

# **The Australian Border Force's Use of Statutory Powers**

Department of Immigration and Border Protection

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Canberra ACT  
27 February 2017

Dear Mr President  
Dear Mr Speaker

The Australian National Audit Office has undertaken an independent performance audit in the Department of Immigration and Border Protection titled *The Australian Border Force's Use of Statutory Powers*. The audit was conducted in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website—<http://www.anao.gov.au>.

Yours sincerely



Grant Hehir  
Auditor-General

The Honourable the President of the Senate  
The Honourable the Speaker of the House of Representatives  
Parliament House  
Canberra ACT

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# Summary and recommendations

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## Background

1. On 9 May 2014, the Minister for Immigration and Border Protection announced the government's decision to bring together the Department of Immigration and Border Protection (Immigration) and the Australian Customs and Border Protection Service (Customs) in a single department from 1 July 2015. Within the integrated department, the government established the Australian Border Force (Border Force) as a 'single frontline operational border agency to enforce our customs and immigration laws and protect our border'.<sup>1, 2</sup>

2. Both the *Customs Act 1901* (Customs Act) and *Migration Act 1958* (Migration Act) contain a wide range of powers. While many of these are essentially administrative in nature, there are a wide range of coercive powers—such as powers to question, search, detain or arrest people, or enter and search vehicles or premises—which departmental officers, such as Border Force officers, can now exercise. Other Acts (such as the *Maritime Powers Act 2013*) also confer powers on officers. In total, officers can exercise coercive powers under 35 Acts and more than 500 empowering provisions.

## Audit objective and criteria

3. The objective of the audit was to assess the establishment and administration of the Australian Border Force's framework to ensure the lawful exercise of powers in accordance with applicable legislation.

4. To form a conclusion against the audit objective, the ANAO adopted the following high-level audit criteria:

- Is there an effective accountability and reporting framework for the lawful exercise of powers?
- Do Border Force officers have adequate knowledge of their powers and how to use them?

## Conclusion

5. As part of the integration of Immigration and Customs, the department has made progress towards establishing a framework to ensure Border Force officers exercise coercive powers lawfully and appropriately. However, significantly more work needs to be done to gain assurance that controls are effective.

6. The department's enterprise risk management framework does not adequately address the risk of officers exercising coercive powers unlawfully or inappropriately. Several internal

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1 S Morrison (Minister for Immigration and Border Protection), 'A new force protecting Australia's borders', speech, Lowy Institute for International Policy, Sydney, 9 May 2014.

2 The Australian Border Force is the operational enforcement unit within the Department of Immigration and Border Protection and forms part of it. The department attends to 'back office' administrative functions. For example, these include policy development, management of delegations and corporate functions (such as payroll). In this report, the terms 'the department' and 'the Border Force' are used to distinguish these responsibilities.

assurance reviews have uncovered problems relating to the exercise of statutory powers. The Border Force has established an integrated operational quality assurance team, which has not yet finalised any reports. Delegations and authorisations for coercive powers are complete and in place but not all instruments are accessible to officers.

7. The ANAO found instances of potentially unlawful searches and failure to comply with instructions under both the Customs Act and Migration Act, which indicate current internal controls for mitigating the risk of unlawful or inappropriate use of coercive powers are inadequate.

8. The department has not provided adequate instructions and guidance for officers exercising coercive powers. There is currently no single source of instructions and guidance material for Border Force officers, and much of the guidance material available is out of date and inaccurate. While positive foundational work has commenced on integrating the former Customs and Immigration training regimes, officers have been exercising significant coercive powers without having undertaken pre-requisite training.

## Supporting findings

9. The department's approach to risk management at the enterprise level has been developing over the past two years. It has established an enterprise risk framework and is finalising profiles for each of its enterprise risks. The current profile relating to unlawful or inappropriate use of coercive powers conflates this risk with integrity and corruption risks, which require different internal controls. This has the potential to divert attention from controls relating to the risk of unlawful or inappropriate use of coercive powers.

10. The department has undertaken several internal assurance reviews that have uncovered problems relating to the exercise of statutory powers. The Border Force has recently established an integrated team responsible for operational quality assurance testing. The team has not yet completed any reviews. Prior to this, the department did not have satisfactory mechanisms for gaining assurance that officers understand their powers and are exercising them lawfully.

11. Instruments of authorisation and delegation for coercive Migration and Customs Act powers are complete and up-to-date. While Migration Act instruments of authorisation and delegation are available on the intranet, instruments relating to the Customs Act (and other Acts) are not accessible to officers.

12. Some personal searches of passengers at international airports examined by the ANAO were unlawful or inappropriate, indicating weaknesses in the control framework. A number of searches of premises under the Migration Act potentially exceeded the authority of the warrant which authorised them, and officers routinely questioned people without documenting their legal authority to do so. Officers also frequently failed to comply with departmental policy instructions, including compliance with certification and recordkeeping requirements.

13. The department has commenced a project to identify the statutory powers of officers of the integrated department, with a longer term view to possibly amending some powers. As part of the project, in July 2016, the department completed a consolidated inventory of all powers available to departmental officers under Commonwealth legislation. Such an inventory will enable the department to identify overlap, duplication, redundancy and inconsistency within and between Acts. It will also assist with identifying any gaps or deficiencies in powers in order to be able to submit a proposal for potential legislative change for government consideration.

14. The Border Force is developing a coordinated systematic framework for reporting on its use of coercive powers. It presently does not have such a framework.

15. Many of the instructions that are provided to Border Force officers on the department's intranet are out of date, incomplete, inaccurate and are not accessible to all officers. A project to remedy this situation was endorsed by the department's executive in December 2015 and has to date delivered only a very small number of operational instructions for Border Force officers.

16. The department has made progress in integrating the former Customs and Immigration training regimes and addressing deficiencies identified through pre-integration training audits conducted in 2014. The establishment of an integrated Learning and Development Branch and the Border Force College has been managed as a priority project, under the Reform and Integration Taskforce. While this project has delivered solid foundations for enhancing the learning maturity of the department, at the time of examination the results of these foundational efforts had yet to be realised.

17. Not all officers exercising coercive powers under the Migration Act and Customs Act have received pre-requisite training. The department has established an integrated Learning Management System but issues remain in relation to the completeness of training records.

18. The department has been undertaking a project to transition to a new workforce model, which has involved establishing 'vocations', profiling job roles under each vocation, mapping required competencies, and developing high level curricula. Training needs analysis for the Border Force vocational stream commenced in October 2016.

## Recommendations

### Recommendation No.1

#### Paragraph 2.15

The department develop and disseminate a separate enterprise risk profile relating to the risk of officers exercising powers unlawfully or inappropriately due to inadequate guidelines, training or supervision.

**Department of Immigration and Border Protection's response:** *Agreed.*

### Recommendation No. 2

#### Paragraph 4.14

The department:

- (a) urgently upload all operational instructions, guidance, delegations and authorisations to the Document Control Register; and
- (b) within one year, design and implement an integrated platform for instructions, guidance, delegations and authorisations that meets the operational needs of users.

**Department of Immigration and Border Protection's response:**

- (a) *Agreed.*
- (b) *Partially agreed.*

**Recommendation  
No. 3**

**Paragraph 4.40**

The department ensure:

- (a) certification and training records relating to statutory powers are entered into the Learning Management System; and
- (b) officers exercising coercive powers have current pre-requisite qualifications.

**Department of Immigration and Border Protection's response:**

- (a) *Agreed.*
- (b) *Agreed.*

## Summary of entity response

19. The Department of Immigration and Border Protection's summary response to the report is provided below, and its full response is at Appendix 1.

The Department recognises and appreciates the efforts of the Australian National Audit Office staff who conducted the audit. This audit and subsequent report provide timely assurance over the ABF's use of statutory powers.

While the Report's recommendations are sensible, the Department has not fully agreed to all. There are also several matters presented in the Report which the Department wishes to clarify.

The Department challenges the Report's characterisation of the powers available to ABF officers solely as coercive powers. The term 'coercive powers' has been misused throughout the Report to describe both coercive and administrative powers of ABF officers.

The Department notes the Report's conclusions include that the ANAO found instances of potentially unlawful searches and failure to comply with mandatory instructions under both the *Customs Act 1901* and *Migration Act 1958*. The Department contends that it is highly likely these instances are in the category of inadvertent and administrative breaches as opposed to deliberate and intentional breaches. Notwithstanding, the Department takes this seriously and is conducting a detailed review to verify whether the searches were conducted lawfully/appropriately, identify and address any control weaknesses and will take necessary remedial actions.

## **Audit Findings**



# 1. Background

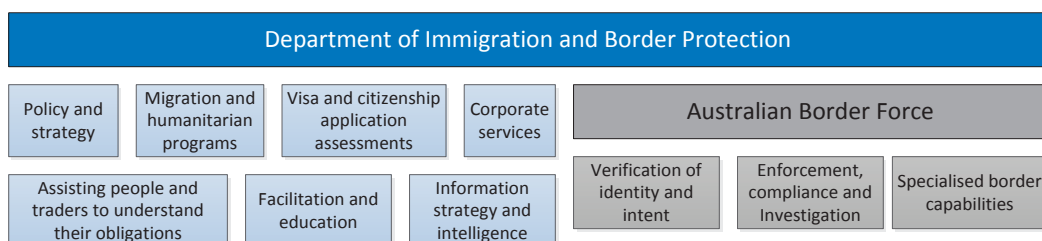
## Reform and integration

1.1 On 9 May 2014, the Minister for Immigration and Border Protection announced the government's decision to bring together the Department of Immigration and Border Protection (Immigration) and the Australian Customs and Border Protection Service (Customs) in a single department from 1 July 2015. This was known as 'integration'. The government established the Australian Border Force as a group within the integrated department headed by a statutory officer, the Australian Border Force Commissioner, and reporting for administrative purposes to the Secretary.<sup>3</sup>

1.2 In 2012, prior to the integration announcement, Customs had commenced work on a reform program following allegations of corruption at Sydney International Airport. The program, outlined in Customs' *Blueprint for reform 2013–2018* (July 2013), included 'reform tracks' which would become key features of the Border Force's organisational design.<sup>4</sup> In the 2014–15 Budget, Customs received \$480.5 million over four years for a range of capability enhancements, including \$53.6 million for workforce, training and integrity measures.

1.3 Following the integration announcement, Immigration and Customs set up a Reform and Integration Taskforce. A fully integrated Executive Division was 'stood up' from 1 August 2014 with responsibility for policy, strategy and corporate functions, including governance and risk management. In November 2014, the entities launched the *Blueprint for Integration*, which outlined the division of functions between the Border Force and the rest of the new department (see Figure 1.1).

**Figure 1.1: Division of functions within the new department**



Source: Department of Immigration and Border Protection & Australian Customs and Border Protection Service, *Blueprint for integration*, 2014, p. 18.

1.4 The *Blueprint for Integration* set out two focus areas for reform:

- People—introducing a new workforce model, built around five 'vocations' (Border Force, Policy and Regulation, Intelligence, Client Services and Enabling/Support), with 'blended teams' and enhanced integrity measures; and

3 The Minister noted this model was based on lessons from the United Kingdom, which had abolished its stand-alone Border Agency in March 2013 and integrated its functions into the Home Office. The Home Secretary cited four issues that prompted the decision to abolish it: conflicting cultures within the agency; poor transparency and accountability; inadequate IT systems; and a complex policy and legal framework. National Audit Office, *Reforming the UK border and immigration system*, 22 July 2014, p. 12.

4 Australian Customs and Border Protection Service, *Blueprint for reform 2013–2018*, June 2013, p. 19.

- Systems—using technology and revised business practices to enhance service delivery and support an intelligence-led, risk-based approach to border security.<sup>5</sup>

1.5 The *Plan for Integration* (February 2015), which followed on from the *Blueprint for Integration*, provided further detail for staff on the design of the new department, including governance committee arrangements, proposed job roles under each vocation, and a series of high-level integration and reform milestones from March 2015 to June 2016. With regard to the exercise of statutory powers, the document urged staff to be vigilant during the transition period:

Staff throughout the Portfolio exercise powers under a range of legislation, both that we administer and that are administered by other agencies. These significant powers are managed through a network of delegations and authorisations. During transition, and from 1 July and beyond, we will need to maintain a high level of vigilance on our delegations to both protect our staff and the decisions we make.<sup>6</sup>

## Statutory powers available to Border Force officers

1.6 The *Australian Border Force Act 2015*, which came into force on 1 July 2015, established the statutory office and role of Australian Border Force Commissioner and introduced various provisions relating to employment conditions (such as alcohol and drug testing, and secrecy and disclosure provisions). The *Customs and Other Legislation Amendment Act 2015* amended the *Customs Act 1901* (the Customs Act), the *Migration Act 1958* (the Migration Act) and a number of other Acts to give effect to the integration. While these amendments did not materially change the range of statutory powers available to officers<sup>7</sup>, they extended to all approximately 15,000 employees within the new department the powers previously exercised by officers of Customs and Immigration under the Customs and Migration Acts and other legislation.

1.7 Both the Customs and Migration Acts contain a wide range of powers. Many of these are essentially administrative in nature (such as the power to issue licences to Customs brokers or the power to grant visas to visitors to Australia). In addition, there are a wide range of coercive powers—such as powers to question, search, detain or arrest people, or enter and search vehicles or premises—which departmental officers can now exercise either ‘as of right’ or under a delegation or authorisation from the Minister, Secretary or Commissioner (for explanations of these concepts see Table 1.1). Analysis by the ANAO indicates that departmental officers can exercise coercive powers under 35 Acts and more than 500 empowering provisions (a list of identified Acts and provisions that confer coercive powers is at Appendix 2).

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5 Department of Immigration and Border Protection & Australian Customs and Border Protection Service, *Blueprint for integration*, 2014, p. 21.

6 Department of Immigration and Border Protection & Australian Customs and Border Protection Service, *Plan for Integration*, 2015, p. 13.

7 At Senate Estimates on 19 October 2015, the Australian Border Force Commissioner stated ‘In essence, the [Border Force’s] operational remit is a combination of the operational functions of the former Customs service and the former immigration department, no more, no less. Similarly, the powers available to [Border Force] officers are simply an amalgamation of the powers that were available to the officers of the former Customs and Immigration’.

**Table 1.1: Key concepts relating to statutory powers**

Concept	Description
Coercive powers	<p>'Coercive powers are powers conferred by statute on government agencies to enable them to obtain information and perform their functions. These include powers to:</p> <ul style="list-style-type: none"> <li>enter and search premises, and seize evidential material ...</li> <li>arrest, restrain or detain a person ...</li> <li>require a person to provide their name and address ...</li> <li>conduct personal search powers.'<sup>a</sup></li> </ul>
'As of right'	Powers conferred directly upon officers. For example, under s. 189 of the Migration Act, an officer who 'knows or reasonably suspects' that a person is an unlawful non-citizen must detain the person. <sup>b</sup>
Delegation	Powers conferred on senior positions, such as the Minister, Secretary or Commissioner, that are delegated to other officers. For example, the Immigration Secretary has delegated the power to issue search warrants under s. 251(4) of the Migration Act to officers at certain levels throughout the department.
Authorisation	Powers conferred on officers who are authorised under a separate provision. For example, under s. 219ZA of the Customs Act, the Border Force Commissioner has authorised officers at certain levels at international airports to be 'detention officers' who can detain a person under ss. 219L, 219Q and 219S.

Note a: Attorney-General's Department, *A guide to framing Commonwealth offences, infringement notices and enforcement powers*, September 2011, p. 69.

Note b: Under Australian migration law, all people in Australia are either citizens or non-citizens. Non-citizens are either lawful (such as tourists who hold a valid visa) or unlawful (such as people whose visa has expired, called overstayers, or who entered Australia unlawfully without ever having been granted a visa).

Source: Attorney-General's Department, ANAO.

## Powers under the Customs Act and other legislation

1.8 The Customs Act confers a range of coercive powers on customs officers, including powers to detain and search incoming international passengers, examine goods being imported into or exported from Australia, board and search ships and aircraft, and exercise search and seizure warrants. Given their law enforcement role at the border, in addition to Customs Act powers, customs officers (which now includes all officers in the department) have been conferred various coercive powers 'as of right' under other Commonwealth legislation, such as powers to:

- prevent the movement of people subject to departure prohibition orders—for example, under the *Child Support (Registration and Collection) Act 1988*;
- seize goods subject to trademarks and other protections—for example, under the *Major Sporting Events (Indicia and Images) Protection Act 2014*; and
- enforce environmental laws—for example, under the *Environment Protection and Biodiversity Conservation Act 1999*.

1.9 With around 40 million international air and sea travellers processed at the Australian border each year<sup>8</sup>, some of the most frequently exercised coercive powers under the Customs Act are the powers to detain and search people at the border (outlined in Table 1.2).

8 During 2015-16, more than 40 million travellers were processed. Department of Immigration and Border Protection, *Annual Report 2015-16*, p. 9.

**Table 1.2: Customs Act search powers relating to international travellers**

Section(s)	Description of power
219L– 219ZJ	<p><i>Detention and search</i></p> <p>A detention officer may detain a person suspected of carrying prohibited goods, or internally concealing a suspicious substance, for the purposes of carrying out:</p> <ul style="list-style-type: none"><li>• a frisk search—which involves a search officer quickly running his or her hands over a person’s outer garments (and includes an examination of anything worn or carried by the person that is conveniently and voluntarily removed);</li><li>• an external search—which involves a search of the body of, and of anything worn by, a person and may include removal of all outer clothing, or removal of all outer and underclothing; or</li><li>• an internal search—which involves either a body scan x-ray or ultrasound, and potentially an internal examination, carried out by a doctor in a medical facility.</li></ul>

Source: *Customs Act 1901*; Australian Customs and Border Protection Service, *Detention and Search*, Instruction and Guideline, 15 February 2010.

## **Powers under the Migration Act**

1.10 The Migration Act contains a range of coercive powers that have been legislated at different times for specific purposes, primarily relating to:

- verifying people’s identity at the border;
- locating and detaining unlawful non-citizens within Australia;
- maintaining safety and order at immigration detention facilities;
- removing unlawful non-citizens from Australia;
- monitoring compliance with temporary sponsored work and student visas; and
- investigating sponsorship or work-related offences or provisions.

1.11 Powers relating to the temporary sponsored work visa program (ss. 140UA-140XJ), student visas (ss. 268AA-268CZH) and sponsorship or work-related offences and provisions (ss. 487A-487ZH) are similar to powers exercised by other regulatory entities. They provide authorised officers with the ability to: enter certain premises (by consent or under a search warrant); search for, examine or inspect things; question people found on the premises; and copy or seize any evidence found.

1.12 Powers relating to locating and detaining unlawful non-citizens within Australia (outlined in Table 1.3) can generally be exercised ‘as of right’ and differ in other key ways from standard regulatory provisions. In particular, unlike search warrants issued under other Commonwealth legislation, search warrants under s. 251 can be issued by departmental delegates, rather than magistrates, are not issued for a specific place, and do not have an explicit questioning power. The s. 251 entry and search power pre-dates the Migration Act and was enacted in the *Immigration Restriction Act 1910*. In 1958, with the passage of the Migration Act, the search power was amended to introduce the requirement to obtain a warrant and allow entry to places at any time of the day or night. It has not been subject to any substantive review or amendment since that time.

**Table 1.3: Migration Act coercive powers relating to the location and detention of unlawful non-citizens**

Section(s)	Summary of power
188	<i>Lawful non-citizen to provide evidence of being so</i> An officer may require a person whom they know or reasonably suspect is a non-citizen to provide evidence of identity or visa status.
189	<i>Detention of unlawful non-citizens</i> An officer must detain a person whom they know or reasonably suspect is an unlawful non-citizen.
251	<i>Powers of entry and search</i> An officer in possession of a search warrant issued by a departmental delegate may, at any time of the day or night, enter any building, premises, vessel, vehicle or place at which they have reasonable cause to believe they will locate: an unlawful non-citizen, removee or deportee; a person in breach of work conditions; or related documents.

Source: ANAO summary of *Migration Act 1958* provisions.

## Operation Fortitude

1.13 On 28 and 29 August 2015, the Border Force was scheduled to participate in Operation Fortitude—a multi-agency operation led by the Victorian Police to target crime in the Melbourne central business district. The intention was for six Border Force officers, stationed at two central business district taxi ranks, to conduct immigration status checks on suspected unlawful non-citizens referred by other authorities and, if necessary, detain them.

1.14 On the morning of 28 August 2015, the Border Force issued a media release that included the following quote from the Regional Commander for Victoria and Tasmania:

[Border Force] officers will be positioned at various locations around the [Melbourne central business district] speaking with any individual we cross paths with... You need to be aware of the conditions of your visa; if you commit visa fraud you should know it's only a matter of time before you're caught out.<sup>9</sup>

1.15 The operation was cancelled later that day following significant media, political and community attention. On 29 August 2015, the Prime Minister stated:

Obviously it was a mistake. It was over the top and wrong because we would never stop people randomly in the street demanding their visa details, we don't do that sort of thing in Australia and it would never happen under this government.<sup>10</sup>

1.16 On 30 August 2015, the Shadow Minister for Immigration and Border Protection wrote to the Auditor-General requesting an investigation into the training provided to Border Force officers, with a specific focus on training relating to the legal exercise of statutory powers.

9 Department of Immigration and Border Protection, 'ABF joining inter-agency outfit to target crime in Melbourne CBD' [Internet], media release, 28 August 2015, available from: <<http://newsroom.border.gov.au/releases/abf-joining-inter-agency-outfit-to-target-crime-in-melbourne-cbd>> [accessed 13 September 2016].

10 Jacob Saulwick, 'Prime Minister Tony Abbott says Border Force Operation Fortitude release was a "mistake"' [Internet], *Sydney Morning Herald* news story, 29 August 2015, available from: <<http://www.smh.com.au/federal-politics/political-news/prime-minister-tony-abbott-says-border-forceoperation-fortitude-release-was-a-mistake-20150829-gjammd.html>> [accessed 24 September 2016].

1.17 Following the public release of the Shadow Minister's letter, the Border Force Commissioner wrote to the Auditor-General to inform him that he had commissioned a review to assess the training and use of powers for enforcing immigration compliance. The Acting Auditor-General responded to the Shadow Minister informing him that the Auditor-General would take into account both the Shadow Minister's request and the Commissioner's letter in deciding whether to undertake an audit. The review report, *Management of Field Compliance Officers Training in and Use of Powers*, was considered as part of this audit.

## Audit approach

1.18 The objective of the audit was to assess the establishment and administration of the Australian Border Force's framework to ensure the lawful exercise of powers in accordance with applicable legislation.

1.19 To form a conclusion against the audit objective, the ANAO adopted the following high-level audit criteria:

- Is there an effective accountability and reporting framework for the lawful exercise of powers?
- Do Border Force officers have adequate knowledge of their powers and how to use them?

1.20 The audit team examined departmental records, consulted departmental staff and other stakeholders, and analysed records obtained from the department's operational databases. The primary focus of the audit was on broader frameworks governing the exercise of statutory powers (for example, risk management, quality assurance, reporting, guidance material and training).

1.21 The ANAO also undertook more detailed testing of a sample of case records relating to:

- detentions and searches conducted under ss. 219L-219ZJ of the Customs Act; and
- search warrants executed under s. 251 of the Migration Act.

1.22 The conduct of the audit was hampered by the department's generally poor record keeping practices<sup>11</sup>: although it has an Electronic Data and Records Management System, many officers use local or network drives or folders for day-to-day record keeping purposes.<sup>12</sup>

1.23 The audit was conducted in accordance with ANAO Auditing Standards at a cost to the ANAO of approximately \$565 000.

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11 Adequacy of record keeping in the Department of Immigration and Border Protection has been identified as an issue in ANAO Reports No. 34 2005-06 *Advance Passenger Processing*, No. 53 2011-12 *Records Management in the Australian Public Service*, No. 21 2012-13 *Individual Management Services Provided to People in Immigration Detention*, No. 47 2014-15 *Verifying Identity in the Citizenship Program*, No. 13 2015-16 *Managing Compliance with Visa Conditions*, and No. 16 2016-17 *Offshore Processing Centres in Nauru and Papua New Guinea: Procurement of Garrison Support and Welfare Services*.

12 A May 2016 Deputies Committee paper noted 'In a review of the maturity of [information management] by the National Archives of Australia across Commonwealth agencies, [Immigration] is currently ranked 146 out of 165 agencies. This represents a decrease in our rating from 131 in 2014'. A National Archives of Australia publication *Managing information and records in network drives* notes that 'a network drive is not a records management system' and that using it for this purpose has 'inherent risks' because: documents can be easily altered; it is difficult to create audit trails; network drives are often poorly managed; it is difficult to find relevant records and it can be difficult to be sure of the status of a document (for example, whether it is a draft, final or authorised version).

## 2. Managing the risk of unlawful or inappropriate use of coercive powers

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### Areas examined

The ANAO examined the Department of Immigration and Border Protection's risk management, quality assurance and delegations frameworks for ensuring the lawful and appropriate exercise of statutory powers.

### Conclusion

The department's enterprise risk management framework does not adequately address the risk of officers exercising coercive powers unlawfully or inappropriately. Several internal assurance reviews have uncovered problems relating to the exercise of statutory powers. The Border Force has established an integrated operational quality assurance team, which has not yet finalised any reports. Delegations and authorisations for coercive powers are complete and in place but not all instruments are accessible to officers.

### Areas for improvement

The ANAO has recommended developing and disseminating a revised enterprise risk profile for the risk of inappropriate or unlawful use of coercive powers.

### Has an appropriate risk management framework been established for coercive powers?

The department's approach to risk management at the enterprise level has been developing over the past two years. It has established an enterprise risk framework and is finalising profiles for each of its enterprise risks. The current profile relating to unlawful or inappropriate use of coercive powers conflates this risk with integrity and corruption risks, which require different internal controls. This has the potential to divert attention from controls relating to the risk of unlawful or inappropriate use of coercive powers.

2.1 Where Parliament confers coercive statutory powers to enable officers to monitor and enforce compliance with regulation, there is an associated risk that those powers may be exercised unlawfully or inappropriately.<sup>13</sup> Unlawful or inappropriate exercise of coercive powers may result in adverse impacts on individuals, such as deprivation of liberty as a result of unlawful detention. Other consequences include:

- exclusion of evidence, leading to failed prosecutions or overturned decisions;
- compensation claims against the Commonwealth; and
- reputational damage.

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13 In this context, unlawfully means operating outside the legal framework, whereas inappropriately means exercising a power lawfully but in breach of internal policy requirements.

2.2 Entities therefore have a responsibility to establish strong internal checks and controls and an effective risk and assurance framework to monitor and manage this risk. The Commonwealth Ombudsman's report *Lessons for public administration* (2007) states:

A strong theme in Australian legal tradition is that government coercive power should be closely controlled. This is necessary to safeguard rights and freedoms that are regarded as fundamental in our society.<sup>14</sup>

2.3 The 'lessons' outlined in the Ombudsman's report were derived from inquiries into the unlawful detention of Cornelia Rau and deportation of Vivian Alvarez Solon in the early 2000s (both of whom were Australian citizens) and subsequent investigations into a further 247 referred immigration cases.<sup>15</sup> The Ombudsman's investigations found Immigration's system of internal checks and controls were, at that time, inadequate.

### Pre-integration risk management approaches

2.4 The Australian Public Service Commission completed capability reviews of Immigration and Customs during 2012 and 2013 which identified deficiencies relating to their risk management frameworks. Immigration's review report noted a perception that the entity was prone to regular crises and suggested it 'embed a more analytical and sophisticated approach' to risk and crisis management.<sup>16</sup> The report relating to Customs stated:

Enterprise risk management does not appear to have been well assessed and monitored. The level of risk tolerance is unclear; hence, it is difficult for the agency to have a sense of priority of various risks, resulting in every risk being treated equally and resources stretched.<sup>17</sup>

2.5 Following these findings, Customs and Immigration separately redeveloped their entity-level risk management frameworks and these revised frameworks were in place prior to integration. Customs' most recent risk document was its *2013-14 Risk Plan* (April 2013), which included 'inappropriate use of officer powers' as a key enterprise risk. The risk was rated as 'medium' and the following potential sources were identified:

- inadequate training or lack of understanding of powers;
- poor supervision or lack of performance management; and
- environmental complexity leading to errors.

2.6 Immigration's *Enterprise Risk Map 2014-15*, endorsed by its Executive Committee on 23 April 2014, did not explicitly identify unlawful or inappropriate exercise of statutory powers as an enterprise risk.

2.7 After the government's integration announcement in May 2014, the focus for both entities shifted to strategic risks relating to the reform and integration process. The Immigration and

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14 Commonwealth Ombudsman, *Lessons for public administration: Ombudsman investigation of referred immigration cases*, Report no. 11, 2007, p. 6.

15 Cornelia Rau was an Australian citizen who, in March 2004, was wrongfully detained for ten months as an unlawful non-citizen. Vivian Alvarez Solon was an Australian citizen who was detained and then deported to the Philippines in July 2001. Their cases were the subject of inquiries by former police commissioners Mick Palmer AO APM and Neil Comrie AO APM.

16 Australian Public Service Commission, *Capability Review: Department of Immigration and Citizenship*, Review Report, July 2012, p. 9.

17 Australian Public Service Commission, *Capability Review: Australian Customs and Border Protection Service*, Review Report, May 2013, p. 8.

Customs risk and assurance teams were brought together with the establishment of an integrated Executive Division from August 2014. During August and September 2014, the risk team facilitated workshops with the Reform and Integration Taskforce, leading to the identification of seventeen strategic integration risks (see Appendix 3 for a list of integration risks). None of these strategic risks explicitly addressed the issue of officers unlawfully exercising powers. One of the risks identified was ‘integrity and fraud exposure arising from changing systems and reductions in controls’. However, this risk relates to illegal or intentionally unlawful activity by officers seeking to gain advantage from their position, rather than the unintentional unlawful exercise of powers due to poor guidance, training or supervision.

## **Compliance with Commonwealth risk management requirements**

2.8 In the months leading up to 1 July 2015, the Risk and Assurance branch commenced a body of work to meet the risk management requirements of the *Public Governance, Performance and Accountability Act 2013* and *Commonwealth Risk Management Policy*.<sup>18</sup> The department’s *Risk Management Policy* and *Risk Management Framework – Guidance* were endorsed by its Executive Committee on 12 June 2015 and published on its intranet from 1 July 2015.

2.9 Immigration’s policy notes that a risk appetite statement would be articulated in its Annual Risk Profile and Plan, which has not been completed.<sup>19</sup> A statement was endorsed by the committee on 28 October 2015, which stated ‘we have no tolerance for unethical or improper behaviour, waste of resources or non-compliance with legislation and Government policy’. As at November 2016, the statement had not been promulgated to departmental officers (the intended audience for such a statement), although the department advised it is working on a revised Risk Management Policy that includes a risk appetite statement.

2.10 The current *Risk Management Policy* and *Risk Management Framework – Guidance* includes references to a number of supporting documents, including the Annual Risk Profile and Plan. As at November 2016, many documents had not been developed. Notably, the department has not finalised and disseminated an updated enterprise risk plan since integration. The department advised that, following the release of the risk policy and framework, there was a deliberate change in strategy to focus less on developing a suite of documents and more on building its senior managers’ capability to identify and manage critical risks.

## **‘Reinvigorating’ enterprise risk management**

2.11 A paper presented to the Executive Committee on 28 October 2015 notes that the Secretary had recently directed that the department’s ‘approach to risk management at the enterprise level be reinvigorated’. The paper outlined fourteen draft enterprise risks, including the risk of ‘officers acting, or being seen to act, unlawfully or inappropriately’. The committee agreed that these were ‘a valid initial set’ of enterprise risks and requested further refinements to the list and the development of risk management plans for each enterprise risk by March 2016.

2.12 On 23 May 2016, a revised list of eleven enterprise risks was provided to the committee for endorsement (see Appendix 3 for a list of enterprise risks), with draft ‘risk and control profiles’

<sup>18</sup> Department of Finance, *Commonwealth Risk Management Policy*, 1 July 2014.

<sup>19</sup> One of the requirements of the *Commonwealth Risk Management Policy* is that an entity’s risk management policy must define its ‘risk appetite’. Risk appetite is the amount of risk an entity is willing to accept or retain in order to achieve its objectives.

presented for four of the eleven enterprise risks as an illustration of the proposed style and format. The committee endorsed the set of enterprise risks and agreed that ‘risk stewards’ would begin managing them from 1 July 2016.<sup>20</sup> The profile for enterprise risk eight, the risk that ‘departmental staff and authorised representatives act unlawfully’, was not presented to the committee.

2.13 The final profile for enterprise risk eight provided to the ANAO in November 2016 conflates the risk of unlawful or inappropriate exercise of statutory powers with unlawful or illegal actions resulting from corruption or fraud. Different internal controls are required for each of these risks. Combining them may lead to integrity measures diverting attention from critical controls relating to coercive powers. Notably, the profile does not adequately address all of the critical controls for the exercise of coercive powers identified by the Ombudsman (outlined in Box 1). Further, of the controls outlined in the profile, only those relating to the integrity or corruption risks were assessed as effective (examples include employment suitability clearances, code of conduct investigations, and drug and alcohol monitoring), suggesting these have been a primary focus for the department.

**Box 1: Critical controls for coercive powers identified in *Lessons for Public Administration***

Staff are well trained and provided with practical and up-to-date policy guidance.

The delegated authority to exercise coercive powers is only given to staff who have the required skill level.

The use of coercive powers is well documented and records the identity of officers and the reasons for decisions.

The use of coercive powers is regularly monitored and audited, and subject to quality assurance.

Agency policies that guide the use of coercive powers draw attention to unique circumstances that may require special attention (such as the use of power affecting a child or person with a physical or intellectual disability, or other special need).

Source: Commonwealth Ombudsman, *Lessons for public administration: Ombudsman investigation of referred immigration cases*, Report no. 11, 2007, p. 7.

## Operational risk management

2.14 Border Force officers face significant risks on a daily basis at the operational level that are considered through operational planning processes. In late 2015, the Border Force established an Operational Risk Management section to support line areas in conducting operational risk assessment. As at November 2016, the team had developed a draft policy statement and procedural instruction, and was conducting workshops with operational teams to build risk management capability and develop a consolidated operational risk register.

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20 Risk stewards are Deputy Secretaries and Deputy Commissioners.

## Recommendation No.1

2.15 The department develop and disseminate a separate enterprise risk profile relating to the risk of officers exercising powers unlawfully or inappropriately due to inadequate guidelines, training or supervision.

**Department of Immigration and Border Protection's response:** *Agreed.*

2.16 *The Department agrees that the risk of officers exercising powers unlawfully or inappropriately due to inadequate guidelines, training or supervision be specifically addressed as part of the review of enterprise risks in the first half of 2017.*

## Does the department obtain assurance that officers adequately understand their powers?

The department has undertaken several internal assurance reviews that have uncovered problems relating to the exercise of statutory powers. The Border Force has recently established an integrated team responsible for operational quality assurance testing. The team has not yet completed any reviews. Prior to this, the department did not have satisfactory mechanisms for gaining assurance that officers understand their powers and are exercising them lawfully.

2.17 The department's assurance activities primarily consist of a range of centralised assurance reviews, including internal audits, health checks and management initiated reviews to assess the adequacy of internal controls, as well as 'post action reviews' focussing on critical incidents. Assurance reviews conducted in recent years have included findings and recommendations that relate to the risk of unlawful or inappropriate exercise of powers (see Box 2).

### Box 2: Findings of recent internal assurance reviews

A management-initiated review of *Management of Field Compliance Officers Training In and Use of Powers* (December 2015) found: warrant delegates had not been provided training since June 2010; officer training records are not centrally recorded; officers use multiple systems to record the use of powers; and guidance has not been updated to reflect the new operating environment.

An internal audit report on *Management of Delegations* (November 2016) found: officers had exercised powers without delegations; instruments of delegation or authorisation are inaccessible; officers receive insufficient training on the use of delegations; and processes for monitoring and coordinating operational delegations are inadequate.

An internal audit report on *Detention-Related Decision Making* (May 2016) found: governance arrangements for the immigration field compliance, detention and removals functions are not appropriate; key controls are not operating effectively; and enabling functions such as training, systems and templates do not effectively support officers in consistently making lawful and appropriate decisions.

2.18 The department's draft *Assurance Strategy* includes the following observations about the current state of departmental assurance maturity:

- there is a heavy reliance on central assurance activities;
- assurance activities within operational work areas are fragmented and not coordinated;
- work areas see assurance as something done to them, not by them;
- systemic issues go unidentified; and
- recommendations are accepted but not always implemented.<sup>21</sup>

2.19 In relation to coercive powers, a key weakness in the assurance framework, recognised in internal assurance reviews, has been the lack of regular sample-based quality assurance testing of compliance with regulatory and policy requirements and the adequacy of internal controls. Such testing is critical for assessing whether systemic performance issues are emerging in operational areas.

2.20 An internal health check conducted in Immigration prior to integration (April 2015) identified 'significant variation' in quality assurance approaches and recommended the department:

- undertake a stocktake of quality assurance activities across Immigration and Customs;
- review and refine its quality management policy and framework; and
- establish a mechanism for assessing compliance with the revised framework.

2.21 The department informed the ANAO that the area responsible for implementing the recommendations had experienced resourcing constraints and had prioritised the risk and assurance programs over quality management. In September 2016, the department engaged a consultant to design a quality management framework and toolkit. The scope of work for the engagement did not include a stocktake of current activities.

2.22 The Border Force established an integrated Operational Quality Assurance team in July 2016, which has developed a work program for 2016-17 of priority quality assurance reviews. Several of the proposed reviews relate to the exercise of coercive statutory powers. As the team had not completed any reviews at the time of audit fieldwork, it was too early to assess the efficacy of this new function.

## Are instruments of delegation and authorisation accessible, complete and current?

Instruments of authorisation and delegation for coercive Migration and Customs Act powers are complete and up-to-date. While Migration Act instruments of authorisation and delegation are available on the intranet, instruments relating to the Customs Act (and other Acts) are not accessible to officers.

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21 Department of Immigration and Border Protection, *Assurance Strategy* [draft], version 11, September 2016. The strategy provides an overview of the department's approach to assurance and a roadmap for improving assurance over a two-year period.

## Accessibility of delegation instruments

2.23 The management of instruments of delegation and authorisation is fundamental to the lawful exercise of powers: if an officer exercises certain powers without a delegation or authorisation, the exercise of the power may be unlawful. In planning operational activity, it is important that managers and supervisors are able to check whether their staff hold relevant delegations. The department's intranet contains the following advice:

It is very important that staff undertaking their roles and duties hold the correct delegations and authorisations to perform their functions. You should not assume that you have the authority, or rely on the fact that the previous person who performed your role and duties did hold the correct delegations and authorisations.

2.24 The LEGEND database on the intranet contains copies of instruments of delegation for powers under the Migration Act.<sup>22</sup> However, instruments relating to powers under the *Australian Citizenship Act 2007* and the Customs Act are not contained in LEGEND or anywhere else on the intranet. The department advised the ANAO that Border Force officers could ascertain what delegations they hold for these Acts by emailing the legal unit in Canberra. The department also advised that 'the intended time frame for a full list of migration, citizenship and customs delegations on LEGEND is May 2017'.

## Completeness and currency

2.25 The ANAO examined all instruments of delegation for the Migration Act and Customs Act instruments for completeness and currency in relation to the coercive powers under the two Acts. The number of such powers is shown in Table 2.1.

**Table 2.1: ANAO examination of coercive powers delegations as at 17 September 2016**

Number	<i>Migration Act 1958</i>	<i>Customs Act 1901</i>	Total
Number of coercive powers	102	129	231
Number of coercive powers requiring authorisation or delegation	41	29	70

Source: ANAO from Department of Immigration and Border Protection data.

2.26 The ANAO found that all 70 coercive powers under the two Acts which required authorisation or delegation had current instruments.

22 LEGEND is an electronic database of migration and citizenship legislation and policy documents. It is available to departmental officers through the department's intranet and to individuals outside the department by subscription or through libraries.

### 3. Use of coercive powers

#### Areas examined

The ANAO examined the Border Force's use of two of its most coercive powers: personal searches under the Customs Act and searches of premises under the Migration Act. It also examined whether the department has adequate knowledge of all legislation and powers available to its officers.

#### Conclusion

The ANAO found instances of potentially unlawful searches and failure to comply with mandatory instructions under both the Customs Act and Migration Act, which indicate current internal controls for mitigating the risk of unlawful or inappropriate use of coercive powers are inadequate.

#### Area for improvement

The ANAO has suggested that the department include section 251 of the *Migration Act 1958* as part of its broader review of legislative powers, including, if necessary, identification of options for amending the Act.

### Are Border Force officers exercising coercive powers lawfully and appropriately?

Some personal searches of passengers at international airports examined by the ANAO were unlawful or inappropriate, indicating weaknesses in the control framework. A number of searches of premises under the Migration Act potentially exceeded the authority of the warrant which authorised them, and officers routinely questioned people without documenting their legal authority to do so. Officers also frequently failed to comply with departmental policy instructions, including compliance with certification and recordkeeping requirements.

3.1 To determine whether Border Force officers are exercising coercive powers lawfully and appropriately, the ANAO examined two categories of coercive powers:

- personal searches of incoming international passengers at airports under ss. 219L-219ZJ of the Customs Act; and
- search warrants executed under s. 251 of the Migration Act.

3.2 These powers were chosen as they are two of the most regularly exercised coercive powers available to Border Force officers. In addition, they have the potential to affect any traveller entering Australia (Customs Act personal search) or any person at a building, premises, vessel, vehicle or place within Australia (Migration Act s. 251 search warrants).

#### Customs Act personal search powers

##### *Legislative and policy framework*

3.3 Under Division 1B of Part XII of the Customs Act (ss. 219L-219ZJ) a detention officer may detain a person suspected of carrying prohibited goods, or internally concealing a suspicious substance, for the purposes of carrying out a frisk, external or internal search (see Table 1.2 for definitions of these categories). The Border Force Commissioner, in his capacity as Comptroller-General of Customs, has the statutory power to declare classes of officers to be detention officers

for the three categories of search (classes currently declared are outlined in Table 3.1).<sup>23</sup> In addition, to operate prescribed ‘body scan’ equipment for the purposes of undertaking a non-medical internal scan, officers must be individually named in an authorisation instrument.<sup>24</sup>

**Table 3.1: Classes of officer declared to be detention officer**

Category of personal search	Classes declared
Frisk search (Subdivision A)	APS <sup>a</sup> Levels 1, 2, 3, 4, 5 and 6 and Executive Level 1
External search (Subdivision B)	APS Levels 5 and 6 and Executive Level 1
Internal search (Subdivision C)	APS Levels 5 and 6 and Executive Level 1

Note a: APS stands for Australian Public Service.

Source: Instruments No. 5, 6 and 58 of 2015.

3.4 The department’s internal *Detention and Search* instruction (last updated in 2010) requires that, for each category of search (with the exception of an internal medical search), there must be a detention officer, search officer and witnessing officer. The search officer and witnessing officer must be of the same sex as the detainee. It is also departmental policy that all of these officers must hold current certification as an Authorised Search Officer, indicating they have completed training in detention and search procedures within the past two years.

#### *Compliance with legislative and policy requirements*

3.5 The ANAO examined internal records relating to 69 personal searches undertaken at Australian airports during 2015–16.<sup>25</sup> The test results in Table 3.2 demonstrate the detention officer was unauthorised for five (12 per cent) of the 42 external, internal medical or body scan searches in the sample, which means these searches were unlawful.<sup>26</sup> With regard to certification, 20 (29 per cent) of the 69 searches sampled involved at least one uncertified officer, meaning these were inappropriate searches.<sup>27</sup> All body scan operators in the sample were authorised.

23 Under s. 219ZA of the Customs Act.

24 The *Customs Regulation 2015* prescribes the Smiths Detection B-SCAN 16HR-DV. The body scanner produces a computer image of a person’s internal cavities within a skeletal structure.

25 The ANAO obtained records from the department’s Baggage Action General Statistics database and airports search registers and selected a stratified sample of 69 searches, from a total of 2020 searches in 2015–16, to ensure adequate coverage of each search type. Searches were chosen randomly, so results can be interpreted as representative for the search type specified. To test whether officers were certified and authorised, the ANAO accessed personnel records and obtained Learning Management System data.

26 Unlawful is defined as operating outside the legal framework.

27 Inappropriate is defined as exercising a power lawfully but in breach of internal policy requirements.

**Table 3.2: Test results for Customs Act personal searches**

Search type	Number of searches in sample	Officer uncertified	Detention officer unauthorised	Body scan operator unauthorised
Frisk only	27	4	0	N/A
External or internal medical	22	7	3	N/A
Body scan	26	13	4	0
<b>Total<sup>a</sup></b>	<b>69</b>	<b>20</b>	<b>5</b>	<b>0</b>

Note a: Rows do not add to total as some searches involved more than one search category.

Source: ANAO analysis of departmental data.

### *Compliance with departmental instructions*

3.6 Since official records of searches may be required as evidence in prosecutions, it is important they are accurate and reliable. The ANAO found several recordkeeping and data integrity issues in its examination of records relating to Customs Act personal searches:

- Officers are required to complete a 'B992' form for any external or internal search performed and record the folio reference in the Baggage Action General Statistics database. Twelve (29 per cent) of the 42 external or internal searches in the ANAO's sample had incorrect or missing references.
- The search type for seven of the searches in the ANAO's sample had been incorrectly classified in the database.
- Officers' details were recorded using their 'UserID' for only nine (13 per cent) of the 69 searches in the ANAO's sample. The database's user manual states:  
UserID is the preferable method for recording all three officer categories. Name should only be used where UserID is not readily available. Where the UserID can be later obtained, this should be updated in the record.<sup>28</sup>
- The database does not have the capacity to record body scan operators' details for internal non-medical searches.

3.7 An internal report, *Airport Operations Review and Redesign*, also found inconsistencies between airports in compliance with requirements to record operational activities in the database, which led to inaccuracies in the data.<sup>29</sup> A subsequent report, *Airport Traveller Procedures Consistency Review*, recommended targeted quality assurance on database entries<sup>30</sup>, which has been included in the Border Force's quality assurance work plan for 2016–17.

3.8 The department's current risk tolerance statement is that it has 'no tolerance for unethical or improper behaviour, waste of resources or non-compliance with legislation and Government policy'. The relatively high levels of unlawful and inappropriate searches in the ANAO's sample of personal searches indicate that controls over officers' exercise of Customs Act personal search

28 Australian Customs and Border Protection Service, *BAGS (Baggage Action General Statistics) User Manual*, version 0.03, March 2010, p. 73.

29 Ernst & Young, *Airport Operations Review and Redesign*, report, 4 September 2015, p. 28.

30 Australian Border Force, *Airport Traveller Procedures Consistency Review*, report, May 2016, p. 31.

powers are currently inadequate and do not align with the department's stated risk tolerance. Guidelines and instructions are out-of-date (see Chapter 4), supervisors are not ensuring officers' training is current, and the Border Force has not been performing sufficient sample-based quality assurance testing of the use of these powers.

## Migration Act section 251 search warrants

### *Legislative and policy framework*

3.9 Section 251(6) of the Migration Act allows an officer 'having with him or her a search warrant' to at any time 'enter and search any building, premises, vessel, vehicle or place' in which the officer has 'reasonable cause to believe' that there may be an unlawful non-citizen or specified related documents.<sup>31</sup>

3.10 Section 251 is unique in Commonwealth legislation in that:

- warrants are not required to specify the name of the person or address on which they may be executed; and
- warrants may be issued by departmental officers<sup>32</sup>, rather than a judicial officer (such as a magistrate or judge).<sup>33, 34</sup>

3.11 Section 189(1) of the Migration Act provides that if an officer 'knows or reasonably suspects' that a person 'in the migration zone' is an unlawful non-citizen, the officer must detain the person.<sup>35</sup> Consequently, if officers encounter an unlawful non-citizen that they 'know or reasonably suspect' to be an unlawful non-citizen during a search, they are obliged to detain that person. Sections 189 and 251 are thus significant powers.

3.12 Table 3.3 shows the number of searches conducted under s. 251 warrants and the number of detentions under s. 189 arising from them.

**Table 3.3: Searches under s. 251 warrant and detentions, 2011–12 to 2015–16**

	2011–12	2012–13	2013–14	2014–15	2015–16
Number of searches under warrant	611	567	706	746	437
Number of detentions	736	722	769	1 001	502

Source: Departmental data provided in July and December 2016.

3.13 Following inquiries into the wrongful detention of Cornelia Rau and Vivian Alvarez Solon, the department introduced a system of Mandatory Control Points (MCPs) which are intended to

31 The scope of s. 251(6) also includes removees, deportees and holders of temporary visas subject to work conditions.

32 These officers are generally at the Executive Level 1, although there is provision in delegations for more junior officers to issue warrants.

33 The *Search Warrants Manual*, issued by the Commonwealth Director of Public Prosecutions, examines search warrant provisions contained in 32 Acts. The Migration Act is the only one with these features (although some Acts allow searches without warrant to be conducted in specified emergency situations).

34 In order for the Australian Federal Police to obtain a search warrant under s. 3E of the *Crimes Act 1914*, a police officer must make a sworn affidavit to a magistrate or justice of the peace. The Australian Federal Police is not able to issue its own warrants. Similarly, in all states and territories except South Australia, search warrants may only be issued by justices of the peace, magistrates or judges based upon a sworn affidavit from a police officer.

35 The migration zone is defined as including the States and the Territories.

ensure that detention-related decision making is lawful and reasonable. Although, as noted in paragraph 3.10, a search warrant does not specify a person's name or address, departmental policy is that an officer who proposes to seek a warrant must include this information in an MCP1 'Application for a Search Warrant' and (among other requirements) the officer must outline:

- a full name or description of the person/s (referred to as the 'person/s of interest'), documents or valuables that the officer has reasonable cause to believe may be found;
- the location of the building, premises, vessel, vehicle or place to be searched; and
- the analysis of, and conclusions drawn, from the information that led to the officer's reasonable cause to believe.

3.14 The MCP1 is electronically submitted to the warrant delegate who is also required (by departmental policy) to 'reasonably believe' the grounds outlined in the MCP1. If the warrant delegate agrees to issue a warrant, he or she generates and signs a hard copy of the warrant and provides it to the officer.

3.15 A companion form, the MCP2 'Report on the Use of Search Warrant', must be completed after the warrant has been executed and is submitted to the warrant delegate who is required to electronically sign the form if he or she is satisfied that 'all appropriate action was taken'. There is also scope in the MCP2 for the warrant delegate to include any comments and to note any further action required.

### *Compliance with legislative and policy requirements*

3.16 The ANAO examined a selection of 50 warrants from 2015-16 to assess both compliance with the requirements of the Migration Act and the policy requirements established by the department as laid out in its *Field Visits* manual.<sup>36, 37</sup>

#### Reusing warrants

3.17 Since s. 251 of the Act does not require a warrant to include a name or address of a specific person (and is, to that extent, 'open ended'), the department can, and does, use a warrant granted as a result of an MCP1 application in relation to a different person at a different address.<sup>38</sup> Departmental policy is that each use of the same warrant should be supported by a separate MCP1.

3.18 The ANAO found that it is common practice, permitted by departmental policy, for officers to use the same warrant for unrelated searches. Of the 50 warrants in the ANAO's sample, 23 (46 per cent) were used for more than one search. The 50 warrants were used as authority for 69 searches of premises.<sup>39</sup> One warrant was used for seven separate searches. This contrasts with the other 31 Acts referred to in the Commonwealth Director of Public Prosecutions *Search Warrants Manual*. In respect of those Acts, the manual observes:

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36 The *Field Visits* manual provides instructions and guidance to officers on conducting 'field actions', which include searches.

37 In each case, the ANAO examined the MCP1 'Application for a Search Warrant', the MCP2 'Report on the Use of Search Warrant' and the 'Action Detail Report' (which is a brief summary of the outcome of the warrant).

38 Departmental policy is that a single warrant may be used for up to ten separate searches.

39 Although the 50 warrants provided authority for 94 searches, in 25 cases the warrant was not executed for reasons such as the premises being vacant or 'time constraints'. The total number of searches executed was 69.

Note, however, that it is necessary to obtain a separate search warrant in relation to each set of premises. A search warrant, by its very nature, can only relate to one set of premises, or one person as the case requires.<sup>40</sup>

#### Questioning and identification

3.19 When attempting to identify the person of interest during the execution of a search warrant, officers need to ask the people present questions, such as whether the person of interest is at the premises (or lives there).

3.20 There is no explicit power in the Migration Act for officers to ask people questions when they are executing a warrant. However, the department advised the ANAO that:

It is an established principle of statutory interpretation that a power conferred by a legislature carries with it the power necessary for its performance or execution. In the Department's view, s251 impliedly authorises officers acting under a warrant issued in the belief that an unlawful non-citizen...may be found in particular premises to ask questions as are reasonably necessary to discover whether such a person is or such persons are in fact present. **This is so long as the questions go to identifying persons who come within the terms of the warrant.** [Emphasis added]

3.21 When a warrant is executed, it is common for other people such as family members, friends or visitors (who are not within the terms of the warrant) to be present at the time. Although, as noted, there is no explicit power for officers to ask such people questions about their identity and immigration status, s. 188 of the Act allows officers to require a person who the officer 'knows or reasonably suspects' is a non-citizen to provide either evidence that he or she is a lawful non-citizen or evidence of identity. The *Field Visits* manual does not require officers to record the occasions on which they have invoked this power, nor the grounds on which they knew or reasonably suspected that a person is a non-citizen.

3.22 The ANAO found that officers routinely conduct 'immigration checks' for the purposes of determining the immigration status of people who were at premises being searched, but who were not the subject of the warrant.<sup>41</sup> For the ANAO's sample of 69 searches, in three cases the MCP2 recorded that the officers invoked the s. 188 power to require the production of identity for this purpose. On 28 occasions, officers conducted immigration checks on a total of 102 people who were not the subject of the warrant. Of these people, 63 were lawful non-citizens, 24 were unlawful non-citizens and 15 were Australian citizens.

3.23 The *Field Visits* manual also does not provide guidance for officers on the circumstances in which they may question people. An information sheet, which officers provide at the commencement of a search, states that occupants of premises being searched should 'provide officers with all facilities and assistance necessary', but it does not inform them of their rights and, in particular, does not advise them whether they are obliged by law to answer questions. The department should review the information sheet to make it clear that people are not required to answer officers' questions unless explicitly required to provide evidence of identity under s. 188 of the Migration Act.

40 Commonwealth Director of Public Prosecutions, *Search Warrants Manual*, November 2014, p. 38.

41 An immigration check involves checking a person's details (such as name and date and place of birth) against departmental databases, which will show whether a person is a citizen or a non-citizen.

## Warrant scope

3.24 Although, as noted at paragraph 3.10, the Migration Act does not require a warrant to name a specific person or address, the department has, as a matter of policy, required that an application for a warrant should relate to a named person of interest at a specific address. In terms of interpreting the scope of a warrant, internal advice obtained in 2004 suggested that a court would be likely to have regard to what was stated in the MCP1, and the warrant should not be regarded as authorising a search for any other unlawful non-citizen on the premises. The advice also expressed the opinion that once the person of interest named in the MCP1 had been located, officers could not continue the search.

3.25 The effect of this advice is that once the authority given by the warrant has ceased, the officers no longer have a lawful reason to be on the premises. Similarly, if the search does not locate the person of interest, the warrant would no longer be valid.

3.26 In the 50 warrants that the ANAO examined, there were 12 searches where a total of 20 people who were not nominated in the warrant application or approval were detained. In each case, people were detained either after the person named in the warrant had been located or after a search had confirmed that the person was not at the premises. Case study 1 provides an example.

### Case study 1. Warrant executed June 2016

A search warrant was issued by the departmental delegate on 28 June 2016 to search for a named unlawful non-citizen (referred to here as Mr X) at a nominated address in Sydney. The warrant was executed the following day. Ten ABF officers participated in the search.

On arrival at the premises, officers found Mr X sitting in 'an annexe at the end of the driveway'. He was 'positively identified with a face to photo match to the photo in the [department's] systems'. An officer 'executed the warrant' and detained Mr X.

Officers then searched the property. They found a total of eight other people and conducted immigration checks which showed that they included two Australian citizens, three lawful non-citizens and three unlawful non-citizens. The three unlawful non-citizens were detained.

3.27 The ANAO sought the department's comment on the lawfulness of detentions which resulted from searching or questioning possibly without lawful authority. The department advised the ANAO that:

The current High Court authority on the issue of unlawful detention is the case of *Ruddock v Taylor* (2005) HCA 48 (Taylor case). According to the High Court in this case, as long as the officer had the requisite state of mind, knowledge or reasonable suspicion that the person was an unlawful non-citizen, the detention of the person concerned is required by s. 189. The High Court also found that the lawfulness of detention turned on the authority to detain under s. 189.

Even if the lawfulness to search for or question an individual was in issue (and the searching and questioning led to the detention of the individual), the lawfulness to detain the individual would not be an issue. This is so long as the detaining officer has the requisite state of mind, knowledge or reasonable suspicion that the person was an unlawful non-citizen.

### *Compliance with departmental instructions*

3.28 As noted, the *Field Visits* manual provides instructions and guidance to officers conducting 'field actions'. The manual includes various requirements that must be included in every MCP1.

These requirements include: the names of all officers likely to attend the execution of a warrant; the person of interest's immigration history; the risk to officers and the community and the results of certain checks against the department's systems.

3.29 These requirements were not met to varying degrees. For example, the requirement to list all officers likely to attend the execution of a warrant was not included in 59.6 per cent of the 94 MCP1s that the ANAO examined.<sup>42</sup>

### Reviews of the section 251 search warrant framework

3.30 A number of internal and external reports and reviews have highlighted concerns and difficulties with the existing s. 251 framework. These are summarised in Table 3.4.

**Table 3.4: Reports relating to the s. 251 Migration Act search power**

Report	Findings/comments
<i>Entry and Search Provisions in Commonwealth Legislation</i> (Senate Standing Committee for Scrutiny of Bills, 2000) <sup>a</sup>	The power to issue warrants to enter and search premises should only be conferred on judges and magistrates (judicial officers); justices of the peace should not have this power, nor should a Minister or departmental officer.
<i>Quality Assurance Review</i> (Department of Immigration and Border Protection, 2012)	The Review has found problems with policy clarity, systems support, documentation of decisions and inconsistencies in application, which taken together mean that the Review is unable to provide assurance that the s. 251 power is being appropriately used.
<i>Post Action Review</i> (Department of Immigration and Border Protection, 2015) <sup>b</sup>	External law enforcement agencies adhere to significantly different search warrant procedures, which require search warrants to be sworn in the presence of a Magistrate or Justice of the Peace. This provides an external level of oversight to regulate law enforcement activity ...  The review recommended that the department assess and identify deficiencies in using delegates to issue s. 251 search warrants.
<i>'Special project' report</i> (Department of Immigration and Border Protection, 2015) <sup>c</sup>	<ul style="list-style-type: none"> <li>• Currently there is an absence in policy advice of the accountability requirements of compliance officers...</li> <li>• The s. 251 delegate should not be involved in activities associated with the warrant application.</li> <li>• There are however no checks in place to verify that the information contained in the MCP2 report is a true reflection of warrant activities by all officers participating.</li> <li>• Warrants be limited to one address for each associated planned field activity.</li> </ul>

Note a: The government did not accept this recommendation.

Note b: The review followed a s. 251 search in April 2015. The person named in the warrant (and thought to be an unlawful non-citizen) was an Australian citizen who complained to the Secretary of the department.

Note c: Commissioned by the Border Force Commissioner to 'examine the current governance and practice frameworks in relation to search warrant powers'. The department advised in August 2016 that 'consultation with relevant stakeholders has commenced and a draft discussion paper has been circulated'.

Source: ANAO summary from reports.

<sup>42</sup> The ANAO's examination showed that none of the MCP1s prepared by officers in New South Wales met the requirement, while all those from Victoria did.

## Need for review of section 251 Migration Act framework

3.31 The ANAO's detailed examination of warrants has shown that Border Force officers may have inadvertently been acting unlawfully in relation to the execution of warrants due to systemic deficiencies in the s. 251 framework, weaknesses in guidance material and deficiencies in training. Previous reviews and reports (as shown in Table 3.4) have identified other deficiencies in the overall framework of the s. 251 search warrant power. As detailed in paragraph 3.35 below, the department is presently conducting a broader review of its legislative framework with a view to providing advice to the government on the possibility of legislative reform. The review should include s. 251 of the Migration Act including, if necessary, identification of options for amending the Act.

### Has the department undertaken an analysis of officers' powers under all relevant legislation?

The department has commenced a project to identify the statutory powers of officers of the integrated department, with a longer term view to possibly amending some powers. As part of the project, in July 2016, the department completed a consolidated inventory of all powers available to departmental officers under Commonwealth legislation. Such an inventory will enable the department to identify overlap, duplication, redundancy and inconsistency within and between Acts. It will also assist with identifying any gaps or deficiencies in powers in order to provide advice to the government on the possibility of legislative reform.

### The department's analysis of officers' powers

3.32 The ANAO developed an 'inventory' of the coercive powers available to departmental officers which identified 35 separate Acts with more than 500 provisions that confer coercive powers upon officers. While many of the provisions are conceptually similar, there are significant differences in their practical application and in the processes which must be followed once the power has been exercised. For example, officers have the power, under certain circumstances, to arrest people under eleven separate Acts.<sup>43</sup> In order to demonstrate the differences that exist between Acts in relation to the arrest power, Table 3.5 compares four of the eleven Acts.

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43 The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, *Crimes Act 1914*, *Customs Act 1901*, *Environment Protection and Biodiversity Conservation Act 1999*, *Environment Protection (Sea Dumping) Act 1981*, *Excise Act 1901*, *Financial Transaction Reports Act 1988*, *Fisheries Management Act 1991*, *Maritime Powers Act 2013*, *Migration Act 1958* and *Torres Strait Fisheries Act 1984*.

**Table 3.5: Arrest provisions: selected Acts**

		MA	CA	EPBC Act	FM Act
Arrest provision		s. 245F(3)(f)	s. 210	s. 430(1)	s. 84(1)(j)
Arrested person must be taken before:		Not specified	Police officer, magistrate or bail justice (s. 212)	Justice of the Peace or other proper authority (s. 430(3))	Not specified
Force may be used in making arrest		Yes (s. 245F(12))	Yes (s. 210A(1))	No	Yes (s. 87J)
Searches allowed	Frisk search	No	Yes (s. 211)	Yes (s. 431)	No
	Ordinary search	No	Yes (s. 211A)	Yes (s. 432)	No
	Arrested person's premises	No	No	Yes (s.433)	No
Arrested person to be informed of grounds of arrest		No	Yes (s. 210B(1))	No	No
Arrested person can be required to provide name and address		No	Yes (s. 213(1))	No	No

Note: MA = *Migration Act 1958*, CA = *Customs Act 1901*, EPBC Act = *Environment Protection and Biodiversity Conservation Act 1999*, FM Act = *Fisheries Management Act 1991*.

Source: ANAO.

3.33 The differences between Acts with similar provisions have implications for officer training and instruction and guidance material provided to them. These issues are discussed in Chapter 4.

3.34 Border Force officers exercise a range of powers under some Acts (such as the Customs and Migration Acts) on a daily basis in the normal course of their duties. Some powers available under other Acts would rarely, if ever, be used. At the start of the ANAO's audit the department did not have an inventory of Acts and powers, either coercive or general.

3.35 In June 2016, the department initiated a 'body of work on the powers of the [Border Force] for immigration and customs functions, now and into the future'. A project team was formed to undertake this work. The department advised that the strategic justification for the project is as follows:

- officers have a wider array of powers available to them than before integration;
- senior leadership is also reviewing the mix of existing powers with a view to modernising them, consistent with Government expectation of the ABF;
- it is timely to do a stocktake of all powers so that it is clear which officers and functions have which powers;
- it is likely that the project will recommend that portfolio legislation be amended once the stocktake is completed and senior leadership views are taken into account.

3.36 An October 2016 minute to the Secretary and Border Force Commissioner refers to a number of issues that the ANAO had also identified during the course of the audit; in particular:

- almost 1600 provisions in 56 Commonwealth Acts that confer powers upon officers<sup>44</sup>;
- powers worded or constructed across various Acts in ways that might cause officers to confuse or conflate the purpose and extent of powers;
- many enforcement powers being inconsistent with modern regulatory standards;
- the alignment between certain powers, policy and legislation not being always clear;
- 'dormant' powers existing within Acts; and
- certain powers being available to officers, although their use is not supported by policy.

3.37 As noted above, this audit, the 2000 report of the Senate Standing Committee for Scrutiny of Bills and a number of internal reviews have found deficiencies in the existing search framework under s. 251 of the Migration Act which require attention. The work presently under way provides an opportunity to review the s. 251 framework and include options for reform for the Minister's consideration.

### Does the Border Force have an adequate reporting framework for its use of coercive powers?

The Border Force is developing a coordinated systematic framework for reporting on its use of coercive powers. It presently does not have such a framework.

3.38 In a highly operational organisation such as the Border Force, accurate and timely reporting is essential. It assists with the planning and evaluation of operational activity; contributes to demonstrating accountability for actions and decisions; and supports analysis and comparison of operational effectiveness across regions.

3.39 Following the integration of Customs and Immigration, the Border Force has noted the following deficiencies with its existing reporting frameworks:

- information and data quality is uneven across the department;
- full and accurate records of activities and decisions are not, in all instances, being captured;
- information is frequently duplicated across different areas of the organisation and saved in multiple and non-standardised formats; and
- 'shadow systems' (such as access databases and excel spreadsheets) are being created where existing systems are not perceived as meeting information needs.<sup>45</sup>

3.40 In April 2016, a proposal for a new reporting framework suggested the creation of a Central Reporting Unit, appointment of divisional reporting custodians and the development of a single information repository. The proposal was endorsed by the Border Force Commissioner in May 2016 and was thus at too early a stage of development for the ANAO to be able to assess its effectiveness and whether it is meeting the entity's needs.

44 As noted at paragraph 1.7, the ANAO had identified more than 500 provisions in 35 Acts: the difference is because the ANAO examined coercive powers only, while the department included general administrative powers.

45 Australian Border Force, *ABF Reporting Framework Business Rules*, April 2016, p. 4.

## 4. Guidance and training in the use of coercive powers

### Areas examined

The ANAO examined whether the Department of Immigration and Border Protection provides adequate guidance and training to officers who exercise coercive powers.

### Conclusion

The department has not provided adequate instructions and guidance for officers exercising coercive powers. There is currently no single source of instructions and guidance material for Border Force officers, and much of the guidance material available is out of date and inaccurate. While positive foundational work has commenced on integrating the former Customs and Immigration training regimes, officers have been exercising significant coercive powers without having undertaken pre-requisite training.

### Areas for improvement

The ANAO made two recommendations aimed at creating a repository for instructions, guidance, delegations and authorisations that meets the operational needs of users, and ensuring officers exercising coercive powers have current pre-requisite qualifications.

### Do officers have access to accurate and up-to-date guidance material?

Many of the instructions that are provided to Border Force officers on the department's intranet are inaccurate, incomplete, out of date and are not accessible to all officers. A project to remedy this situation was endorsed by the department's executive in December 2015 and, to date, has delivered only a very small number of operational instructions for Border Force officers.

4.1 Border Force officers are able to exercise a wide range of powers, many of them coercive in character, under more than 50 separate Acts of Parliament. In such a complex operational environment, it is imperative that officers are provided with, and are easily able to access, detailed practical guidance about how to exercise the powers they hold<sup>46</sup>, which serves to:

- help control business risks;
- establish expectations for officer behaviour;
- form the basis for the development of training;
- be a source of accountability for officers, the department, the Parliament and the community; and
- assist officers to make lawful, consistent, accountable and reasonable decisions.

4.2 Where officers do not have access to accurate up-to-date information about how to exercise the powers with which they are entrusted, the risk that they will inadvertently do so unlawfully is significantly increased.

<sup>46</sup> Such material may be referred to as guidance, instructions, manuals or standard operating procedures. In this report, the term 'guidance' is used.

4.3 Since instructions can be affected by changes to legislation and policy, or may simply require updating, it is good practice to provide this type of information online, typically on an agency's intranet. This allows broad access to up-to-date instructions for officers across the agency as well as facilitating changes as they arise. Readers need to know whether any given instruction is current and up-to-date. This can be indicated by including a date for review.

4.4 Prior to integration, both Immigration and Customs had centralised suites of operational guidance documentation. For Immigration, this was the Procedures Advice Manual which was part of LEGEND; and for Customs, it was the Practice Statement Framework, housed on a SharePoint site on the intranet. However, early planning for integration did not include the substantial work needed to integrate the two guidance frameworks.

4.5 In April 2015, the department engaged a consultant to compile a catalogue of all of the guidance and related material in the two previous frameworks. The consultant identified a total of 3479 documents, including 1058 'procedural instructions' and 'standard operating procedures'.

4.6 On 26 November 2015, the Executive Committee endorsed a Policy and Procedure Control Framework as 'an internal control framework outlining the governing arrangements for all operational policies and procedures'.<sup>47</sup> The framework would apply to 'former Customs Practice Statements, Instructions and Guidelines' and 'existing [Immigration] policy, procedures and standard operating procedures'. The framework document did not outline a timeframe for the implementation of the framework. A paper to the Deputies Committee on 19 February 2016 outlined that high priority documents would be published by October 2016.<sup>48</sup> In October 2016, the department advised the ANAO that the timing for publishing critical priority policies and procedures had been revised to January 2017.

4.7 Pending the roll-out of the Policy and Procedure Control Framework, the ANAO examined the guidance material presently available for Border Force officers exercising statutory powers.

## LEGEND

4.8 The ANAO examined 229 documents categorised as 'instructions' in the Procedures Advice Manual within the LEGEND database as at 3 August 2016. The instructions examined included subjects such as detention, personal searches of immigration detainees and the use of search warrants.

4.9 Instructions in the Procedures Advice Manual do not contain information about when they are to be reviewed (nor when they were last reviewed). Rather, they show the date on which they were issued or reissued. Table 4.1 shows the length of time since each document examined by the ANAO was issued (or reissued).

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47 Department of Immigration and Border Protection, 'Policy and Procedure Control Framework', p. 5.

48 Medium and low priority documents are to be published during 2017.

**Table 4.1: LEGEND instructions: elapsed time since last issue/reissue, as at 3 August 2016**

Time since last issued	Number	Per cent
0–1 years	99	43.2
1–2 years	61	26.6
2–3 years	23	10.0
3–4 years	15	6.6
4–5 years	20	8.7
More than 5 years	9	3.9
Not dated	2	0.9
<b>Total</b>	<b>229</b>	<b>100.0</b>

Source: ANAO analysis of departmental information.

4.10 The ANAO's analysis showed that a 'reissue' of an instruction does not mean that the content of the instruction has been reviewed and updated. While some instructions indicated that this had occurred, in other cases, instructions had been revised only to reflect a new 'owner', amend contact details or to allow the instruction to be 'web accessible'. There were also 57 instructions (24.8 per cent) which explicitly stated that they are, or could be, 'incomplete, inaccurate and out-of-date'. This narrative comment did not apply only to older instructions: 31 of the 99 instructions which had been issued or reissued within the past year had such a comment. In one case, an instruction (relating to Bridging E visas<sup>49</sup>), reissued on 1 July 2015, was stated to be 'legally flawed, incomplete, inaccurate and out-of-date'.

### Practice statement framework

4.11 The ANAO examined 112 instructions relating to personal searches, arrests and detention from the former Customs Practice Statement Framework SharePoint site.<sup>50</sup> Unlike instructions on the LEGEND intranet site, most Practice Statement Framework instructions include a due date for review. Table 4.2 shows that only one out of 112 of the instructions examined were current.

49 A Bridging E visa is a temporary visa that may be granted to an unlawful non-citizen while a decision is being made about whether the person must leave Australia or is granted another type of visa.

50 The SharePoint site is not directly accessible from the intranet home page.

**Table 4.2: Status of Practice Statement Framework instructions as at 3 August 2016**

Status	Number	Per cent
Current	1	0.9
Less than one year overdue for review	4	3.6
1–2 years overdue for review	16	14.3
2–3 years overdue for review	12	10.7
3–4 years overdue for review	25	22.3
4–5 years overdue for review	9	8.0
More than five years overdue for review	22	19.6
Unable to determine <sup>a</sup>	23	20.5
<b>Total</b>	<b>112</b>	<b>100.0</b>

Note a: Date for review not specified.

Source: ANAO analysis of departmental information.

### Document control register

4.12 In October 2016, the department released a document entitled *Document Control Register – a solution for PPCF documents on Bordernet*.<sup>51</sup> The document stated that the document control register ‘will also act as an interim publication solution for documents that would ordinarily be housed on LEGEND’.

4.13 The Register contains a number of functional categories (such as border enforcement), with documents grouped according to tiers of various types of material (such as procedural instructions and standard operating procedures). As at 13 November 2016, the Document Control Register contained 157 documents. Of these, 140 (89.2 per cent) related to corporate type functions, such as procurement and property management, and 17 (10.8 per cent) related to operational functions. The categories of border enforcement, detention management and trade and traveller management contained no documents. The category of visa and migration management contained a single document.<sup>52</sup>

51 Bordernet is the department’s intranet. PPCF is the Policy and Procedure Control Framework (see paragraph 4.6).

52 *Applications for certain visitor visas – the APEC Business Travel Card Scheme*.

## Recommendation No.2

4.14 The department:

- (a) urgently upload all operational instructions, guidance, delegations and authorisations to the Document Control Register; and
- (b) within one year, design and implement an integrated platform for instructions, guidance, delegations and authorisations that meets the operational needs of users.

**Department of Immigration and Border Protection's response:** (a) Agreed; (b) Partially agreed.

4.15 *In response to (a), the Department has made significant progress with regard to this recommendation. The Policy and Procedure Control Register (PPCR), previously referred to as Document Control Register, was formally launched on 1 December 2016. The PPCR provides staff with a single point of access to policies and procedures, and direct access to delegations and authorisations. As at 10 January 2017, 645 documents have been loaded onto the PPCR. Over the next 12 months, the Department will progressively review its existing policy and procedure documents in accordance with an endorsed risk-based prioritisation process. Newly revised policy and procedure documents will be uploaded to the PPCR over 2017.*

4.16 *In response to (b), while the Department agrees that an integrated platform for instructions, guidance, delegations and authorisations should be delivered, its ability to do so within one year will be conditional upon the availability of sufficient funding and resourcing amid competing priorities and operational pressures. Considerable progress has been made already with implementation of the Policy and Procedures Control Framework and successful commissioning of a technical upgrade of the LEGEND system to accommodate delegations, authorisations and Customs legislation.*

## Have the former Customs and Immigration training regimes been effectively integrated?

The department has made progress in integrating the former Customs and Immigration training regimes and addressing deficiencies identified through pre-integration training audits conducted in 2014. The establishment of an integrated Learning and Development Branch and the Border Force College has been managed as a priority project, under the Reform and Integration Taskforce. While this project has delivered solid foundations for enhancing the learning maturity of the department, at the time of examination the results of these foundational efforts had yet to be realised.

4.17 Prior to integration, Immigration and Customs had both separately identified issues with their officer training regimes following high profile incidents and had initiated processes to develop formal officer training colleges.

4.18 Immigration received \$230 million over five years in the 2005–06 Budget to address deficiencies identified through independent inquiries into its unlawful detention of Cornelia Rau and unlawful deportation of Vivian Alvarez. As part of this package, Immigration appointed a National Training Manager, developed a National Training Strategy, and established a College of Immigration Border Security and Compliance in 2006 to provide specialist technical training for officers working in compliance, detention and removal roles.

4.19 Similarly, officer training was identified as a key component of the Customs reform program initiated in 2012. As noted in Chapter 1, Customs received funding of \$53.6 million over four years in the 2014-15 Budget for a package of 'people and workforce' measures, including establishment of the Border Force College. Internal records indicate that the following target dates were set: 1 July 2014 to 'stand up' a Customs College; and 1 July 2015 to transition to an integrated Border Force College.

4.20 On 9 May 2014, in announcing the integration of Customs and Immigration, the Minister for Immigration and Border Protection stated that the College would 'deliver the professional technical and operational training border force officers will need in the border environment of the future'.<sup>53</sup>

### **Pre-integration training audits**

4.21 The department commissioned pre-integration training audits to benchmark Customs and Immigration's learning maturity levels and make recommendations for enhancing capability. Internal reports on these audits were finalised in March 2014 for Customs and in December 2014 for Immigration.

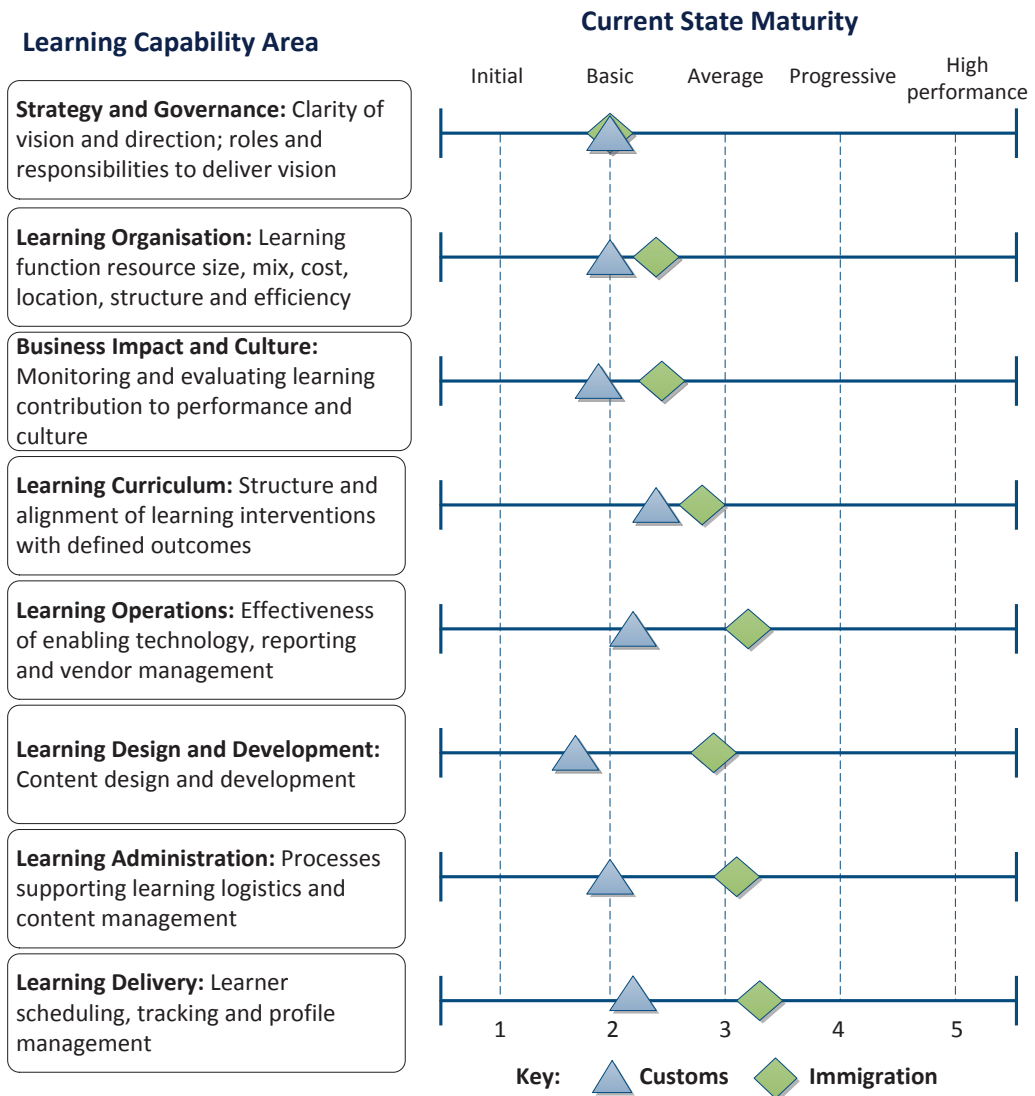
4.22 The Customs training audit report found 'the current [Customs] learning capability does not adequately support the Service's needs and is deemed insufficient to realise Reform'.<sup>54</sup> Customs achieved ratings of 'initial' or 'basic' across the learning capability criteria (see Figure 4.1). The report concluded that Customs had a decentralised, uncoordinated, siloed and reactive approach to learning and development.

4.23 Immigration was rated as 'basic' to 'average' across the same learning capability criteria (see Figure 4.1). The report found there was a lack of central governance and strategy for learning and development, a fragmented approach, and an inability to measure investments and outcomes. It recommended developing competency frameworks to enable competency-based training, which is more targeted and cost-effective.

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53 S Morrison (Minister for Immigration and Border Protection), 'A new force protecting Australia's borders' [Internet], address to the Lowy Institute for International Policy, Sydney, 9 May 2014, available from <<http://pandora.nla.gov.au/pan/143035/20141002-0006/www.minister.immi.gov.au/media/sm/2014/sm214247.htm>> [accessed 3 August 2016].

54 Accenture, *ACBPS Learning Diagnostic Report*, March 2014, p. 8.

**Figure 4.1: Customs and Immigration’s pre-integration training audit results**

Source: Accenture, *ACBPS Learning Diagnostic Report* (March 2014); Accenture, *Department of Immigration and Border Protection – Training Audit Report* (December 2014)

### Learning and college stand-up

4.24 The establishment of an integrated Learning and Development Branch and the Border Force College was identified as a priority project within the Reform and Integration Taskforce’s delivery program. The objectives of the ‘learning and college stand-up’ project were to put in place a formal, centralised learning and development system for the new department and establish a College to develop and deliver high quality operational training to staff.

4.25 The project has:

- launched the Border Force College on 1 July 2015;
- developed and piloted a Systematic Learning Model outlining standardised systems, policies, processes and tools for developing and delivering learning options using the ‘analyse, design, develop, implement and evaluate’ model;
- established a governance model involving a Learning and Development and College Board and a series of vocational committees to advise the Board, including the Border Operations Vocational Committee;
- established an integrated Learning Management System and migrated data from previous systems to the new platform<sup>55</sup>; and
- developed the Border Force Officer Recruit Training curriculum and delivered training to 258 new recruits.

4.26 In April 2016, the department commissioned an assessment of the consolidation of Customs and Immigration, including an assessment of the ‘pre-integration’ and ‘after integration’ state of learning and development. The report, published in September 2016, notes:

Many changes have been incorporated into the training, learning, and developmental programmes of the newly formed [Immigration]. The extent to which these programmes will be successful and lead to greater operational effectiveness and efficiency has yet to be seen. Many of these efforts are in the early stages of implementation; therefore, the full impact cannot yet be assessed.<sup>56</sup>

## Does the department provide training to all officers exercising coercive powers?

Not all officers exercising coercive powers under the Migration Act and Customs Act have received pre-requisite training. The department has established an integrated Learning Management System but issues remain in relation to the completeness of training records.

4.27 The Border Force College’s focus over its first year of operation was on establishing new governance and policy arrangements, consolidating existing operational training courses within the College, and delivering the Border Force Officer Recruit Training program to new recruits. The majority of the College’s officer training courses are legacy programs inherited from the former Customs and Immigration training regimes (courses relating to coercive powers are outlined at Table 4.3). With the exception of Search Warrant Delegate Training, these legacy courses have not been evaluated or redesigned in accordance with the new Systematic Learning Model.

55 A Learning Management System is a software application for managing records relating to staff learning and development activities, including training course curricula, attendance and assessment records.

56 RAND Corporation, *Assessment of the Consolidation of the Australian Customs and Border Protection Service (ACBPS) with the Department of Immigration and Border Protection (DIBP)*, September 2016, p. 35.

**Table 4.3: Border Force College courses relating to coercive powers**

Course title	Description
<b>Former Immigration courses</b>	
Status Resolution Essentials	Examines client pathways that lead to compliance action and the functions of different roles in moving clients to a status resolution.
Compliance Field Training (currently suspended: see paragraph 4.37)	Enables staff to investigate and resolve immigration status, detain unlawful non-citizens and grant visas. [Note: successful completion previously resulted in issue of Certificate IV in Government (Statutory Compliance).]
Search Warrant Delegate Training	Provides legislative, policy and practical skills to enable delegates to approve search warrant applications.
Detention Essentials Training	Prepares officers for work in the detention facility environment across a range of detention related roles. Includes specific courses for departmental staff and contractors working in onshore and offshore detention facilities.
Detention Superintendent Orientation	Provides Superintendents and high performing Inspectors with the knowledge and skills to effectively run an immigration detention facility.
Returns and Removals	Enables officers to organise the removal from Australia of unlawful non-citizens.
Removals Liaison Officer Training	Equips suitable officers to escort clients being returned to or removed from Australia.
Sponsor Monitoring Inspector Training	Provide officers with specialist skills for performing the role of an Inspector within Sponsor Monitoring Units.
Sponsor Monitoring Specialist Training	Provide officers with specialist skills for performing sponsor monitoring functions within Program Integrity Units.
<b>Former Customs courses</b>	
Border Force Officer Recruit Training	Provides new recruits with the skills, knowledge and confidence to safely and competently undertake the general duties of a Border Force officer.
Aircraft and Vessel Search Training	Provides training on how to safely enter and search aircraft and vessels. Specific courses: Aircraft Search; Boarding Vessels at Sea; Maritime Vessel Search; Merchant Vessel Search; and Pleasure Craft Search.
s219 Detention and Search	Equips officers with the skills and knowledge to conduct a frisk and/or external search.
Operational Safety Training Basic	Provides officers with basic operational safety skills and knowledge to mitigate risks encountered while undertaking operational activities.
Operational Safety Continuation Training	Provides officers with operational safety qualifications with the opportunity to maintain and further develop their skills and techniques in pistol craft and defensive tactics.

Source: Department of Immigration and Border Protection

4.28 At a Border Force Board meeting in February 2016, it was noted that ‘training was needed in relation to the powers of officers as this was currently an area of huge legal risk’. Recent internal assurance reviews have also identified deficiencies relating to training for officers exercising coercive powers, including:

- training for officers delegated the power to issue search warrants under s. 251 of the Migration Act not having occurred since June 2010 and most current delegates not having completed training;

- training for immigration field compliance officers not being supported by an effective training framework that outlines training expectations, tracks whether officers have undertaken requisite training, and addresses non-compliance with standards;
- insufficient training being provided to Border Force officers on the use of operational delegations; and
- limited availability of training in operational safety (or ‘use of force’) due to Border Force College capacity issues and an inconsistent and devolved approach to determining training needs.

## **Currency of pre-requisite qualifications**

4.29 As a component of the substantive testing outlined in Chapter 3, the ANAO tested whether officers exercising coercive search powers under the Migration Act and Customs Act held current pre-requisite qualifications.

### ***Customs Act personal search training***

4.30 To perform the roles of detention, search or witnessing officers for frisk, external or internal searches, officers must have completed the s219 Detention and Search course, or a shorter online recertification course, within the past two years. Data on officers’ training records for these courses are contained within the department’s integrated Learning Management System, which is accessible to officers on the intranet.

4.31 Maintenance of detention and search certification is a fundamental component of the appropriateness of personal searches conducted at airports under Division 1B of Part XII of the Customs Act (ss. 219L to 219ZJ). As outlined at paragraph 3.5, 29 per cent of the 69 personal searches sampled by the ANAO involved at least one uncertified officer, which means these searches were inappropriate.

4.32 The ANAO’s testing also uncovered an additional four officers who participated in sampled searches whose training records were incomplete. The department claimed that the officers were certified but that their recertification records had not been entered into the Learning Management System. It was unable to provide sufficient evidence to substantiate this claim.

4.33 In most cases, uncertified officers had previously undertaken the s219 Detention and Search training but their certification had lapsed, usually only by a few weeks or months. While it is unlikely that the knowledge and skills of an officer who undertook training one year and eleven months ago differ significantly from an officer who undertook training two years and one month ago, the level of non-compliance with this policy requirement indicates internal controls are currently inadequate.

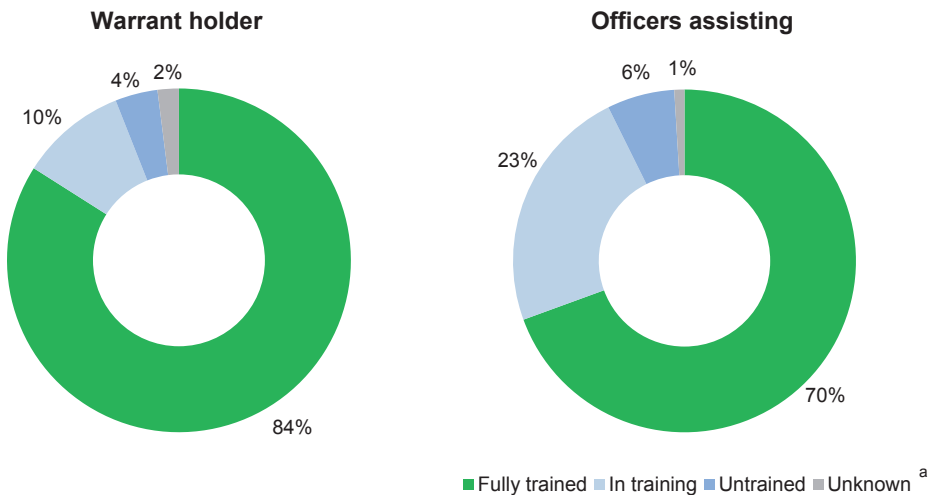
### ***Migration Act field compliance training***

4.34 It is a departmental requirement (outlined in the Procedures Advice Manual) that all field compliance officers participating in warrant visits aimed at locating unlawful non-citizens hold a Certificate IV in Government (Statutory Compliance). At the time of audit fieldwork, data on the currency of officer qualifications for immigration field compliance functions were not available on the department’s Learning Management System. This issue was known to the department.

4.35 The ANAO obtained the ‘Qualified Personnel Matrix’ compiled by a data integrity project undertaken by the department, which lists the field compliance qualification status of all current departmental officers, and tested whether the officers who participated in warrant visits for the

ANAO's test sample of 50 search warrants from 2015–16 (discussed in Chapter 3) had completed or commenced the pre-requisite training. The results of the ANAO's testing are outlined in Figure 4.2. The majority of warrant holders (84 per cent) and officers undertaking assisting roles in search warrant visits (70 per cent) held Certificate IV qualifications. However, for only five of the 50 warrants, all officers participating in warrant visits were fully trained. For 16 of the 50 warrants, at least one officer participated who had not commenced training.

**Figure 4.2: Pre-requisite qualification status of warrant holders and officers assisting**



Note a: The status 'unknown' indicates the ANAO was unable to determine whether officers had pre-requisite qualifications as they left the department prior to the data integrity project.

Source: ANAO analysis.

4.36 These results fall short of the policy requirement that all officers participating in warrant visits aimed at locating unlawful non-citizens must hold a Certificate IV qualification. The department informed the ANAO that departmental policy is out-of-step with current operational practice, which is to allow officers currently participating in training to participate in a limited capacity in warrant visits to demonstrate competency.

4.37 The Border Force College is developing a new training program for immigration compliance officers. Its previous training has been on hold since March 2016, when the Certificate IV in Government (Statutory Compliance) was abolished. A submission to the Learning and Development and College Board, dated 3 August 2016, indicates that development of a replacement learning solution is one of the College's highest priorities for 2016-17.

#### *Search Warrant Delegate Training*

4.38 An internal assurance review completed in December 2015 found most current delegates issuing search warrants under s. 251 had not undertaken training, and training had not been offered since June 2010. In response to this finding, the Border Force issued a directive, which took effect from 10 February 2016, that only officers with a Certificate IV in Government (Statutory Compliance) or who had attended the previous Search Warrant Delegate Training would be permitted to issue warrants. Within the sample of 50 warrants examined, the ANAO's

substantive testing found all warrants issued after this directive had been approved by a delegate who met these training requirements.

4.39 The Border Force College developed a revised Search Warrant Delegate Training course and delivered it to fifteen delegates from regional offices across Australia in June 2016. One of the delegates, who had approved several hundred s. 251 warrants in recent years, failed the competency assessment at the completion of the course. The department informed the ANAO that the delegate was not permitted to issue any warrants until he passed a competency reassessment a few weeks later. However, the ANAO's analysis indicates the delegate issued two 251 search warrants in the intervening period.

### Recommendation No.3

4.40 The department ensure:

- (a) certification and training records relating to statutory powers are entered into the Learning Management System; and
- (b) officers exercising coercive powers have current pre-requisite qualifications.

**Department of Immigration and Border Protection's response:** *Agreed.*

4.41 *In response to (a), the Department's Learning and Development Branch will work with the ABF College and the relevant business lines to ensure the certification of training records relating to statutory powers are entered into the Learning Management System (LMS).*

4.42 *In response to (b), the Department is currently conducting training needs analysis in roles that require officers to exercise coercive powers; this work will assist in identifying the pre-requisite qualifications in ABF roles. The Learning and Development Branch and the ABF College will ensure pre-requisite qualifications are embedded into training packages and in the curriculum in the LMS. The enhancements to the LMS that are currently underway will align an individual's position to a job role and then to the curriculum and relevant qualifications. This will assist managers to access reports to ensure their officers have current qualifications when they are being deployed.*

### Has the department undertaken training needs analysis on the use of statutory powers?

The department has been undertaking a project to transition to a new workforce model, which has involved establishing 'vocations', profiling job roles under each vocation, mapping required competencies, and developing high level curricula. Training needs analysis for the Border Force vocational stream commenced in October 2016.

4.43 As part of its reform program, Customs articulated a business case for transitioning to a new workforce model—moving from compartmentalised functional areas, such as cargo operations, passenger processing, compliance and investigations, to a mobile workforce of well-trained, disciplined officers who could be deployed across multiple domains. Customs' *Blueprint for reform 2013-2018* (July 2013) states:

To meet the needs of today and the challenges of the future, our people will need to be agile and skilled. We will build a standardised approach to training across the Service, including a

structured pathway for learning that stretches from induction and on-boarding, through to active career management and continuous development. This will ensure our officers have the right skills to do their job.<sup>57</sup>

4.44 This program of work continued and broadened with the decision to merge Customs and Immigration. As noted in Chapter 1, a central component of the new workforce model was the establishment of five ‘vocational streams’: Border Force, Policy and Regulation, Intelligence, Client Services and Enabling/Support.<sup>58</sup> Across the five vocations, it has defined more than 20 job families and 150 job roles. Every employee in the department has been assigned to a vocation, job family and job role in the department’s Human Resources Management Information System. The job families and roles for the Border Force vocation are outlined in Table 4.4.

**Table 4.4: Border Force vocation job families and roles**

Border Force		
Deliver on national, international, regional and local border protection, law enforcement and national security priorities.		
<b>Compliance and Regulation<sup>a</sup></b> <ul style="list-style-type: none"> <li>Border Enforcement Operations (includes “General Duties” and “Counter Terrorism Unit”)</li> <li>Detector Dog Operations</li> <li>Human Source Handler<sup>b</sup></li> </ul>	<ul style="list-style-type: none"> <li>Investigation</li> <li>Marine Unit Deck</li> <li>Marine Unit Enforcement</li> <li>People Compliance</li> <li>Surveillance Operations</li> <li>Trade Compliance</li> </ul>	<b>Development Programme</b> <ul style="list-style-type: none"> <li>Border Force Officer Recruit Trainee</li> </ul>
		<b>Forensics</b> <ul style="list-style-type: none"> <li>Digital Forensic Investigation</li> <li>Financial Forensics</li> </ul>

Note a: **Bold text** indicates the job family under which each job role falls.

Note b: **Blue text** indicates the job role is under development and may be subject to change.

Source: Department of Immigration and Border Protection, *Vocational Job Family Framework*, April 2016 (version 1.2)

4.45 With priority to the Border Force and Client Services vocations, the department is developing, in sequence, for each key job role:

- job role profiles—typical duties, general capabilities, mandatory and preferred role requirements, and career pathways;
- vocational competency profiles—key competencies, typical tasks and activities, and expected skills, knowledge and attributes for each classification level; and
- vocational training pathways—proposed learning pathways based on training needs analysis.

4.46 As at November 2016, vocational competency profiles for Border Force job roles were progressing, with profiles for the Investigation, Digital Forensic Investigation and Surveillance Operations roles complete and awaiting endorsement by the Border Operations Vocational Committee. Training needs analysis commenced in October 2016 for the Border Enforcement Operations (General Duties) role.

57 Australian Customs and Border Protection Service, *Blueprint for reform 2013-18*, Canberra, 2013, p. 31.

58 Department of Immigration and Border Protection & Australian Customs and Border Protection Service, *Blueprint for integration*, 2014, p. 21.

4.47 As noted in Chapter 1, the department's vision for the general duties Border Force 'officers of the future' is that they will be agile, multi-skilled and deployable across multiple domains. The ANAO considers the department's work to rationalise, simplify and modernise statutory powers, outlined in Chapter 2, to be a key dependency for achieving this vision.

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Grant Hehir  
Auditor-General

Canberra ACT  
27 February 2017

## Appendices



## Appendix 1 Entity response



Australian Government  
Department of Immigration  
and Border Protection



Australian  
**BORDER FORCE**

Ms Michelle Kelly  
Group Executive Director  
Performance Audit Services Group  
Australian National Audit Office  
GPO Box 707  
Canberra ACT 2601

Dear Ms Kelly

Thank you for the opportunity to provide comments on the audit report on *The Australian Border Force's Use of Statutory Powers* (the Report).

The Australian Border Force (ABF) is an operational law enforcement agency and has a trained and suitably equipped workforce to undertake diverse activities. The ABF is responsible for the Department's operational functions such as; the facilitation and lawful passage of people and goods; investigations, compliance and enforcement in relation to illicit goods and immigration malpractice; and onshore detention, removals and activities related to regional processing. To perform these responsibilities, the ABF is supported by the broader Department and works in partnership with law enforcement agencies to identify and protect against threats such as terrorism and transnational organised crime while also facilitating legitimate trade and travel.

A range of legislation provides ABF officers with legal authority to exercise powers or perform functions. The current range of ABF statutory powers represent the consolidation of the powers which existed in the former Department and former Australian Customs and Border Protection Service, and were brought together during portfolio integration on 1 July 2015. The *Australian Border Force Act 2015* did not create new powers to be exercised by ABF officers.

ABF officers have broad powers, enabling them to effectively manage activities across the border continuum. This includes questioning for the purpose of investigating a contravention of a border-related law, accessing or seizing evidentiary material, detaining persons, undertaking the removal of certain non-citizens from Australia and searching goods and persons. The Department takes its obligations seriously and complies with the legislative framework to ensure its officers exercise powers lawfully.

The ABF College was established to provide structured and specialised training, and programmes for officers that supports an agile, disciplined and innovative workforce and to provide cross-functional access to powers by ABF officers. The College provides officers with learning and development opportunities to address skill gaps, enhance standardisation of professional best practice and develop the cross-skilling that is required to operate across multiple domains.

While the Report's recommendations are sensible and the Department welcomes them as part of its professionalisation of governing the use of powers, the Department has not fully agreed to all of the recommendations. There are also several matters presented in the report which the Department wishes to clarify.

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### Overuse of the term 'coercive' powers

The Department challenges the Report's characterisation of the powers available to ABF officers solely as coercive powers. The term 'coercive powers' has been misused throughout the Report to describe both coercive and administrative powers of ABF officers.

The ANAO conducted an assessment to identify coercive powers available to ABF officers and found 99 powers under the *Migration Act 1958*. The Department has considered these powers and found not all could be properly described as 'coercive'. Rather, many were considered to be 'administrative' powers that – although they may adversely affect the individual concerned – do not restrain or constrain the individual in an immediate sense or compel them to do anything, which is the essence of a coercive power.

For example, the power in s.18 of the *Migration Act 1958* to require a person to give information or produce a document about an unlawful non-citizen is clearly a 'coercive' power. However the power in s.25(1) to inspect and make copies of a document produced under s.18 cannot properly be described as 'coercive'.

The various powers in the *Migration Act 1958* to cancel visas are also wrongly described in the Report as coercive powers. Similarly the Department disagrees with the statement made in the Report's introduction that ABF officers can exercise coercive powers under 36 Acts and more than 700 empowering provisions.

Further clarifying information has separately been provided to the ANAO audit team.

### Potentially unlawful searches

The Department notes the Report's conclusions include that the ANAO found instances of potentially unlawful searches and failure to comply with mandatory instructions under both the *Customs Act 1901* and *Migration Act 1958*. The Department contends that it is highly likely these instances are in the category of inadvertent and administrative breaches as opposed to deliberate and intentional breaches. Notwithstanding, the Department takes this seriously and is conducting a detailed review to verify whether the searches were conducted lawfully/appropriately, identify and address any control weaknesses and will take necessary remedial actions.

### Legal professional privilege

The Department maintains Legal Professional Privilege (LPP) over legal advice obtained in relation to issues covered in the report and requests that references to legal advice be removed from the final report to avoid waiver of LPP.

### Specific departmental responses

The Department's responses to the recommendations are at [Attachment A](#); DIBP amendment requests and comments are at [Attachment B](#), and our summary response is at [Attachment C](#). If you would like to further discuss our response to the Report, please contact Mr Stephen Hayward (Chief Audit Executive) on (02) 6264 1427.

Yours sincerely

  
**Jenet Connell**  
Chief Operating Officer  
Deputy Secretary Corporate  
13 January 2017

  
**Michael Outram**  
Deputy Commissioner Operations  
16 January 2017

Note: Subsequent to receiving the department's response to the proposed report, the ANAO reassessed its categorisation of coercive powers and revised the number from more than 700 empowering provisions under 36 Acts to 534 powers under 35 Acts, consistent with the definition of 'coercive powers' (see Table 1.1). This revision did not change the department's view with respect to the report.

## Appendix 2 Provisions of Acts that confer coercive powers on Australian Border Force officers

Act <sup>a</sup>	No.	Question or demand information	Stop, enter, board, search (person or place)	Arrest, detain, seize, restrain, remove
<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>	23	199(1), 199(2), 200(1), 200(2) <sup>b</sup>	199(3), 199(4), 199(7), 199(8)(a), 199(8)(b), 199(9)(a), 199(9)(b), 200(11), 200(4), 200(5), 200(6), 200(7), 200(8), 200(9)	199(5), 199(10), 200(12), 200(13), 201(1)
<i>Australian Passports Act 2005</i>	6		26(2)	23(1), 24(1), 24A(1), 25(1), 26(1)
<i>Aviation Transport Security Act 2004</i>	7		89C(1), 89D(1)(a), 89D(1)(b)	89E(1), 89F(1), 89F(2), 89G(1)
<i>Biosecurity Act 2015</i>	1			101(1)
<i>Child Support (Registration and Collection) Act 1988</i>	3	72U(2)(b), 72W(1)		72U(2)(a)
<i>Commerce (Trade Descriptions) Act 1905</i>	1		5(3)	
<i>Copyright Act 1968</i>	1			135(7)
<i>Crimes (Currency) Act 1981</i>	1			29(3)
<i>Crimes Act 1914</i>	1			3Z(1)
<i>Customs Act 1901</i>	128	71AAO(5), 71DA(5), 71DL(5), 102EB(1), 106J(a), 106J(b), 114A(5), 114CC(2), 114CC(5), 124(1), 126AC(1), 126AD(1), 126AH(1), 126AI(1), 126AJC(1), 126AJD(1), 126AKG(1), 126AKD(1), 126ALC(1), 126ALD(1), 126AMC(1), 126AMD(1), 126ANC(1), 126AND(1), 126AOC(1), 126AOD(1), 195(1), 195A, 196C(1), 196C(1)(d), 197(2), 203B(4), 203C(4), 203CB(4), 203HA(1), 213(1), 214AH(2), 214B(4), 219N, 219R(12), 240AA(1), 240AC(1), 274	91, 102E(1), 123(1), 123(2), 186(1), 186AA(2), 186AA(3), 187, 187(f), 188, 189, 193, 197(1), 199(1)(a), 199(1)(c), 199(1)(e), 203A(1)(a), 203A(1)(b), 203A(1)(f), 203B(2)(a), 203B(2)(b), 203B(2A)(a), 203C(2)(a), 203C(2)(b), 203C(2)(c), 203CB(2)(a), 203CB(2)(b), 203CB(2)(c), 203DB(1)(a), 203DB(1)(b), 211(a), 211A, 214AB(1)(a), 219M(1A)(a), 219R(1), 219R(8), 219ZJD(1), 275	71E(3AA), 74(1), 74(3), 119AA(5), 119AC(1), 187(g), 190, 196C(3), 199(1)(d), 199(1)(e)(ii), 201(2), 203A(1)(c), 203A(1)(d), 203A(1)(f)(ii), 203B(2), 203B(2A)(b), 203B(3), 203C(2), 203C(2A), 203C(3), 203CA(3), 203CA(4), 203CB(2), 203CB(3), 203DB(1)(c), 203DB(1)(d), 203TT(3), 209(2), 209U(1), 210(1), 210(4), 211(b), 214AB(1)(h), 219L(1), 219L(1A), 219Q(1), 219R(8), 219S(1), 219S(2), 219W(3), 219ZJB(1), 219ZJC(1), 219ZJCA(1), 219ZJD(3), 227F(1), 234ABA(1), 275A(1)

Act <sup>a</sup>	No.	Question or demand information	Stop, enter, board, search (person or place)	Arrest, detain, seize, restrain, remove
<i>Environment Protection and Biodiversity Conservation Act 1999</i>	59	403(2A)(a), 403(2A)(b), 403(2A)(c), 403(5), 412A(1)(a), 412A(1)(b), 412A(1)(c), 442(1), 442(3), 443(3), 443A(2), 444(1), Sch1 Cl28(1), Sch1 Cl38(1) <sup>c</sup>	403(2)(a), 403(2)(b), 406(1), 406(1)(ba), 407(1), 409(4), 417(1)(a), 417(1)(c), 417(1)(f), 417(2)(a)(i), 417(2)(a)(ii), 431(a), 432, 443(2), Sch1 Cl15(1), Sch1 Cl16(1), Sch1 Cl17(1), Sch1 Cl22(1), Sch1 Cl22(4)	406(1)(d), 406AA(2), 407A(3), 407A(6), 408(4), 409(5), 417(1)(d), 417(2)(c), 422(2), 422(4), 430(1), 431(b), 433, 444A(1), 445(1), 447(1), 456AA(2), 456AB(2), 456AC(2), Sch1 Cl10(1), Sch1 Cl12(1), Sch1 Cl15(3), Sch1 Cl22(4)(e), Sch1 Cl22(6), Sch1 Cl8(1), Sch1 Cl9(1)
<i>Environment Protection (Sea Dumping) Act 1981</i>	8	29(3), 29(5)	29(2), 30(3), 31(1)	17(3), 29(4), 32(1)
<i>Excise Act</i>	8	87(2)	87(1), 87AA, 91, 104(1)	87(3), 100(1), 100(2)
<i>Financial Transaction Reports Act 1988</i>	7		33(3A), 33(6), 33(7), 33(7A)	33(4), 33(8), 33A(1)
<i>Fisheries Management Act 1991</i>	28	84(1)(n), 84(1)(s), Sch1A Cl28(1), Sch1A Cl38(1)	84(1)(d)(i), 84(1)(d)(ii), 84(1)(e)(i), 84(1)(e)(ii), 85A(1)(a), 85A(1)(c), Sch1A Cl15(1), Sch1A Cl16(1), Sch1A Cl17(1), Sch1A Cl23(1), Sch1A Cl23(4)	84(1)(d)(iii), 84(1)(g), 84(1)(j), 85A(1)(d), 85F(2), 85F(4), Sch1A Cl10(1), Sch1A Cl12(1), Sch1A Cl15(3), Sch1A Cl19(1), Sch1A Cl23(4)(e), Sch1A Cl23(6), Sch1A Cl8(1)
<i>Foreign Passports (Law Enforcement and Security) Act 2005</i>	3			16(3), 16A(3), 17(1)
<i>Hazardous Waste (Regulation of Exports and Imports) Act 1989</i>	2	52(2), 52A(2)		
<i>Major Sporting Events (Indicia and Images) Protection Act 2014</i>	1			25(1)
<i>Maritime Powers Act 2013</i>	25	55(1), 57(1), 58	52(1), 54(1), 55(7), 56(1), 59(1), 61(1), 63(1)	61(3) 64(1), 66(1), 67(1), 68(1), 69(1), 70, 71, 72(3), 72(4), 72(5), 73, 76(1), 77, 78
<i>Maritime Transport and Offshore Facilities Security Act 2003</i>	16		139(2), 145E(1), 148(2), 148A(2), 152(1), 152A(1), 153(1), 154(1)(a), 154(1)(b), 155(1)(a), 155(1)(b)	156(1), 156(2), 157(1), 158(1), 159(1)

Act <sup>a</sup>	No.	Question or demand information	Stop, enter, board, search (person or place)	Arrest, detain, seize, restrain, remove
Migration Act 1958	101	18(1), 91W(1), 137(1), 175(1), 188(1), 192(3), 225(4), 226(4), 227(4), 245F(3)(d), 251(2), 257(1), 257A(1), 261AA(1), 261AK(1), 268BA(2), 268CK(a)(i), 268CK(a)(ii), 268CK(b), 487B(1), 487K(2)(a), 487K(2)(b)	223(16)(a), 223(18), 245F(3)(a), 245F(3)(b), 245FA(1), 247(6), 251(1), 251(2), 251(6), 251(7), 252(1), 252A(1), 252AA(1), 252G(1), 252G(4), 268CA(1)(a), 268C(1), 268CR(2)(a), 487D(1), 487E(b)(i), 487H(2)(a)	26(1), 180(1), 180(3), 181(1), 181(2), 181(3), 189(1), 189(2), 189(3), 189(3A), 189(4), 192(1), 198(1), 198(1A), 198(1C), 198(2), 198(2A), 198(5), 198(6), 198(7), 198(8), 198(9), 198AD(2), 198AD(3)(b), 198AD(3)(c), 198B(2)(b), 198B(2)(c), 199(1), 199(2), 199(3), 206(1), 223(16)(b), 223(5), 245F(3)(f), 245F(8), 245F(9)(a), 245F(9)(b), 245F(9A)(a), 245F(9A)(b), 245F(9A)(c), 249(1), 249(1AA), 252(3), 252(4), 252C(1), 253(1), 253(10), 259(1), 260(2), 260(5), 261(1), 261B(1), 261B(2), 268CR(2)(b), 487E(b)(ii), 487F(2)(a), 487G(2), 487S(2), 487ZJ(1)
National Health Act 1953	3		99ZL(1)	99ZJ(1), 99ZK(1)
Navigation Act 2012	2	252(2)		252(3)
Offshore Petroleum and Greenhouse Gas Storage Act 2006	6	621(1)(b)(i), 621(1)(b)(ii)	621(1)(a), 621(1)(b)(iii)	620(1), 621(1)(d)
Olympic Insignia Protection Act 1987	1			54(2)
Ozone Protection and Synthetic Greenhouse Gas Management Act 1989	17	54(1)	51(1), 51A(1)(a), 51B(3)(a), 51B(3)(b), 52(1), 53(1)(a), 53A(3)(a), 53A(3)(b)	51A(1)(e), 51A(5), 53(2), 53(4), 53(8), 53(9), 55C(1), 59(1)
Passenger Movement Charge Collection Act 1978	1	7		
Proceeds of Crime Act 2002	12	213(1)	228(1)(a), 228(1)(b), 228(1)(e), 251(2)(a), 251(2)(b)	228(1)(d), 244(1), 245(3), 247(1), 251(2)(c), 251(3)
Protection of the Sea (Civil Liability) Act 1981	4	15(4), 19C(2)		15(5), 19C(3)
Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008	2	20(1)		21
Taxation Administration Act 1953	3	14ZA(1), 14Z(1)(e)		14Z(1)(d)

Act <sup>a</sup>	No.	Question or demand information	Stop, enter, board, search (person or place)	Arrest, detain, seize, restrain, remove
<i>Therapeutic Goods Act 1989</i>	13	48(1)(e)(i), 48(1)(e)(ii)	46(1), 46A(1), 46B(1), 46B(1)(c), 47(1)(a), 48(1)(a)	46B(1)(d), 47(1)(c), 47(4), 48C(2), 48C(4)
<i>Torres Strait Fisheries Act 1984</i>	36	42(1)(j), 42(1)(k), 42(1)(ka), 42(1)(m), 42(1)(n), 42(1)(pa), 42(1)(pb), Sch2 Cl29(1), Sch2 Cl38(1)	42(1)(b)(i), 42(1)(b)(ii), 42(1)(ba)(i), 42(1)(ba)(ii), 42(1)(da), Sch2 Cl15(1), Sch2 Cl16(1), Sch2 Cl17(1), Sch2 Cl23(1), Sch2 Cl23(4)	42(1)(b)(iii), 42(1)(d), 42(1)(ea), 42(1)(eb), 42(1)(ec), 42(1)(ed), 42(1)(f), 42(2)(ba)(iv), 43J(2), 43J(4), Sch2 Cl10(1), Sch2 Cl12(1), Sch2 Cl15(3), Sch2 Cl19(1), Sch2 Cl23(4)(e), Sch2 Cl23(6), Sch2 Cl8(1)
<i>Trade Marks Act 1995</i>	3	143(1)(c), 143(1)(d)		133(2)
<i>Weapons of Mass Destruction (Prevention of Proliferation) Act 1995</i>	1			17(2)
<b>TOTAL</b>	<b>534</b>			

Note a: Hyperlinks to the Acts referred to in this table can be found at the [Federal Register of Legislation](#).

Note b: References starting with a number are to sections of the Act.

Note c: References containing 'Sch' and 'Cl' are to a Schedule and Clause of the Act.

## Appendix 3 Integration and enterprise risks

Integration risks (September 2014)		Enterprise risks (May 2016)	
1	Reform and Integration fails to meet its objectives due to complex interdependencies	1	The Department does not effectively contribute to preventing illegal activity in the border continuum
2	Industrial unrest negatively impacts the capacity to undertake reform and integration	2	Facilitation of legitimate trade across the border is not effective or efficient
3	Lack of organisational capacity and capability to sustain integration and reform activities	3	The Department is unable to effectively and efficiently facilitate the movement and stay of legitimate travellers, migrants and potential citizens
4	Technology architecture and systems integration does not support the delivery of Portfolio outcomes	4	The system of immigration detention is not sustainable or fit for purpose
5	Lack of clarity around integration objectives at the portfolio and divisional levels	5	Measures to deter people smuggling are no longer lawful or effective
6	Stakeholder and partner relationships may deteriorate	6	The Department is unable to deliver the reform need to sustain and enhance its performance over the short, medium and long-term
7	Failure to adequately design the foundation and functions of the Australian Border Force to meet the Government's intent	7	The Department's governance arrangements do not support effective accountability and top-level decision-making
8	Failure to achieve legislative Reform	8	Departmental staff and authorised representatives act unlawfully
9	Managers lack experience in leading change, or fail to positively engage with reform and integration	9	The Department is unable to sustain its core functions during a major business disruption or whole of government crisis
10	Integrity and fraud exposure arising from reform and integration activities	10	The Department's key systems are infiltrated and its people are compromised
11	Deterioration of enterprise information quality and data integrity	11	Procurement and contract management in the Department is ineffective and inefficient
12	Change adversely affecting staff morale and productivity		
13	Failure to have funding for reform initiatives released		
14	Failure to achieve desired state of cultural integration		
15	Loss of senior personnel and expertise		
16	Possible reduction in border operations and security during integration		
17	Business Case not lodged in agreed timeframe as a result of insufficient capacity within the Department of Finance to complete costing processes		

Source: Department of Immigration and Border Protection.

