

Chapter 4

Matters relating to the ATO, ASIC and the AGD

4.1 As foreshadowed at the beginning of this report, this chapter examines whether the Australian Taxation Office (ATO), the Australian Securities and Investments Commission (ASIC) and the Attorney-General's Department (AGD) ought to be subject to Australian Commission for Law Enforcement Integrity's (ACLEI) jurisdiction.

4.2 The chapter first sets out two earlier parliamentary inquiries that have touched upon the inclusion of these agencies in one form or another. It then considers the key evidence tendered to the committee regarding each of those agencies.

Operation of the LEIC Act inquiry

4.3 In July 2011, this committee (PJC-ACLEI) tabled its final report into the operation of the *Law Enforcement Integrity Commissioner Act 2006*. The inquiry, which was initiated in 2009, sought to examine the merits of expanding ACLEI's jurisdiction to include other Commonwealth departments and agencies with either law enforcement functions or coercive powers.¹ It is important to note that at that time, ACLEI's jurisdiction applied to the ACC (including the former National Crime Authority) and the AFP.

4.4 The committee made numerous recommendations about the operation of both the LEIC Act and ACLEI's jurisdiction. The committee supported the expansion of ACLEI's jurisdiction to encompass a 'second tier' that would include specific agencies within a more limited form of ACLEI's jurisdiction. The second tier would operate on a voluntary basis, in that corruption issues could be voluntarily referred to the Integrity Commissioner by an agency head or Minister.² This is distinct from current arrangements, where agency heads are required to notify the Integrity Commissioner of corruption issues within their agency.³

4.5 The agencies recommended by the committee for inclusion within the proposed second tier jurisdiction included the ATO, AUSTRAC, CrimTrac, the then Australian Quarantine and Inspection Service (AQIS) and the then Department of

1 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006*, July 2011, p. 1.

2 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006*, July 2011, p. vii.

3 *Law Enforcement Integrity Commissioner Act 2006*, section 19.

Immigration and Citizenship.⁴ With the exception of the ATO, these agencies (current and former) are all now subject to ACLEI's jurisdiction.

4.6 With regard to the ATO, the committee noted that while not a traditional law enforcement agency, the organisation has significant law enforcement functions and works collaboratively with the ACC and AFP.⁵ The committee found that:

In addition to the intrinsic value of the information held by the ATO and its role in collecting revenue for the government, the ATO has a significant law enforcement function, investigating tax fraud and ensuring compliance with taxation legislation. In doing so, it works closely with law enforcement agencies, notably the ACC...

The committee considers that it would be beneficial to include the ATO in a tier two oversight arrangement, particularly in light of the ATO's involvement in investigations targeting serious and organised crime...⁶

Government response

4.7 In February 2012, the Government responded to the committee's recommendations. In noting the committee's second tier recommendation, the Government stated a preference for recent increases in ACLEI's jurisdiction to be 'bedded down' prior to further expansion:

Before considering the inclusion of new agencies within ACLEI's jurisdiction, the Government considers that it is appropriate to allow 12 to 18 months for ACLEI to consolidate existing jurisdiction following the inclusion of [Customs]. That experience then be used to properly inform any further expansion of ACLEI's functions.⁷

Criminal intelligence inquiry

4.8 In May 2013, the Parliamentary Joint Committee on Law Enforcement (PJC-LE) presented a report to Parliament into the gathering and use of criminal intelligence.⁸ That inquiry examined substantive issues around the collection and

4 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006*, July 2011, p. vii.

5 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006*, July 2011, p. 11.

6 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006*, July 2011, pp 11–12.

7 Government response, Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006*, February 2012, p. 3.

8 Parliamentary Joint Committee on Law Enforcement, *Inquiry into the gathering and use of criminal intelligence*, May 2013, p. 92.

dissemination of criminal intelligence information between commonwealth law enforcement agencies, some of which are currently subject to ACLEI's jurisdiction.

4.9 In the report, the PJC-LE noted the earlier inquiry of PJC-ACLEI had recommended the inclusion of some additional agencies, including the ATO, within ACLEI's jurisdiction under the 'second tier' model.⁹

4.10 The PJC-LE also noted the development of the Australian Criminal Intelligence Model (ACIM), which 'will facilitate better [criminal intelligence] information sharing across agencies, including law enforcement, policy and regulatory agencies.'¹⁰ At the same time the PJC-LE acknowledged that 'law enforcement and other government agencies are vulnerable to corruption by reason of their use or knowledge of information technology systems and processes.'¹¹ In this regard the PJC-LE stated that 'many Commonwealth agencies who have endorsed the ACIM are currently under the purview of ACLEI. These include the ACC, AFP and [Customs]. CrimTrac will come under ACLEI's oversight from 1 July 2013.'¹²

4.11 However the PJC-LE expressed concerns 'that three Commonwealth agencies [the ATO, ASIC and the AGD] that have endorsed the model and will gain access to sensitive information and intelligence through the national repository are not subject to the oversight of the ACLEI.'¹³

4.12 To address this concern the PJC-LE decided that further investigation was required into the possible expansion of ACLEI's jurisdiction. Accordingly, the PJC-LE recommended that:

...the Parliamentary Joint Committee on ACLEI (PJC-ACLEI) [inquire] into the feasibility of extending ACLEI's jurisdiction to include ASIC, the AGD and the ATO. The [PJC-LE] committee recommends that the PJC-ACLEI consider whether these three agencies should be brought under ACLEI's jurisdiction on a whole-of-agency basis by regulation.¹⁴

4.13 As discussed earlier in this report, this recommendation, along with the committee's ongoing interest in this area, led to the initiation of this inquiry into ACLEI's jurisdiction.

9 Parliamentary Joint Committee on Law Enforcement, *Inquiry into the gathering and use of criminal intelligence*, May 2013, p. 92.

10 Government response, Parliamentary Joint Committee on Law Enforcement, *Inquiry into the gathering and use of criminal intelligence*, October 2014, p. 1.

11 Parliamentary Joint Committee on Law Enforcement, *Inquiry into the gathering and use of criminal intelligence*, May 2013, p. 91.

12 Parliamentary Joint Committee on Law Enforcement, *Inquiry into the gathering and use of criminal intelligence*, May 2013, p. 92.

13 Parliamentary Joint Committee on Law Enforcement, *Inquiry into the gathering and use of criminal intelligence*, May 2013, p. 92.

14 Parliamentary Joint Committee on Law Enforcement, *Inquiry into the gathering and use of criminal intelligence*, May 2013, p. 92.

Australian Taxation Office

4.14 As described above, the question of the potential inclusion of the ATO within ACLEI's jurisdiction largely revolves around access to sensitive law enforcement information.

Integrity issues

4.15 In evidence, Mr Malone, Assistant Commissioner in the Fraud Prevention and Internal Investigations area, gave an overview of the number of integrity complaints received by the ATO on an annual basis. He indicated that 295 integrity complaints had been received in 2011-12; followed by 187 in 2012-13; and 241 in 2013-14.¹⁵ Of the integrity complaints received, Mr Malone explained that approximately 20 per cent are substantiated.¹⁶ This equates to a range of approximately 36–60 established integrity breaches per annum over recent years.

4.16 Mr Malone acknowledged that like other large agencies, the ATO was not immune to integrity issues, but argued:

...relative to the size of the organisation...I do not think we have any more issues or less issues than other people. I would say that they are quite well managed.¹⁷

Internal integrity risk management

4.17 Mr Malone outlined the ATO's internal integrity framework:

The ATO maintains a dedicated and experienced fraud prevention and internal investigations branch that investigates allegations of fraud and serious corruption by ATO employees. Whilst it has no statutory powers, it has the capability to conduct most facets of a criminal investigation, including the submission of briefs of evidence to the Commonwealth Director of Public Prosecutions. Several of these investigations have resulted in successful prosecutions and lengthy terms of imprisonment for those employees found to have acted corruptly.¹⁸

4.18 While not subject to its jurisdiction, ACLEI noted that the ATO has one of the most highly respected professional standards units of the entire Australian Public Service.¹⁹ ACLEI also acknowledged that the ATO goes one step further, by volunteering information to ACLEI that helps both agencies stay in close cooperation:

15 Mr Paul Malone, Assistant Commissioner, ATO Corporate, Fraud Prevention and Internal Investigations, Australian Taxation Office, *Committee Hansard*, 26 September 2014, p. 54.

16 Mr Paul Malone, Assistant Commissioner, ATO Corporate, Fraud Prevention and Internal Investigations, Australian Taxation Office, *Committee Hansard*, 26 September 2014, p. 55.

17 Mr Greg Williams, Deputy Commissioner, Private Groups and High Wealth Individuals, Australian Taxation Office, *Committee Hansard*, 26 September 2014, p. 53.

18 Mr Paul Malone, Assistant Commissioner, ATO Corporate, Fraud Prevention and Internal Investigations, Australian Taxation Office, *Committee Hansard*, 26 September 2014, p. 54.

19 ACLEI, *Submission 1*, Supplementary submission, p. 3.

The [ATO professional standard unit] works closely with several law enforcement partners on investigations and detection operations and, with the AFP, has achieved a number of corruption-related prosecutions relating to its staff or former staff. On its own initiative, the ATO maintains links with ACLEI to keep itself informed of developments in the anti-corruption threat picture, and to apprise ACLEI of its own anti-corruption activities.²⁰

Arguments for inclusion

4.19 ACLEI noted that of the three Commonwealth agencies discussed in this chapter (the ATO, the AGD and ASIC), 'the case for inclusion appears strongest for the ATO'.²¹ ACLEI explained that this was because the ATO is 'both a user and contributor of law-enforcement related information, and a primary partner in joint law enforcement activities, such as Project Wickenby'.²²

4.20 Since the committee's public hearings the government has established the Serious Financial Crime Taskforce. This new taskforce, established to fight serious and organised financial crime, includes officers from the ATO, the ACC, the AFP, the AGD, AUSTRAC and ASIC.

4.21 ACLEI suggested that if its jurisdiction were expanded to include the ATO it would 'add significantly to the law enforcement anti-corruption system'.²³ ACLEI also noted the benefits that would flow to the ATO from its inclusion within ACLEI's jurisdiction:

It is likely also that the coercive and intrusive information-gathering powers available to the Integrity Commissioner would assist the ATO in its management of its corruption and criminal infiltration risks.²⁴

4.22 The ACC argued that an increase in ACLEI's jurisdiction to include agencies such as the ATO would alter ACLEI's remit, given they are not primarily law enforcement agencies. However, the ACC also observed that the ATO (as well as DIBP, AGD and ASIC) contains high risk areas that 'would be susceptible to corruption'.²⁵

Arguments against inclusion

4.23 ATO representatives appeared ambivalent on the question of whether the ATO should be included within ACLEI's jurisdiction. Mr Greg Williams, Deputy Commissioner of Taxation, argued that the second tier proposal was the ATO's preferred model:

20 ACLEI, *Submission 1*, Supplementary submission, p. 3.

21 ACLEI, *Submission 1*, Supplementary submission, p. 3.

22 ACLEI, *Submission 1*, Supplementary submission, p. 3.

23 ACLEI, *Submission 1*, Supplementary submission, p. 3.

24 ACLEI, *Submission 1*, Supplementary submission, p. 3.

25 ACC, *Submission 6*, p. 3.

Ideally, the tier 2 arrangements that we have where the [Commissioner of Taxation] can call on ACLEI in certain circumstances, to be honest, would be our preferred outcome. Having said that, in terms of coming under ACLEI's jurisdiction, we are open to that... We believe we do have robust internal processes. What we would not want to see is a degradation of those, because we think that is about prevention.²⁶

Committee view

4.24 The committee notes the commentary regarding the potential inclusion of the ATO within ACLEI's jurisdiction. While the ATO's preference is for a second tier arrangement, the committee notes that this previously recommended model has not been adopted by government, and is not likely to be implemented in the near future.

4.25 The committee notes ACLEI's comments in support of the ATO's inclusion, but also notes the lack of clear risk assessment information. While the committee received some evidence about the numbers of integrity investigations across the ATO, resulting on average to 36–60 substantiated integrity breaches annually, no differentiation was made regarding the lesser forms of misconduct and the more serious forms of corruption.

4.26 Accordingly, the committee believes that further detail is required to assess the level of the integrity risks within the ATO. The committee therefore strongly supports an independent assessment of the ATO's corruption risks, including an examination of the likelihood of corrupt conduct within the ATO, its potential consequences for the organisation, the government and the economy, and the resourcing implications of inclusion.

4.27 The committee believes that an independent assessment of the ATO's organised crime corruption and integrity risks, together with possible funding options is critical in determining whether it should be included within ACLEI's jurisdiction.

Recommendation 2

4.28 The committee recommends that the Government initiate an independent assessment of the Australian Taxation Office's corruption risk profile, together with an examination of the feasibility of including the Australian Taxation Office within ACLEI's jurisdiction.

Australian Securities and Investments Commission

4.29 As the financial services regulator, ASIC is responsible for investor and consumer protection in financial services, through the administration of the Australian financial services licensing regime.²⁷

4.30 ASIC also performs functions as the consumer credit, markets and corporate regulator, ensuring various financial market participants adhere to financial services

26 ACLEI, *Submission 1*, Supplementary submission, p. 3.

27 ASIC, *Submission 5*, p. 2.

legislation, including the *National Consumer Credit Protection Act 2009*, and the *Corporations Act 2001*.²⁸

ASIC integrity risks

4.31 As a self-acknowledged law enforcement agency, ASIC is responsible for the investigation and prosecution of a range of criminal offences and civil penalties.²⁹ ASIC's submission notes however that at present, '[ASIC] has not had any reported instances of serious and systemic law-enforcement relation corruption issues'.³⁰

4.32 ASIC submitted that its corruption risks are associated with its regulator role, where:

Potential corruptors may stand to make a financial profit, or otherwise enhance their commercial interests, by obtaining access to the information and intelligence that ASIC collects as a result of ASIC's regulatory functions. Alternatively, potential corruptors may seek to benefit from favourable treatment such as the imposition of lower penalties, improper determinations of relief applications, or other biased decisions.³¹

4.33 ASIC's submission details its integrity risk management processes, that include public interest disclosure frameworks, together with the Australian Public Service (APS) Code of Conduct as important integrity measures.³² The submission also describes ASIC's Professional Standards Unit, which:

...is an independent unit housed within ASIC's Chief Legal Office with responsibility for investigating allegations of misconduct by ASIC officers. Where appropriate, the Professional Standards Unit will refer investigations to the AFP or the relevant State Police. Reports of misconduct or corruption can be made by existing and ex-staff as well as by members of the public via the whistleblower arrangements or as a complaint.³³

4.34 ASIC acknowledged that its staff may seek to gain profits or benefits for themselves or others, or misuse ASIC powers and discretions for improper purposes, protection of unlawful activities or manipulating surveillance and investigations.³⁴ However, at the hearing ASIC's Commissioner, Mr Greg Tanzer stated that 'there does not seem to be a compelling case for including ASIC within the jurisdiction of ACLEI...'³⁵

28 ASIC, *Submission 5*, p. 2.

29 ASIC, *Submission 5*, p. 6.

30 ASIC, *Submission 5*, p. 6.

31 ASIC, *Submission 5*, p. 6.

32 ASIC, *Submission 5*, p.8.

33 ASIC, *Submission 5*, p. 9.

34 ASIC, *Submission 5*, p. 6.

35 Mr Greg Tanzer, Commissioner, ASIC, *Committee Hansard*, 26 September 2014, p. 37.

4.35 ASIC noted that ACLEI focuses on serious and systemic law enforcement related corruption, and particularly, examines links between law enforcement and organised crime.³⁶ As such, ASIC argued its operational activities rarely contain a 'strong nexus with combating serious and organised crime.'³⁷

4.36 ASIC argued that its business processes also lower corruption risks. For example, ASIC noted that its processes encourage decisions being made by more than one officer, and that ASIC officers rarely operate away from central agency controls.³⁸

4.37 With respect to the ACIM/ACIF criminal intelligence access issue, ASIC submitted that 'ASIC's endorsement of the ACIM has not, in an appreciable way, enhanced ASIC's access to sensitive information and intelligence'.³⁹

4.38 Furthermore, while it has previously and continues to access sensitive information disseminated by the ACC, ASIC has a number of measures in place to mitigate the type of risk described by the PJC-LE.⁴⁰

4.39 ACLEI noted that ASIC had provided the committee with a realistic assessment about its law enforcement corruption risks. ACLEI further noted that an expanded jurisdiction must be based on either a demonstrated connection to law enforcement functions or a clear assessment of corruption risks.⁴¹ In response to ASIC's evidence, the former acting Integrity Commissioner, Mr Robert Cornall, observed that ASIC's written submission and ASIC officers' oral evidence 'supported the position that [ASIC is] not in a high-risk environment'.⁴²

Committee view

4.40 On the available information, the committee is persuaded that ASIC is adequately addressing its integrity risks. The committee notes that ASIC remains a relatively low risk target for serious and organised crime infiltration. The committee also notes the various integrity measures set out by ASIC. Further the committee notes that the level of ASIC's corruption risk, due to its access to criminal intelligence, has not changed appreciably since its endorsement of ACIM. Given ASIC's own processes, and the evidence presented by ACLEI, the committee is satisfied that ASIC should not be included within ACLEI's jurisdiction at this time.

36 ASIC, *Submission 5*, p. 6.

37 ASIC, *Submission 5*, p. 7.

38 ASIC, *Submission 5*, p. 7.

39 ASIC, *Submission 5*, p. 7.

40 ASIC, *Submission 5*, pp 7–8.

41 Mr Robert Cornall, Acting Integrity Commissioner, ACLEI, *Committee Hansard*, 26 September 2014, p. 63.

42 Mr Robert Cornall, Acting Integrity Commissioner, ACLEI, *Committee Hansard*, 26 September 2014, p. 67.

Attorney-General's Department

4.41 The Attorney-General's Department (AGD) delivers programs and policies including in areas that support, maintain and improve Australia's law and justice framework, and strengthen our national security and emergency management.⁴³ Its submission notes that:

The Department is the central policy and coordinating element of the Attorney-General's portfolio, for which the Attorney-General and Minister for the Arts, and the Minister for Justice are responsible. ACLEI falls within this portfolio, as do other agencies within the Integrity Commissioner's jurisdiction, namely the Australian Federal Police (AFP), Australian Crime Commission (ACC), AUSTRAC and CrimTrac.⁴⁴

4.42 Like the two aforementioned agencies, the ATO and ASIC, the PJC-LE recommended consideration of whether the AGD should be brought under ACLEI's jurisdiction. The recommendation was made on the basis of the AGD's access to sensitive criminal intelligence, via its participation in ACIM.

4.43 The AGD consists of three groups: Strategic Policy and Coordination; Civil Justice and Legal Services; and National Security and Criminal Justice.⁴⁵ The AGD submission notes that only one of these groups could be classified as having law enforcement functions, and even then only indirectly. Staff of the National Security and Criminal Justice Group are responsible for matters in relation to the *Crimes Act 1901*, the *Australian Federal Police Act 1979* and the *Telecommunications (Interception and Access) Act 1979*.⁴⁶

4.44 Further, AGD officers perform background checks for the issuance of Aviation and Maritime Security Identification Cards, assess applications for importing firearms and make decisions in relation to parole of federal offenders.⁴⁷

4.45 The ACC noted that while the group of officers with access to sensitive information within the AGD is small; the agency's inclusion is nonetheless worthy of examination. Mr Chris Dawson, CEO of the ACC argued that the regulatory function specifically involved in issuing of Aviation and Maritime Security Identification Cards warranted consideration of inclusion within ACLEI's jurisdiction:

By way of example, the Attorney-General's Department has access to certain privacy information as it relates to persons that are applying for access to maritime air transport sectors. That such information is not broadly across the Attorney-General's Department, but there are very small areas there. The submission we make is simply that it is an area that government may wish to consider because of the type of information and

43 AGD, *Submission 3*, Supplementary submission, p. 2.

44 AGD, *Submission 3*, Supplementary submission, p. 2.

45 AGD, *Submission 3*, Supplementary submission, p. 2.

46 AGD, *Submission 3*, Supplementary submission, p. 4.

47 AGD, *Submission 3*, Supplementary submission, p. 4.

the persons who are seeking such access to areas of risk. That is a matter that is worthy of consideration.⁴⁸

4.46 In a similar fashion to its comments about ASIC, ACLEI submitted that the AGD had set out a realistic assessment of its corruption risks.⁴⁹

4.47 The AGD's submission contends that the staff responsible for the identity card vetting processes, assessing applications for importing firearms and making parole decisions were not carrying out "law enforcement functions" as defined by the LEIC Act, nor do they have access to sensitive information:

While these staff may have an indirect involvement in law enforcement issues, they do not have law enforcement functions as defined by both section 5 of the LEIC Act and the further criteria developed by ACLEI. In particular, they do not have access to the types of information or powers that would make them attractive targets for corruption by serious and organised crime, especially when compared with staff from agencies already within jurisdiction. Their roles are limited to policy formulation and advice, the delivery of Australian Government programs and some regulatory functions.⁵⁰

Committee view

4.48 While the committee has recommended an independent corruption and integrity risk assessment for the ATO, the committee does not support a similar review of either ASIC or the AGD at this time.

4.49 Given its findings in relation to Agriculture, the committee is not inclined to recommend partial inclusion of agencies or departments. This is because in the committee's view the existence of 'grey spots' within Australia's law enforcement integrity framework is problematic. Therefore, the committee is not inclined to support the prescription of certain areas of either ASIC or the AGD to ACLEI's jurisdiction by regulation at this time.

4.50 With respect to ASIC and the AGD, the committee is persuaded that their overall corruption risks remain relatively low. While the committee does not support ASIC's or the AGD's inclusion at this time, it will continue to monitor the adequacy of ACLEI's jurisdiction into the future.

4.51 Finally, with respect to aviation and maritime security cards arrangements at the AGD, the committee notes that the recent Government response to the Ice Taskforce report announced changes to the eligibility criteria of the cards.⁵¹ The committee further notes that the tightening of the security card eligibility criteria may

48 Mr Chris Dawson APM, CEO, ACC, *Committee Hansard*, 26 September 2014, p. 30.

49 Mr Robert Cornall, Acting Integrity Commissioner, ACLEI, *Committee Hansard*, 26 September 2014, p. 62.

50 AGD, *Submission 3*, Supplementary submission, p. 4.

51 Australian Government, *Taking action to combat ice, Australian Government response to the National Ice Taskforce Final Report*, December 2015, p. 2.

increase the incentives for serious and organised crime groups to gain influence within the approvals process, which in turn may increase the corruption risk to vetting officers.

4.52 Legislation to implement these changes is currently before the Senate and the bill has been referred to the Senate Rural and Regional Affairs Legislation Committee.⁵² On the assumption that the bill is not considered by the Senate during the upcoming Parliamentary sittings, the committee believes that it is appropriate for the Government to examine whether officers responsible for the card security vetting ought to be subject to ACLEI's jurisdiction by being transferred to an agency within ACLEI's jurisdiction.

Recommendation 3

4.53 The committee recommends that the Government consider transferring the responsibility for vetting Aviation Security Identification Cards and Maritime Security Identification Cards to an agency within ACLEI's jurisdiction.

52 Transport Security Amendment (Serious or Organised Crime) Bill 2016, Second reading moved on 16 March 2016.

