

EXPLANATORY STATEMENT

Issued by authority of the Secretary of the Department of Home Affairs

Australian Border Force Act 2015

Australian Border Force (Prohibited Drugs) Instrument 2024

Authority

The *Australian Border Force Act 2015* (ABF Act) concerns the Australian Border Force, the Australian Border Force Commissioner and Immigration and Border Protection workers (being persons defined under that Act that are exercising powers and performing functions under Acts administered by the Department of Home Affairs (Department)), and related matters.

Subsection 4(3) of the ABF Act allows the Secretary of the Department or the Australian Border Force Commissioner, by legislative instrument, to prescribe drugs for the purposes of paragraph (b) of the definition of *prohibited drug* in subsection 4(1) of the ABF Act.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Background

Part 5 of the ABF Act provides that all Immigration and Border Protection 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.

Subsections 35(1) and 36(1) of the ABF Act authorise an authorised person to give an Immigration and Border Protection worker who is in the course of performing his or her duties in that capacity a written direction requiring the worker to provide a body sample of a kind specified in the direction for a prohibited drug test.

The term *prohibited drug test* is defined in subsection 4(1) of the ABF Act as a test of a body sample of a person to determine the presence (if any) of a prohibited drug in the sample. The term *prohibited drug* is defined in subsection 4(1) of the ABF Act as either a *narcotic substance* within the meaning of the *Customs Act 1901* (Customs Act), or any drug prescribed in a legislative instrument made under subsection 4(3) of the ABF Act.

Subsection 4(1) of the Customs Act provides that *narcotic substance* means a *border controlled drug* or *border controlled plant*. Subsection 4(1) of the Customs Act defines *border controlled drug* and *border controlled plant* as having the same meaning as in Part 9.1 of the *Criminal Code*. For the purposes of Part 9.1, the list of drugs can be found in Schedule 1 to the *Criminal Code*.

Code Regulations 2019, and captures more commonly known drugs, such as cannabis and cocaine.

A prohibited drug test can be conducted for the drugs prescribed in an instrument made under subsection 4(3) of the ABF Act and for the border controlled drugs and plants identified in the table in Schedule 1 to the *Criminal Code Regulations 2019*.

The *Specification of Prohibited Drugs No. 1 of 2014* (2014 Instrument) was made under section 16H of the now repealed *Customs Administration Act 1985* and is scheduled to sunset on 1 April 2024. The 2014 Instrument was preserved by operation of section 4 of Schedule 9 to the *Customs and Other Legislation Amendment (Australian Border Force) Act 2015*.

The Department reviewed and assessed the necessity and performance of the 2014 Instrument and found that it was achieving its objective efficiently and effectively. The Department determined that the 2014 Instrument should be remade.

Drug and alcohol testing was introduced in the Australian Customs and Border Protection Service (ACBPS) in early 2013 as part of measures to ensure greater integrity within the ACBPS. On 1 July 2015, the ACBPS integrated with the then Department of Immigration and Border Protection (DIBP) and the drug and alcohol testing program was expanded to include all DIBP workers, including those in the Australian Border Force (ABF).

Should an officer be acting in contravention of the drug and alcohol policy and their occupation become known to criminal interests involved in the illicit drug markets, the officer would be vulnerable to extortion and may be prepared to assist criminal groups in order to avoid possible exposure and the consequences of breaching the Department's drug and alcohol policy. The Department, including the ABF, continues to have a zero tolerance for the possession, use, or trafficking of prohibited drugs.

Purpose and effect

The purpose of the *Australian Border Force (Prohibited Drugs) Instrument 2024* (Prohibited Drugs Instrument) is to repeal and replace the 2014 Instrument, specifying prohibited drugs for the purposes of prohibited drug testing under subsections 35(1) and 36(1) of the ABF Act. The Prohibited Drugs Instrument prescribes the same drugs as those prescribed in the 2014 Instrument.

The drugs prescribed in the Prohibited Drugs Instrument can be broadly classified as benzodiazepines and performance and image enhancing drugs. Both of these classes of drugs have legitimate uses; however, both are also used outside of accepted medical parameters, and there is an illicit trade in both. All of the drugs listed in the instrument are currently subject to border controls under the *Customs (Prohibited Imports) Regulations 1956*.

Details of the Prohibited Drugs Instrument are set out in **Attachment A**.

Consultation

On 9 June 2023, the Department’s Executive Committee agreed for the Integrity and Professional Standards Branch to conduct consultations with staff and union representatives, in relation to a review of the Department’s Integrity Framework, including several options under consideration for the future of Drug and Alcohol Management Program.

This consultation process was open for a period of 6 weeks and closed on 15 August 2023. Feedback supported retaining drug and alcohol testing for ABF workers, acknowledging the unique working environment in which the ABF operates. There is a risk that Immigration and Border Protection workers engaged by the ABF may be vulnerable to compromise. This risk is increased for ABF workers if they were to engage in the use of illicit substances. This applies not only to front line operational staff, but also to office-based workers with access to sensitive information. Drug and alcohol testing is an integrity measure designed to mitigate this risk and to ensure a safe working environment.

Commencement

The Prohibited Drugs Instrument commences on the day after registration on the Federal Register of Legislation.

Other matters

The Prohibited Drugs Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

A Statement of Compatibility with Human Rights has been prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is at **Attachment B**.

Details of the *Australian Border Force (Prohibited Drugs) Instrument 2024*

Section 1 Name

This section provides that the name of the instrument is the *Australian Border Force (Prohibited Drugs) Instrument 2024* (Prohibited Drugs Instrument).

Section 2 Commencement

This section sets out, in a table, the date on which each of the provisions contained in the Prohibited Drugs Instrument commences.

Table item 1 has effect that all sections commence on the day after the instrument is registered on the Federal Register of Legislation.

The note under the table in subsection 2(1) indicates that the table only relates to the provisions of this instrument as originally made and will not be amended to deal with any later amendments of this instrument.

Section 3 Authority

This section sets out the authority under which the Prohibited Drugs Instrument is made, which is subsection 4(3) of the *Australian Border Force Act 2015* (the Act).

The note under section 3 of the instrument clarifies the operation of subsection 4(3) of the ABF Act when read together with subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. This clarification is necessary to explain the authority for section 6 of this instrument.

Section 4 Definitions

This section defines terms frequently referred to throughout the Prohibited Drugs Instrument and provides for the following terms:

- *Act* means the *Australian Border Force Act 2015*.
- *prohibited drug* has the same meaning as in subsection 4(1) of the Act.

Section 5 Prohibited drugs

Part 5 of the ABF Act provides that all Immigration and Border Protection 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.

Subsections 35(1) and 36(1) of the ABF Act authorise an authorised person to give an IBP worker who is in the course of performing his or her duties in that capacity a written direction requiring the worker to provide a body sample of a kind specified in the direction for a prohibited drug test.

The term *prohibited drug test* is defined in subsection 4(1) of the ABF Act as a test of a body sample of a person to determine the presence (if any) of a prohibited drug in the sample. The term *prohibited drug* is defined in subsection 4(1) of the ABF Act as either a *narcotic substance* within the meaning of the *Customs Act 1901* (paragraph (a) of the definition of *prohibited drug*), or any drug prescribed in a legislative instrument made under subsection 4(3) of the ABF Act (paragraph (b) of the definition of *prohibited drug*).

For paragraph (b) of the definition of *prohibited drug* under subsection 4(1) of the Act, this section provides for the drugs listed under item 1 of Schedule 1 to this instrument to be prescribed.

The effect of this provision is that prohibited drug tests can be conducted for the purposes of subsections 35(1) and 36(1) of the ABF Act.

Section 6 Repeal

This section repeals the whole of the 2014 Instrument.

Schedule 1

Item 1 List of Prescribed Prohibited Drugs

Section 5 of this instrument provides that, for the purposes of paragraph (b) of the definition of *prohibited drug* in subsection 4(1) of the Act, each of the drugs mentioned in an item in Schedule 1 is prescribed. The drugs listed in a table under this item are drugs prescribed for section 5 of this instrument.

Statement of Compatibility with Human Rights

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

Australian Border Force (Prohibited Drugs) Instrument 2024

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

Overview of the Legislative Instrument

The *Australian Border Force (Prohibited Drugs) Instrument 2024* (the Instrument) specifies drugs for the purposes of the definition of *prohibited drug* contained in 4(1) of the *Australian Border Force Act 2015* (ABF Act).

Subsections 35(1) and 36(1) of the ABF Act allows an authorised person to issue a written direction to an Immigration and Border Protection worker who is in the course of performing their duties to undergo a prohibited drug test.

Prohibited drug test is defined in subsection 4(1) of the ABF Act as a test of a body sample of a person to determine the presence (if any) of a prohibited drug in the sample. *Prohibited drug* is defined in subsection 4(1) of the ABF Act as either a *narcotic substance* within the meaning of the *Customs Act 1901* (Customs Act) or any drug prescribed in a legislative instrument made under subsection 4(3) of the ABF Act.

Subsection 4(1) of the Customs Act provides that *narcotic substance* means a *border controlled drug* or *border controlled plant*. Subsection 4(1) of the Customs Act defines *border controlled drug* and *border controlled plant* as having the same meaning as in Part 9.1 of the *Criminal Code*. For the purposes of Part 9.1, the list of drugs can be found in Schedule 1 to the *Criminal Code Regulations 2019*.

A prohibited drug test can be conducted for the drugs prescribed in an instrument made under subsection 4(3) of the ABF Act and for the border controlled drugs and plants identified in the table under section 1 of Schedule 1 to the *Criminal Code Regulations 2019*.

The Instrument repeals and replaces the *Specification of Prohibited Drugs No. 1 of 2014*, which is scheduled to sunset on 1 April 2024. The drugs specified in the Prohibited Drugs Instrument can be broadly classified as benzodiazepines and performance and image enhancing drugs (PIEDs).

Both of these classes of drugs have legitimate uses; however, both are also used outside of accepted medical parameters, and there is an illicit trade in both. All of the drugs listed in the instrument are currently subject to border controls under the *Customs (Prohibited Imports) Regulations 1956*.

Human Rights Implications

This Instrument will engage the right to privacy in Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)*.

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy. It provides that persons have the right to the protection of the law against each interference. An interference with privacy will not be arbitrary if it is not inconsistent with the provisions, aims and objectives of the ICCPR and is reasonable in the circumstances. Reasonableness in this context, incorporates notions of proportionality, appropriateness and necessity.

The right to privacy is engaged by this Instrument as it will allow the Department to test an Immigration and Border Protection worker for drugs which are available for legitimate use. The Department can already test Immigration and Border Protection workers for drugs that have legitimate uses, those being drugs within the opiates and amphetamine-type substance classes pursuant to the definition of a *narcotic substance* within the meaning of the Customs Act.

It is necessary for the Department to have the ability to test for a broad range of drugs where required, because, like the classes of drugs defined as a *narcotic substance*, PIEDs and benzodiazepines are trafficked in illicit markets.

Immigration and Border Protection workers who involve themselves in illicit markets for drugs make themselves and the Australian Border Force (ABF) vulnerable to corruption. Transactions in any markets include contact among buyer and seller. Should one party discover that the other is an Immigration and Border Protection worker, an opportunity presents itself for that party to use that knowledge to influence or coerce the Immigration and Border Protection worker to assist with criminal activity or risk having the drug-taking activity exposed.

Testing for these drugs gives the Department greater capacity to assess the extent of the risk of organised criminal influence on Immigration and Border Protection workers.

Replacing the *Specification of Prohibited Drugs No. 1 of 2014* ensures that the Department can continue to test for benzodiazepines and PIEDs, making sure that the broadest range of substances that may be obtainable on the illicit market is captured through drug and alcohol testing.

An Immigration and Border Protection worker's consent is required to undertake the testing, so to the extent that this Instrument limits the right to privacy, the limitation is reasonable, necessary and proportionate in achieving the legitimate objective of ensuring that integrity of ABF and preventing the infiltration by criminal networks.

Conclusion

This legislative instrument is compatible with human rights as, although it does restrict the right to privacy, this restriction seeks to serve a legitimate objective and is reasonable, necessary and proportionate in achieving the legitimate objective.

Stephanie Foster PSM
Secretary of the Department of Home Affairs