



**THE HON JOSH FRYDENBERG MP**  
**TREASURER**

Ref: MS21-000468

Senator the Hon Concetta Fierravanti-Wells  
Chair  
Senate Standing Committee for the Scrutiny of Delegated Legislation  
Parliament House  
CANBERRA ACT 2600

Dear Senator

Thank you for your recent correspondence in relation to various legislative instruments made by the Australian Securities and Investments Commission (ASIC).

I would again like to thank you and the Committee for your ongoing engagement in resolving the Committee's concerns with the sunset period of legislative instruments made by ASIC and more broadly within the Treasury portfolio. In relation to the Committee's outstanding concerns with the *ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834* and the *ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835*, my response to these concerns is attached.

With this in mind and acknowledging my undertaking to continue to work with the Committee to find a long term resolution to the Committee's concerns, I would like to invite yourself and the Committee to a meeting between my office, the Treasury and ASIC following the tabling of the Committee's final report into *the exemption of delegated legislation from parliamentary oversight*. I understand the Committee anticipates tabling this report shortly.

Yours sincerely

THE HON JOSH FRYDENBERG MP

15 / 3 /2021

***ASIC Credit (Notice Requirements for Unlicensed Carried Over Instrument Lenders) Instrument 2020/834***

The Committee has requested my advice in relation to:

- Why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to continue to preserve the effect of item 39A of Schedule 2 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*;
- Why it is considered necessary and appropriate to include civil and criminal penalties in delegated legislation, and whether the Attorney-General was consulted in relation to the inclusion of custodial penalties, in accordance with the *Attorney-General's Department's Guide to Framing Commonwealth Offences*; and
- Whether any further limits apply, in legislation or policy, to constrain the scope of ASIC's power under paragraph 19A(2)(j) of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* to determine what information must be included in a notice lodged with ASIC under subsection 19A(2) of the Act.

The instrument pertains to carried over instruments (COI) which are essentially credit contracts or consumer leases that existed at the time of the commencement of the *National Consumer Credit Protection Act 2009*. Lenders or lessors with such existing loan or lease portfolios were not required to obtain credit licences unless they entered into new loans or new leases on or after the commencement of the Act. However, such lenders or lessors were required to notify ASIC of their unlicensed status.

The Notice Requirements Instrument ensures carried over instrument lenders must continue to notify ASIC if they become unlicensed. This allows ASIC to maintain an up-to-date register of unlicensed COI lenders as required by the *National Consumer Credit Protection Act 2009*, the *National Consumer Credit Protection Regulations 2010* and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.

Whilst noting that it is appropriate for ASIC to address this anomalous outcome in the application of primary legislation by way of this instrument, as it is authorised by Parliament to do so, prior to the sunseting of the Notice Requirements Instrument, I will ask my Department to consider if amendments to primary legislation may be brought before the Parliament.

It is necessary and appropriate to include civil and criminal penalties in the instrument because the declaration in the Notice Requirements Instrument substantially reproduces the effect that item 39A of Schedule 2 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (as notionally inserted by regulation 16E of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010* as in force on 24 May 2010) was intended by Parliament to achieve, but which fails to do so due to drafting anomalies. The Notice Requirements Instrument merely replicates the penal consequences that were originally intended by Parliament. The Attorney-General was not consulted when continuing the effect of ASIC Class order CO 10/381 through the Notice Requirements Instrument.

ASIC uses Form COI1 to obtain information under subsection 19A(2) *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* and this form does not ask for additional information under paragraph 19A(2)(j) of the Act, other than for basic identity information about the entity (e.g. name and email of a contact person and identifying information about the entity's managers). There are no further legislative limits on what information must be included.

*ASIC Credit (Electronic Precontractual Disclosure) Instrument 2020/835*

The Committee has requested advice as to whether the government intends to pursue the changes to primary legislation necessary to replace the exemptions provided for by the Electronic Precontractual Disclosure Instrument and, if not, why not.

The Electronic Precontractual Disclosure Instrument allows credit licensees and representatives to give pre-contractual disclosure to consumers in the same electronic manner that is allowed for other credit disclosure documents.

The purpose of the Electronic Precontractual Disclosure Instrument is to preserve the effect of ASIC Class Order [CO 10/1230] which is due to sunset on 1 April 2021. The class order fixed the problematic interaction between regulations 26 and 28L of the *National Consumer Credit Protection Regulations 2010*.

Regulation 28L of the *National Consumer Credit Protection Regulations 2010* permits licensees and credit representatives to give “disclosure documents” electronically to consumers if the conditions in the regulation are met. “Disclosure document” is defined in regulation 26 to include credit guides, proposal documents and quotes required to be given under Chapter 3 of the *National Consumer Credit Protection Act 2009* and pre-contractual statements required to be given under section 16 of the National Credit Code. Subregulation 28L(1) lists the provisions of the *National Consumer Credit Protection Act 2009* under which the regulation is purportedly made. The list includes section 18 of the National Credit Code (credit provider’s contract document) but does not refer to pre-contractual disclosure.

Whilst noting that it is appropriate for ASIC to address this anomalous outcome in the application of primary legislation by way of this instrument, as it is authorised by Parliament to do so, prior to the sunset of the Electronic Precontractual Disclosure Instrument, I will ask my Department to consider if amendments to primary legislation may be brought before the Parliament.





**The Hon Christian Porter MP**  
Attorney-General  
Minister for Industrial Relations  
Leader of the House

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Dear Chair

Thank you for your letter of 18 February 2021 regarding the *Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020* (Regulations).

As you are aware, the Regulations expand the jurisdiction of the Australian Commission for Law Enforcement Integrity (ACLEI) to cover the Australian Competition and Consumer Commission, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission and the Australian Taxation Office.

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) has requested further advice as to why it is necessary and appropriate to expand ACLEI's jurisdiction via delegated, rather than primary, legislation. Please see my advice on this matter below.

***Law Enforcement Integrity Commission Act 2006***

Parliament considered the appropriateness and necessity of expanding ACLEI's jurisdiction via Regulation when it passed the *Law Enforcement Integrity Commission Act 2006* (LEIC Act). Paragraph (d) of the definition of 'law enforcement agency' in subsection 5(1) of the LEIC Act allows agencies within ACLEI's jurisdiction to be added by regulation. The then Attorney-General the Hon Phillip Ruddock's Second Reading speech to the LEIC Act on 29 March 2006 expressly stated that '*the Australian government agencies with law enforcement functions may later be brought within the jurisdiction [of ACLEI] by regulations.*'

Further, the Explanatory Memorandum to the LEIC Act identified that (when discussing the general regulation making power in section 224):

*'in the future, it may be necessary for the Regulations to prescribe other agencies to be included as a 'law enforcement agency' for the purposes of the Bill and Clause 5 currently reflects that any additional Commonwealth government agencies may be prescribed by regulation'* at page 99 (emphasis added).

There are various mechanisms throughout the LEIC Act which allow for the expansion of ACLEI's jurisdiction by delegated legislation. For example, subsection 10(4) and 10(5)(d) of the LEIC Act provide that 'staff members' and 'seconded' of the prescribed law enforcement agencies can be also be prescribed by regulation. Paragraph (c) of the definition of 'head' in subsection 5(1) of the LEIC Act provides that the 'head' of such agencies can be prescribed by regulation. Subsection 6(2) of the LEIC Act limits ACLEI's jurisdiction to those prescribed law enforcement agencies that 'engage in corrupt conduct' in relation to the performance of 'law enforcement functions'.

In my view, it remains appropriate that the Government be able to extend ACLEI's jurisdiction in a flexible way to respond to the way agencies evolve and corruption risks emerge.

Additionally, there is precedent for expanding ACLEI's jurisdiction by delegated legislation utilising the mechanisms described above. For example, the *Law Enforcement Integrity Commissioner Amendment Regulations 2010 (No.1)* (2010 Regulations) prescribed the then Australian Customs and Border Protection Service as a law enforcement agency within ACLEI's jurisdiction. My department has not been able to find any record of scrutiny concerns the Committee raised in relation to the 2010 Regulations, though the Explanatory Statement to these regulations did not specify why ACLEI's jurisdiction was expanded via delegated legislation at that time.

In light of the matters outlined above, it is clear that the Parliament has previously considered it appropriate for ACLEI's jurisdiction to be expanded via delegated, rather than primary, legislation. I believe this approach continues to be necessary. Accordingly, I consider the recent expansion of ACLEI's jurisdiction via Regulation to be appropriate.

### ***Oversight of ACLEI***

In considering this matter, the Committee may wish to have regard to the various oversight arrangements for ACLEI. These arrangements ensure that ACLEI uses its expanded jurisdiction appropriately. For example, ACLEI is subject to oversight by various bodies, including through the following measures:

- the Commonwealth Ombudsman, who must brief the Committee once a year about the Integrity Commissioner's involvement in controlled operations under Part IAB of the *Crimes Act 1914* (LEIC Act, section 218)
- the Parliamentary Joint Committee on the ACLEI which must, among other things, monitor and review the Integrity Commissioner's performance of his or her functions, report to both Houses of Parliament on matters connected with the performance of the Integrity Commissioner's functions or relating to ACLEI, and examine each annual report or special report prepared by the Integrity Commissioner (LEIC Act, section 215)
- the Minister, who ACLEI must report to after completing an investigation (LEIC Act, section 54).

Further, the Integrity Commissioner must report on a range of matters in its annual report. These include prescribed particulars of corruption issues notified to the Integrity Commissioner, corruption issues dealt with by the Integrity Commissioner on his or her own initiative, and ACLEI corruption issues investigated during that period (LEIC Act, section 201(a)). These arrangements ensure ACLEI is subject to oversight as it extends its jurisdiction over the agencies prescribed in the Regulations.



***Consultation with agencies affected***

The Attorney-General's Department consulted extensively with each of agencies prescribed in the Regulations and worked with agencies to ensure the Regulations were fit for purpose.

***Commonwealth Integrity Commission***

Finally, I advise that the expansion of ACLEI's jurisdiction is a crucial component of the Government's commitment to establish the Commonwealth Integrity Commission (CIC). The expansion of ACLEI's jurisdiction is phase one of the two-phased implementation of the Government's CIC, ahead of the commencement of the proposed CIC legislation.

The CIC will be a centralised, specialist centre investigating corruption in the public sector. It will be established as an independent statutory agency, led by the Integrity Commissioner and assisted by the Law Enforcement Integrity Commissioner and the Public Sector Integrity Commissioner. The CIC will comprise two divisions:

- a law enforcement integrity division – this will have the same functions and powers as ACLEI, but with a broader jurisdiction. The CIC would be established as a new independent statutory agency, with the law enforcement integrity division subsuming and replacing ACLEI.
- a public sector integrity division – this will investigate alleged criminal corruption involving government departments and their staff, parliamentarians and their staff, the staff of federal judicial officers, and in appropriate circumstances, recipients of Commonwealth funds.

The first phase of the government's plan for a CIC is provided for in the Regulations through the expansion of ACLEI's jurisdiction over the prescribed agencies. Given the unique corruption risks posed by agencies exercising law enforcement functions, Government viewed it as both necessary and appropriate to expand ACLEI's jurisdiction to these agencies ahead of the CIC's establishment. The second phase of the implementation of the CIC will be the full delivery of the CIC by legislation which, if passed by Parliament, will subsume ACLEI and cover the remainder of the public sector.

The CIC legislation will provide legislative coverage by way of primary legislation for all agencies covered by the CIC's jurisdiction including those currently included in the Regulations.

Thank you again for bringing the Committee's concerns to the Government's attention. I trust this information is of assistance to you.

Yours sincerely

**The Hon Christian Porter MP**  
Attorney-General  
Minister for Industrial Relations  
Leader of the House