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Australian Government

Australian Commission for  
Law Enforcement Integrity

# Inquiry into the expansion of the Australian Commission for Law Enforcement Integrity's jurisdiction and the corruption vulnerabilities of law enforcement agencies' contracted services

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Submission by the Australian Commission for Law Enforcement  
Integrity to the Parliamentary Joint Committee on ACLEI

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# Introduction

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on ACLEI's Inquiry into the expansion of ACLEI's jurisdiction and the corruption vulnerabilities of law enforcement agencies' contracted services and partnerships with non-law enforcement agencies. Our submission addresses the inquiry's terms of reference in 4 parts:

1. First, providing an overview of ACLEI's jurisdiction under the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act)
2. Second, considering the expansion of ACLEI's jurisdiction to 4 additional agencies, including:
  - the ongoing support ACLEI is providing to those agencies to ensure the agencies and their staff understand ACLEI's role and the matters that must be referred to the Integrity Commissioner under the LEIC Act, and to support those agencies to prevent corruption and strengthen internal integrity frameworks.
  - the complexities arising from those agencies being brought into jurisdiction via amendments to the Law Enforcement Integrity Commissioner Regulations 2017 (LEIC Regulations).
  - managing the impacts on ACLEI as an organisation – balancing the need to significantly expand our workforce while maintaining a high operational tempo in relation to the agencies already in our jurisdiction and supporting the new agencies.
3. Third, examining the potential corruption vulnerabilities associated with:
  - contracts for the provision of services to agencies
  - the 'outsourcing' of law enforcement functions to external parties, and
  - partnerships between law enforcement agencies and other government agencies.
4. Fourth, examining potential corruption risks associated with other arrangements between law enforcement agencies and the private sector.

## Part 1: ACLEI's jurisdiction

The office of the Integrity Commissioner and ACLEI are established by the [Law Enforcement Integrity Commissioner Act 2006](#) (LEIC Act). Under the LEIC Act, the Integrity Commissioner has jurisdiction to investigate allegations of corrupt conduct by staff members of law enforcement agencies under her jurisdiction. Prior to 1 January 2021, these agencies were:

- Australian Criminal Intelligence Commission (ACIC)
- Australian Federal Police (AFP) (including ACT Policing)
- Australian Transaction Reports and Analysis Centre (AUSTRAC)

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- prescribed aspects of the Department of Agriculture, Water and the Environment (DAWE)
- Department of Home Affairs (Home Affairs), including the Australian Border Force (ABF).

In this submission, we refer to these agencies as 'pre-expansion agencies'.

From 1 January 2021, the agencies subject to the Integrity Commissioner's jurisdiction were expanded by amendments to the [Law Enforcement Integrity Commissioner Regulations 2017](#) (LEIC Regulations) to include:

- Australian Competition and Consumer Commission (ACCC)
- Australian Prudential Regulation Authority (APRA)
- Australian Securities and Investments Commission (ASIC)
- Australian Taxation Office (ATO).

In this submission, we refer to these agencies as 'expansion agencies'.

## Corruption issue

An allegation will fall within ACLEI's jurisdiction if it is a **corruption issue**. A corruption issue is defined in section 7 of the LEIC Act as:

- (a) For the purposes of this Act, a *corruption issue* is an issue whether a person who is, or has been, a staff member of a law enforcement agency:
  - (a) has, or may have, engaged in corrupt conduct; or
  - (b) is, or may be, engaging in corrupt conduct; or
  - (c) will, or may at any time in the future engage in corrupt conduct.
- (b) To avoid doubt, an allegation, or information, may raise a *corruption issue* even if the identity of the person is unknown, is uncertain or is not disclosed in the allegation or information

For the pre-expansion agencies, the LEIC Act provides two limbs that need to be satisfied for an allegation to be a corruption issue.

For the post-expansion agencies, the LEIC Act provides an additional third limb that needs to be satisfied for an allegation to be a corruption issue.

The first two limbs that apply to all agencies are:

1. Is the allegation about a person who is or was a staff member of a law enforcement agency?
2. Is the allegation that the person, while a staff member, engaged, may be engaging or will engage in corrupt conduct?

For the pre-expansion agencies, if the allegation meets both of these two limbs, then the matter falls within the Integrity Commissioner's jurisdiction under the LEIC Act.



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For the expansion agencies (ACCC, APRA, ASIC and ATO) a third test must also be satisfied.

3. Does conduct alleged relate to the performance of one of the agency's law enforcement functions?

## Staff members

Section 10 of the LEIC Act and ss 7 and 7A of the LEIC Regulations define the term 'staff member' for each agency. As shown in Appendix A: 'Staff members' of each agency, the coverage of the definition varies between agencies. In general terms:

- the agency head, all employees engaged under the *Public Service Act 1999* or equivalent agency legislation, and statutory office holders are considered 'staff members' for all agencies except DAWE.
  - For DAWE, s 7 of the LEIC Regulations defines a limited class of persons as 'staff members' in addition to the Secretary of DAWE – namely, persons holding or acting in the position of Regional Manager; staff whose duties include undertaking assessment, clearance or control of vessels or cargo imported into Australia and staff who have access to the Integrated Cargo System. The term 'staff' is not defined and so it is not clear whether it would encompass consultants, contractors or secondees engaged by DAWE.
- coverage of secondees, consultants and contractors varies from agency to agency, in many cases relying on these people having been engaged under specific provisions of the enabling legislation (rather than through a commercial contractual arrangement).

The coverage of consultants and contractors is relevant to terms of reference (b) – (d) and is discussed in more detail below at Part 3.

## Engages in corrupt conduct

*Engages in corrupt conduct* is defined in section 6 of the LEIC Act. A staff member of a law enforcement agency engages in corrupt conduct if, while a staff member of that agency, they engage in conduct that:

- involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of the agency
- perverts, or that is engaged in for the purpose of, perverting, the course of justice
- having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind.

For the pre-expansion agencies, if the allegation meets both of these two limbs, then the matter falls within the Integrity Commissioner's jurisdiction under the LEIC Act.

For the expansion agencies (ACCC, APRA, ASIC and ATO) a third test must also be satisfied.

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## **Third test for expansion agencies – the law enforcement function test**

Subsection 6(2) of the LEIC Act requires that, for staff members of agencies prescribed by the LEIC Regulations, the conduct alleged must also relate to the performance of one of the agency's law enforcement functions.

Section 5 of the LEIC Act provides that a law enforcement function means any of the following:

- (a) investigating whether:
  - (i) an offence has been committed against a law of the Commonwealth; or
  - (ii) there has been a contravention of a law of the Commonwealth in relation to which civil penalty proceedings may be brought;
- (b) preparing the material necessary to prosecute a person for an offence against a law of the Commonwealth;
- (c) preparing the material necessary to bring civil penalty proceedings against a person for a contravention of a law of the Commonwealth;
- (d) collecting, maintaining, correlating, analysing, accessing or distributing information for the purpose of assisting the enforcement of laws of the Commonwealth;
- (e) assisting in carrying out a function referred to in paragraphs (a) to (d).

Under this definition, the relevant agency functions are those that are closely associated with the investigation of breaches of criminal offence provisions or civil penalty provisions – both of which are issues ultimately decided by a court. This is distinct from regulatory or administrative processes where the agency exercises the role of decision maker by imposing sanctions for non-compliance.

Also under subs 6(2) the alleged conduct must 'relate to' the performance of a law enforcement function. ACLEI takes the view that this term should be interpreted broadly to encompass conduct which has either a direct or indirect relationship with a law enforcement function. Importantly, it is the conduct that must relate to the law enforcement function, rather than the staff member's role or the position which the staff member occupies. This requires a case-by-case assessment of the facts of each allegation.

The factsheets at Appendix B and Appendix C provide some examples of the definition of corrupt conduct and how the law enforcement function test might apply.

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## Part 2: The expansion of ACLEI's jurisdiction from 1 January 2021

### Engaging with and supporting expansion agencies

The expansion of ACLEI's jurisdiction was announced by the Government in the October 2020 Federal Budget. During the intervening period before amendments to the LEIC Regulations commenced on 1 January 2021, ACLEI and the four expansion agencies engaged closely through a series of roundtables, workshops and meetings. These engagements had several aims:

- building the partnership between ACLEI and the expansion agencies
- ensuring key personnel in each agency - including agency heads, senior executives with responsibility for internal integrity frameworks and officers who implement those frameworks - had a clear understanding of ACLEI's role, their obligations under the LEIC Act and the support ACLEI was able to offer them both in terms of potential notifications and investigations of alleged corrupt conduct, and to support their corruption prevention efforts.
- providing ACLEI with an initial understanding of the law enforcement functions, corruption risks and vulnerabilities and internal integrity frameworks of each agency.

As with all LEIC Act agencies, ACLEI's relationships with key personnel are essential to the success of the partnership model established by the LEIC Act. As noted in the [Integrity Commissioner's 2019-20 Annual Report](#):

The LEIC Act establishes a framework within which the Integrity Commissioner and the heads of the agencies under ACLEI's jurisdiction work in partnership to detect and investigate corruption issues and prevent corrupt conduct within those agencies.

This arrangement recognises both the continuing responsibility that agency heads have for the integrity of their staff members and the role that the Integrity Commissioner, as an independent decision-maker, plays in the law enforcement integrity framework.<sup>1</sup>

Following our initial engagement with expansion agencies, ACLEI developed the factsheets at Appendix B and Appendix C on the definition of corruption and the law enforcement function test to assist staff in the expansion agencies to identify corruption issues for the purpose of notifying ACLEI.

The Integrity Commissioner meets regularly with the heads of all agencies within her jurisdiction. These meetings provide opportunities to discuss matters notified to ACLEI, agency frameworks to prevent, detect and notify ACLEI of corruption, corruption risks and vulnerabilities and the support that ACLEI can provide.

ACLEI's Executive Directors for Operations meet monthly with the integrity and internal investigations units of agencies within ACLEI's jurisdiction. This enables them to discuss

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<sup>1</sup> [Annual report of the Integrity Commissioner 2019-20](#), pp 8-9.

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potential notifications of corrupt conduct and whether they come within ACLEI's jurisdiction (specifically for expansion agencies, whether the staff member exercises a law enforcement function); corruption vulnerabilities; ongoing ACLEI and agency investigations; and areas for ACLEI's support to strengthen integrity frameworks.

ACLEI is also working closely with other integrity agencies with jurisdiction over these agencies. For example, we are exploring with the Inspector-General of Taxation and Taxation Ombudsman potential areas for collaboration in the context of ACLEI's and IGTO's oversight of the ATO.

## **Corruption vulnerabilities and prevention in the expansion agencies**

The four expansion agencies are in some ways different to the pre-expansion agencies in terms of their functions and powers, the stakeholder groups with which they work most closely and the skills and expertise of the staff they employ. However, there is still a great deal of commonality in terms of the corruption vulnerabilities that arise for all nine LEIC Act agencies – and for all government agencies. Over the last 12 months, some of the key corruption risks ACLEI has observed and which arise for all agencies include:

- unauthorised access to and disclosure of sensitive information
- the potential for the corruption of decision making processes – especially high volume processes
- the risk of officers being groomed by commercial or criminal entities with a view to corrupting the officers
- vulnerabilities associated with corruption in high value procurements, including ICT contracting.

All four expansion agencies have in place key elements of an internal integrity framework:

- employees are bound by a Code of Conduct (either the Australian Public Service (APS) Code of Conduct or an agency-specific equivalent)
- an agency-wide fraud and corruption control plan is maintained and reviewed every two years (as required under the Public Governance, Performance and Accountability Act 2013 (PGPA Act))
- some form of pre-employment screening or suitability check is undertaken on potential employees
- policies are in place on managing conflicts of interest, secondary employment, information and systems access and the giving and receiving of gifts, benefits and hospitality
- there are mechanisms for the public to report suspected corruption by agency officers, and
- procedures are in place for managing internal investigations.

Other important elements of an integrity framework are in place in some of the expansion agencies at varying levels of maturity. These include:

- ongoing suitability assessments



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- mechanisms for early identification of and intervention with staff who may be at risk of becoming corrupted
- agency-wide, team or role specific integrity training
- procurement governance and integrity frameworks
- proactive systems access audits, or
- internal reporting mechanisms allowing staff members to report integrity concerns.

ACLEI is working with all agencies within the Integrity Commissioner's jurisdiction to identify opportunities to enhance and strengthen their frameworks. Some potential areas of focus include supporting the agencies that do not currently have in place ongoing and targeted integrity training, protected internal reporting frameworks and practices to monitor and audit unauthorised access to agency systems.

One of the key vehicles for this support is through ACLEI's quarterly Corruption Prevention Community of Practice (CPCoP) which brings together integrity and investigations managers from all 9 agencies within ACLEI's jurisdiction. This forum provides an invaluable opportunity for the sharing of insights and good practices in identifying corruption vulnerabilities and corruption prevention strategies. Key themes explored in the 3 meetings held to date in 2021 have include corruption in IT contracting and procurement and unauthorised access and disclosure of sensitive information.

ACLEI provides classified briefings to agencies about potential corruption vulnerabilities based on observations from our operational work. With the establishment of our new Strategic Intelligence and Data Analysis team and expansion of our Corruption Prevention team, we will be able to provide agencies with insights into emerging or recurrent corruption risks and vulnerabilities in a more timely way.

We are currently in the process of developing our next corruption prevention strategy. The strategy will involve close collaboration with other stakeholders including the Commonwealth Fraud Prevention Centre, the Criminal Justice and Law Enforcement Forum and the newly formed APS Academy to share our insights into these vulnerabilities and to promote best practice approaches to prevention.

## **Challenges arising from the prescription of agencies under the LEIC Regulations**

The addition of the 'law enforcement function' test as a third step in assessing whether an allegation relating to an expansion agency falls within the Integrity Commissioner's jurisdiction adds significant complexity for both ACLEI and those agencies. This additional complexity arises because the agencies were brought into ACLEI's jurisdiction by amendments to the LEIC Regulations, rather than being prescribed through amendments to the LEIC Act – thus enlivening the requirements of subs 6(2).

The four expansion agencies carry out a range of functions, many of which relate to regulation and compliance – for example, regulating industry behaviour, monitoring compliance with legal obligations and imposing administrative sanctions for non-compliance. A much smaller proportion of the functions of these agencies would be considered to have a close enough connection to the investigation or prosecution of potential breaches of Commonwealth criminal offences or civil penalty provisions to fall within the meaning of 'law enforcement functions' in s5 of the LEIC Act.

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Further complexity arises because the staff member's conduct need only 'relate to' the performance of one of these law enforcement functions. This has two consequences:

- many staff members of these agencies do not play a direct role in the exercise of the law enforcement functions. Nevertheless, their conduct may 'relate to' those functions if there is a real but indirect connection between their conduct and one of the agency's law enforcement functions.
- the mere fact that a staff member works in an area of the agency that is responsible for exercising law enforcement functions is not necessarily sufficient for their conduct to relate to the law enforcement function of the agency, although it may be a good indicator.

## Referrals and notifications relating to the expansion agencies to 30 September 2021

While the expansion agencies have been proactive in detecting and notifying ACLEI of suspected corruption issues, the number of notifications and referrals have not been as high as expected, given ACLEI's experience with the then Department of Immigration and Border Protection (now Home Affairs) coming fully within ACLEI's jurisdiction on 1 July 2015. There may be various reasons for this, however it is in part due to the impact of the additional 'law enforcement function test' which has also resulted in an increase in the time required to assess those notifications and referrals.

As shown in Table 1 below, between 1 January and 30 September 2021 ACLEI received 23 referrals or notifications relating to the expansion agencies.

**Table 1.** Expansion agency matters received 1 January - 30 September 2021

Expansion agency matters received for assessment 1 January – 30 September 2021	APRA	ASIC	ATO	Total
<b>Total matters received</b>	<b>1</b>	<b>9</b>	<b>13</b>	<b>23</b>
Agency head notifications	1	3	8	12
Referrals from other sources (including members of the public)		5	5	10
Integrity Commissioner own-initiative		1		1
<b>Outcome of assessment of matters received</b>				
Matters assessed as raising a corruption issue		1	4	5
Matters assessed as being out of jurisdiction		6	5	11
Under assessment at the end of the period	1	2	4	7
<b>Investigations commenced into matters assessed as raising a corruption issue</b>		1	4	5
Joint investigation commenced [s26(2)]			2	2
Unsupervised agency investigation commenced [s26(1)(b)(iii)]		1	2	3

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Three matters relating to the expansion agencies received by ACLEI during this period were determined to be outside of ACLEI's jurisdiction only because the conduct alleged did not relate to a law enforcement function of the agency.

ACLEI continues to encourage all agencies to notify all matters that may meet the threshold for a corruption issue, to enable ACLEI to better understand corruption risks and vulnerabilities and explore the limits of the law enforcement function test.

Applying the law enforcement function test adds significantly to the time taken to assess whether the matters fall within jurisdiction. ACLEI sought internal legal advice in relation to 5 matters; external legal advice in relation to 3 matters; and further information from the source of the notification or referral in 8 matters. The delays involved in obtaining legal advice or seeking further information may significantly impact subsequent investigations, such as avenues for inquiry no longer being available, loss or destruction of evidence, or witness, suspect or asset flight.

There is also added complexity for members of the public who may wish to refer a matter to ACLEI relating to expansion agencies, or who complain to the agencies directly about potential corrupt conduct. For example, the majority of the 7 matters assessed relating to ASIC arose from complaints made to ASIC and then referred to ACLEI or made directly to ACLEI by people who are the subject of ongoing enforcement action by ASIC or who are disgruntled with the outcome of enforcement action against their own or another company. The complaints related to the exercise of a mixture of regulatory (non-law enforcement) and law enforcement functions by ASIC officers. Only 1 of the 7 matters assessed relating to ASIC has been determined to be within the Integrity Commissioner's jurisdiction.

## The impact of expansion on ACLEI as an organisation

At the same time as supporting this high level of engagement with the expansion agencies, ACLEI maintained a high operational tempo in relation to the pre-expansion agencies and commenced a significant recruitment campaign to expand our workforce to support the new jurisdiction.

The October 2020 Federal Budget provided ACLEI with an additional \$8.5 million in operating funding and 39 ASL (average staffing level) to support the expansion of ACLEI's jurisdiction. From 2021-22, ACLEI's base annual budget and staffing profile has effectively doubled (compared with 2019-20) to \$26.3 million and 110 ASL. The scale of the growth required is especially significant for an agency of ACLEI's size. During the course of 2020-21, ACLEI undertook 23 recruitment processes – some for multiple positions, including the recruitment of 2 new Executive Directors of Operations – and significantly restructured our organisation.

Our Corporate Services and Governance Branch expanded across the year to support the growth in the rest of the organisation. This has allowed us to invest greater resources into our essential corporate services, such as information technology, human resources and financial management. Work has also been underway to ensure that our governance arrangements and processes will support a significantly larger organisation and jurisdiction.

We now have two Operations Branches, we have increased our number of operations teams and will continue to recruit investigators and intelligence analysts in 2021-22.

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While that recruitment is ongoing, it is pleasing to see that we are attracting large numbers of applicants to our roles. We have invested more resources into our Intake and Assessment function and established an Operational Support, Coordination and Agency Investigation team. The establishment of the Operational Support team recognises the expected increase in matters referred to ACLEI from all agencies and the consequential need to provide additional operational support to our investigations, by bringing together the units which support our operational activity. The team will also allow us to take a more proactive approach in our dealings with jurisdictional agencies on matters which have been referred back to them under s26 of the LEIC Act. The team will work with those agencies to foster a more collaborative approach to enable them to effectively manage this suite of investigations.

We have also stood up a new Strategic Intelligence and Data Analysis section. This team will look across our suite of investigations to identify themes and trends relating to our work; these will be shared with our jurisdictional agencies and with our Corruption Prevention section to ensure we are proactively engaging with our agencies to mitigate corruption risks.

While managing this internal expansion and change, we continued to perform well in relation to our key activities. During 2020-21, we assessed the largest number of matters containing allegations of corrupt conduct and provided the most reports to the Attorney-General of completed investigations in any year in our 15-year history. The timeliness of our investigations has continued to improve, with the average duration of finalised investigations commenced in 2019 or later reducing to 427 days (across all kinds of closure or finalisation). This represents a significant improvement, which can be attributed to the process improvements that we have made over the past 2 years as outlined in our annual reports. Our corruption prevention outreach continued, although at a reduced pace compared with other years as the Corruption Prevention team pivoted during the first half of the financial year to be our main coordination point for our support for and engagement with the expansion agencies.

## **Part 3: Corruption vulnerabilities associated with contracted service arrangements, outsourcing of functions and partnerships with non-law enforcement agencies**

### **Corruption risks associated with contracted services and outsourced functions**

All agencies engage external providers to perform services for them under contract. ACLEI, for example, has contracts in place for cleaning, security and payroll management. We engage expert contractors and consultants to provide us with advice on specific issues – for example risk or financial management. We also receive ICT services under a Memorandum of Understanding (MoU) with the Attorney-General's Department. In this submission, we refer to these as 'contracted services'.

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Agencies may also engage external parties to assist them in performing the law enforcement functions of the agency – for example, by engaging external parties to deliver specific aspects of a law enforcement function like forensic analysis, investigations or audits. Some agencies outsource the delivery of a particular function of the agency, which may involve the exercise of an agency's law enforcement functions. For example, the provision of detention services at immigration detention facilities in Australia is outsourced to a private entity under arrangements managed by the Department of Home Affairs (see the case study below). In this submission, we call these 'outsourced functions'.

As detailed in Part 1, ACLEI's jurisdiction over the providers of contracted services and outsourced functions, and the personnel or subcontractors they engage to deliver those services or functions, will depend on whether the terms of their engagement by the agency would meet the requirements of the definition of a 'staff member' for that agency in the LEIC Act or LEIC Regulations.



**OFFICIAL****Case Study: ACLEI's jurisdiction over immigration detention service providers**

Immigration detention is a key feature of Australia's border protection regime. Since 2009, Home Affairs has contracted Serco Pty Ltd to provide immigration detention facilities and detainee services in Australia. Serco employs more than 2000 staff to provide a range of services including security, detainee welfare and detainee engagement. Serco also subcontracts security services to Wilson Security and MSS Security.

Under subs 10(2A) of the LEIC Act, Home Affairs staff members relevantly include categories of employees listed in the Minister for Home Affairs' Migration Officers Authorisation. The current Minister for Home Affairs' Migration Officers Authorisation covers only those roles considered to be performing roles consistent with migration officers under the Migration Act. This means that other contracted staff working in the detention centre environment are outside the jurisdiction of ACLEI.

Corruption risks associated with the outsourcing of criminal detention and corrections services have been the subject of investigations by state-based integrity agencies.<sup>2</sup> Concerns identified in these investigations include the trafficking of contraband (including illicit drugs) into detention centres; false accusations and fraudulent covering up of complaints.

Pursuant to its obligations under the LEIC Act, Home Affairs notifies ACLEI of any suspected corrupt conduct in detention centres by Home Affairs (ABF) staff members and Serco employees subject to the Integrity Commissioner's jurisdiction. Serco reports certain integrity incidents to Home Affairs in accordance with its contractual obligations. ACLEI also receives referrals directly from the public, including detainees, in relation to alleged corruption by ABF and Serco officers in Australia's onshore immigration detention centres.

Between 1 July 2015 and 30 Sept 2021, ACLEI assessed 45 referrals or notifications relating to immigration detention centres as containing allegations of corruption issues. Thirty-two of these allegations specifically related to Serco officers. Twenty-three of these matters have been closed and 22 remain open, either in the context of agency or ACLEI investigations or ongoing ACLEI assessment processes.

**Corruption by staff members involved in procurement processes**

There are a range of corruption risks associated with the procurement and delivery of contracted services and outsourced functions.

If contracted services and outsourced functions are used by agencies, they are likely to go through a procurement process. ACLEI can investigate allegations that LEIC Act agency staff members engaged in corrupt conduct in relation to the procurement of

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<sup>2</sup> Victoria Independent Broad-Based Anti-Corruption Commission (IBAC), [Special Report on Corrections](#) (2021); South Australia Independent Commissioner against Corruption (ICAC), [Evaluation of the Practices, Policies and Procedures of the Department for Correctional Services](#) (2021).

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services.<sup>3</sup> Corruption in procurement processes is not a risk unique to law enforcement agencies. For example, the Committee may be aware of recent high profile cases involving corruption in the procurement processes of Commonwealth agencies, such as the alleged defrauding of the Department of Finance by a group of IT contractors.<sup>4</sup>

In ACLEI's investigations into agency procurement processes, the main corruption vulnerabilities identified relate to abuse of office and failures to appropriately disclose or manage conflicts of interest.<sup>5</sup> Abuse of office can involve staff members responsible for contract management circumventing procurement governance and integrity frameworks to manipulate outcomes in favour of a preferred tenderer, which may result in a contract not being awarded to the best qualified tenderer or at an inflated price. This can give rise to misuse of Commonwealth resources and potentially create a scenario where the official is paid kickbacks from the successful tenderer. Conflicts of interest can give rise to staff members involved in the procurement deriving personal interests (for example, through increased dividends if the contract is awarded to a company in which they are a shareholder) or providing undue benefits to personal associates (for example, through granting contracts to companies owned or operated by family or associates). In an ACLEI investigation, Operation Iceland, the former Integrity Commissioner recommended strengthening conflict of interest declaration frameworks, including processes to obtain approval for secondary employment, as one means to combat these vulnerabilities.

State and Territory integrity agencies have concluded multiple investigations into corrupt conduct in procurement processes, identifying corruption risks ranging from fraud and conflicts of interest, to abuse of office, false invoicing, bribery and secret commissions.<sup>6</sup> Recommendations included safeguarding confidential tender information; identifying and assessing corruption risks at each stage of procurement; properly declaring and managing conflicts of interest; undertaking adequate due diligence on contractors and suppliers, and implementing systems for identifying and reporting red flags related to projects and procurement activities.<sup>7</sup>

The Australian National Audit Office (ANAO), which plays a key role in auditing procurements undertaken by all Commonwealth agencies including the agencies within ACLEI's jurisdiction,<sup>8</sup> also emphasises the importance of these integrity measures. For example, in a recent audit in relation to emergency procurements the ANAO found that deciding not to use the *Commonwealth Procurement Rules* using the exemptions set out in para. 2.6 'created additional risks to the proper use of public resources and

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<sup>3</sup> For expansion agencies, the law enforcement function test would need to be satisfied.

<sup>4</sup> See, for example, <https://www.afp.gov.au/news-media/media-releases/three-men-charged-conspiracy-defraud-commonwealth>.

<sup>5</sup> See, for example, ACLEI Website: [Investigation Report 01/213: Operation Iceland – An investigation into the conduct of an Australian Federal Police appointee in relation to a conflict of interest in procurement and official duties](#).

<sup>6</sup> See, for example, QLD CCC: [Prevention in focus – When conflicts of interest in procurement result in criminal convictions](#) (September 2021); NSW ICAC: [Corruption Prevention advice topics – Procurement](#); Victoria IBAC: [Preventing corruption: Are you vulnerable to corruption? Procurement](#).

<sup>7</sup> See, for example, [NSW ICAC: Operation Yarrow Investigation Report](#) (2019).

<sup>8</sup> See, for example, [Auditor-General Report No. 32 of 2005-06, Management of the Tender Process for the Detention Services Contract](#); [Auditor-General Report No. 37 of 2019-20, Procurement of Garrison Support and Welfare Services](#).

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achievement of outcomes.<sup>9</sup> The ANAO found in this case that conflict of interest declarations were late and incomplete, and that there were inadequacies in record-keeping and due diligence checks of suppliers.<sup>10</sup>

Integrity in procurement processes will be a key focus of ACLEI's forthcoming corruption prevention strategy. As this is a risk common to all agencies, we are working with other agencies across Government – including the Commonwealth Fraud Prevention Centre at the Attorney-General's Department – to ensure that agencies have access to the latest information and best practice guidance on addressing this risk.

## **Unauthorised access to or disclosure of sensitive information**

Law enforcement agencies hold a range of sensitive information. Misuse of information or systems is an ongoing corruption vulnerability affecting all agencies within ACLEI's jurisdiction. Misuse of information is not a risk unique to law enforcement agencies.<sup>11</sup> Information is a key commodity for organised criminal groups, corporate entities, foreign actors and others who may seek to exploit it for personal gain.

Inappropriate or unlawful access to or disclosure of this information could cause serious harm:

- to the ongoing efficacy of the agency's (and other law enforcement agencies') operations, through the disclosure of law enforcement methodologies.
- to the personal safety, privacy and reputation of individuals about whom the agency holds information.
- to fair and open market competition, when confidential tender, project or commercial information is disclosed to individuals or corporate entities seeking to gain an advantage.
- to the community in circumstances where sensitive information is provided to criminal entities to facilitate further criminality, avoiding law enforcement detection and/or defeating law enforcement agency investigations.

Some of the LEIC Act agencies grant other agencies and external service providers access to their internal information systems to facilitate the delivery of services or performance of functions. These can include, for example, IT companies and contractors; security companies and contractors; and human resources and employment services companies and contractors. The following measures can be effective in monitoring and mitigating corruption risk in external access to information systems:

- clear, unbiased, accountable and recorded processes for determining the grounds on which providers are granted access
- conditions for acquiring access, including due diligence on individuals and entities and mandatory confidentiality agreements prior to granting access

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<sup>9</sup> [Auditor-General Report No. 39 of 2020-21: COVID-19 Procurements and Deployments of the National Medical Stockpile](#) (27 May 2021).

<sup>10</sup> Ibid.

<sup>11</sup> See, for example, <https://www.cdpp.gov.au/news/insider-traders-kamay-and-hill%E2%80%94now-inside-gaol>.

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- clear communication of the conditions governing systems access and consequences for breach of those conditions
- user-specific access controls and encryption
- proactive auditing of external service providers' access to and use of agency information systems.

**Personnel may not be fit to perform outsourced functions and/or access sensitive information**

Agencies are generally unable to directly control who is engaged by an external party to deliver services or perform a function under contract. Unlike agency employees, individuals delivering the functions or services on behalf of a contracted provider may not be subject to the same level of pre-employment or ongoing suitability screening – creating a risk that unsuitable people are engaged to perform those functions or continue to perform functions despite no longer being suitable.

The terms of an employment contract or subcontract for those delivering the functions or services on behalf of a contracted provider are determined by the provider and may not be the same as for agency employees. They do not necessarily undergo similar mandatory integrity training or have the same professional training requirements as their counterparts in government agencies.

For example, all LEIC Act agency employees are required to comply with relevant Codes of Conduct that set out standards of behaviour that they must uphold. If agency employees are accused of wrongdoing, procedures to investigate the allegation (or refer the allegation to ACLEI or another oversight body as appropriate) will be enacted and sanctions can be imposed if allegations are proven. This system of clear expectations, processes and sanctions has a deterrent effect but also incentivises agency employees to support a pro-integrity culture.

Conversely, personnel or subcontractors engaged by a contracted provider are not necessarily subject to the same expectations of behaviour (e.g. through Codes of Conduct) or corresponding potential sanctions. While private sector employers must comply with regulatory requirements and often have in place internal compliance policies and procedures, these vary significantly depending on the company size and sector. Corporate entities may decide on commercial grounds not to investigate allegations of wrongdoing, preferring instead to terminate the employment or contract of the subcontractor/employee.

**General measures to combat these corruption risks**

In addition to measures to combat the risks identified above, initial and ongoing due diligence on external service providers is an effective way to identify potential corruption.

Contractual obligations, including mandatory or discretionary exclusion clauses, can provide an effective tool to enforce integrity and anti-corruption procedures. To mitigate the integrity risks posed by personnel or subcontractors engaged by external providers to support or deliver key agency functions, agencies could consider including robust integrity requirements in their contracts with the providers. These could include:

- contractual requirements for the provider to undertake employee screening (e.g. regular police checks)

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- implementation of mandatory conflict of interest and asset declarations
- requiring compliance with Codes of Conduct
- regular integrity training, and
- requiring the investigation and reporting of integrity incidents by the contracting agency.

Agencies could also provide contractors with integrity training and communications tools for use with their personnel, to help strengthen the integrity culture and align organisational objectives with those of the contracting agency.

## **Corruption risks associated with partnerships between law enforcement agencies and other government agencies**

### **Outsourcing the delivery of law enforcement functions to other law enforcement agencies**

ACLEI engages other law enforcement agencies through MoUs and letters of exchange to provide services in relation to telecommunications interception, surveillance devices, physical surveillance and digital forensics to assist with our investigations. We also have arrangements in place to enable access to hearing rooms as we do not have our own hearing rooms.

For ACLEI, these outsourcing arrangements are essential. The functions performed or resources provided are highly specialised and expensive, well beyond what an agency of ACLEI's size could maintain, but essential to our ability to effectively investigate corrupt conduct. However, we recognise that there are potential risks associated with the outsourcing of these functions to other agencies. These include the potential for:

- sensitive ACLEI information to be accessed by or disclosed to a person of interest – potentially tipping them off to ACLEI's investigation, or
- personnel of the other agency actively undermining ACLEI's investigation, for example by acting unlawfully, misusing official powers, intentionally concealing or corrupting the outcomes of an activity.

ACLEI has in place measures to mitigate these risks. In particular, before engaging an agency to provide a particular service or resource, we actively consider if there are any potential conflicts of interest – for example, relating to the subject of the investigation. If any conflicts are identified, we source the service or resource from another agency.

### **Working in partnership with non-law enforcement agencies**

Law enforcement agencies often work in partnership with non-law enforcement agencies in the course of delivering their functions – for example, as part of a joint investigation or through informal cooperation to share information.

While many of the same corruption risks arise with these partnerships as are identified in relation to contracted service providers and the outsourcing of functions, there are arguably more robust and consistent controls in place that mitigate these risks for partnership with non-law enforcement agencies due to the respective obligations under applicable Commonwealth laws and frameworks. Commonwealth agencies are also



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engaged in APS-wide work to build and maintain a pro-integrity culture following recent independent reviews of the Australian Public Service and its approaches to ensure institutional integrity.<sup>12</sup>

For example, at the Commonwealth level, agencies are likely to have in place key elements of an internal integrity framework identified above in Part 2; employees will be subject to a Code of Conduct and corresponding sanctions for inappropriate behaviour; and all employees are subject to offences in the Commonwealth Criminal Code relating to corruption and the unauthorised access to, use of or disclosure of official information. Similar mitigations apply to employees of state government and law enforcement agencies.

## **Part 4: Related risks arising through partnerships between law enforcement agencies and the private sector**

### **Trusted private sector partner arrangements**

To achieve their outcomes, some LEIC Act agencies also license or enter into other arrangements with private sector entities in a form of 'partnership' to expedite processes or as a form of co-regulation. These arrangements are often characterised by trusted private sector entities being 'rewarded' for compliance with regulatory requirements, for example by being able to fast-track or self-assess the application of regulatory schemes. These types of arrangements allow agencies to cut 'red tape' and to facilitate quicker, cheaper regulatory compliance in circumstances where risks of non-compliance are assessed as low. However, these arrangements can involve corruption risks. Corrupt conduct involving a private sector partner would only be subject to the Integrity Commissioner's jurisdiction if it also involved a 'staff member' of an agency.

Below, ACLEI identifies several such schemes which have been relevant to ACLEI investigations.

#### **The Integrated Cargo System**

The Integrated Cargo System (ICS) is an integrated software application administered by the ABF and used by ABF officers and DAWE biosecurity officers to manage imports and exports, undertake cargo risk assessments, maintain a client register, track cargo movement and enable interaction with clients and other agencies.

A range of external service providers involved in the movement and safekeeping of goods also have access to ICS. These include owners of sea ports and airports; stevedores and air cargo handlers; depot operators; warehouse operators; customs brokers and freight forwarders. Access to ICS can be obtained through various arrangements, including

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<sup>12</sup> [Our Public Service, Our Future: Independent Review of the Australian Public Service](#) (2019); [Report into consultations regarding APS approaches to ensure institutional integrity](#) (2020), 'the compliance framework to support APS institutional integrity does not currently require radical additional changes'.

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through the grant of a Customs Depot or Warehouse Licences or DAWE Approved Arrangements.

The ICS allows registered users in industry to legitimately track the movement of goods to ensure efficient transportation. However, there is a risk that individuals may abuse access to cargo movement information to track illicit goods.<sup>13</sup>

**Customs Depot Licences**

Customs Depot Licences are issued and managed by the ABF under s 77G of the Customs Act. The licence permits a depot to accept and store 'under bond' cargo - goods that must be moved away from the wharf or airport but have not yet been cleared for home consumption - and provides the licensee with access to the ICS. Applicants for such a licence, and all individuals in key management positions, must be 'fit and proper' and meet a range of other conditions imposed under the Act. Recognising the vulnerabilities in its process for issuing and overseeing Customs Depot Licences, the ABF has introduced new obligations on customs depot and customs warehouse licence holders, including the requirement to disclose relevant corporate information (including convictions or insolvency procedures) and personnel records; record-keeping and reporting; site access; CCTV monitoring; communication via the ICS; and facilitating entry and inspection by ABF staff.<sup>14</sup>

**Approved Arrangements**

An 'approved arrangement' pursuant to s 406(1)(a) of the Biosecurity Act allows a company to manage biosecurity risks and/or perform the documentary assessment of goods in accordance with DAWE requirements, using their own sites, facilities, equipment and people. DAWE maintains a list of sites operating under an approved arrangement on its website, however only sites that choose to be listed are included.<sup>15</sup> The Committee analysed the corruption vulnerabilities of the Approved Arrangements scheme in its *Inquiry into the Integrity of Australia's Border Arrangements*.<sup>16</sup> As with the conditions for s 77G Customs Depot Licences, applicants for Approved Arrangements must satisfy DAWE's fit and proper person test.<sup>17</sup>

**Australian Trusted Trader Program**

The Australian Trusted Trader (ATT) program is administered by Home Affairs and ABF and accredits Australian businesses with compliant trade practices and a secure supply chain. Companies with ATT status are viewed as low risk and provided priority treatment at the border with faster customs processing, including priority cargo examinations, and fewer interventions.

To be eligible for ATT status, businesses must have been active in the international supply chain for at least two years, be financially solvent and have an Australian Business

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<sup>13</sup> ABF Website: [Integrated Cargo System \(ICS\)](#)

<sup>14</sup> [Australian Customs Notice No. 2021/23: New Obligations on Customs Depot and Warehouse Licences](#).

<sup>15</sup> DAWE Website: [Sites operating under an approved arrangement](#).

<sup>16</sup> Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity: [Inquiry into the Integrity of Australia's Border Arrangements \(December 2020\)](#) (para. 2.28).

<sup>17</sup> DAWE Website: [Fit and proper test for approved arrangements applicants](#).

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Number (ABN). Businesses with ATT status must comply with the Customs (Australian Trusted Trader Programme) Rule 2015.<sup>18</sup> The ABF maintains a register of ATT agreements on its website.<sup>19</sup>

Despite requirements for ATT businesses to implement personnel security arrangements,<sup>20</sup> public reporting reinforces the vulnerability of these businesses to infiltration by criminal groups.<sup>21</sup>

## Industry involvement in decision-making

Some regulatory schemes are supported by advisory bodies involving industry representatives. For example, the Customs Act establishes the National Customs Broker Licensing Advisory Committee, comprised of an independent Chair, an industry representative and deputy representative and a Commonwealth representative, to assess and make recommendations to the Comptroller-General of Customs (the ABF Commissioner) about the suitability of applicants to be licenced Customs Brokers.<sup>22</sup> In undertaking its functions, the Committee may exercise statutory powers – including the ability to summon witnesses, serve notices and examine witnesses under oath or affirmation. Although the Commonwealth representative would be within the Integrity Commissioner's jurisdiction, the Chair and industry representative would not. The potential for conflicts of interest to arise for members of committees such as this one may raise corruption risks for these bodies.

The role of industry representatives on ASIC's Financial Services and Credit Panel (FSCP)<sup>23</sup> is also likely to raise similar risks around the potential for conflicts of interest. The [Financial Sector Reform \(Hayne Royal Commission Response—Better Advice\) Bill 2021](#) proposes significant changes to the functions and powers of the FSCP, including to expand the role of the FSCP to operate as a single disciplinary body for financial advisers. While the Bill proposes to address this risk by placing members under an ongoing obligation to disclose to ASIC 'any direct or indirect financial or other interests, such as personal or business relationships, that could conflict with the proper performance of their duties as members of a Financial Services and Credit Panel', ACLEI has raised concerns that the proposed self-disclosure regime does not adequately address the potential risk.<sup>24</sup> This risk is further exacerbated by the fact that industry representatives on the FSCP are unlikely to fall within the Integrity Commissioner's jurisdiction.

<sup>18</sup> Federal Register of Legislation, [Customs \(Australian Trusted Trader Programme\) Rule 2015](#).

<sup>19</sup> ABF Website: [Accredited Trusted Traders](#).

<sup>20</sup> Subsection 11(3) Customs (Australian Trusted Trader Programme) Rule

<sup>21</sup> See, for example, <https://www.smh.com.au/national/qantas-infiltrated-by-organised-criminals-says-intelligence-report-20210603-p57xp2.html>

<sup>22</sup> ABF website, <https://www.abf.gov.au/licensing/brokers/step-by-step/interview>

<sup>23</sup> For information about the FSCP, see <https://asic.gov.au/regulatory-resources/financial-services/financial-services-and-credit-panel/>

<sup>24</sup> See ACLEI's submission to the Senate Economics Legislation Committee's inquiry into the Bill, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/FASEAHaynebetteradvice/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/FASEAHaynebetteradvice/Submissions)

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## **Risks associated with staff 'capture' and grooming by commercial and criminal entities**

Even in the absence of formalised schemes like those identified above, many agencies intentionally pursue collaborative relationships with the industries they regulate in order to facilitate compliance and reduce regulatory burden. These approaches often rely on engagement between staff members of agencies and regulated entities to facilitate compliance, especially in relation to lower risk issues. For example, in outlining its Enforcement Approach, APRA notes that much of its work 'is achieved through using non-formal approaches and working cooperatively with entities to identify and rectify problems before they threaten the ability of an entity to meet its financial promises.'<sup>25</sup>

While these arrangements play an important role in reducing regulatory red tape, they can be exposed to corruption risks. Staff members in these engagement roles are attractive targets for grooming by commercial or criminal entities who may attempt to corrupt those staff members in order to gain access to information or decision-making that will benefit their commercial or criminal exploits. ACLEI investigations have identified that officials can unwittingly fall victim to grooming when personal and professional relationships evolve in ways that compromise their integrity and might only realise they have been exploited after having engaged in corrupt conduct.<sup>26</sup> It is essential that staff members understand the value of the information they have access to and their decision making role and avoid 'self-managing' risk.

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<sup>25</sup> APRA's Enforcement Approach,

[https://www.apra.gov.au/sites/default/files/apras\\_enforcement\\_approach\\_-\\_final.pdf](https://www.apra.gov.au/sites/default/files/apras_enforcement_approach_-_final.pdf)

<sup>26</sup> See, for example, ACLEI Operation Voss and ACLEI Operation Ruby ([Investigation Reports | Australian Commission for Law Enforcement Integrity \(aclei.gov.au\)](#)).

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## Appendix A – 'Staff members' of each agency

The table below provides an indication of the various categories of people who may fall under the Integrity Commissioner's jurisdiction as staff members of the different agencies as set out in the LEIC Act and Regulations. For the expansion agencies, we note that while a person may fall into the definition of 'staff member' any allegations of corrupt conduct will only be within ACLEI's jurisdiction if the person's conduct relates to a law enforcement function of the agency. In practice, for many staff members of those agencies, this will mean they are ordinarily outside of ACLEI's jurisdiction.

Further, we note that while some agency enabling legislation (including the LEIC Act) refers to the potential for people to be engaged as contractors or consultants, the terms are not defined. Within the APS, the term 'contractor' is generally understood to apply to persons engaged under a non-ongoing contract under the Public Service Act to undertake duties of a similar nature to an ongoing APS employee for a specified term or to undertake a specified task<sup>27</sup> (although in other contexts the term can be used in relation to those engaged under a contract to deliver goods or services). Similarly, a 'consultant' may be considered to be a person who is engaged for a limited term to provide specific, specialist expertise or knowledge which is not retained internally by the agency.<sup>28</sup>

	AFP	ACIC	AUSTRAC	DAWE	Home Affairs (including the ABF)	ACCC	APRA	ASIC	ATO
<b>Relevant enabling legislation</b>	<i>Australian Federal Police Act 1979</i>	<i>Australian Crime Commission Act 2002</i>	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>		<i>Customs Act 1901</i> <i>Migration Act 1958</i> <i>Australian Border Force Act 2015</i>	<i>Competition and Consumer Act 2010</i>	<i>Australian Prudential Regulation Authority Act 1998</i>	<i>Australian Securities and Investments Commission Act 2001</i>	<i>Taxation Administration Act 1953</i>

<sup>27</sup> Section 3.5 Public Service Regulations 1999.

<sup>28</sup> See for example the Department of Finance's guidance to agencies on consultancy and non-consultancy contracts:  
<https://www.finance.gov.au/government/procurement/buying-australian-government/contract-characteristics>



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Agency head	AFP Commissioner	ACIC CEO	AUSTRAC CEO	Secretary	Secretary	Chairperson	Chair of APRA	Chairperson of ASIC	Commissioner of Taxation
<b>Employees</b>	Persons engaged as AFP employees by the AFP Commissioner under s 23 AFP Act	All APS employees	All APS employees	Only as prescribed in s7 LEIC Regulations: <ul style="list-style-type: none"> <li>persons holding or acting in the position of Regional Manager</li> <li>staff whose duties include undertaking assessment, clearance or control of vessels or cargo imported into Australia</li> <li>staff who have access to the Integrated Cargo System</li> </ul>	All APS employees	All APS employees	Permanent, temporary or casual staff appointed by the Chair (s45 APRA Act)	Permanent, temporary or casual staff appointed by the Chair (s120 ASIC Act)	All APS employees
<b>Office holders under enabling legislation</b>	Deputy Commissioners	<ul style="list-style-type: none"> <li>Examiners</li> <li>Counsel Assisting</li> </ul>	N/A	No	ABF Commissioner	<ul style="list-style-type: none"> <li>Members of the Commission (s7)</li> <li>Associate members (s8A)</li> <li>Deputy Chairperson (s10)</li> </ul>	All APRA members (s16 APRA Act)	<ul style="list-style-type: none"> <li>Deputy Chairpersons (s10 ASIC Act)</li> <li>Members of ASIC (s9 ASIC Act)</li> </ul>	Second Commissioners of Taxation (s4 TA Act)

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<b>Seconded</b>	Yes, (s69D AFP Act)	Yes, if consistent with ss49 and 58 ACC Act	Yes (s225(3) AMLCTF Act)	No	Only if appointed as 'Officers of Customs' or Officers under the Migration Act – see below	Yes, if consistent with item 1(f) of s7A(3) LEIC Regulations	Yes, if appointed under s46 APRA Act or consistent with item 2(c) of s7A(3) LEIC Regulations	Yes, if appointed under s122 ASIC Act or consistent with item 3(d) of s7A(3) LEIC Regulations	Yes, if consistent with item 4(d) of s7A(3) LEIC Regulations
<b>Consultants</b>	Yes, if appointed/determined under s35 AFP Act	Yes, if appointed under s48 ACC Act	Yes (s225(1) AMLCTF Act)	No	Only if appointed as 'Officers of Customs' or Officers under the Migration Act – see below	Yes, if appointed under s27A CCA Act	No	No	Only if they meet the definition in s355-15 of Schedule 1 of the TA Act – ie: <ul style="list-style-type: none"> <li>An entity engaged to provide services to the ATO (or an individual working for such an entity), or</li> <li>An individual appointed/employed by or performing services for the Commonwealth and performing functions or exercising powers under or for the purposes of a taxation law.</li> </ul>
<b>Contractors</b>	Yes, if appointed/determined under s35 AFP Act	No	No	No	Only if appointed as 'Officers of Customs' or Officers under the Migration Act – see below	No	No	No	

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## Appendix B – Factsheet: What is Corruption? Defining Corrupt Conduct



Australian Government  
Australian Commission for  
Law Enforcement Integrity

### FACT SHEET

#### WHAT IS CORRUPTION? DEFINING CORRUPT CONDUCT

The purpose of this fact sheet is to provide general guidance and examples of corrupt conduct under the Law Enforcement Integrity Commissioner Act 2006 (Cth) (LEIC Act). The examples are not exclusive, but are provided to assist in understanding what types of conduct might fall within the definitions. **Regardless of the type of corruption or level of seriousness, all corruption issues must be referred or notified to ACLEI.**

##### Engages in corrupt conduct

Section 6 of the LEIC Act states that:

1. ...a staff member of a law enforcement agency engages in corrupt conduct if the staff member, while a staff member of the agency, engages in:
  - a. conduct that involves, or that is engaged in for the purposes of, the staff member **abusing his or her office** as a staff member of the agency; or
  - b. conduct that perverts, or that is engaged in for the purpose of **perverting, the course of justice**; or
  - c. conduct that, having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, **corruption of any other kind**.

For staff members of agencies prescribed in the *Law Enforcement Integrity Commissioner Regulations 2017* (Cth) (LEIC Regulations), the conduct must also

relate to the performance of a law enforcement function of the agency.<sup>1</sup>

##### Abuse of office

Abuse of office involves improper acts or omissions by officials in their capacity as an official, accompanied by an awareness that the act or omission is improper or in circumstances where they should have been aware.

##### Is the conduct an abuse of office?

The elements of s 142.2 of the Criminal Code Act 1995 (Cth) below can be useful when considering whether a staff member engaged in conduct involving an abuse of office.

Did the staff member of the agency:

- **Exercise any influence** that the official has in their capacity as an employee of the agency; or
- **Engage in any conduct** in the exercise of their duties as an employee of the agency; or
- **Use any information** that they acquired in their capacity as an employee of the agency; and

<sup>1</sup> The agencies prescribed in the LEIC Regulations are the Australian Competition and Consumer Commissioner, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission and the Australian Taxation Office

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Did the staff member of the agency do it with the intention of:

- Dishonestly **obtaining a benefit** for him or herself or another person; or
- Dishonestly **causing a detriment**, to another person?

### Examples

- Seeking to gain profit or benefit for self or others
- Using official powers and discretions for an improper purpose
- Using law enforcement functions to support or assist criminal activity
- Misusing official information to support or assist criminal activity

**Note:** No benefit or detriment needs to actually occur but there must be an intention to obtain a benefit or cause a detriment. Where there is no evidence of an intention to obtain a benefit or cause a detriment, consider if the conduct is 'corruption of any other kind'. There are many types of benefits and not all involve a financial advantage or incentive. See ACLEI's Social Capital Fact Sheet and Investigation Reports for further information.<sup>2</sup>

### Perverting the course of justice

Perverting the course of justice involves interfering with judicial processes.

Is the conduct perverting the course of justice?

- Was there **conduct which has a tendency, and is intended**, to pervert the course of justice?<sup>3</sup>
- 'The course of justice is perverted (or obstructed) by **impairing (or preventing the exercise of) the**

**capacity** of a court or competent judicial authority to do justice.<sup>4</sup>

### Examples

Conduct involving the erosion of the integrity of the court or judicial authority by:<sup>5</sup>

- Hindering access to it
- Deflecting applications that would be made to it
- Denying it knowledge of the relevant law
- Denying it the true circumstances of the case
- Impeding the free exercise of its jurisdiction and powers
- Impeding the powers of executing its decisions

**Note:** The course of justice begins with the commencement of proceedings before a court or competent judicial body.<sup>6</sup> Generally, police investigations are not considered part of the 'course of justice', except where prosecution or disciplinary proceedings are 'imminent, probable or even possible'.<sup>7</sup> An example of 'possible' is where a person engages in conduct in relation to a criminal investigation to prevent the commencement of a prosecution where a prosecution was possible (not merely hypothetical).

### Corruption of any other kind

Corruption of any other kind concerns improper conduct connected with official duties that involves dishonesty or knowledge that the conduct is improper. This category is a catch-all for corrupt conduct that does not fit into the other categories but there may also be some overlap.<sup>8</sup>

<sup>2</sup> ACLEI Social Capital Fact Sheet; ACLEI Investigation Reports.

<sup>3</sup> *R v Rogerson* (1992) 174 CLR 268, 276 (Mason CJ, *R v Vreones* (1891) 1 QB 369).

<sup>4</sup> Ibid 280 (Brennan and Toohey JJ).

<sup>5</sup> Ibid.

<sup>6</sup> Ibid 276 (Mason CJ).

<sup>7</sup> Ibid 276–277.

<sup>8</sup> It is not necessary for agencies to determine which category the corrupt conduct falls into.



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Is the conduct corruption of any other kind?

Did the staff member of the agency engage in conduct that was:

- 'a deliberate act of dishonesty, breach of the law, or abuse of public trust or power that undermines or is incompatible with the impartial exercise of an official's powers, authorities, duties or functions';<sup>9</sup> or
- a 'moral impropriety in, or in relation to, public administration'?<sup>10</sup>

### Examples

- Unauthorised access to personal records may be corruption of any other kind if the staff member did not gain a benefit or cause a detriment by disclosing the information.
- Lying about work experience or qualifications in order to receive a promotion. While the staff member is seeking to gain a benefit for themselves, it might not be an abuse of office if they aren't using influence, exercising duties or using information obtained in their position as a public officer. However, their conduct is a deliberate act of dishonesty.
- Where a staff member forges their boss' signature on a decision minute because they disagree with the approach being taken. Such conduct might not be an abuse of office if they did not intend to gain a benefit or cause a detriment but it would be a deliberate act of dishonesty which is incompatible with the impartial exercise of an official's powers, authorities, duties or functions.

### Learn more

For further information and resources, please visit [aclei.gov.au](https://aclei.gov.au).

<sup>9</sup> LexisNexis, *Encyclopaedic Australian Legal Dictionary* (online at 15 March 2021) Corruption.

<sup>10</sup> *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 32 (Gageler J).

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## Appendix C – Factsheet: The law enforcement function of expansion agencies



### FACT SHEET

#### THE LAW ENFORCEMENT FUNCTION OF PRESCRIBED AGENCIES

The purpose of this fact sheet is to provide general guidance and examples of the law enforcement function under the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (LEIC Act) and *Law Enforcement Integrity Commissioner Regulations 2006* (Cth) (LEIC Regulations). The examples are not exclusive, but are provided to assist in understanding.

##### Prescribed Agencies

In 2021, the following agencies became prescribed Law Enforcement Agencies:

- The Australian Competition and Consumer Commission (ACCC);
- The Australian Prudential Regulation Authority (APRA);
- The Australian Securities and Investment Commission (ASIC); and
- The Australian Taxation Office (ATO).

Section 6(2) of the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (LEIC Act) provides that a staff member of a prescribed agency engages in corrupt conduct only if the conduct relates to the performance of a law enforcement function of the Agency.

'Law Enforcement Functions' are defined at s 5 of the LEIC Act. They are considered below.

##### The Law Enforcement Function

###### What is the Law Enforcement Function?

A law enforcement function 'relates to' the investigation into:

- Whether an offence has been committed against the law of the Commonwealth; or
- Whether there has been a contravention of a law of the Commonwealth to which a civil penalty proceeding may be brought.

Investigations about whether an offence has been committed against the law of the Commonwealth relates to the commission of criminal offences.

Investigations about whether a civil penalty proceeding can be brought involves legislative civil penalty provisions. Civil penalties are distinct from other action which may be undertaken by an agency where they are the Decision Maker. Civil penalties, like criminal offences, are decided by a court.

In some instances it may be a simple task to identify the relationship to the investigation of an offence or a civil penalty proceeding, but other instances will require a deeper consideration. The relationship to the investigation can be both direct and indirect.

It does not matter whether an investigation actually results in the investigation for the offence or civil penalty

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ultimately being decided by a Court, the fact that an investigation is a possibility is sufficient.

### What does 'relates to' the Law Enforcement Function mean?

'Relates to' should be considered broadly, with the corrupt conduct being directly or indirectly related to the function.

It is important to remember that it is the conduct of the staff member that must relate to the law enforcement function, rather than the position which the staff members occupies. This must be assessed on the facts of each notification or referral.

The danger in just looking at the function occupied by the staff member is that this does not always reflect the conduct and does not account for the mixed nature of the functions within any role, or that the staff member has engaged in conduct that is outside of their function or position, but it has a relationship to a 'law enforcement function'. This would most obviously include conduct which compromises the integrity of law enforcement activity, but might also extend in some cases to situations where someone improperly benefits because of the agency's law enforcement function.

Given it is the conduct, which should be the focus of considering whether a referral to the Integrity Commissioner is required, agencies should consider the following questions:

- What are the facts of the conduct?
- What was the purpose of the conduct?
- What was the result, or possible result, of the conduct? This includes the impact the conduct had on any law enforcement function of the agency.

This connection to the law enforcement function, need only be at least a possibility, but there must be a foreseeable connection. For example, conduct may be 'related' to the law enforcement function of an agency where it:

- related to avoidance of a law enforcement function; and

- abusing access or powers held by virtue of a law enforcement function.

### Examples

#### Example 1

A criminal investigator submits a false claim for an employment entitlement. This entitlement is available to all staff members within their agency.

- The purpose of the conduct was to receive an entitlement they were not otherwise entitled to.
- While the majority of their role within the agency is carrying out a law enforcement function, their conduct is not related to this function because the entitlement is available to all staff member of the agency.
- The conduct does not impact the law enforcement role of the agency.

*This example would not fall within the jurisdiction of the Integrity Commissioner.*

#### Example 2

A criminal investigator submits a false claim for an employment entitlement. This entitlement is only available to them because they carry out a law enforcement function of the agency.

- The purpose of the conduct was to receive an entitlement they were not otherwise entitled to.
- The entitlement was only available to them because they worked within a law enforcement function of the agency. There is a connection between the conduct and the law enforcement function of the agency.
- The conduct impacts the integrity of the law enforcement function of the agency.

*This example would fall within the jurisdiction of the Integrity Commissioner.*

#### Example 3

A non-law enforcement staff member of an agency, uncovers evidence of criminal conduct while conducting their duties. They intentionally delete the evidence of the

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criminal conduct because they know the person to whom it relates. They therefore do not pass this information onto the relevant law-enforcement function of the agency for investigation.

- The purpose of their conduct was to remove evidence of the criminal conduct of their friend and to not draw it to the attention of the relevant law enforcement function.
- The result of the conduct did not come to the attention of the law enforcement function of the agency and could not be properly investigated. This assists in the criminal conduct remaining undetected and possibility continuing.

*This example would fall within the jurisdiction of the Integrity Commissioner because the conduct engaged in by the staff member relates to the law enforcement function of the Agency.*

### **Learn more**

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