

EXPLANATORY STATEMENT

Select Legislative Instrument 2020

Issued by authority of the Attorney General

Law Enforcement Integrity Commissioner Act 2006

Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020

The Regulations expand the jurisdiction of the Australian Commission for Law Enforcement Integrity (ACLEI) over four additional Commonwealth government agencies.

The *Law Enforcement Integrity Commissioner Act 2006* (Cth) (Act) establishes the office of the Integrity Commissioner. The Integrity Commissioner's functions include detecting, determining and investigating corruption issues in law enforcement agencies within his or her jurisdiction. The Act also establishes ACLEI to assist the Integrity Commissioner in the performance of his or her functions. The Integrity Commissioner is the accountable authority and agency head of ACLEI.

Section 224 of the Act provides that the Governor-General can make regulations prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020* (Cth) (Regulations) is to amend the *Law Enforcement Integrity Commissioner Regulations 2017* (Cth) (Principal Regulations) to bring four new agencies within ACLEI's jurisdiction: the Australian Competition and Consumer Commission (ACCC), the Australian Prudential Regulation Authority (APRA), the Australian Securities and Investments Commission (ASIC) and the Australian Taxation Office (ATO) – collectively, the 'new agencies'. The Regulations seek to do this by:

- prescribing the new agencies as 'law enforcement agencies' for the purposes of the Act
- specifying the persons prescribed as the staff members and secondees of the new agencies, and
- specifying the office prescribed as the agency heads of the new agencies.

Paragraph (d) of the definition of 'law enforcement agency' in subsection 5(1) of the Act provides that regulations may prescribe Commonwealth government agencies as law enforcement agencies under the Act. For the purposes of the definition of 'staff member' in subsection 5(1) of the Act, subsection 10(4) and paragraph 10(5)(d) of the Act provide that the staff and secondees of these agencies may also be prescribed by regulation. Paragraph (c) of the definition of 'head' of a government agency in section 5(1) of the Act provides that regulations may prescribe the person holding the office of the 'head' of a 'law enforcement agency' for the purpose of the Act. The effect of this prescription is that the regulations will

set out which person is the head of each agency (agency head) that has been prescribed by the regulations as a law enforcement agency.

Each of the new agencies and ACLEI were consulted on the development of the Regulations. The Regulations are not likely to impact on business or restrict competition.

Details of the Regulations are set out in the Attachment.

The Act specifies no conditions that need to be met before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* (Cth).

The Regulations commence on 1 January 2021.

Authority Section 224 of the *Law Enforcement Integrity Commissioner Act 2006*

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2020

Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

1. The *Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020* (the Amendment Regulations) amend the *Law Enforcement Integrity Commissioner Regulations 2017* (Cth) (Principal Regulations) to expand the jurisdiction of the Integrity Commissioner of the Australian Commission for Law Enforcement Integrity (ACLEI) to oversee additional Commonwealth government agencies who exercise law enforcement functions (new agencies). The Amendment Regulations specify the persons who are the staff members, secondees and agency heads of the new agencies.
2. The *Law Enforcement Integrity Commissioner Act 2006* (the Act) establishes the office of the Integrity Commissioner, and the ACLEI. Paragraph (d) of the definition of ‘law enforcement agency’ in section 5(1) of the Act provides that regulations may prescribe the new agencies as law enforcement agencies under the Act. Subsection 10(4) and 10(5)(d) of the Act provide that the staff and secondees of new agencies may be prescribed by regulation. Paragraph (c) of the definition of ‘head’ in section 5(1) of the Act provides that regulations may prescribe the person holding the office of the ‘head’ of a new agency.
3. The new agencies prescribed by the Amendment Regulations are the Australian Competition and Consumer Commission (ACCC), the Australian Prudential Regulation Authority (APRA), the Australian Securities and Investments Commission (ASIC) and the Australian Taxation Office (ATO).
4. The Amendment Regulations specify persons who will be defined as staff members, secondees and heads of the new agencies.
5. The main purpose of the Amendment Regulations is to enhance the integrity of Commonwealth law enforcement agencies.
6. Further details regarding the measures in the Regulations and their human rights implications are set out below.

Human rights implications

Right to privacy

7. The Amendment Regulations engage the right to freedom from unlawful or arbitrary interference with a person’s right to privacy under article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

8. The right to privacy may be limited in pursuit of a legitimate objective, and where the limitation is authorised by law and is not arbitrary. Any limitation should be reasonable, necessary and proportionate to the objectives of the limitation.

Information disclosure to prescribed Commonwealth government agencies

9. The Regulations engage the right to privacy as the Act specifies that the Integrity Commissioner may share information or documents to government agencies if it is relevant to a corruption issue. For example, section 70 of the Act allows the Integrity Commissioner to pass on information to a government agency investigating a corruption issue.
10. The types of information that may be disclosed to government agencies by the Integrity Commissioner could include personal information.
11. The Integrity Commissioner's powers to disclose personal information is limited. The Integrity Commissioner is prohibited from disclosing information or documents that could be contrary to the public interest if such a disclosure would result in prejudicial consequences (Act, s 54(6)). This limitation is proportionate to the objective of ensuring appropriate oversight of information sharing by the Integrity Commissioner, by limiting such information sharing to situations where the information is relevant to a corruption issue.
12. It is reasonable to allow the Information Commissioner to share information with the government agencies as it enables the Integrity Commissioner to cooperate and support effective oversight of corruption issues. Further, these agencies have a continuing interest in assuring the integrity of staff members within their jurisdiction.
13. In these circumstances, the Regulations create permissible limitations on the right to privacy.

Information disclosure from prescribed Commonwealth government agencies

14. The Regulations also engage the right to privacy because the Act provides that the staff members and secondees of the prescribed Commonwealth government agencies within the Integrity Commissioner's jurisdiction, or other persons with information that is relevant to corruption of those agencies, can be required to provide information to ACLEI or answer questions. A failure to provide that information or answer a question is an offence (see, for example, Act, s 75 – 77).
15. Prescribing the staff members and secondees of the government agencies within the Integrity Commissioner's jurisdiction therefore potentially impacts on the right to privacy of these people.
16. The Integrity Commissioner's ability to require an individual of a prescribed government agency to answer questions is limited to situations where it will be relevant to an investigation of a corruption issue or the conduct of a public inquiry into corruption. The Act also specifies how information that individuals provide to ACLEI is able to be used and disclosed. Disclosure is generally only permitted for the purpose of investigating a corruption issue or other purposes connected with the exercise of the Integrity Commissioner's functions (see, for example, Act, s 90).
17. A person's privacy is also protected by the provision of a 'use immunity' in relation to self-incriminatory evidence given at a hearing. Self-incriminatory evidence is not admissible in evidence against the person in criminal proceedings. The immunity protection does not apply to a small number of offences, including providing false and

misleading information, obstructing a Commonwealth official, or a disciplinary proceeding against the person if the person is a staff member of a law enforcement agency (see, for example, Act, s 80).

18. In these circumstances, although the right to privacy is limited by this measure, it is appropriate and reasonable in the circumstances and includes protections to limit information from inappropriate use or disclosure.

Conclusion

This Legislative Instrument is compatible with human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate.

Details of the *Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020*

Section 1 – Name

This section provides that the title of the Regulations is the *Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020* (Cth) (the Regulations).

Section 2 – Commencement

This section inserts a table which specifies the commencement date of each of the provisions of and Schedules to the Regulations. Item 1 of the table provides that the whole of the Regulations commence on 1 January 2021.

Section 3 – Authority

This section provides that the Regulations are made under the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (Act).

Section 4 – Schedule

This section enables an instrument that is specified in a Schedule to the Regulations to be taken to be repealed or amended as set out in the Schedule, and specifies that any other item in a Schedule has effect according to its terms. This means that each of the amendments the Regulations purport to make to the *Law Enforcement Integrity Commissioner Regulations 2017* (Cth) (Principal Regulations) come into effect on 1 January 2021 (provided the Regulations are made by that date).

Schedule 1 – Amendments

This schedule contains amendments to the Principal Regulations.

Item [1] – Before section 6

Item 1 inserts a new section – section 5A – into the Principal Regulations. Section 5A prescribes the office which is the head of certain new prescribed Commonwealth government agencies (listed at Item [2] of this Explanatory Memorandum) for the purpose of paragraph (c) of the definition of ‘head’ in subsection 5(1) of the Act (agency head).

The agencies mentioned in column 1 of the table at section 5A are those new agencies that are prescribed by the Amendment Regulations for the purposes of paragraph (d) of the definition of law enforcement agency in subsection 5(1) of the Act (listed at Item [2] of this Explanatory Memorandum). Column 2 of the table specifies the office of the agency head for each of the agencies listed in column 1 of the table.

For example, the first column of the table specifies that the Chairperson of the Australian Competition and Consumer Commission (ACCC) is the agency head of ACCC for the purpose of paragraph (c) of the definition of ‘head’ in subsection 5(1) of the Act.

Those specified as an agency head under the Act – including those prescribed in the Regulations pursuant to paragraph (c) of the definition of ‘head’ in subsection 5(1) of the Act) – have certain obligations under the Act. For example, under s 19 of the Act, if an agency head becomes aware of an allegation or information relating to a corruption issue that relates to that law enforcement agency, he or she must notify the Integrity Commissioner in writing of the corruption issue. This obligation applies to each of the agency heads specified in the table at section 5A.

Importantly, the Amendment Regulations do not purport to impose obligations on agency heads in relation to corrupt conduct of which they were aware before the commencement of the Amendment Regulations. Accordingly, the mandatory notification obligation at section 19 of the Act does not extend to conduct of which the agency head of the new agency became aware before the commencement of the Regulations. However, under section 23 of the Act, the agency head has the discretion to refer matters to the Integrity Commissioner that they became aware of prior to the commencement of the Regulations.

Item [2] – After section 6

Item 2 inserts new section 6A into the Regulations. Section 6A prescribes certain Commonwealth government agencies for the purposes of paragraph (d) of the definition of ‘law enforcement agency’ in subsection 5(1) of the Act. Those agencies are the:

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

(together, the new agencies).

The effect of section 6A is that the Integrity Commissioner is able to exercise their functions in relation to the new agencies – for example, by detecting and investigating corruption issues related to those agencies (see paragraphs 15(aa) and 15(a) of the Act).

As the new agencies are prescribed under paragraph (d) of the definition of ‘law enforcement agency’, section 6A also has the effect of making the Integrity Commissioner’s jurisdiction subject to section 6 of the Act which provides that the staff members of those prescribed agencies only engage in corrupt conduct if the conduct relates to the performance of a law enforcement function of the agency.

Section 6A does not capture in any way other government agencies, even those that are closely linked to the new agencies listed in that section. This includes, for example, agencies who may share governance arrangements and staff with the new agencies. Accordingly, agencies such as the Australian Charities and Not-for-profits Commission (ACNC), the Australian Tax Practitioners Board (TPB) and the Australian Energy Regulator (AER) and

their staff, secondees and agency heads are not covered by the Regulations despite those agencies sharing some governance arrangements and staff with the ATO (in the case of the ACNC and TPB) and ACCC (in the case of the AER).

Item [3] – At the end of Part 2

Staff members and secondees

Item 3 adds a new section – section 7A – to the Principal Regulations. The purpose of this section 7A is to avoid doubt and identify the persons who are subject to the jurisdiction of the Integrity Commissioner within the new agencies. To this end:

- Section 7A specifies the *staff members* of the new agencies for the purpose of subsection 10(4) of the Act (see subsection 7A(1) and Column 2 of the table). Subsection 10(4) of the Act provides that staff members prescribed by regulation for the purposes of that subsection are within the Integrity Commissioner’s jurisdiction.
- Section 7A also specifies the *secondees* of the new agencies for the purpose of subsection 10(5)(d) of the Act (see subsection 7A(2) and Column 3 of the table). Subsection 10(5)(d) of the Act provides that secondees prescribed by regulation for the purpose of that subsection are within the Integrity Commissioner’s jurisdiction.

Section 7A prescribes applicable staff members and secondees via a table. Column 1 of the table specifies which new agencies the item applies to. Column 2 specifies the persons who are staff members of the new agencies listed in the same row at column 1, and column 3 prescribes the persons who are secondees of the new agencies listed in the same row at column 1.

For the avoidance of doubt, all secondees of a new agency will also be *staff members* of that agency for the purpose of the Regulations. This will be achieved by identifying secondees in column 3 of the table by reference to particular subsets of those persons listed as ‘staff members’ in column 2 of the table. It will be important for the Regulations to explicitly identify staff members of the new agencies who also constitute secondees, so that matters involving secondees enliven the secondee-specific provisions in the Act. For example, under section 29(2)(a) of the Act, if a corruption issue relates to a secondee of a law enforcement agency who is an employee of a government agency, the Integrity Commissioner must inform the agency head of the secondees’ home agency of the corruption issue. By identifying secondees of the new agencies in column 3 of the table at section 7A, the Regulations ensure that secondee-specific provisions of the Act such as section 29(2)(a) apply in matters relating to secondees.

The Regulations take a deliberately broad approach to defining ‘secondees’, so as to ensure that the secondee provisions in the Act are enlivened in all appropriate circumstances. To this end, the definition of ‘secondees’ for each new agency in column 3 of the table at subsection 7A includes, in each case, any secondees engaged under a new agency’s enabling legislation *and* (by cross-reference to relevant provisions in column 2) any officer or employees of another body or organisation whose services are made available by that body or organisation to the new agency in connection with the performance or exercise of any of the new agency’s

functions or powers. These provisions be broad enough to effectively capture all of the of the new agencies' secondee arrangements as they arise, including any arrangements with government bodies and private and international entities.

Item 1 of subsection 7A – ACCC

The purpose of item 1 is to broadly capture persons who are staff members of and secondees to, ACCC.

Column 2 of item 1 prescribe a list of persons who are staff members of ACCC for the purpose of the Act. For example, the column specify that staff members of ACCC includes its Chairperson and members of the Commission appointed under section 7 of the *Australian Competition and Consumer Act 2010* (Cth) (see paragraph (a) of that item). By prescribing these persons as staff members, the Integrity Commissioner will be able to exercise their functions in relation to matters involving these people. Column 3 of item 1 prescribes persons who are secondees to ACCC for the purpose of the Act, being officers or employees of another body or organisation whose services are made available by or on behalf of that body or organisation to ACCC in connection with the performance or exercise of any of ACCC's functions or powers.

Item 2 of subsection 7A – APRA

The purpose of this item 2 is to broadly capture persons who are staff members of and secondees to APRA.

Column 2 of item 2 prescribes a list of persons who are staff members of APRA for the purpose of the Act. For example, the item specifies that staff members of APRA includes persons who are members of APRA within the meaning of the *Australian Prudential Regulation Authority Act 1998* (Cth) (APRA Act - see paragraph (a) of Column 2 of item 2), which in turn includes, for example, APRA members appointed under section 16 of the APRA Act. Column 3 of item 2 prescribes persons who are secondees to APRA for the purpose of the Act. These include persons engaged under section 46 of the APRA Act an officer or employee of another body or organisation whose services are made available by that other body or organisation to APRA in connection with the performance or exercise of any of APRA's functions or powers (see paragraph (b) of that item).

Item 3 of subsection 7A – ASIC

The purpose of this item 2 is to broadly capture persons who are staff members of and secondees to ASIC.

Column 2 of item 3 prescribes a list of persons who are staff members of ASIC for the purpose of the Act. For example, the item specifies that staff members of ASIC include a member of ASIC appointed under s 9 of the *Australian Securities and Investments Commission Act 2001* (Cth) (see paragraph (b) of that item). Column 3 of item 3 prescribes persons who are secondees of ASIC for the purposes of the Act to include any persons whose

services are made available by that other body or organisation to ASIC and referred to in s 122 of the *Australian Securities and Investments Commission Act 2001* (Cth) (see paragraph (a) of that item).

Item 4 of subsection 7A – ATO

The purpose of this item 4 is to broadly capture persons who are staff members and secondees to ATO.

Column 2 of item 4 prescribes a list of persons who are staff members of ATO for the purpose of the Act. For example, the item includes a member of staff mentioned in subsection 4A(1) of the *Taxation Administration Act 1953* (Cth) (see paragraph (b) of that item).

Column 3 of item 4 prescribes persons who are secondees to ATO for the purpose of the Act. These include an officer or employee of another body or organisation whose services are made available to by that other body or organisation to ATO in connection with the performance or exercise of any of ATO's functions or powers.