screening process. The OSA supports the integrity measures intended to strengthen the Department against the risk of infiltration and corruption.
269. The initial OSA and security clearance process provides a snapshot of an individual at a particular point in time meeting ongoing requirements associated with OSA could include actions or reporting requirements that need to be met to ensure ongoing organisational suitability. This includes reporting changes in circumstances and any other reporting requirements that may be required.
270. Subclause 55(5) is consistent with section 4B of the Customs Administration Act. Subclause 55(5) provides that the Secretary may issue a direction that requires IBP workers to report serious misconduct and criminal activity, which affects or likely to affect, the operations, responsibilities or reputation of the Department. This subclause is also similar to section 40A of the AFP Act in relation to the AFP Commissioner's power to issue orders under section 38 of that Act.
271. The intention of the power for the Secretary to impose mandatory reporting requirements is to support the identification and investigation of potential criminal behaviour or corruption that is likely to affect the operation or reputation of the Department.
272. The Secretary's direction under subclause 55(5) will be aimed at exposing misconduct and possible corruption. They are intended to send a clear message that the Department is determined to promote a culture of high integrity in the workplace and will not tolerate conduct amounting to serious misconduct and criminal activity.
273. 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.

274. The reporting requirement includes a requirement for the IBP worker to report serious misconduct or criminal activity that he or she has engaged in. In this situation, the worker must comply with a direction under this clause (if any) to give information, answer questions and produce documents and is not excused from doing so on the grounds that such actions might tend to incriminate the worker or expose the worker to a penalty. It is important that the Department is able to act on and undertake further investigations in relation to information obtained under these powers.
275. However, subject to clause 40 below, the information, answers and evidence given under subclause 55(10) is not admissible in evidence against the relevant person in proceedings (subclauses 55(10) and (11) refer). The immunity in subclause 55(11) does not extend to a derivative use immunity set out in clause 40 which sets out the circumstances in which results from an alcohol or drug test or other information, answers or documents relevant to conducting the tests can be used.
276. Subclause 55(7) provides that an IBP worker must comply with a direction under this clause. The notes to this subsection indicate that the consequences of not complying are set out in subsection 13(4) and sections 15, 28 and 29 of the Public Service Act.
277. Failure to comply with this requirement is considered a breach of law and the APS Code of Conduct (see subsection 13(4) of the Public Service Act), and may attract sanctions for breach of the Code of Conduct under section 15 of the Public Service Act. Sanctions under section 15 include suspension under section 28 or termination under section 29 of the Public Service Act, reduction in classification, reassignment of duties, reduction in salary by way of a fine, or a reprimand. The notes to this subclause also refer to clause 57 of the Bill which provides for the termination of a person's engagement as a consultant or contractor, or for the arranging of a person to cease to perform services for the Department, if the person does not comply with subclause (5) of this clause.
278. Subclause 55(8) provides that directions under clause 55 are not legislative instruments within the meaning of the Legislative Instruments Act. This may amount to a substantive exemption from the Legislative Instruments Act in certain circumstances. These directions will relate to the internal workings of the Department and not to the operation of the law. In particular, they will set out the standards required for workers to safely and effectively carry out their duties, and enhance the integrity of the workforce. The directions will be essentially internal in nature.
279. As the directions will specify internal procedures including requirements and procedures for ongoing investigations of misconduct, integrity and criminality, security and organisational assessment protocols, their publication could undermine the proper administration of efforts to protect the public by compromising the ability of the Secretary and the Department to investigate allegations of misconduct, criminality and corruption and set security protocols. It is therefore not appropriate that the directions be subject to publication and possible disallowance and sunseting.
280. Subclause 55(9) provides that clause 55 does not limit any other power of the Secretary to give directions to any persons.

Clause 56 – Directions by Secretary - performance of functions or exercise of powers under laws of the Commonwealth

281. This clause sets out the scope of the Secretary's direction making power in relation to the performance of functions or exercise of powers under laws of the Commonwealth.
282. Subclause 56(1) enables the Secretary to give written directions to IBP workers in relation to the performance of functions or exercise of powers, by those workers under a law of the Commonwealth.
283. Subclause 56(2) provides that subclause 56(1) does not apply in relation to the Migration Act and notes that section 499 of that Act allows the Minister to give directions to a person or body about the performance of functions or the exercise of powers under that Act.
284. Subclause 56(3) provides that a direction under this clause prevails over a direction under clause 27 by the ABF Commissioner to the extent of any inconsistency.
285. Subclause 56(4) provides that an IBP worker must comply with a direction under this clause. The notes to this subsection indicate the consequences of not complying are set out in subsection 13(4) and sections 15, 28 and 29 of the Public Service Act.
286. Failure to comply with this requirement is considered a breach of law and the APS Code of Conduct (see subsection 13(4) of the Public Service Act), and may attract sanctions for breach of the Code of Conduct under section 15 of the Public Service Act. Sanctions under section 15 include suspension under section 28 or termination under section 29 of the Public Service Act, reduction in classification, reassignment of duties, reduction in salary by way of a fine, or a reprimand.
287. The notes to this subsection also refer to section 57 of the Bill which provides for the termination of a person's engagement as a consultant or contractor, or for the arranging of a person to cease to perform services for the Department, if the person does not comply with subclause 56(4) of this clause.
288. Subclause 56(5) provides that directions under clause 56 are not legislative instruments within the meaning of the Legislative Instruments Act. This may amount to a substantive exemption from the Legislative Instruments Act in certain circumstances. Many of the directions issued by the Secretary under this provision will cover sensitive activities, for example how identity and security checking is to be undertaken in order to confirm identity. Publication of such directions would undermine their effectiveness as doing permits those seeking to commit fraud or disguise identity, criminal or other character concerns access information about sensitive operational tactics and processes. It would be prejudicial to the proper administration of the law and undermine the effectiveness of screening activity if such directions were made public.
289. Subclause 56(6) provides that clause 57 does not limit any other power of the Secretary to give directions to any persons.
290. The purpose and effect of clause 56 is to set out the power to issue relevant directions, which relate to the performance and exercise of functions and powers by certain IBP workers. These directions are in addition to the directions that the Secretary can give under clauses 53

and 55, and this provision does not limit any other power of the Secretary to give directions to any person.

Clause 57 – Termination of engagement of consultant or contractor

291. The Department is committed to ensuring high standards of personal integrity and professionalism are upheld by its workers. As such, it is also important that the same high standards are equally applied to consultants, contractors and other external persons who are engaged to perform services or exercise powers or functions as IBP workers.
292. This clause provides that the Secretary or ABF Commissioner may terminate a person's engagement as a consultant or a contractor (as referred to in paragraph (e) of the definition of IBP worker) if they do not comply with any of the following directions or requirements issued by them under this Bill (see subclause 57(1)):
- directions in connection with the administration and control of the ABF or Department;
 - directions relating to the performance of functions or exercise of powers under Commonwealth laws;
 - a requirement or direction to undergo tests for alcohol or prohibited drugs under Part 5 of the Bill; or
 - a direction to arrange for an affected worker to cease performing services for the Department because the affected worker has failed to comply with a requirement or direction referred to above (see subclause 57(2)). "Affected worker" is defined by reference to paragraph (f) of the definition of IBP worker.
293. For example, with respect to subclause 57(2), if the Department engages a company to provide certain services (being a company determined to be an IBP worker under subclause 5(2) of the Bill), and an employee of the company (who has also been determined to be an IBP worker) fails to comply with a direction to undergo a test for alcohol or prohibited drugs under Part 5 of the Act, the Secretary may issue a direction to the company under clause 57(2) to arrange for the employee to cease performing services for the Department. Failure to comply with this direction would be grounds for termination of the company's engagement.
294. Another example is if:

- the Department engages company X to provide certain services (being a company determined to be an IBP worker under subclause 5(1) above);
- the Department approves the subcontracting of certain services by company X, and that subcontractor and its employee and contractor personnel are determined to be IBP workers under subclause 5(2) above; and
- an employee of the subcontractor (or one of its contractor personnel) who is performing services for the Department fails to comply with a direction about integrity requirements issued by the Secretary under clause 57 (or by the ABF Commissioner under clause 26),

in these circumstances the Secretary (or ABF Commissioner) may issue a direction to company X under subclause 57(2) to arrange for the relevant employee (or contractor personnel) (the affected person) to cease performing services for the Department.

295. This clause provides the Secretary and the ABF Commissioner with a discretionary power of termination to address a failure to meet the expected standards of integrity and professionalism. This power is also in addition to any contractual rights or remedies that may be available to the Commonwealth in these circumstances.

Clause 58 – Rules

296. This clause provides that the Minister may, by legislative instrument, make rules prescribing matters that are required or permitted by the Act to be prescribed by the rules or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

297. Subclause 58(2) provides to avoid doubt on the scope of the Minister's ability to make rules by legislative instruments, the rules may not do the following:

- create an offence or civil penalty;
- provide powers of:
 - arrest or detention; or
 - entry, search or seizure;
- impose a tax;
- set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
- amend this Act.