



**Australian
Privacy
Foundation**

<http://www.privacy.org.au>

Secretary@privacy.org.au

<http://www.privacy.org.au/About/Contacts.html>

18 February 2013

Mr M. Pezzullo
Chief Executive Officer
Australian Customs and Border Protection Service

Michael.Pezzullo@customs.gov.au, information@customs.gov.au

cc. Mr J. McMillan, Information Commissioner, John.McMillan@oaic.gov.au
Nicholas Wilson, Fair Work Ombudsman, Nicholas.Wilson@fairwork.gov.au

Dear Mr Pezzullo

Re: New Measures Highly Invasive of Staff Privacy

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. A brief backgrounder is attached.

We refer to the Fairfax article of Friday 15 February 2013, 'Customs staff told to do in mates who smoke pot'.

- 1. Would you please advise if there are any material inaccuracies in the article, and, if so, what the actual position is.**

The APF appreciates that there is a need for action within the agency, in light of the revelations of the last year. However, there is a clear public policy need for a Privacy Impact Assessment to be undertaken prior to the imposition of such privacy-invasive measures.

- 2. Would you please advise whether a Privacy Impact Assessment (PIA) has been undertaken?**
- 3. If so, then:**
 - (a) what employee and privacy advocacy organisations were engaged, as part of that process?**
 - (b) would you please provide us with a copy of the resulting report, or the URL where we can download it.**

A couple of the measures referred to the article are of especial concern.

We attach a copy of the APF's Policy Statement on Substance Abuse Testing and the Workplace, available at: <http://www.privacy.org.au/Papers/SATW.html>.

We submit that a blanket substance abuse testing program is untenable, and that such testing as may be performed must be clearly justified, based on reasonable grounds for suspicion of impairment or high levels of danger to the public or fellow-workers.

We further submit that it is seriously inappropriate to require staff-members to report, to their employer, about activities by colleagues that occur outside the workplace (as distinct from reporting reasonable belief in the performance of a criminal act, to the relevant law enforcement agency).

The degree of concern is compounded by the fact that the activities referred to may or may not be illegal, or even in breach of the person's terms of employment. The concern is further heightened by the imposition of duress on staff, in the form of threats of investigation and dismissal.

We express serious concern that these measures in particular fail the relevant tests of justification, proportionality and transparency, and perhaps also of controls, challenge, review and audit.

4. We request your response to these concerns.

5. We request copies of any documents additional to the PIA Report that provide evidence in support of these seriously privacy-invasive measures.

Thank you for your consideration.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Roger Clarke', with a long horizontal line extending to the right.

Roger Clarke
Chair, for the Board of the Australian Privacy Foundation
(02) 6288 1472 Chair@privacy.org.au

Australian Privacy Foundation

Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, Committees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, Committees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by its Patrons, The Hon Michael Kirby and Elizabeth Evatt, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>



Substance Abuse Testing and the Workplace

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There has been an increasing tendency by employers to try to exercise power over their employees in the form of compulsorily-imposed tests for consumption of alcohol and other drugs.

There are some circumstances in which a genuine need exists to do so. But those circumstances are highly unusual, and many employer initiatives are ill-judged and excessive. Meanwhile, proponents of testing, including technology providers, have made dubious and insufficiently tested claims about its effectiveness, and have made incredible statements to the effect that the enforced extraction of swabs is non-intrusive.

As long ago as 1992, the then NSW Privacy Committee concluded ([NSWPC 1992](#)) that "unless specifically authorised by legislation, workplace [substance abuse] testing should only take place when:

1. a person's impairment by [a substance] would pose a substantial and demonstrable safety risk to that person or to other people; and
2. there is reasonable cause to believe that the person to be tested may be impaired by [a substance]; and
3. the form of [substance abuse] testing to be used is capable of identifying the presence of a [substance] at concentrations which may be capable of causing impairment".

The 20-year delay in the imposition of appropriate regulatory measures cannot be allowed to continue.

APF Policy Statement on Substance Abuse Testing and the Workplace

Foundation Principles

- Intrusions into physical privacy are very serious privacy invasions
- Interferences with human behaviour are very serious privacy invasions
- Interferences by an employer that extend beyond the workplace are even more serious
- Employers have no business performing law enforcement roles
- In such circumstances, justification, proportionality and transparency are critical

Process Matters

Substance abuse testing must not be imposed unless all of the following pre-conditions have been fulfilled:

- a privacy impact assessment (PIA) is undertaken in advance of any commitment being made to impose substance abuse testing
- the PIA process includes consultation with representatives of and advocates for the categories of affected people
- the justification is exposed in advance, and subjected to examination
- in particular, sufficient detail is made available concerning:
 - the workplace risks that it is intended will be addressed by the testing
 - the nature, incidence and severity of those risks
 - expert review of evidence of the effectiveness of the proposed testing in addressing those risks
 - alternative methods that have been considered as ways to address those risks
 - comparative assessment of those alternative methods
- after examination, it is reasonably concluded that substantial and specific justification has been demonstrated to exist, sufficient to justify the seriousness of the privacy intrusions
- the privacy intrusions are proportionate to the need
- all privacy intrusions that are found to be justified are the subject of mitigating measures to reduce their negative impacts

Notice

Where substance abuse testing is imposed, explicit and clear information must be given to employees in relation to the following matters:

- the specific purposes for which it is being imposed
- the circumstances under which it will be imposed
- the procedures involved in:
 - extracting the sample
 - extracting data from the sample
 - using the data
 - storing and destroying the sample
 - storing and destroying the data
- the employer's responsibilities
- the employee's rights
- the uses to which the resultant samples and data may be put
- any disclosures that the resultant samples and data may be subject to

Actions

- All actions taken as a result of substance abuse testing procedures must be:
 - justified
 - proportionate
 - subject to controls, challenge, review and audit

APF thanks its
site-sponsor:



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Created: 7 February 2012 - Last Amended: 31 March 2012 by Roger Clarke - Site Last Verified: 11 January 2009

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