



# **Australian Border Force Amendment (Protected Information) Act 2017**

**No. 115, 2017**

**An Act to amend the *Australian Border Force Act 2015*, and for related purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation (<https://www.legislation.gov.au/>)



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# **Australian Border Force Amendment (Protected Information) Act 2017**

**No. 115, 2017**

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## **An Act to amend the *Australian Border Force Act 2015*, and for related purposes**

[Assented to 30 October 2017]

The Parliament of Australia enacts:

### **1 Short title**

This Act is the *Australian Border Force Amendment (Protected Information) Act 2017*.

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## 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provisions</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	30 October 2017
2. Schedule 1, Part 1	Immediately after the commencement of the <i>Australian Border Force Act 2015</i> .	1 July 2015
3. Schedule 1, Part 2	The day after this Act receives the Royal Assent.	31 October 2017
4. Schedule 1, Part 3	The later of: (a) the day after this Act receives the Royal Assent; and (b) the day the <i>Petroleum and Other Fuels Reporting Act 2017</i> commences.  However, the provisions do not commence at all if the event mentioned in paragraph (b) does not occur.	31 October 2017 (paragraph (a) applies)

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

## 3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule

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concerned, and any other item in a Schedule to this Act has effect according to its terms.

## Schedule 1—Amendments

### Part 1—Amendments commencing on 1 July 2015

#### *Australian Border Force Act 2015*

##### 1 Subsection 4(1)

Insert:

***duty of confidence*** means any duty or obligation arising under the common law or at equity pursuant to which a person is obliged not to disclose information.

***Immigration and Border Protection information*** means information of any of the following kinds that was obtained by a person in the person's capacity as an entrusted person:

- (a) information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia;
- (b) information the disclosure of which would or could reasonably be expected to prejudice the prevention, detection or investigation of, or the conduct of proceedings relating to, an offence or a contravention of a civil penalty provision;
- (c) information the disclosure of which would or could reasonably be expected to prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;
- (d) information the disclosure of which would or could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence;
- (e) information the disclosure of which would or could reasonably be expected to cause competitive detriment to a person;
- (f) information of a kind prescribed in an instrument under subsection (7).

Note: See also subsections (4) to (7).

***intelligence agency*** means:

- (a) the Australian Geospatial-Intelligence Organisation; or



- (b) the Australian Secret Intelligence Service; or
- (c) the Australian Security Intelligence Organisation; or
- (d) the Australian Signals Directorate; or
- (e) the Defence Intelligence Organisation; or
- (f) the Office of National Assessments; or
- (g) a government body or authority responsible for intelligence gathering for, or the security of, a foreign country.

**2 Subsection 4(1) (definition of *protected information*)**

Repeal the definition.

**3 Subsection 4(4) (heading)**

Repeal the heading, substitute:

*Immigration and Border Protection information*

**4 Subsection 4(4)**

Omit “*protected information*”, substitute “*Immigration and Border Protection information*”.

**5 At the end of section 4**

Add:

- (5) Without limiting the definition of *Immigration and Border Protection information* in subsection (1), the following kinds of information are taken to be information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia:
  - (a) information that has a security classification;
  - (b) information that has originated with, or been received from, an intelligence agency.
- (6) Without limiting the definition of *Immigration and Border Protection information* in subsection (1), information that was provided to the Commonwealth pursuant to a statutory obligation or otherwise by compulsion of law is taken to be information the disclosure of which would or could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence.

(7) The Minister may, by legislative instrument, prescribe a kind of information for the purposes of paragraph (f) of the definition of ***Immigration and Border Protection information*** in subsection (1) if the Minister is satisfied that disclosure of the information would or could reasonably be expected to:

- (a) prejudice the effective working of the Department; or
- (b) otherwise harm the public interest.

## 6 Section 41

Omit “protected information”, substitute “Immigration and Border Protection information”.

## 7 Paragraph 42(1)(c)

Omit “protected information”, substitute “Immigration and Border Protection information”.

## 8 After subsection 42(1)

Insert:

(1A) If the information is Immigration and Border Protection information because of the operation of subsection 4(5) or (6), the fault element of recklessness for paragraph (1)(c) of this section is taken to be satisfied if the person is reckless as to whether or not whichever of the following applies:

- (a) the information has a security classification;
- (b) the information originated with, or was received from, an intelligence agency;
- (c) the information was provided to the Commonwealth pursuant to a statutory obligation or otherwise by compulsion of law.

Note: Recklessness is the fault element for paragraph (1)(c)—see section 5.6 of the *Criminal Code*.

## 9 Section 43

Omit “protected information”, substitute “Immigration and Border Protection information”.

## 10 Subsection 44(1) (heading)

Repeal the heading, substitute:

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*Immigration and Border Protection information that is not personal information*

**11 Subsection 44(1)**

Omit “protected information, or a class of protected information,”, substitute “Immigration and Border Protection information”.

**12 Subsection 44(2) (heading)**

Repeal the heading, substitute:

*Immigration and Border Protection information that is personal information*

**13 Subsection 44(2)**

Omit “protected information, or a class of protected information,”, substitute “Immigration and Border Protection information”.

**14 Paragraphs 44(6)(a) and (b)**

Omit “protected information”, substitute “Immigration and Border Protection information”.

**15 Subsection 45(1) (heading)**

Repeal the heading, substitute:

*Immigration and Border Protection information that is not personal information*

**16 Subsection 45(1)**

Omit “protected information, or a class of protected information,”, substitute “Immigration and Border Protection information”.

**17 Subsection 45(2) (heading)**

Repeal the heading, substitute:

*Immigration and Border Protection information that is personal information*

**18 Subsection 45(2)**

Omit “protected information, or a class of protected information,” substitute “Immigration and Border Protection information”.

**19 Subsection 45(5)**

Omit “protected information”, substitute “Immigration and Border Protection information”.

**20 Sections 47, 48 and 49**

Omit “protected information”, substitute “Immigration and Border Protection information”.

**21 After section 50**

Insert:

**50A Information must be certified as appropriately classified before proceedings can be initiated**

If, an offence against section 42 relates to information that has a security classification, proceedings for the offence must not be initiated unless the Secretary has certified that it is appropriate that the information had a security classification at the time of the conduct that is alleged to constitute the offence.

**22 Paragraphs 51(a) and (b)**

Omit “protected information” (wherever occurring), substitute “Immigration and Border Protection information”.

**23 After section 57**

Insert:

**57A Act not to apply so as to exceed Commonwealth power**

- (1) If a provision of this Act, or of an instrument made under this Act:
- (a) would, apart from this section, have an application (an *invalid application*) in relation to:

- (i) one or more particular persons, things, matters, places, circumstances or cases; or
  - (ii) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases; because of which the provision exceeds the Commonwealth's legislative power; but
- (b) also has at least one application (a **valid application**) in relation to:
- (i) one or more particular persons, things, matters, places, circumstances or cases; or
  - (ii) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases; that, if it were the provision's only application, would be within the Commonwealth's legislative power;
- it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.
- (2) This section applies to a provision of this Act, or of an instrument made under this Act, whether the provision is enacted or made before, on or after the commencement of this section.

## **24 Application—Immigration and Border Protection information**

To avoid doubt, if:

- (a) before the day this Act receives the Royal Assent a person did an act, or omitted to do an act; and
- (b) at the time of the act or omission, the act or omission did not make the person liable to a penalty under Part 6 of the *Australian Border Force Act 2015*;

then, despite the amendments of that Act made by this Schedule, the person is not liable to a penalty for the act or omission.

## **25 Savings—interaction with Privacy Act**

- (1) This item applies in relation to the making of a record, or a disclosure, of protected information if the record or disclosure was made:
- (a) on or after 1 July 2015; and
  - (b) before the day this Act receives the Royal Assent.

**Schedule 1** Amendments

**Part 1** Amendments commencing on 1 July 2015

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- (2) Despite the amendments made by this Part, section 51 of the *Australian Border Force Act 2015*, as in force immediately before the day this Act receives the Royal Assent, continues to apply in relation to the making of the record or the disclosure, as if those amendments had not been made.

***Customs and Other Legislation Amendment (Australian Border Force) Act 2015***

**26 Subitem 5(3) of Schedule 9**

Repeal the subitem.

## **Part 2—Amendments commencing on the day after Royal Assent**

### ***Australian Border Force Act 2015***

#### **27 Paragraph 44(2)(c)**

Omit “condition; and”, substitute “condition.”.

#### **28 Paragraph 44(2)(d)**

Repeal the paragraph.

#### **29 Paragraph 45(2)(c)**

Omit “law; and”, substitute “law.”.

#### **30 Paragraph 45(2)(d)**

Repeal the paragraph.

#### **31 After paragraph 46(n)**

Insert:

- (na) a purpose relating to the inter-country adoption of a child;
- (nb) a purpose relating to the protection of national security or the defence of Australia;
- (nc) a purpose relating to locating a missing person;

## **Part 3—Consequential amendments**

### ***Petroleum and Other Fuels Reporting Act 2017***

#### **32 Subsection 31(1)**

Omit “protected information”, substitute “Immigration and Border Protection information”.

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*[Minister’s second reading speech made in—  
House of Representatives on 9 August 2017  
Senate on 12 September 2017]*

(151/17)

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