

**PROSECUTIONS ARISING FROM INDEPENDENT
COMMISSION AGAINST CORRUPTION
INVESTIGATIONS**

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Australian Government

Australian Commission for
Law Enforcement Integrity

**Parliament of New South Wales
Committee on the Independent
Commission Against Corruption**

Inquiry into prosecutions arising from
Independent Commission Against
Corruption investigations

**Submission by the
Australian Commission for
Law Enforcement Integrity**

7 August 2014

1. Introduction

ACLEI welcomes the opportunity to make a submission to the Parliament of New South Wales Committee on the Independent Commission Against Corruption inquiry into *Prosecutions arising from Independent Commission Against Corruption investigations*.

This submission addresses the Committee's first Term of Reference: Whether gathering and assembling evidence that may be admissible in the prosecution of a person should be a principal function of the ICAC.

Part 2 of the submission provides background about ACLEI and its role and responsibilities, including a description of its investigation options and powers. Part 3 describes the range of corruption deterrence and accountability strategies available to ACLEI, which includes gathering evidence to support criminal prosecution of corruption-based offences.

2. Role and responsibilities of ACLEI

Establishment

The office of Integrity Commissioner and ACLEI are established by the *Law Enforcement Integrity Commissioner Act 2006*.

The objects of the LEIC Act¹ are:

- (a) *to facilitate:*
 - (i) *the detection of corrupt conduct in law enforcement agencies; and*
 - (ii) *the investigation of corruption issues that relate to law enforcement agencies; and*
- (b) *to enable criminal offences to be prosecuted, and civil penalty proceedings to be brought, following those investigations; and*
- (c) *to prevent corrupt conduct in law enforcement agencies; and*
- (d) *to maintain and improve the integrity of staff members of law enforcement agencies.*

Six agencies are presently subject to the Integrity Commissioner's jurisdiction under the LEIC Act:

- the Australian Crime Commission and its predecessor, the former National Crime Authority
- the Australian Customs and Border Protection Service
- the Australian Federal Police
- the Australian Transaction Reports and Analysis Centre
- the CrimTrac Agency, and
- prescribed aspects of the Department of Agriculture.

¹ Section 3

Role

Section 15 of the LEIC Act establishes the functions of the Integrity Commissioner (see Attachment A). ACLEI's primary role is to detect and prevent corrupt conduct in law enforcement agencies and to assist the Integrity Commissioner to investigate law enforcement-related corruption issues, giving priority to systemic and serious corruption. ACLEI also collects intelligence about corruption in support of the Integrity Commissioner's functions.

The Integrity Commissioner must consider the nature and scope of corrupt conduct revealed by investigations and report annually on any patterns and trends concerning corruption in law enforcement agencies.

ACLEI also aims to understand corruption and prevent it. When the Integrity Commissioner identifies Commonwealth laws or administrative practices of government agencies with law enforcement functions that might contribute to corrupt practices or prevent their early detection, he or she may make recommendations for these laws or practices to be changed.

The Minister may also request the Integrity Commissioner to conduct a public inquiry into all or any of the following²:

- a corruption issue
- an issue about corruption generally in law enforcement, or
- an issue or issues about the integrity of staff members of law enforcement agencies.

Independence

ACLEI is a statutory authority within the Attorney-General's portfolio. The Minister for Justice is responsible for ACLEI.

Impartial and independent investigations are central to the Integrity Commissioner's role. Although the Minister may request the Integrity Commissioner to conduct public inquiries, the Minister cannot direct how inquiries or investigations will be conducted.

The LEIC Act contains measures to ensure that the Integrity Commissioner and ACLEI remain free from political interference and maintain an independent relationship with government agencies. Accordingly, the Integrity Commissioner:

- is appointed by the Governor-General and cannot be removed arbitrarily
- is appointed for up to five years, with a maximum sum of terms of seven years
- can commence investigations on his or her own initiative, and
- can make public statements, and can release reports publicly.

² Section 71

Receiving and disseminating information about corrupt conduct

The LEIC Act establishes a framework whereby the Integrity Commissioner and the agency heads can prevent and deal with corrupt conduct jointly and cooperatively. The arrangement recognises both the considerable work of the agencies to introduce internal corruption controls (including detection and deterrence-focussed mechanisms) and the continuing responsibility that the law enforcement agency heads have for the integrity of their staff members.

An important feature of the LEIC Act is that it requires the head of an agency in ACLEI's jurisdiction to notify the Integrity Commissioner of any information or allegation that raises a corruption issue in his or her agency³.

The LEIC Act also enables any other person, including members of the public, other government agencies and the Minister, to refer a corruption issue to the Integrity Commissioner.

Further, ACLEI is authorised under the *Telecommunications (Interception and Access) Act 1979* to receive information about any corruption issue involving an agency within ACLEI's jurisdiction that may be identified by other integrity agencies or law enforcement agencies as a result of their telecommunications interception activities.

The Integrity Commissioner may disclose information to the head of a law enforcement agency, or other government agency, if satisfied that — having regard to the functions of the agency concerned — it is appropriate to do so.

The Integrity Commissioner is exempt from the operation of the *Privacy Act 1988*, reflecting the importance of ACLEI's collection and intelligence-sharing role.

Investigation options

The Integrity Commissioner decides independently how to deal with any allegations, information or intelligence about corrupt conduct concerning the agencies in ACLEI's jurisdiction.

The Integrity Commissioner is not expected to investigate every corruption issue that arises in Commonwealth law enforcement. Rather, the Integrity Commissioner's role is to ensure that indications and risks of corrupt conduct in law enforcement agencies are identified and addressed appropriately.

The Integrity Commissioner can choose from a range of options in dealing with a corruption issue. The options are to:

- investigate the corruption issue
- investigate the corruption issue jointly with another government agency

³ Section 19

- refer the corruption issue to the law enforcement agency for internal investigation (with or without management or oversight by ACLEI) and to report findings to the Integrity Commissioner
- refer the corruption issue to another agency, such as a State integrity agency, the AFP or another government agency, for investigation, or
- take no further action.

Section 27 of the LEIC Act sets out the matters to which the Integrity Commissioner must have regard in deciding how to deal with a corruption issue.

With these matters in mind, the Integrity Commissioner will investigate when there is advantage in ACLEI's direct involvement. Under the LEIC Act, the Integrity Commissioner must also give priority to serious or systemic corruption.

Accordingly, the Integrity Commissioner gives priority to corruption issues that:

- may indicate a link between law enforcement and organised crime
- involve suspected conduct, such as the private use of illicit drugs, which would undermine an agency's law enforcement functions
- bring into doubt the integrity of senior law enforcement officers and managers
- relate to law enforcement activities that have a higher inherent corruption risk
- warrant the use of the Integrity Commissioner's information-gathering powers, including hearings, or
- would otherwise benefit from independent investigation.

ACLEI also prioritises corruption issues that relate to the law enforcement character of the agencies in its jurisdiction, having regard to the objects of the LEIC Act.⁴

Investigation powers

A challenge facing ACLEI is that law enforcement officers subject to investigation by the Integrity Commissioner are likely to be familiar with law enforcement methods and may be skilled at countering them to avoid scrutiny. As a consequence, ACLEI has access to a range of special law enforcement powers.

The key investigative powers available to the Integrity Commissioner and ACLEI are:

- notices to produce information, documents or things
- summons to attend an information-gathering hearing, answer questions and give sworn evidence, and to produce documents or things
- intrusive information-gathering (covert) –
 - telecommunications interception
 - electronic and physical surveillance
 - controlled operations
 - assumed identities

⁴ Some of the agencies within ACLEI's jurisdiction have law enforcement and other functions and responsibilities

- scrutiny of financial transactions, and
 - access to specialised information databases for law enforcement purposes;
- search warrants
- right of entry to law enforcement premises and associated search and seizure powers, and
- arrest (relating to the investigation of a corruption issue).

It is an offence not to comply with notices, not to answer truthfully in hearings or otherwise to be in contempt⁵ of ACLEI.

3. ACLEI's approach

Different forms of corrupt conduct are likely to require different modes of investigation and treatment.

Due to ACLEI's focus on law enforcement corruption risk, the objects of the LEIC Act give some primacy to prosecution as a remedy. However, the Act recognises other forms of remedy: disciplinary action; publication of reports; recovery of proceeds of crime; and recommendations for changes to laws, policy and practice.

The type of approach taken will depend on the nature of the corruption issue and an assessment of the most effective action to address it. In some instances, arrest and prosecution may be the most appropriate, achievable and effective outcome.

In other situations, alternative approaches may serve to uncover a broader corruption network or identify systemic vulnerabilities. In those cases, prosecution may not be the most effective outcome or may be only one of several measures necessary to respond to a corruption issue.

However, under ACLEI's operational model — which often operates at the boundary between organised crime and corrupt collusion — the majority of investigations aim to collect evidence at the criminal standard to support prosecution of criminal offences.

Accordingly, ACLEI employs a range of covert law enforcement powers to support that objective, including telecommunications interception and surveillance devices. Private hearings are an important part of this strategy.

Hearings

The Integrity Commissioner may conduct a hearing (or part of a hearing) in relation to the investigation of a corruption issue. The LEIC Act provides direct use immunity for evidence gathered through hearings, except in relation to specific prescribed matters, due to the coercive powers available to the Integrity Commissioner.⁶

⁵ See section 96B (Federal Court or Supreme Court to deal with contempt), *Law Enforcement Integrity Commissioner Act 2006*.

⁶ Section 96

In deciding whether a hearing is to be held in private or in public⁷, the Integrity Commissioner must have regard to the following⁸:

- whether evidence that may be given, or a matter that may arise during the hearing (or that part of the hearing), is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence
- any unfair prejudice to a person's reputation that would be likely to be caused if the hearing (or that part of the hearing) took place in public
- whether it is in the public interest that the hearing (or that part of the hearing) take place in public, and
- any other relevant matter.

To date, the Integrity Commissioner has conducted hearings primarily as an investigative tool directed to those serious or systemic corruption issues that are given priority under the LEIC Act⁹.

As a result, it is frequently the case that the evidence given may relate to the commission, or to the alleged or suspected commission, of an offence. This factor, along with the other factors to which the Commissioner must have regard, has contributed to the Integrity Commissioner deeming it appropriate to conduct these hearings in private.

Gathering evidence

Gathering and assembling evidence to enable criminal offences to be prosecuted is one of the several objects set out in section 3 of the LEIC Act. Those objects include '*to enable criminal offences to be prosecuted, and civil penalty proceedings to be brought, following...investigations*'¹⁰. Further, in relevant circumstances, Part 10 of the LEIC Act (Attachment B) requires the Integrity Commissioner to assemble and provide evidence to a relevant authority where the Integrity Commissioner — in investigating a corruption issue or conducting a public hearing — obtains:

- evidence of an offence or liability to civil penalty¹¹
- evidence that could be used in confiscation proceedings under the Commonwealth *Proceeds of Crime Act 2002* or *Proceeds of Crime Act 1987*, or a corresponding State or Territory law¹²
- evidence of a breach of duty or misconduct by a staff member of a prescribed law enforcement agency¹³, or
- evidence of, or information suggesting, wrongful conviction.

⁷ Section 82(3)

⁸ Section 82(4)

⁹ Section 16

¹⁰ Section 3(b)

¹¹ Section 142

¹² Section 143

¹³ Section 146

A case study

The following case study provides an example of the ways in which ACLEI's operational model supports successful prosecutions for corrupt conduct as well as broader organisational integrity reform and corruption prevention initiatives.

Operation Heritage–Marca

Operation Heritage investigated alleged corrupt conduct among officers of the Australian Customs and Border Protection Service at Sydney International Airport. The investigation was conducted jointly with the Australian Federal Police — which used the designation Operation Marca — and the ACBPS, with assistance from the Australian Crime Commission and the New South Wales Police Force.

The evidence collected under Operation Heritage–Marca indicated that several ACBPS officers were actively involved in the importation into Australia of border-controlled substances, including the precursor drug pseudoephedrine. On the basis of this evidence, it is alleged that they abused their positions to arrange and effect the importations, and to attempt to frustrate detection of their activities. It is also alleged that they variously gave and received bribes to achieve their objectives.

The Commonwealth Director of Public Prosecutions (which is the relevant prosecuting authority) is also an important partner in dealing with this evidence.

A number of people have faced criminal charges arising from Operation Heritage–Marca, some of whom were ACBPS officers at the time of the conduct that gave rise to their prosecution. A number of ACBPS officers have also faced disciplinary action.

In addition to the prosecutions, the operation has contributed to a significant body of work within the ACBPS to:

- strengthen anti-corruption systems and processes
- identify and address systemic vulnerabilities that provided opportunity for corrupt conduct to occur, and
- instil a culture of high professional standards.

These measures are being strengthened further as part of the establishment of the Australian Border Force.

4. Conclusion

In summary, ACLEI does not regard prosecutions in isolation as a useful measure of the effectiveness of an anti-corruption agency or system.

However, prosecutions and disciplinary outcomes — along with corruption detection and investigation programs — undoubtedly contribute to the deterrence effect that form part of a robust corruption prevention and accountability strategy.

Attachment A: Section 15 of the LEIC Act

15 Functions of the Integrity Commissioner

The Integrity Commissioner has the following functions:

- aa) to detect corrupt conduct in law enforcement agencies;
- a) to investigate and report on corruption issues;
- b) to refer corruption issues, in appropriate circumstances, to a law enforcement agency for investigation;
- c) to manage, oversee or review, in appropriate circumstances, the investigation of corruption issues by law enforcement agencies;
- d) at the request of the Minister, to conduct public inquiries into:
 - i) corruption issues; or
 - ii) corruption generally in, or the integrity of staff members of, law enforcement agencies;
- da) to prevent corrupt conduct in law enforcement agencies;
- e) to collect, correlate, analyse and disseminate information and intelligence in relation to corruption generally in, or the integrity of staff members of, both:
 - i) law enforcement agencies; and
 - ii) other Commonwealth government agencies that have law enforcement functions;
- f) on the Integrity Commissioner's own initiative, or on request by the Minister, to make reports and recommendations to the Minister in relation to any matter that concerns the need for or the desirability of legislative or administrative action on issues in relation to corruption generally in, or the integrity of staff members of, law enforcement agencies;
- g) any other function conferred on the Integrity Commissioner by other provisions of this Act or by another Act.

Note: Paragraph (a) — the investigation of a corruption issue may be conducted in response to a referral or notification of the corruption issue to the Integrity Commissioner or on the Integrity Commissioner's own initiative.

Attachment B: Part 10 of the LEIC Act

Part 10—Dealing with evidence and information obtained in investigation or public inquiry

142 Evidence of offence or liability to civil penalty

Commonwealth offence or civil penalty

- 2) If, in investigating a corruption issue or conducting a public inquiry, the Integrity Commissioner obtains:
- a) evidence of an offence against a law of the Commonwealth that would be admissible in a prosecution for the offence; or
 - b) evidence of the contravention of a law of the Commonwealth:
 - i) in relation to which civil penalty proceedings may be brought; and
 - ii) that would be admissible in civil penalty proceedings for the contravention;
- the Integrity Commissioner must:
- c) assemble the evidence; and
 - d) give the evidence to:
 - i) the Commissioner of the AFP; or
 - ii) another person or authority who is authorised by or under a law of the Commonwealth to prosecute the offence or bring the civil penalty proceedings.

State or Territory offence or civil penalty

- (2) If, in investigating a corruption issue or conducting a public inquiry, the Integrity Commissioner obtains:
- a) evidence of an offence against a law of a State or Territory that would be admissible in a prosecution for the offence; or
 - b) evidence of the contravention of a law of a State or Territory:
 - i) in relation to which civil penalty proceedings may be brought; and
 - ii) that would be admissible in civil penalty proceedings for the contravention;
- the Integrity Commissioner must:
- c) assemble the evidence; and
 - d) give the evidence to:
 - i) the head (however described) of the police force of the State or Territory; or
 - ii) another person or authority who is authorised by or under a law of the State or Territory to prosecute the offence or bring the civil penalty proceedings.

Note: See also subsection 96B(5).

143 Evidence that could be used in confiscation proceedings

Commonwealth proceedings

(1) If, in investigating a corruption issue or conducting a public inquiry, the Integrity Commissioner obtains evidence that would be admissible in a proceeding under the Proceeds of Crime Act 1987 or the Proceeds of Crime Act 2002 (other than a criminal prosecution for an offence under that Act), the Integrity Commissioner must:

- a) assemble the evidence; and
- b) give the evidence to:
 - i) the Commissioner of the AFP; or
 - ii) another person or authority who is authorised by or under a law of the Commonwealth to bring the proceeding.

State or Territory proceedings

(2) If, in investigating a corruption issue or conducting a public inquiry, the Integrity Commissioner obtains evidence that would be admissible in a proceeding under a corresponding law within the meaning of the Proceeds of Crime Act 1987 or the Proceeds of Crime Act 2002 (other than a criminal prosecution for an offence under the corresponding law), the Integrity Commissioner must:

- a) assemble the evidence; and
- b) give the evidence to:
 - i) the head (however described) of the police force of the State or Territory; or
 - ii) another person or authority who is authorised by or under a law of the State or Territory to bring the proceeding.

144 Consultation with law enforcement agency head before taking action under section 142 or 143

(1) This section applies if the Integrity Commissioner proposes to take action under section 142 or 143 in relation to an investigation of a corruption issue that relates to a law enforcement agency.

(2) The Integrity Commissioner must take reasonable steps to consult the head of the law enforcement agency before taking the action.

(3) If:

- a) the corruption issue relates to the conduct of a secondee to the law enforcement agency; and
- b) the secondee is an employee of a government agency (the home agency);

the Integrity Commissioner must also take reasonable steps to consult the head of the home agency before taking the action.

(4) If:

- a) the corruption issue relates to the conduct of a secondee to the law enforcement agency; and
- b) the secondee is an employee of a State or Territory government agency;

the Integrity Commissioner must also take reasonable steps to consult the head of the integrity agency (if any) for that State or Territory before taking the action.

(5) However, the Integrity Commissioner need not consult a person under subsection (2), (3) or (4) if doing so is likely to prejudice:

- a) the investigation of the corruption issue or another corruption investigation; or
- b) any action taken as a result of an investigation referred to in paragraph (a).

(6) If the Integrity Commissioner does not consult a person because of subsection (5), the Integrity Commissioner must:

- a) inform the Minister that the person has not been consulted; and
- b) give the Minister the Integrity Commissioner's reasons for not consulting the person.

145 Notification of action taken under section 142 or 143

(1) This section applies if the Integrity Commissioner takes action under section 142 or 143 in relation to the investigation of a corruption issue that relates to a law enforcement agency.

(2) The Integrity Commissioner must inform the head of the law enforcement agency that the action has been taken.

(3) If:

- a) the corruption issue relates to the conduct of a secondee to the law enforcement agency; and
- b) the secondee is an employee of a government agency (the **home agency**);

the Integrity Commissioner must inform the head of the home agency that the action has been taken.

(4) If:

- a) the corruption issue relates to the conduct of a secondee to the law enforcement agency; and
- b) the secondee is an employee of a State or Territory government agency;

the Integrity Commissioner must also inform the head of the integrity agency (if any) for that State or Territory that the action has been taken.

(5) However, the Integrity Commissioner need not inform a person under subsection (2), (3) or (4) if doing so is likely to prejudice:

- a) the investigation of the corruption issue or another corruption investigation; or
- b) any action taken as a result of an investigation referred to in paragraph (a).

(6) If the Integrity Commissioner does not inform a person because of subsection (5), the Integrity Commissioner must:

- a) inform the Minister that the person has not been informed; and
- b) give the Minister the Integrity Commissioner's reasons for not informing the person.

146 Evidence of breach of duty or misconduct by staff member

Passing evidence on to head of law enforcement agency

(1) If:

- a) the Integrity Commissioner, in investigating a corruption issue or conducting a public inquiry, obtains evidence of a breach of duty or misconduct by a staff member of a law enforcement agency; and
- b) the Integrity Commissioner is satisfied that the evidence may justify:
 - i) terminating the staff member's employment or, if the staff member is a secondee to the law enforcement agency, the staff member's secondment; or
 - ii) initiating disciplinary proceedings against the staff member; and
- c) the Integrity Commissioner is satisfied that the evidence is, in all the circumstances, of sufficient force to justify his or her doing so;

the Integrity Commissioner must bring the evidence to the notice of the head of the law enforcement agency.

Passing evidence on to head of secondee's home agency

(2) If:

- a) the Integrity Commissioner, in investigating a corruption issue or conducting a public inquiry, obtains evidence of a breach of duty or misconduct by a staff member of a law enforcement agency; and
- b) the staff member is a secondee to the law enforcement agency; and
- c) the secondee is an employee of a government agency (the **home agency**); and
- d) the Integrity Commissioner is satisfied that the evidence may justify:
 - i) terminating the secondee's employment; or
 - ii) initiating disciplinary proceedings against the secondee; and
- e) the Integrity Commissioner is satisfied that the evidence is, in all the circumstances, of sufficient force to justify his or her doing so;

the Integrity Commissioner must bring the evidence to the notice of:

- f) the head of the home agency; and
- g) if the home agency is a State or Territory government agency—the integrity agency (if any) for that State or Territory.

147 Evidence of, or information suggesting, wrongful conviction

Commonwealth offence

(1) If the Integrity Commissioner:

- a) in investigating a corruption issue or conducting a public inquiry, obtains evidence that a person was wrongly convicted of an offence against a law of the Commonwealth; and
- b) is satisfied that the evidence is, in all the circumstances, of sufficient force to justify his or her doing so;

the Integrity Commissioner must:

- c) bring the evidence to the notice of the Minister; and
- d) advise the person that the Integrity Commissioner has brought the evidence to the notice of the Minister.

State or Territory offence

(2) If the Integrity Commissioner:

- a) in investigating a corruption issue or conducting a public inquiry, obtains evidence that a person was wrongly convicted of an offence against a law of a State or Territory; and
- b) is satisfied that the evidence is, in all the circumstances, of sufficient force to justify his or her doing so;

the Integrity Commissioner must:

- c) bring the evidence to the notice of the Minister; and
- d) advise the person that the Integrity Commissioner has brought the evidence to the notice of the Minister.