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Australian Government
Australian Commission for
Law Enforcement Integrity

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Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Fitt

Thank you for your invitation to provide a submission to the Senate Economics Legislation Committee Inquiry into Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021 [Provisions] (the Bill).

The office of the Integrity Commissioner, and the Australian Commission for Law Enforcement Integrity (ACLEI), are established by the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (LEIC Act) to investigate and prevent corrupt conduct in Commonwealth law enforcement agencies. I attach a brief overview of our role for the information of the Committee.

While I do not intend to make a formal submission, I offer some observations that may assist the Committee's considerations.

The Bill proposes new and expanded powers for ASIC's Financial Services and Credit Panels (FSCPs) as a single disciplinary body for financial advisors. The functions and powers of FSCPs are defined under the *Corporations Act 2001* and *Australian Securities and Investment Commission Act 2001*. Under the Bill, FSCPs will have powers to hold hearings and take administrative action against a financial adviser and, for certain types of breaches, give an adviser an infringement notice or recommend that ASIC apply to the court for a civil penalty.

Should the conduct of panel members be intended to fall within ACLEI's jurisdiction, the Committee may wish to consider the following issues:

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- whether the FSCP members should come within ACLEI's jurisdiction
- if so, how this might be achieved – through amending legislation or regulation, and
- the potential corruption risk that conflicts of interest present.

FSCP members

An FSCP must comprise a minimum of at least two industry participants, which ASIC must select from a list of eligible persons appointed by the Minister. The Chair of the panel will always be an ASIC staff member. Members of the FSCP, other than the Chair, are not officials of ASIC for the purposes of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

ACLEI's jurisdiction over staff members and secondees of ASIC is currently provided by regulation 7A of the *Law Enforcement Integrity Commissioner Regulations 2017* (Cth) (LEIC Regulations).

The Committee may like to consider whether all FSCP members (apart from the Chair) should fall within ACLEI's jurisdiction, and if so, how this might best be achieved. It could be achieved by amending the LEIC Act to explicitly include ASIC staff members as staff members of law enforcement agencies, which would ensure all of the activities of the FSCP are included in ACLEI's jurisdiction.

Alternatively, FSCP participants may be included in ACLEI's jurisdiction if they are included in a class of persons identified in the table at regulation 7A of the LEIC Regulations.

Legislation or Regulation

If regulation 7A of the LEIC Regulations was amended to include FSCP members (rather than amending the LEIC Act), the activities of FSCP members would also need to be 'law enforcement functions' in order to fall within ACLEI jurisdiction.

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).

The Bill proposes an FSCP may take administrative action against a financial adviser, consisting of warnings or reprimands, directions to undertake specified training, supervision, counselling or reporting, and orders suspending or cancelling

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an adviser's registration. For certain types of breaches, a FSCP may give the adviser an infringement notice or recommend that ASIC apply to the court for a civil penalty.

If an amendment to the regulation is preferred, I note that the current definition of 'law enforcement function' will limit the types of conduct that could be considered to be 'corrupt conduct' by the panel, to conduct that is connected to the investigation of criminal offence or civil penalty proceedings.

Conflicts of interest

The draft Explanatory Memorandum and the Bill recognise that the primary corruption risk for FSCPs under the proposed arrangement is likely to be conflicts of interest. This may be particularly the case for the industry representatives appointed to the FSCPs.

ACLEI considers this a significant risk to the integrity of the proposed arrangement for FSCPs as the single disciplinary body for financial advisers.

This risk is heightened noting that these members (all except the Chair) may be outside of ACLEI jurisdiction. The risks are noted in paragraph 1.43 of the Draft Explanatory Memorandum and are currently addressed through 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 notes the Bill's proposed conflict of interest declarations as a measure to mitigate this risk, however we also note that this system relies entirely on self-disclosure by the panel members.

ACLEI investigations have shown that the manner in which conflict of interest declarations are notified and recorded, and appropriate employee training and awareness, are important components of a successful conflict of interest regime.

The robustness of any conflict of interest declaration framework hinges on the ability of officers to recognise and report instances giving rise to potential or actual conflicts of interest.

High risk areas can include:

- the personal/private nexus
- relationships and associations (including professional relationships and associations)
- people attempting to self-manage risk, and
- ineffective notification, recording and training processes.

Conflicts of interest may also occur where the parties to a relationship find their loyalty to one another is inconsistent with the integrity expectations of their agency. For example, in cases where one of the parties to the relationship engages in misconduct and the other party decides not to report it.

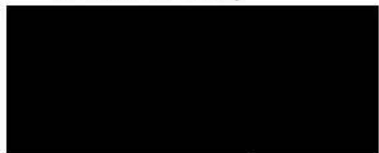
Self-managing risk involves officers attempting to deal with integrity issues alone and failing to report matters or seek assistance through management or their agency's integrity framework. Self-managing risk exposes staff to compromise, and denies the employer the opportunity to understand, appreciate and deal with risk holistically.

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Undeclared conflicts of interest may add weight to allegations of improper conduct and bring the validity of key decisions into question.

The draft Bill and explanatory memorandum could provide additional clarity around the activities required to manage potential conflicts of interest for FSCP members.

Yours sincerely



Penny McKay
Acting Integrity Commissioner

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Overview of ACLEI

The *Law Enforcement Integrity Commissioner Act 2006* (Cth) (LEIC Act) establishes the office of the Integrity Commissioner and the Australian Commission for Law Enforcement Integrity (ACLEI).

ACLEI's purpose is to make it more difficult for corruption in designated Australian Government law enforcement agencies to occur or to remain undetected.

This purpose supports ACLEI's single outcome under the Attorney-General's Portfolio Budget Statements – to provide independent assurance to the Australian Government that Commonwealth law enforcement agencies and their staff act with integrity, by detecting, investigating and preventing corruption.

Role and functions

ACLEI achieves its purpose and outcome by performing the functions set out in the LEIC Act.

ACLEI has 4 core functions:

- Receive and assess notifications and referrals of alleged corrupt conduct by staff members of LEIC Act agencies.
- Conduct investigations into serious and systemic corrupt conduct in LEIC Act agencies.
- Support LEIC Act agencies to conduct their own investigations.
- Prevent corruption through engagement, support and identification of vulnerabilities within LEIC Act agencies.

The following agencies are subject to the Integrity Commissioner's jurisdiction under the LEIC Act:

- the Australian Criminal Intelligence Commission
- the Australian Federal Police (including ACT Policing)
- the Australian Transaction Reports and Analysis Centre
- prescribed aspects of the Department of Agriculture, Water and the Environment
- the Department of Home Affairs, including the Australian Border Force.

From 1 January 2021, the law enforcement functions of four new agencies were brought into ACLEI's jurisdiction by amendments to the Law Enforcement Integrity Commissioner Regulations 2017.

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

These four agencies carry out a range of activities. However, only some of these could be defined as law enforcement functions. ACLEI's jurisdiction extends only to referrals or notifications of alleged corrupt activities specifically in relation to the law enforcement functions of these agencies.

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Reporting and investigation corruption

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. Accordingly, the Integrity Commissioner works to ensure that indicators and risks of corrupt conduct in law enforcement agencies are identified and addressed, to strengthen those agencies against compromise.

Corrupt conduct

A staff member of a law enforcement agency 'engages in corrupt conduct' if the staff member:

- abuses his or her office
- perverts the course of justice, or
- having regard to his or her duties and powers, engages in corrupt conduct of any other kind.

Section 16 of the LEIC Act provides that the Integrity Commissioner is to give priority to dealing with serious and systemic corruption.

Dealing with corruption issues

A corruption investigation can commence in different ways:

- the Minister may refer to the Integrity Commissioner an allegation or information that raises a corruption issue.
- the head of a law enforcement agency within ACLEI's jurisdiction must notify the Integrity Commissioner of any allegation or information that raises a corruption issue which relates to that agency.
- any person or government agency can refer to the Integrity Commissioner an allegation or information that raises a corruption issue. A referral may be anonymous, or on behalf of another person.
- the Integrity Commissioner can commence an investigation on his or her own initiative.

The Integrity Commissioner may decide to deal with the corruption issue in a number of ways:

- have ACLEI investigate the corruption issue either alone or jointly with another government agency or an integrity agency for a State or Territory
- refer the corruption issue to the law enforcement agency to conduct its own investigation
- decide that an investigation is not warranted.

The Integrity Commissioner can decide to manage or oversee any investigation that has been referred to a law enforcement agency. If the law enforcement agency were not the Australian Federal Police (AFP), the Integrity Commissioner can also refer the issue to the AFP for investigation and may manage or oversee that investigation.

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Reports

After completing a corruption investigation, the Integrity Commissioner must prepare a report setting out:

- a) the Integrity Commissioner's findings on the corruption issue; and
- b) the evidence and other material on which those findings are based; and
- c) any action that the Integrity Commissioner has taken, or proposes to take, under Part 10 in relation to the investigation; and
- d) any recommendations that the Integrity Commissioner thinks fit to make and, if recommendations are made, the reasons for those recommendations.

The Integrity Commissioner must give the report on the investigation to the Minister who administers the LEIC Act and a copy to the head of the law enforcement agency to which the corruption issue relates. The Integrity Commissioner may decide to publish reports in the interests of corruption prevention and awareness.

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