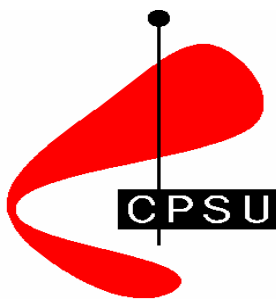


**SENATE RURAL AND REGIONAL AFFAIRS AND TRANSPORT  
LEGISLATION COMMITTEE**

**PROVISIONS OF THE BORDER PROTECTION LEGISLATION  
AMENDMENT (DETERRENCE OF ILLEGAL FOREIGN FISHING)  
BILL 2005**



**Submission by**

**Community and Public Sector Union (PSU Group)**

**31 March 2005**

## **CPSU Recommendations**

1. CPSU recommends that the provisions of the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005 that allow for the authorisation of contractors as "detention officers" be removed from this Bill.

If this recommendation is not adopted by the Committee, then:

2. CPSU recommends that the class of officers to be designated as "authorised officers" should exclude contract detention officers and opposes the creation of a new class of detention officer who can exercise the p.
3. CPSU recommends that minimum training requirements should be inserted into the Bill, including with specific regard to the APS Code of Conduct and Values to ensure that Australian Public Service standards, as far as possible, are promoted and maintained.

# **CPSU Submission - Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005**

## **Introduction**

Community and Public Sector Union (PSU Group) ["CPSU"] welcomes this opportunity to make a submission on the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005.

The Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill ["the Border Protection Bill"] creates a new class of officer who may exercise powers related to fisheries detention. This will allow employees and contractors of AFMA and DIMIA, who are specifically appointed by the fisheries minister, to exercise detention powers under fisheries legislation.

CPSU opposed a similar attempt last year in the Agriculture, Fisheries and Forestry Legislation Amendment Bill (No 2) 2004 ["the AFFA Bill"] to grant powers as quarantine officers to contractors and their employees.

In the case of the 2004 AFFA Bill, the rationale for CPSU opposition to the granting of quarantine officer powers to contractors was based on a firm belief that only Commonwealth employees should exercise statutory law enforcement powers.

This argument was made because only APS employees are bound by the *APS Code of Conduct* and *APS Values* which underpin the high standards of accountability and ethical behaviour which characterises the Australian Public Service.

Similarly, in the Border Protection Bill, CPSU believes that allowing contractors to be engaged as detention officers may mean a lower professional standard of operations in this critical area and should therefore be opposed.

For the reasons that will be further detailed below, CPSU recommends that the provisions of the Border Protection Bill that

allow for the creation of "detention officers" be removed from this Bill.

## **The Bill**

Under Clause 3 of Schedule 1 of the Border Protection Bill, the Minister may appoint persons or a class of persons to be detention officers. Under the Bill, this person or class of persons may include private contractors as well as public servants.

The Border Protection Bill also allows AFMA to authorise detention officers to carry out additional specific functions. These authorised officers can not only detain persons, but will also have authority to move and search a detainee, conduct strip searches, screen detainees and conduct identification tests.

Of concern to the CPSU is the acknowledgement that the employment relationship between the Commonwealth and contractors is as a third party and that the Commonwealth will only have the power to direct an individual contractor not to work within a detention centre.<sup>1</sup>

This reinforces the reality of the employment relationship between the government and an individual contractor is one conducted at an arms length. It is difficult to envisage that the requisite APS culture of accountability will be strongly held in these circumstances.

## **APS Code of Conduct and Values**

The Australian Public Service [APS] *Code of Conduct* binds APS employees to the highest standards of professional and ethical conduct.

According to the most recent Australian Public Service Commission *State of the Service Report*, this ethical standard "goes beyond what might be expected elsewhere in the community; it reflects the fact that APS employees are paid by taxpayers and can exercise authority delegated by Parliament."<sup>2</sup>

Furthermore, *APS Values* require APS employees to act with fairness, impartiality and courteously and to be sensitive to the diversity of the Australian public. The *APS Values* also require APS

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<sup>1</sup> Senate Rural and Regional Affairs and Transport Legislation Committee Inquiry into the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Hansard, 17<sup>th</sup> March 2005, p 14.

<sup>2</sup> Australian Public Service Commission, *State of the Service Report 2003-04*, p 109.

employees to perform their duties professionally and ethically and to be openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public.

CPSU believes that this high standard of professional conduct which is a source of pride to those associated with the Australian Public Service has no equivalence in the private sector.

CPSU also believes it is regrettable that this high professional standard has to be increasingly defended from inroads by private contractors into pockets of activity in the delivery of public services.

The flexibility and responsiveness of the modern APS means that there is no arguable reason why these positions cannot be fulfilled by APS employees.

As mentioned above, the 2004 AFFA Bill entailed a similar proposal to the Border Protection Bill with regard to contract employees being authorised as quarantine officers.

However, unlike the Border Protection Bill, in the AFFA Bill there was an important recognition that public service style accountability was required for the exercise of those important functions.

To that end, the AFFA Bill attempted to duplicate the accountability of public service employment by requiring that the contractor "has agreed to comply with the APS *Code of Conduct* in the performance of the duties as a quarantine officer, as if that person were an APS employee".

The Border Protection Bill makes no such reference to the APS *Code of Conduct*, despite the serious law enforcement style powers that will be carried out by contract detention officers.

Instead, evidence to the Senate Committee Inquiry reveals that a code of conduct that the current DIMIA contractor GSL Australia has in place will be relied on. However, the GSL Australia Code of Conduct, as yet unsighted by the Committee, cannot be held in the same regard as the APS *Code of Conduct*.<sup>3</sup>

Any attempts by the Australian Fisheries Management Authority [AFMA] to upholding the GSL Code of Conduct for contract detention officers would require AFMA to sue the contractor for breach of

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<sup>3</sup>Op cit, p 8.

contract in the courts. This would be expensive and time consuming, creating a significant disincentive from upholding the APS Code of Conduct from all but the most significant breaches.

By comparison, breaches of the APS *Code of Conduct* can be readily investigated by AFMA and disciplinary or termination measures taken without the involvement of the courts.

Similarly, there would be no role for the Public Service Commissioner or the Merit Protection Commissioner in respect of contract detention officers or contract authorised officers.

The lack of a direct ability to uphold the APS *Code of Conduct* will inevitably impact on the culture and integrity of detention officers.

For these reasons, CPSU opposes the provisions of the Border Protection Bill that allow for a new class of officer, the detention officer, to exercise the powers that are currently exercised by fisheries officers under the *Fisheries Management Act 1991*.

### **Professional integrity and misuse of powers**

It is also apparent from evidence to the Senate Committee Inquiry that despite the serious law enforcement powers being authorised under this Bill, no consideration has been given with regard to whistleblower protection for contractors.<sup>4</sup>

Again this reinforces the fact that the accountability mechanisms with regard to the conduct of contract detention officers will not be available in the same way that there would be if these officers were public servants.

Only a public servant has a level of security and protection against pressure to act corruptly because they know they cannot be summarily or unfairly dismissed or victimised, but can rely on the established procedural fairness procedures outlined in the Australian Public Service Act.

By contrast, the Border Protection Bill will offer no culture of protection to an individual who is under pressure to misuse his or her powers. And if a contractor does misuse his or her powers, there is no statutory accountability framework that can be applied to the situation.

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<sup>4</sup> Op cit, p 8.

A public servant operates within a culture that actively works against corrupt practices, and they readily know they can stand up to any corrupt pressures and act to maintain their integrity without any worry that their employment contract may not be renewed by their employer.

### **Lack of control by Commonwealth**

The weakness of the accountability of contractors to the Commonwealth for the exercise of law enforcement powers should be of concern to the Senate Rural and Regional Affairs And Transport Legislation Committee.

No only does the Commonwealth have no direct control over contract employees but in a contract relationship the Commonwealth cannot legally control the manner in which the work of contract detention officers or contract authorised officers can be done.

The contractor is only bound by the terms of the contract which will specify the services to be provided. Beyond that, the Commonwealth will have no control over many aspects of how this sensitive work is performed. This goes to the heart of the absence of the APS *Code of Conduct* and *Values* for contractors. And this is a serious gap in accountability for the exercise of law enforcement powers.

As has been already raised above, it has been acknowledged in evidence to the Senate Committee that the Commonwealth will only have the power to direct an individual contractor not to work within a detention centre, and beyond that it is reliant on the procedures of the contractor company with regard to individual contractors.<sup>5</sup>

This critical lack of accountability will be further exacerbated if the contractor company, for example GSL Australia, itself sub-contracts for staff to fill positions as detention officers. This would place the Commonwealth in the position of needing to rely on the breaching of two contracts in order to deal with any disciplinary breaches.

The Border Protection Bill contains serious law enforcement powers that are proposed to be vested in private sector contract staff and

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<sup>5</sup> Senate Rural and Regional Affairs and Transport Legislation Committee Inquiry into the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005, Hansard, 17<sup>th</sup> March 2005, p 14.

the accountability regime proposed in the Bill is weak with comparison to that which exists for public servants.

CPSU therefore recommends that the class of officers to be designated as "authorised officers" should exclude contract detention officers.

## **Training**

Another issue of concern to the CPSU is that there is no provision in the Border Protection Bill with regard to any minimum training levels for contractors who may carry out these authorised functions.

Instead the Bill allows for the government to rely on the contracting company, in this case GSL Australia, to carry out the relevant training and character checks.<sup>6</sup>

In particular, the APS Value that requires public servants to be sensitive to the diversity of the Australian public should be equally applicable to the conduct of all Commonwealth employees, including private sector contractors, to illegal foreign fishers with regard to language and cultural differences.

This is particularly pertinent with regard to the conduct of strip searches which as evidence to the Senate Committee Inquiry has pointed out, contains a lower standard than the Crimes Act with regard to searches.<sup>7</sup>

CPSU believes that minimum training requirements should be inserted into the Bill, including with specific regard to the APS *Code of Conduct* and *Values* to ensure that Australian Public Service standards are promoted and maintained as far as possible.

## **Consultation with Departmental Staff**

CPSU also notes that the Australian Fisheries Management Authority has acknowledged not having held any consultations with current staff about the new arrangements proposed in the Border Protection Bill and that it is only through this Senate Inquiry that the opportunity has arisen for these issues to be raised.<sup>8</sup>

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<sup>6</sup> Op cit, p 3.

<sup>7</sup> Op cit, p 14.

<sup>8</sup> Op cit, p 8.



CPSU calls on the Australian Fisheries Management Authority and Department of Agriculture Fisheries and Forestry to engage in appropriate consultation with staff with regards to these issues.

### **Conclusion**

It is clear that the Border Protection Bill envisages providing serious authority and powers to detention officers who may include private sector contractors.

CPSU believes that the requisite level of public sector accountability for the exercise of these powers is only present for Commonwealth employees and that the use of private sector contractors for the exercise of these powers should be reconsidered by the government.