**EXPLANATORY STATEMENT**

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

*Australian Border Force Act 2015*

 ***Australian Border Force (Alcohol and Drug Tests) Rule 2015***

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

**Purpose**

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

Part 5 of the Act provides the legislative basis for alcohol and drug testing in the Department. In particular, sections 34, 35 and 36 of the Act provide that an authorised person may require an Immigration and Border Protection worker to undergo an alcohol screening test, an alcohol breath test, or a prohibited drug test. The purpose of introducing alcohol and drug testing is to ensure a safe working environment and to increase the corruption resistance of the Department.

Section 39 of the Act provides that the rules, for the purposes of Part 5, may make provision for certain matters, including the authorisation of persons, the devices to be used in conducting tests, procedures for handling samples taken and the confidentiality of the test results.

The purpose of the *Australian Border Force (Alcohol and Drug Tests) Rule 2015* (the Rule) is to prescribe matters for the purposes of section 39 required to implement alcohol and drug testing in the Department. The Rule substantially replicates the provisions in the *Customs (Drug and Alcohol Testing) Regulation 2013* which applied to the Customs workers in the ACBPS.

Details of the Rule are set out in the Attachment.

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

**Timing**

The Rule commences on the later of:

* the day after the Rule is registered; or
* the day the Act commences, which is 1 July 2015.

**Consultation**

No consultation was undertaken specifically in relation to the provisions; however, extensive consultation and communication has been undertaken with representatives from the Department’s business lines as well as with their union representatives in the design of alcohol and drug testing.

**ATTACHMENT**

**DETAILS OF THE *AUSTRALIAN BORDER FORCE (ALCOHOL AND DRUG TESTS) RULE 2015***

**Part 1 - Preliminary**

**Division 1 - Preliminary**

**Section 1 – Name**

This section provides that the title of the Rule is the *Australian Border Force (Alcohol and Drug Tests) Rule 2015*.

**Section 2 – Commencement**

This section provides that the Rule commences on the later of:

* the day after the Rule is registered; and
* the day the *Australian Border Force Act 2015* commences, which is 1 July 2015.

**Section 3 – Authority**

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

**Division 2 – Simplified outline of this instrument**

**Section 4 – Simplified outline of this instrument**

Section 4 sets out a simplified outline of the Rule to assist the reader.

**Division 3 – Definitions**

**Section 5 – Definitions**

Section 5 inserts a number of definitions for the purposes of the Rule, including:

***accredited analyst***: see section 7

***Act*** means the *Australian Border Force Act 2015*.

***alcohol or drug test*** means any of the following:

* an alcohol screening test;
* an alcohol breath test;
* an alcohol blood test;
* a prohibited drug test.

***approved device*** means a device approved under section 8.

***authorised laboratory***: see section 7.

***authorised tester***: see section 6.

***medical practitioner*** has the same meaning as in subsection 3(1) of the *Health Insurance Act 1973.*

***registered nurse*** has the same meaning as in subsection 3(1) of the *Health Insurance Act 1973*.

The note to this section provides that several other terms used in the Rule are defined in the Act, for example:

* alcohol screening test;
* alcohol breath test;
* alcohol blood test;
* authorised person;
* body sample; and
* prohibited drug test.

**Part 2 – Authorisation of alcohol or drug testing and analysis**

**Section 6 – Authorised testers – alcohol or drug tests**

Paragraph 39(a) of the Act allows for rules to make provision in relation to the authorisation of persons to conduct alcohol and prohibited drug tests (subsection 6(1) refers).

Section 6 provides for the authorisation of individuals known as an authorised tester to:

* conduct an alcohol screening test;
* conduct an alcohol breath test;
* collect a blood sample for purposes relating to the conduct of an alcohol blood test;
* collect a blood sample for purposes relating to the conduct of a prohibited drug test;
* collect a body sample other than blood or human breath, for purposes relating to the conduct of a prohibited drug test;

under sections 34, 35 and 36 of the Act. Section 6 does not deal with the authorisation of persons to analyse body samples for alcohol blood tests and prohibited drug tests, as this is dealt with in section 7.

Subsection 6(2) inserts a table which provides that an authorised tester, for a purpose mentioned in column 1 of the table, means an individual specified in column 2 of the table for that purpose.

In accordance with subsections 6(2) and 6(3), the Secretary can only authorise an officer of Customs who has successfully completed an approved training course, a police officer of a State or Territory, or a company to conduct alcohol screening tests or alcohol breath tests. Only medical practitioners, registered nurses, enrolled nurses and companies may be authorised to collect a blood sample. An officer of Customs who has successfully completed an approved training course, a police officer of a State or Territory, a medical practitioner, a registered nurse, an enrolled nurse, or a company may be authorised to collect a sample other than blood or human breath for the purpose of a prohibited drug test. A company is included as the Department may outsource the conducting of tests or collection of samples to an external service provider.

In the case of an individual employed or engaged by a company, subsection 6(3) provides that the Secretary is required to authorise the company, not the individuals employed or engaged by the company. These provisions provide clarification that, although the Secretary authorises the company, the individuals employed or engaged by the company actually conduct the test or collect the sample.

Subsection 6(4) provides that where the Secretary authorises an officer of Customs under subsection 6(3), the Secretary must give the officer a certificate stating that he or she is an authorised tester for that purpose. Similarly, subsection 6(5) provides that, where a company is authorised, the Secretary must give the company a certificate (but not individuals within the company) stating that the company is authorised for that purpose. In addition, under subsections 6(4) and 6(5) an authorised tester must, if requested to do so, show the certificate to an Immigration and Border Protection worker who is directed to undergo a test under sections 34, 35 or 36 of the Act.

**Section 7 – Authorised laboratories and accredited analysts – analysis of body samples**

Paragraph 39(f) of the Act allows for the rules to make provision in relation to the accreditation of persons to conduct analyses in connection with alcohol blood tests and prohibited drug tests (subsection 7(1) refers).

Subsections 7(2) and 7(4) provide that an authorised laboratory is a company that is a laboratory accredited by the National Association of Testing Authorities, Australia (NATA), that is authorised by the Secretary for the purposes of:

* analysing a sample of blood for the purposes relating to the conduct of an alcohol blood test;
* analysing a body sample for purposes relating to the conduct of a prohibited drug test.

These provisions provide clarity that the Secretary may only authorise NATA accredited laboratories as companies authorised to analyse those body samples.

Subsection 7(3) provides that an accredited analyst is an individual employed or engaged by an authorised laboratory. This provision provides clarification that, although the Secretary authorises the laboratory, the individuals employed or engaged by the authorised laboratory actually conduct the analysis of the samples and do not need a separate instrument of authorisation.

Subsection 7(5) provides that, where the Secretary authorises a company under subsection 7(4), the Secretary must give the company a certificate (but not the accredited analysts within the company) stating that the company is authorised for that purpose.

**Section 8 – Devices approved for tests**

Paragraph 39(e) of the Act allows for the rules to make provision in relation to the devices used for the purposes of conducting an alcohol or drug test. Section 8 allows the Secretary, in writing, to approve a device for use in conducting an alcohol or drug test for sections 34, 35 or 36 of the Act.

**Part 3 – Conduct of alcohol or drug tests**

**Section 9 – Alcohol or drug tests – procedures**

Section 9 sets out general rules concerning the conduct of alcohol or drug tests for sections 34, 35 or 36 of the Act.

Subsections 9(1) to 9(3) ensure that tests conducted under the Act are conducted in a respectful manner, affording reasonable privacy to the Immigration and Border Protection worker undergoing the test, and, if practicable, by a person of the same sex.

Subsection 9(4) provides that where a prohibited drug test requires an Immigration and Border Protection worker to provide a sample of hair, the authorised tester collecting the sample:

* must use the least painful technique known and available to the authorised tester;
* must only collect the amount of hair necessary for the conduct of the test; and
* may collect a sample of hair from any part of the Immigration and Border Protection worker’s body, other than the genital or anal area or the buttocks.

This subsection enables a hair sample to be taken in an amount that allows a prohibited drug test to be undertaken and provides certainty as to where on the body a sample of hair can and cannot be taken from. It would be common for samples of hair to be taken from the head however this subsection provides for the situation where, for example, a person presents for a prohibited drug test with a shaved head.

**Section 10 – Alcohol or drug tests – collection of information from body sample**

Section 10 provides that the only information which may be collected from an alcohol or drug test is information relating to the detection of alcohol or prohibited drugs.

This provision provides a general statement which seeks to restrict the information which may be collected from alcohol and drug testing to only that which is related to the detection of prohibited drugs and alcohol.

**Section 11 – Alcohol or drug tests – security and destruction of body samples and other records**

Section 11 sets out the storage, retention and destruction requirements for body samples and other records obtained from the conduct of an alcohol or drug test.

Subsection 11(1) requires a body sample or other record, that is relevant to an alcohol or drug test conducted for sections 34, 35 or 36 of the Act to be kept in a secure location unless it is destroyed in accordance with this section.

The term ‘body sample’ is defined in section 4 of the Act to mean any of the following:

* any human biological fluid;
* any human biological tissue (whether alive or otherwise);
* any human breath.

‘Other record’ is a term which is not defined in the Act, but includes, for example, the name of the Immigration and Border Protection worker tested, the date of the test, the type of test, location of the test, identification of the authorised person who directed the Immigration and Border Protection worker to undergo the test and the name or identification of the authorised tester who conducted the test.

Subsection 11(2) provides that a body sample that does indicate the presence of alcohol or prohibited drugs when tested must be destroyed no later than two years from the day the test was conducted, and a body sample that does not indicate the presence of alcohol or prohibited drugs when tested must be destroyed no later than 28 days after the day the test was conducted. This subsection ensures that retention periods are appropriately aligned with the results of the test. For example, where an Immigration and Border Protection worker returns a positive test result, the worker may be subject to a range of sanctions including dismissal, which the worker may appeal through a court or tribunal. These samples may need to be retained for up to two years to ensure their availability until any actions taken by either party are finalised.

To enhance the governance of the Department’s Drug and Alcohol Management Program (DAMP), subsection 11(3) allows the Department to retain any ‘other record’ regardless of whether they indicate the presence of alcohol or prohibited drugs, until such time as the worker to whom the record relates ceases, for any reason, to be an Immigration and Border Protection worker. This would align the destruction requirements for ‘other records’ and enable the Department to accurately monitor testing and report on the DAMP. It allows the Department to report accurately on the DAMP and its compliance with Commonwealth procurement and spending requirements by enabling the Department to compile records of the numbers, dates and locations of testing, invoices, records of samples, laboratory reports resulting from that testing, and reports from the Medical Review Officer (MRO).

Subsection 11(4) provides that information obtained from the analysis of a sample may be retained for the purpose of compiling a statistical database so long as the information retained cannot be used to identify the Immigration worker and the information relates to:

* the detection of alcohol or prohibited drugs;
* the name of the prohibited drugs detected;
* the quantity of any alcohol or prohibited drugs detected;
* how a urine sample was provided or analysed;
* whether a urine sample was provided, or analysed in accordance with the Australian/New Zealand Standard mentioned in section 20.

This subsection ensures that information retained for the purpose of compiling a statistical database is appropriately limited.

Subsection 11(5) provides that information obtained from the analysis of a sample may be retained for security vetting purposes, including for any organisational suitability assessments conducted by the Department, only if the information relates to the detection of alcohol or prohibited drugs.

Immigration and Border Protection workers will be subject to an Australian Government security clearance and an organisational suitability assessment. Under both processes, applicants submit a range of information that is used to both establish an individual's suitability to access national security information and to assess whether an individual's character and background is suitable to work in the Department.

In the case of a positive drug test, the information obtained from the analysis of a sample may be relevant to assessing whether the person has provided open and honest answers during the clearance process. This information will be stored on the individual's Personal Security File and Organisational Suitability File. The information contained on these files is stored in compliance with the *Archives Act 1983*.

The information may be used to assess an individual's ongoing suitability to hold a security clearance or an organisational suitability assessment for the Department, particularly if a worker attempts to reapply for a security clearance or suitability assessment after resignation from the Department.

**Section 12 – Alcohol or drug tests – disclosure of information**

Section 12 provides for the circumstances in which information revealed by an alcohol or drug test may be disclosed. This includes:

* if the information is already lawfully publicly known;
* in accordance with Part 3;
* for the investigation of any offence or offences generally;
* to enable a conduct issue to be dealt with under the *Public Service Act 1999* and to enable any action to be taken by the Secretary in relation to the issue;
* for a decision whether to institute proceedings for an offence;
* for proceedings for an offence;
* for the Immigration and Border Protection worker’s medical treatment where the worker does not have capacity to consent in writing to the disclosure;
* if the Immigration and Border Protection worker consents in writing to the disclosure;
* for the purposes of security vetting of the Immigration and Border Protection worker.

**Section 13 – Alcohol breath tests – procedures**

Section 13 sets out procedures which must be followed in conducting alcohol breath tests. Subsection 13(1) provides that an alcohol breath test for section 35 or 36 of the Act must be conducted using an approved device for the test. An approved device is defined in section 5 of the Rule and means a device approved under section 8 of the Rule.

Subsection 13(2) also allows an Immigration and Border Protection worker who is directed to undergo an alcohol breath test under subsection 35(1) of the Act, and where the test indicates the presence of alcohol, to ask the authorised tester conducting the test to arrange for the Immigration and Border Protection worker to undergo an alcohol blood test. The authorised tester is then required under subsection 13(4) to take all reasonable steps to contact a person authorised to conduct an alcohol blood test.

Subsection 13(3) provides that, where an Immigration and Border Protection worker makes a request for an alcohol blood test, neither the request nor the alcohol blood test absolves the Immigration and Border Protection worker from the obligation to undergo the alcohol breath test.

Subsection 13(5) requires the authorised tester who conducted an alcohol breath test to give, as soon as practicable after the test, a certificate to the Immigration and Border Protection worker who provided the breath sample and the authorised person who directed the Immigration and Border Protection worker to undergo the alcohol breath test.

Subsection 13(6) provides that the certificate must state the following information:

* the type and serial number of the approved device used to conduct the test;
* the sample number of the test;
* the unique identifying number relating to the Immigration and Border Protection worker tested;
* the full name of the authorised tester who conducted the test (and, if the authorised tester is employed or engaged to conduct the test by a company which is authorised under subsection 6(3), the full name and address of the company);
* whether the authorised tester conducted a self-test on the approved device before and after the analysis;
* if the authorised tester conducted a self-test: the time and result of the self-test, and whether the self-test was conducted on override mode;
* the date on which, and the time at which, the test was conducted;
* the result of the test as shown by the approved device.

These procedures will ensure that Immigration and Border Protection workers are made aware of the relevant details of the alcohol breath test.

**Section 14 – Alcohol screening tests and alcohol breath tests – training courses**

Section 14 allows the Secretary to approve a training course in conducting alcohol screening tests and alcohol breath tests.

Note that under section 6, the Secretary will only be able to authorise officers of Customs to conduct alcohol screening tests and alcohol breath tests where the officer of Customs has completed an approved training course.

**Part 4 – Analysis of body samples from some tests**

**Section 15 – Part 4 – scope**

Section 15 provides that Part 4 applies to alcohol blood tests and prohibited drug tests of body samples other than urine or saliva. Examples of body samples which may be used for a prohibited drug test include hair or blood.

**Section 16 – Transmission of body samples to authorised laboratories**

Section 16 provides for the process involved in collecting a body sample for the purposes of an alcohol blood test, or a prohibited drug test of a body sample other than urine or saliva. This includes the sealing and labelling of containers, placing equal quantities of the sample into two containers, and arranging for both sealed containers to be sent to an authorised laboratory. These procedures will ensure the integrity of body samples collected and the availability of a second container in the event of disputed results.

**Section 17 – Accredited analysts – analysis of body samples**

Section 17 provides for the process involved when an accredited analyst employed or engaged by the authorised laboratory analyses a portion of body sample from one of the containers (the first container) to determine the concentration of alcohol in the blood or whether the body sample contains a prohibited drug. Subsection 17(2) provides that if the first analysis of a portion of the sample indicates the presence of alcohol or a prohibited drug, an analysis of another portion of the sample from the first container must be conducted. Subsection 17(3) provides that the accredited analyst must ensure that the second container of the body sample sent to the authorised laboratory under section 16 remains sealed.

The note to this section provides that the second container of the body sample may be made available for independent testing under section 19.

**Section 18 – Accredited analysts – certificates**

Subsection 18(1) provides that as soon as practicable after the analysis is conducted, the accredited analyst must give a certificate to the Immigration and Border Protection worker and the authorised person who directed that the Immigration and Border Protection worker undergo the test. Subsection 18(2) provides that the certificate must state the following information:

* a unique identifying number relating to the worker;
* the date when the sample was collected;
* the date when the sample was received by the laboratory for analysis;
* the laboratory identification number of the sample;
* the date when the analysis was conducted;
* the results of the analysis;
* the name of the accredited analyst;
* any observations made during the course of the analysis which may have affected the test results.

Subsection 18(3) provides that the certificate must also inform the Immigration and Border Protection worker that he or she may collect the second container of the sample mentioned in subsection 17(3) from the laboratory within six months after the sample was collected and have the portion of the sample independently tested.

Subsection 18(4) provides that the certificate must be signed by the accredited analyst who conducted the analysis.

These procedures will ensure that Immigration and Border Protection workers are made aware of the relevant details of the analysis of a body sample collected from them, and are aware of their rights with respect to independent testing.

**Section 19 – Analysis – disputed results**

Section 19 provides that if the results of an analysis are disputed by the Immigration and Border Protection worker who provided the sample then the second container of the sample, mentioned in subsection 17(3) must be made available for independent testing, and all records of the original test must be made available for re-examination. These procedures will ensure the integrity of test results by allowing the Immigration and Border Protection worker with the ability to confirm the presence of alcohol or prohibited drug.

Note 1 to section 19 clarifies that due to degradation of the sample over time, the re-testing need only detect the presence of the drug or alcohol. A lower result in the second test may not call into dispute the original test results.

Note 2 provides that subsection 17(3) requires the accredited analyst who initially analysed the body sample to keep the second container sealed.

**Part 5 – Prohibited drug tests using urine or saliva samples**

**Section 20 – Taking urine samples – procedures**

Section 20 provides that the provision and analysis of urine samples for the purpose of a prohibited drug test must be conducted in accordance with the Australian/New Zealand Standard AS/NZS 4308:2008 “Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine”.

**Section 21 – Taking urine samples – training courses**

Section 21 allows the Secretary to approve a training course in supervising the provision of urine samples.

Under section 6, the Secretary will only be able to authorise officers of Customs to conduct urine tests where the officer has completed an approved training course in supervising the provision of urine samples.

**Section 22 – Taking saliva samples – procedures**

Section 22 provides that the provision and analysis of saliva samples for the purpose of a prohibited drug test must be conducted in accordance with the Australian Standard AS 4760:2006 “Procedures for specimen collection and the detection and quantitation of drugs in oral fluid”.

**Part 6 – Application and transitional provisions**

**Section 23 – Continuation of authorisations and approvals of training courses and devices**

Section 23 inserts application and transitional provisions for authorisations, and approvals of devices and training courses as in force under the *Customs Administration (Drug and Alcohol Testing) Regulation 2013* immediately before the commencement of the Rule. The authorisations and approvals have effect on and after the commencement day as if they were made or given under the Rule.

**Statement of Compatibility with Human Rights**

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

 ***Australian Border Force (Alcohol and Drug Tests) Rule 2015***

The *Australian Border Force (Alcohol and Drug Tests) Rule 2015* (the Rule) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

*Overview of the Rule*

The Rule prescribes matters for the purposes of alcohol and drug testing which is to be conducted in the Department of Immigration and Border Protection (the Department). The ability to conduct alcohol and drug tests on Immigration and Border Protection workers was introduced by the *Australian Border Force Act 2015* (the Act). The Act also allows a number of matters to be prescribed by legislative instrument including the authorisation of persons, the devices to be used in conducting tests, procedures for handling samples taken and the confidentiality of the test results. Alcohol and drug testing arrangements will be administered under the Department’s *Drug and Alcohol Management Programme* (DAMP).

The Rule commences on the later of:

* the day after the Rule is registered; and
* the day the *Australian Border Force Act 2015* commences.

*Human Rights implications*

The Rule engages a number of human rights, which are discussed below.

Rights in work

Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) includes the right to safe and healthy working conditions under the right to work. The Rule will help to ensure that the Department’s workplace is drug and alcohol free and thereby promotes this specific human right.

Right to protection against arbitrary and unlawful interferences with privacy

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides the right for persons to not be subjected to arbitrary or unlawful interference with their privacy or have unlawful attacks on their honour or reputation. The right to privacy may be subject to permissible limitations. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances.  Reasonableness, in this context, incorporates notions of proportionality, appropriateness and necessity. In essence, this will require that limitations:

* serve a legitimate objective;
* adopt a means that is rationally connected to that objective; and
* the means adopted are not more restrictive than they need to be to achieve that objective.

The alcohol and drug testing measures contained in the Rule will impact on the right to privacy, including through the collection and use of personal information within the Department’s workplace, such as results from mandatory alcohol and drug testing, mandatory disclosure of personal information, and the compulsory physical intervention, such as requiring workers to provide a urine sample or taking a blood sample, of a person for testing purposes.

The Department recognises the significant consequences that could arise from Immigration and Border Protection workers acting under the influence of alcohol or drugs in the course of their duties and that corruption can have a significant detrimental effect on the ability to enforce the law. Given the role of the Department in enforcement of Australia’s drug laws, illicit drug use by Immigration and Border Protection workers undermines the ethical standards the Australian community expects. The alcohol and drug testing regime will serve the legitimate objectives of protection against corruption and unethical conduct in law enforcement and of workplace safety.

Through its management of the 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, the alcohol and drug testing regime is also aimed at protecting the Department from the risk of corruption. It is important the Department has mechanisms to provide an evidence based approach to either confirm allegations or clear a worker through alcohol and drug testing.

Alcohol and drug testing arrangements have proven to operate effectively for the Australian Customs and Border Protection Service (ACBPS). Under the arrangements currently in place for the ACBPS, on which the measures contained in this Rule are based, drug use in the workforce has been identified which has also revealed corrupt and unethical behaviours by officers.

The DAMP is also supported by findings in the Australian Commission for Law Enforcement Integrity’s 2014 investigation in relation to an Australian Crime Commission 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 workers who are in front line roles.

It is the Department’s position that the drug testing process is not more restrictive than it needs to be to achieve the legitimate objectives of protection against corruption and unethical conduct in law enforcement and of workplace safety. For example the procedures in place for the provision and analysis of urine and saliva samples are in accordance with the relevant Australian/New Zealand or 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 as far as possible. In relation to alcohol testing procedures, the Department uses breath analysis instruments that meet the Australian Standard.

*Personal information*

The measures contained in the Rule do not limit the obligations of the Department under the *Privacy Act 1988* and the *Australian Privacy Principles*.

To provide safeguards against arbitrary and unlawful interferences with privacy, a number of provisions in the Rule seek to clarify and limit the information which may be collected and obtained under the Department’s alcohol and drug testing regime. This includes the provision which will restrict the information which may be collected from alcohol and drug testing to only information relating to the detection of alcohol or prohibited drugs.

In relation to alcohol and drug testing procedures, the Rule provides that each sample will only be identified by a unique identifying number. Neither the laboratory staff nor the Medical Review Officer will know the identities of the persons being tested. Prior to a test being positive it is anticipated that only members of the DAMP team will be able to match a unique identifying number to an individual Immigration and Border Protection worker.

The Rule also prescribes clear limits on when information obtained from a drug or alcohol test may be disclosed. For example, information revealed by an alcohol or drug test may be necessary to disclose to a medical practitioner in order to provide medical treatment to the individual. However such information can only be disclosed without the worker’s consent if the worker does not have the capacity to consent.

Additionally, the provision authorising disclosure for the purpose of proceedings for an offence does not displace or override section 40 of the Act. Section 40 provides broad protection against self-incrimination by preventing any document relevant to the conducting of a test being admissible in evidence against the Immigration and Border Protection worker who is subject to a test except for proceedings in relation to a decision of the Secretary to terminate the employment or engagement of a contractor, proceedings under the *Safety, Rehabilitation and Compensation Act 1988* or proceedings in tort against the Commonwealth that are instituted by the worker.

The Rule also clarifies the exact information which may be retained for the purposes of creating a statistical database and limits the retention of any information obtained from the analysis of a sample for this purpose to the extent that it does not contain information that may be used to identify the Immigration and Border Protection worker who provided the sample.

*Hair samples*

Hair testing is an important drug-test methodology that contributes to the objectives of the DAMP. This methodology can detect evidence of drug use up to six months prior to the test, and thus provide greater assurance to officers that drug use (including historical drug use) can be detected.

To ensure proper protections are in place for Immigration and Border Protection workers, the Rule requires the authorised person taking the sample to use the least painful technique known and available to the authorised tester. For example, if a hair sample is required for a prohibited drug test but the individual presents with a shaved head, the provisions will allow a sample of hair to be collected from other places on the body, but the Rule expressly prohibits the authorised tester from taking hair samples from the genital or anal area, or the buttocks. To ensure that hair samples are sufficient for hair testing to be an effective drug-testing methodology, it is not always practicable that the Immigration and Border Protection worker be permitted to specify from which part of the body a hair sample be taken. This is consistent with international guidance and practice and provides certainty that authorised persons are not to take hair samples from intimate regions of the body.

*Retention of Records*

The time for which records, other than body samples, not indicating the presence of alcohol or prohibited drugs, can be retained will enable the Department’s governance of the DAMP by allowing the Department to monitor testing which has been carried out under the program. In particular, the Department will be able to identify Immigration and Border Protection workers who have been subjected to a test (regardless of the results) and enable the Department to maintain more accurate records of testing.

The Department should be able to report accurately on the DAMP and its compliance with Commonwealth procurement and spending requirements. This can only be done by compiling Departmental records of the numbers, dates, and locations of testing, invoices, records of samples sent to the analytical laboratory, laboratory reports resulting from that testing and reports from the Medical Review Officer. Importantly, body samples which do not indicate the presence of alcohol or prohibited drugs will be required to be destroyed no later than 28 days after the test was conducted.

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

Right to security of the person and freedom from arbitrary detention

The Rule may require authorised officers to control the movement of workers within a specified area, for the purpose of conducting mandatory testing. The right to liberty and security of the person is contained within Article 9 of the ICCPR. The Rule contains limitations on the permitted purposes of authorised officer directions, ensuring that the directions are for prescribed purposes and that the worker is aware of the reasoning behind it. However the Rule does not authorise the use of arbitrary detention or force.

Significantly, the Rule does not prohibit the redress of any worker, in support of this right. Within Australia, the worker can take proceedings before a civil court. This is consistent with the intent of Article 9(4) of the ICCPR – the entitlement (of an individual) to take proceedings before a court, to determine the lawfulness of a direction.

Rights against discrimination

Article 26 of ICCPR and article 27 of the *Convention on the Rights of Persons with Disabilities* provides for the protection against discrimination on any ground such as race, colour, sex, language, religion, political or other status.

The Department has a responsibility under Commonwealth and State legislation to ensure that employees are not subjected to behaviour that may constitute unlawful harassment, discrimination or victimisation. The Department is committed to providing a work environment that is safe, fair and free from harassment, discrimination or bullying. All Immigration and Border Protection workers have a responsibility to ensure that harassment is not tolerated.

The Rule does not limit the obligations of the Department under the existing Commonwealth and State legislation, related to equal opportunity, discrimination or harassment. In addition to legislation, inappropriate conduct may be a breach of the Australian Public Service Code of Conduct.

The Department is currently working with staff and their representatives to develop policies that are transparent, fair and consistent and which allow the Department to ensure the professional integrity of its workers. In particular, it is intended that the Department will provide reasonable assessment and support to workers who voluntarily seek assistance with problems associated with alcohol use or misuse and misuse of prescription and over the counter medication.

It is the Department’s intention that any action taken will be proportionate to the objectives of ensuring a safe working environment and ensuring the professional integrity of Immigration and Border Protection workers.

*Conclusion*

This legislative instrument is compatible with human rights. To the extent that the Rule limits human rights, it is a permissible limitation that is considered to be proportionate to the legitimate aims of protection against corruption and unethical conduct in law enforcement and of workplace safety.

**Minister for Immigration and Border Protection**