



# HEARING GUIDELINES

**OCTOBER 2019**

These Hearing Guidelines are intended to inform and guide the conduct of witnesses, legal representatives and other interested persons at or in connection with hearings by the Integrity Commissioner, in order to promote the efficient and effective conduct of such hearings.

Enquiries about these guidelines can be directed to the Australian Commission for Law Enforcement Integrity  
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## SUMMARY

The office of Integrity Commissioner and the Australian Commission for Law Enforcement Integrity (ACLEI) are established under the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act). The LEIC Act confers a range of functions and powers on the Integrity Commissioner in relation to corruption issues and integrity matters in prescribed law enforcement agencies. These agencies are collectively referred to as 'LEIC Act agencies' and presently comprise the Australian Criminal Intelligence Commission (including the former Australian Crime Commission, the former CrimTrac Agency and the former National Crime Authority); the Australian Federal Police (including ACT Policing); the Australian Transaction Reports and Analysis Centre (AUSTRAC); the Department of Home Affairs (including the Australian Border Force); prescribed aspects of the Department of Agriculture, and any other Australian Government agency that is prescribed by regulation under the LEIC Act.

The Integrity Commissioner conducts investigations of corruption issues and, at the Minister's request, public inquiries into any issue about corruption or integrity within the LEIC Act agencies. For the purposes of such investigations and inquiries, the Integrity Commissioner may conduct public or private hearings.

A hearing before the Integrity Commissioner is conducted as part of an investigation and is not an adversarial forum. A witness appears before the Integrity Commissioner at a hearing to provide information and not to support a particular case. The Integrity Commissioner therefore has special powers in conducting a hearing and there are particular rules surrounding the attendance and participation of witnesses.

The Integrity Commissioner has control of the hearing, the witnesses to be called and their order, the documents and things to be produced, the matters and issues to be covered in evidence, whether the hearing is conducted in public or in private and who may be present at a private hearing.

These Hearing Guidelines provide information about the hearing process for witnesses and their legal representatives. The following statutes are referred to in these Hearing Guidelines:

- [\*Acts Interpretation Act 1901 \(Cth\)\*](#)
- [\*Administrative Decisions \(Judicial Review\) Act 1977 \(Cth\)\*](#)
- [\*Crimes Act 1914 \(Cth\)\*](#)
- [\*Freedom of Information Act 1982 \(Cth\)\*](#)
- [\*Law Enforcement Integrity Commissioner Act 2006 \(Cth\)\*](#)
- [\*Privacy Act 1988 \(Cth\)\*](#)
- [\*Proceeds of Crime Act 2002 \(Cth\)\*](#)
- [\*Public Order \(Protection of Person and Property\) Act 1971\*](#)
- [\*Public Service Act 1999\*](#)

## **1. INTRODUCTION**

### **1.1 Purpose of Hearing Guidelines**

These Hearing Guidelines are intended to inform and guide the conduct of witnesses, legal representatives and other interested persons at or in connection with hearings by the Integrity Commissioner, in order to promote the efficient and effective conduct of such hearings.

### **1.2 The LEIC Act and its objects**

The Australian Commission for Law Enforcement Integrity (ACLEI) is a Commonwealth statutory agency established by the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act). The objects of the LEIC Act are to facilitate the detection, investigation, prosecution and prevention of corrupt conduct, and to maintain and improve the integrity of staff members in law enforcement agencies (s 3(1)).

### **1.3 References to legislation**

Unless otherwise indicated, all references to legislation in these Hearing Guidelines are to the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act).

### **1.4 The Integrity Commissioner and ACLEI**

ACLEI is headed by the Integrity Commissioner (s 195(3) and s 197(2)(b)). The LEIC Act confers on the Integrity Commissioner a range of investigation, intelligence and reporting functions in relation to corruption in law enforcement agencies (s 15). ACLEI supports the Integrity Commissioner in performing these functions (s 196).

The agencies currently defined as ‘law enforcement agencies’, and therefore within the Integrity Commissioner’s jurisdiction, are the Australian Criminal Intelligence Commission (including the former Australian Crime Commission, the former CrimTrac Agency and the former National Crime Authority), the Australian Federal Police (including ACT Policing), the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Department of Home Affairs (including the Australian Border Force) and prescribed aspects of the Department of Agriculture (s 5(1) LEIC Act). Other agencies, or parts of agencies, may be added to the jurisdiction by regulations.

### **1.5 Investigations**

The Integrity Commissioner conducts:

- investigations of corruption issues under Part 6 of the LEIC Act (Part 6 investigations), and
- public inquiries, requested by the Minister, under Part 8 of the LEIC Act (Part 8 inquiries) into one or more corruption issues, corruption generally in law enforcement agencies or the integrity of staff of law enforcement agencies.

In these Hearing Guidelines, in cases where the distinction is not significant, Part 6 investigations and Part 8 inquiries are collectively referred to as ‘investigations’.

## 1.6 Hearings

The Integrity Commissioner may conduct a hearing for the purposes of an investigation, in such manner as he or she thinks fit, subject to the LEIC Act (s 82(2)). In particular, a hearing, or part of a hearing, may be conducted in public or in private (s 82), although there is a presumption that a hearing in relation to a public inquiry should be held in public unless the Integrity Commissioner directs otherwise (s 82(5)).

## 2. CONTEXT AND NATURE OF HEARINGS

### 2.1 Hearings differ from court proceedings

The Integrity Commissioner does not perform a judicial function or form part of the administration of justice.<sup>1</sup> The Integrity Commissioner does not make conclusions or findings in regard to criminal or civil liability and his or her hearings are inquisitorial and not adversarial in nature. To that extent, a hearing before the Integrity Commissioner differs from criminal proceedings, even though a hearing can examine issues of criminal law and justice.

Unlike a party to court proceedings, a person who is asked to give evidence during a hearing by the Integrity Commissioner does not have a 'case' to pursue. The following extract explains this point:

Persons who are asked to assist an inquisitorial inquiry by giving evidence on matters being investigated do not have a 'case'. They have evidence to give. There may be adverse evidence that they wish to counter. They may have an interest in trying to ward off various conclusions which they fear the investigating inquiry may reach. And in preparing their evidence with all these things in mind, they may well need the assistance of legal advisers. But the conception that a witness needs to prepare a 'case' introduces an element inherent to adversarial proceedings but alien to an inquisitorial inquiry, at least at the investigative stage.<sup>2</sup>

The word "hearing", as employed in the LEIC Act, has no significance other than to describe a process whereby the Integrity Commissioner may gather information and evidence, and exercise certain coercive powers, for the purposes of supporting an investigation.

The purpose of the hearing is not to decide an issue, but to progress an investigation by assisting the Integrity Commissioner to discover facts that may lead to further action being taken. At the completion of an investigation, the Integrity Commissioner may express findings on a corruption issue, make recommendations (including in relation to a person's employment by a law enforcement agency), refer material to relevant prosecutorial authorities and communicate the results of an investigation to the Minister or to Parliament (ss 54, 55, 57, 73, 74, 142–147).

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<sup>1</sup>Although Note 2 to subsection 87(1) of the LEIC Act indicates that the Integrity Commissioner's power to take evidence by oath or affirmation means that a hearing before the Integrity Commissioner is a "judicial proceeding" for the purposes of Part III of the *Crimes Act 1914* (see s 31 of the Crimes Act). As a "judicial proceeding", it attracts the offence provisions in Part III of the Crimes Act in relation to, for example, giving false evidence or providing fabricated evidence.

<sup>2</sup>Sir Richard Scott, 'Procedures at Inquiries – The Duty to be Fair', 111 *Law Quarterly Review* 596 at 604.

## 2.2 Public and private hearings

The Integrity Commissioner may conduct a hearing either in public or in private. If a hearing were being conducted in public, the Integrity Commissioner may decide to conduct a part of the hearing in private (s 82).

Certain types of evidence must be given in private (s 89(1)). Broadly, this class includes:

- information subject to a Minister or agency's legal professional privilege;
- information protected by certain secrecy provisions<sup>3</sup> and "AUSTRAC information"<sup>4</sup>; and
- information that is the subject of a confidentiality certificate issued by the Attorney-General under section 149 of the LEIC Act (to protect security, defence, international or inter-governmental relations, Cabinet processes, law enforcement operations and methods, and personal safety – see also s 150(3)). A certificate may preclude the Integrity Commissioner or ACLEI from receiving specified information at all, or dealing with it in specified ways once received.

In all other cases, the Integrity Commissioner has discretion to decide whether the hearing, or any part of it, will be held in public or in private. For example, it may be appropriate for evidence to be given in private where it is confidential in nature, it relates to the suspected commission of an offence, a person's reputation would be unfairly prejudiced, or a person has requested confidentiality to avoid unfair prejudice to the person's financial position or profits (ss 82, 89(2)).

Another matter to be considered is the presumption, stated in section 82(5) of the LEIC Act, that a Part 8 inquiry should be held in public. It is in the nature of a public inquiry that matters are reported in the media, including information that is adverse to the reputation or interests of a person. The process for responding to adverse evidence is outlined at Paragraph 7.6 of these Guidelines.

## 3 SCOPE OF INVESTIGATIONS AND HEARINGS

### 3.1 Jurisdiction

The jurisdiction of the Integrity Commissioner to conduct an investigation and to hold a hearing is defined broadly in the LEIC Act.

Firstly, the Integrity Commissioner has power to investigate a 'corruption issue' that relates to a law enforcement agency (ss 7, 9, 15, 26). The Integrity Commissioner can be notified of, or referred, a corruption issue by a law enforcement agency, the Minister or any person or government agency (ss 18, 19, 23). An investigation can also be commenced on the initiative of the Integrity Commissioner (s 38).

Secondly, at the request of the Minister, the Integrity Commissioner may conduct a public inquiry into a corruption issue, into the issue of corruption generally in law enforcement agencies, or into an issue about the integrity of staff members of those agencies (s 71).

The Integrity Commissioner may choose to hold a hearing for the purpose of investigating a corruption issue or conducting a public inquiry (s 82(1)).

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<sup>3</sup> Taxation and law enforcement secrecy provisions, defined in s 5(1) of the LEIC Act. Such provisions typically appear in contexts which contain other provisions allowing ACLEI or the Integrity Commissioner to access the information.

<sup>4</sup> As defined in s 5 of the *Anti-Money Laundering and Counter-Terrorism Act 2006*

### **3.2 Providing information pre-hearing**

The LEIC Act places no general obligation on the Integrity Commissioner to define or publish terms of reference for an investigation or inquiry. The nature of the information which the Integrity Commissioner is required to provide to a person in advance of a hearing is set out in two provisions of the LEIC Act.

Firstly, section 83(3) states that a summons requiring a person to give evidence at a hearing that is being held for the purpose of a corruption issue, 'must set out, so far as is reasonably practicable, the general nature of the matters in relation to which the Integrity Commissioner intends to question the person'. This requirement does not apply where the Integrity Commissioner is satisfied that setting out the nature of the matters in the summons is likely to prejudice any ongoing corruption investigation, or any action taken as a result of an ongoing corruption investigation (section 83(5)).

Secondly, section 72 provides that the Integrity Commissioner 'must invite submissions on the issues that are to be the subject of [a] public inquiry'. It is implicit in that requirement that the Integrity Commissioner must provide public notice of the issues that will be dealt with at a public inquiry.

### **3.3 Providing information during a hearing**

The Integrity Commissioner will deal with any relevant question raised by a party or legal representative during the course of a hearing concerning the scope or direction of the investigation, the hearing or the examination of a witness, unless doing so would reasonably be expected to prejudice a corruption investigation. An exception, dealt with in Paragraph 15.1 of these Guidelines, is that a submission which questions or challenges the jurisdiction of the Integrity Commissioner should ordinarily be made in advance of a hearing.

### **3.4 Obtaining evidence by notice rather than hearing**

Independently of a hearing, the Integrity Commissioner may, by written notice served on a person, require the person to provide information or a document or thing specified in the notice within a specified period (s 75). It is an offence if a person fails to comply with a notice (s 78) or discloses information about the notice contrary to a notation included in the notice prohibiting disclosure of such information (ss 77A and 77B). Similar principles apply to a notice under section 75 as apply to summonses concerning legal professional privilege, self-incrimination and legal protection for compliance (ss 79–81). See also the separate *Notices Guidelines* which are available on the ACLEI website, [www.aclei.gov.au](http://www.aclei.gov.au).

## **4 RESTRICTIONS ON DISCLOSURE OF SUMMONS**

### **4.1 Notations**

The Integrity Commissioner may summon a witness to appear at a hearing to give evidence or produce a document (s83).

The Integrity Commissioner may, if it is in the public interest to do so, include in a summons to attend a hearing a 'notation' stating that the recipient of the notice is not to disclose any information about the notice or associated 'official matter'—including a corruption investigation, a hearing or court proceedings (ss 91(2) and (4)). A notation must be included if a disclosure of such information would reasonably be expected to prejudice a corruption



investigation, the safety or reputation of a person or the fair trial of person who has been, or imminently will be, charged with an offence (s 91(3)).

When a notation is included in a summons, the Integrity Commissioner will provide an accompanying written statement setting out the recipient's rights and obligations under section 92 of the LEIC Act. Section 92 sets out all relevant offences pertaining to non-compliance with a notation.

#### **4.2 Breach of notations**

Breach of the prohibition imposed by a notation is a criminal offence, punishable by imprisonment for 2 years (ss 92(1), (3) and (5)). A breach may be proved even where information about the summons or 'official matter' was not expressly disclosed, if another person could reasonably be expected to infer the existence of the summons or matter from information that was disclosed (s 92(6)).

Credit reporting agencies are ordinarily required by subsection 20E(5) of the *Privacy Act 1988* to make a note on a file detailing any disclosure of information from that file. However, where a notation prohibiting disclosure has been included on a summons issued to a credit reporting agency, the agency is prohibited from making a note recording the disclosure of information under a notice to produce, until the notation is cancelled (s 91(9)).

#### **4.3 Exceptions to breach**

A notation does not prevent the witness from disclosing the existence of the summons to a legal practitioner or legal aid officer, or such persons from further disclosing the matter, for the purpose of obtaining or giving legal advice, representation or assistance in relation to the notice. Nor does a notation prevent disclosure of the matter within a corporation for the purpose of ensuring compliance with the notation.

If a legal practitioner receives a summons requiring disclosure of information that is subject to a client's legal professional privilege, a notation does not prevent the practitioner from disclosing the matter to the relevant client to seek waiver of the privilege.

The Integrity Commissioner may specify additional exceptions in the notation (s 91(2)).

The Integrity Commissioner will consider applications for variation of a notation to allow an additional exception, if it was necessary to ensure fuller compliance with the relevant notice (for example, if it was necessary to enable recovery of documents belonging to the recipient that are in the custody of a third party) or in other exceptional circumstances.

#### **4.4 When notation ceases to have effect**

Once the relevant corruption investigation is complete and any criminal or civil penalty proceedings arising from the investigation have commenced, the notation is automatically cancelled. The Integrity Commissioner will advise the witness, in writing, when this occurs (ss 91(7) and (8)). In any case, an offence is not committed when a disclosure is made more than five years after the summons is served (s 92(1)(d)(ii)).

## **5 WITNESSES AND LEGAL REPRESENTATIVES**

### **5.1 Summonses**

The Integrity Commissioner will usually summon a witness to appear at a hearing, even if a witness volunteers to attend without a summons (s83). The issue of a summons to a person is integral to the other powers of the Integrity Commissioner to control the conduct of proceedings and the disclosure of information about a hearing.

### **5.2 Seeking leave to appear as a witness**

Where practicable, a person intending to seek leave to appear at a hearing as a witness should make a written application to the Integrity Commissioner prior to the hearing, identifying as precisely as possible:

- the nature of the person's interest in the hearing, and
- if an appearance is sought on the basis of the rules of procedural fairness, the particular interest of the person and the reason for relying on those rules.

It is within the discretion of the Integrity Commissioner to determine the manner of conducting an investigation or hearing (ss 48, 82(2)), and who may appear at a hearing. Matters that the Integrity Commissioner will take into account in deciding whether to allow a person who has made an application to appear at a hearing include:

- the reason/s given by the person in the application to appear
- if the person has an interest to protect (such as reputation) that could most effectively be protected by the person appearing
- whether the person's evidence would assist the Integrity Commissioner's investigation
- the effect of the person's appearance on the efficiency and effectiveness of the hearing, and
- whether information can be provided by the person to the Integrity Commissioner by means other than an appearance at a hearing.

### **5.3 Counsel Assisting**

The Integrity Commissioner may appoint an external legal practitioner, a legal practitioner employed by ACLEI or any other legal practitioner as Counsel Assisting to assist generally, in relation to an investigation or in relation to a public inquiry (s 200).

### **5.4 Legal representatives of witnesses and third parties**

The LEIC Act provides for a person who is giving evidence at a hearing to be represented by a legal practitioner (s 85(1)). The Integrity Commissioner may also consent to a person who is not giving evidence to be legally represented at a hearing, in special circumstances (s 85(2)).

As a matter of protocol, a legal practitioner seeking to represent a witness or person at a hearing should seek leave to do so either before or at the commencement of the hearing. It would assist the Integrity Commissioner if, in seeking leave, the legal practitioner outlined the basis on which leave is sought.

Without prejudice to the right of a witness to legal representation, the Integrity Commissioner may, in the exercise of the power under section 86(1) of the LEIC Act, determine who may

be present at a private hearing, or refuse leave for a particular legal practitioner to appear at the hearing. For operational reasons, it may not be appropriate for the Integrity Commissioner to disclose to the legal practitioner all the information known to the Integrity Commissioner that is relevant to such a decision.

## **5.5 Joint representation of different persons**

A special issue that can arise is the appropriateness of a single legal practitioner representing a number of people who are to give evidence at a hearing or who are otherwise involved in an investigation by the Integrity Commissioner. It may not be in the interest of each person to be represented by the same practitioner. It may create unmanageable and unanticipated conflicts for the practitioner seeking to represent parties whose interests may diverge. Finally, it may prejudice a hearing or an investigation more generally for a practitioner to represent more than one person.

One situation in which these issues are likely to arise is where evidence is to be given at a private hearing, or the Integrity Commissioner has issued a direction requiring that information relating to a summons or a hearing be treated as confidential or not be used or disclosed.

The Integrity Commissioner, before granting leave to a legal practitioner to represent more than one person at a hearing, may require the practitioner to confirm that appropriate consideration has been given to the issue of joint representation. The Integrity Commissioner may also reconsider during the course of a hearing whether it is appropriate for a legal practitioner to continue to represent more than one person. The concerns at each point would include the effectiveness and efficiency of the hearing, and the protection of the rights of all witnesses and other persons involved, including those not represented by the specific practitioner.

It may not be appropriate for the Integrity Commissioner, for operational reasons, to disclose to a legal practitioner all the information known to the Integrity Commissioner that is relevant to the issue of joint representation.

## **5.6 Expenses, and legal and financial assistance**

A person called to appear at a hearing before the Integrity Commissioner may be eligible to receive reimbursement for some expenses reasonably incurred in attending the hearing (s 83(6)). The type and level of costs that may be reimbursed are set out in Schedule 1 of the *Law Enforcement Integrity Commissioner Regulations 2006*. These include lost salary, transport costs, accommodation and meals in certain circumstances. Reimbursement of expenses may be claimed by submitting a completed Witness Expense Form to ACLEI. Forms are available at a hearing from ACLEI staff, or can be downloaded from ACLEI's website at [www.aclei.gov.au](http://www.aclei.gov.au).

Witnesses called to appear at a hearing before the Integrity Commissioner are able to apply to the Attorney-General for legal assistance and/or financial assistance (other than witness expenses) in connection with their appearance before the Integrity Commissioner (s 103). All inquiries relating to legal and/or financial assistance, and any application for such assistance, must be made to the Attorney-General's Department, and not to the Integrity Commissioner or ACLEI. For further details, and to make an application online, see [www.ag.gov.au/LegalSystem/Legalaidprogrammes/Commonwealthlegalfinancialassistance/Pages/default.aspx](http://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Commonwealthlegalfinancialassistance/Pages/default.aspx).

A person to whom a summons has been issued with a notation prohibiting disclosure of the summons will not commit any offence in making an application under section 103 for legal assistance (s 92(2)(b)).

## **5.7 Formalities**

There is no set rule as to whether a legal or other representative should stand or be seated when addressing the Integrity Commissioner. Practice may vary depending on the nature of the hearing and hearing room.

Legal practitioners do not robe when appearing before the Integrity Commissioner.

Unless the Integrity Commissioner directs otherwise, parties and representatives should address the Integrity Commissioner by that title, or “Sir” or “Madam” as appropriate, and other parties by surname.

## **6 ATTENDING AND PARTICIPATING IN A HEARING**

### **6.1 General role of the Integrity Commissioner**

The Integrity Commissioner has control of the hearing, the witnesses to be called and their order, the documents and things to be produced, the matters and issues to be covered in evidence, whether the hearing is conducted in public or in private and who may be present at a private hearing (ss 82, 83, 86).

### **6.2 Notice of hearing and attendance of the public**

#### **6.2.1 Public hearings**

The Integrity Commissioner will publish notices of all public hearings and public inquires on ACLEI’s website at [www.aclei.gov.au](http://www.aclei.gov.au) and by way of written notice posted at the hearing venue.

A public hearing may be attended by any member of the public, subject to the availability of seating in the hearing venue.

#### **6.2.2 Private hearing**

The Integrity Commissioner will not publish any notice of a scheduled private hearing. A private hearing may be held at any time, especially to suit operational needs and the availability of witnesses.

No members of the public will be permitted to attend a private hearing. Attendance at a private hearing will normally be limited to:

- the Integrity Commissioner,
- the witness and his or her legal representative,
- Counsel Assisting or a legal practitioner appointed to assist the Integrity Commissioner, and
- one or more investigators from ACLEI or an agency investigating the corruption issue jointly with ACLEI.

A witness at a private hearing has a right to be informed of, and to comment on, the presence of any other person at the hearing (s 86(3)). Attendance at a private hearing

without the Integrity Commissioner's authorisation is an offence punishable by 2 years imprisonment (s 86(5)).

### **6.3 Participating in a hearing**

#### **6.3.1 Obligation to attend**

A person who is issued a summons to attend a hearing must do so; failure to attend constitutes an offence (see below).

A person who claims to be unable to attend a hearing or to produce documents in response to a summons is expected to raise that claim with the Integrity Commissioner at the earliest opportunity. The Integrity Commissioner will give reasonable consideration to any request, including the possibility of adjourning the hearing to a more convenient date for all parties, but regards it as exceptional to excuse a person from the obligation to comply with a summons.

The basis for any claim should be clearly explained in writing and supported by other confirming details. A claim that a person is unable to comply with a summons due to illness should be supported by a medical certificate and diagnosis. The certificate should be prepared and signed by a medical practitioner who has examined the person. The certificate should explain the person's illness, why the illness would reasonably prevent the person from providing evidence at the time required, and when it is expected that the person will be able to provide evidence. Where appropriate, it should include information about the conditions under which it would be feasible for the person to attend and give evidence, despite the health condition.

A medical practitioner who is requested to provide a certificate should be informed that the matters stated in the certificate may be the subject of appraisal by the Integrity Commissioner.

It is open to the Integrity Commissioner not to accept the reasons given or opinions stated in a medical certificate, or not to accept a medical certificate which does not outline the nature of the illness suffered by the person. The Integrity Commissioner may require a person to comply with a summons, notwithstanding the contrary opinion of a medical practitioner.

There is a procedure in the LEIC Act whereby a judge may issue a warrant for the arrest of a witness who has failed, or is likely to fail, to attend a hearing as required by a summons (s 99). There is a corresponding procedure for a judge to issue a warrant requiring a person who may be required to give evidence at a hearing to deliver his or her Australian or foreign passport or other travel document to the Integrity Commissioner (s 97, 98).

#### **6.3.2 Obligation to participate**

The following conduct is an offence under section 93 of the LEIC Act:

- Failing to attend a hearing when summoned (punishable by 12 months' imprisonment),
- Failing to make an oath or affirmation, or answer a question when summoned to a hearing (punishable by 2 years' imprisonment), and
- Failing to produce a document pursuant to a summons (punishable by 2 years' imprisonment)

In the alternative, this conduct may also be prosecuted as obstructing or hindering the conduct of hearings (see Paragraph 6.3.4 of these Guidelines) or as contempt (see Paragraph 6.3.5 of these Guidelines).

### **6.3.3 Order to produce things during a hearing**

The Integrity Commissioner may require a witness at a hearing to produce a document or thing that was not specified in the summons (s 83(5A)).

Failure to comply may be prosecuted under the LEIC Act as obstructing or hindering the conduct of hearings (see Paragraph 6.3.4 of these Guidelines) or as contempt (see Paragraph 6.3.5 of these Guidelines).

### **6.3.4 Obstructing a hearing**

The Integrity Commissioner will not tolerate behaviour at, or in connection with, a hearing that frustrates the conduct of the hearing. Each of the following types of conduct will constitute an offence punishable by 2 years' imprisonment pursuant to section 94 of the LEIC Act:

- obstructing or hindering the Integrity Commissioner in the performance of his or her functions or the exercise of his or her powers,
- disrupting a hearing, and
- threatening any person present at a hearing.

### **6.3.5 Contempt**

In addition to the conduct and consequences noted in Paragraphs 6.3.1-6.3.3 above and other offences (including under the *Criminal Code* or under Part III of the *Crimes Act*), the following types of conduct will also constitute contempt of ACLEI pursuant to section 96A of the LEIC Act

- giving false or misleading evidence,
- insulting, disturbing or using insulting language towards the Integrity Commissioner, and
- taking part in or creating a disturbance in or near a place that the person knows is being used to hold a hearing.

The Integrity Commissioner may apply to the Federal Court of Australia, or to the Supreme Court of a State or Territory, for the person to be dealt with by the Court as if he or she had committed a corresponding contempt of the Court (s 96B).

Details of the contempt procedure are set out in sections 96A to 96F. Before making an application to the Court to commence contempt proceedings, the Integrity Commissioner must inform the witness of the proposed action and provide a copy of the certificate of grounds and evidence that will accompany the application (s 96B(2) and (4)). If necessary, the Integrity Commissioner may direct during a hearing that the witness be detained for the purpose of bringing the person before the Court (s 96D). A detained witness must be brought before the Court as soon as practicable (s 96D(2)).

Once the application has been lodged with the Court and the witness (if detained) brought before the Court, the Court will deal with the merits of the allegation of contempt (ss 96B(6) - (7) and 96C) and with the question of bail (s 96D(3)–(5)). However, the Integrity Commissioner may withdraw the application at any time, in which case the witness, if



detained, must immediately be released (s 96E). Accordingly, the witness's legal representative may make submissions to the Integrity Commissioner as to why contempt proceedings should be discontinued at any time before the Court deals with the matter, but must approach the Court about questions of bail.

A witness may not be both dealt with for contempt and prosecuted in respect of the same conduct (s 96F).

## **6.4 Public order requirements**

Part IIA of the *Public Order (Protection of Person and Property) Act 1971* (the PO Act) permits the use of certain powers in relation to a hearing. The Integrity Commissioner has authorised ACLEI officers under the PO Act to require a person attending a hearing to:

- provide personal particulars and evidence of identity, and
- submit to a frisk search and deposit any hazardous substance or weapon.

Additionally, under the PO Act, a person must not enter into, or remain upon, premises occupied or used by the Integrity Commissioner in connection with hearings or other operations conducted by the Integrity Commissioner, while they are in possession of any firearm, explosive substance or an offensive weapon. Consequently, any law enforcement officer or person in possession of an offensive weapon (eg. Oleoresin Capsicum or 'OC' spray, batons, or firearm), **must** either attend the hearing without their appointments, or surrender their appointments to an ACLEI authorised officer upon their attendance.

Any non-compliance with the PO Act may constitute a criminal offence (s 13C(2), s 13D(2) and s 13F of the PO Act).

For the purposes of security and to ensure order in proceedings, the Integrity Commissioner will usually require those present to lodge their mobile telephones and similar devices for safekeeping prior to entering the hearing room. ACLEI can arrange appropriate safekeeping of devices.

## **7 HEARING PROCESS**

### **7.1 Opening statement**

It will be normal for the Integrity Commissioner to make an opening statement at the start of a hearing. Counsel Assisting the Integrity Commissioner may also be called on to present an opening statement.

#### **7.1.1 Public hearing**

In a public hearing, the Opening Statement will announce the general scope and purpose of the hearing, the order of proceedings, and the rules applying to witnesses and legal representatives at the hearing. As befits a commission of inquiry, the purpose of the Opening Statement will be to introduce each topic or issue generally, and possibly to outline the facts as then known, thereby providing the context for the examination of witnesses and indicating matters of likely inquiry.

An important purpose of the opening statement in a public hearing is to facilitate procedural fairness to those whose interests might be affected by the Integrity Commissioner's inquiry, however, the detail provided by the Integrity Commissioner in the Opening Statement may need to be limited to avoid prejudicing any continuing or prospective investigation.

## 7.2.2 Private hearing

In a private hearing, the Opening Statement will be limited to setting out the rules and expectations applying to witnesses and legal representatives.

## 7.2 Examination and cross-examination of witnesses

Section 88 of the LEIC Act provides that the Integrity Commissioner may, if appropriate, permit examination or cross-examination of any witness on any matter that the Integrity Commissioner considers relevant. The doctrine of procedural fairness does not provide any automatic right to cross-examine in a process of the kind followed by the Integrity Commissioner.

The opportunity to examine or cross-examine may be extended to Counsel Assisting, a legal representative, or a person summoned or otherwise authorised to appear at a hearing (s 88).

A legal representative or party who wishes to cross-examine a witness should make a request to Counsel Assisting or the Integrity Commissioner, either before or during the hearing. The request should outline the issues on which cross-examination would be conducted, and the reason for the request to permit cross-examination.

In deciding whether to permit cross-examination of a witness, the Integrity Commissioner will have regard to the following considerations:

- whether it would facilitate procedural fairness for any party to the hearing,
- whether evidence given by a witness, the credibility or veracity of a witness, or other issues that are material to an investigation, should be tested by cross-examination, in order to assist the Integrity Commissioner in the investigation,
- the importance to the investigation of the issue on which cross-examination may be permitted,
- the overall impact on the effective and efficient investigation of a corruption issue,
- whether contrary evidence on an issue in dispute can be given in a form other than cross-examination, or
- whether it would impede or unduly lengthen a hearing to permit cross-examination.

If the Integrity Commissioner decides to permit cross-examination, he or she may also decide whether cross-examination of a witness should be undertaken by Counsel Assisting, rather than by a legal representative or other party in a hearing.

The Integrity Commissioner may permit cross-examination on some issues but not others, or place restrictions on the cross-examination of a witness. The Integrity Commissioner may also decide to defer a decision on whether to allow cross-examination until a later stage in the hearing. If necessary, a party can be re-called to the hearing in order to be cross-examined. At any time, the Integrity Commissioner may decide that cross-examination should cease, if it is not proving productive or if it jeopardises the hearing or an investigation as a whole.

In declining a request to permit cross-examination or in deciding that cross-examination should cease or be limited, the Integrity Commissioner will ordinarily, and to the extent practicable, explain the reasons for that decision.



### **7.3 Submitting Evidence and Statements**

Documents or other items that are placed in evidence before the Integrity Commissioner should ordinarily be introduced by Counsel Assisting, and at a time of the Integrity Commissioner's choosing. Consequently, and where practicable, any person (including a legal representative) who proposes to place a document or item in evidence at a hearing before the Integrity Commissioner should first indicate his or her intention to do so, through Counsel Assisting. This course should be taken prior to the commencement of a hearing. A departure from this course may be appropriate where the relevance of a document or other thing to a hearing only becomes known during the course of a hearing.

A similar direction applies to providing a statement or written submission to the Integrity Commissioner for the purposes of a hearing. The intent to do so should be raised with the Integrity Commissioner through Counsel Assisting in advance of tendering the statement or submission. This direction does not contradict section 23 of the LEIC Act, which provides that a person may at any time refer to the Integrity Commissioner an allegation or information that raises a corruption issue, but it does not mean that any corruption issue so referred to the Integrity Commissioner at a hearing will necessarily be explored in that hearing.

### **7.4 Application of rules of evidence**

The purpose of a hearing is to assist the Integrity Commissioner in conducting an investigation. The Integrity Commissioner may conduct both an investigation and a hearing in such manner as the Integrity Commissioner thinks fit (ss 48, 82(2)). It follows that the rules of evidence do not apply in a hearing and the Integrity Commissioner may seek to be informed as he or she thinks fit.

It is open to a legal representative or a party in a hearing to question the relevance or purpose of an item of evidence or information being presented to the hearing. Any such objection should, however, take account of the special role that a hearing plays in an investigation being conducted by the Integrity Commissioner. It is in the nature of an investigation or inquisitorial proceeding that issues can be examined in order to gauge their potential relevance to an investigation.

It is for the Integrity Commissioner to determine the relevance of potential evidence. It will not always be possible for the Integrity Commissioner to fully explain fully how particular evidence may be relevant to the investigation without prejudicing the matter.

An objection that is framed solely by reference to the rules of evidence and the admissibility of evidence in a court proceeding will be unpersuasive in a hearing conducted by the Integrity Commissioner. As a general guide, the circumstances in which the Integrity Commissioner is more likely to restrict evidence being presented or a witness being examined are when:

- the connection between the evidence or examination, and the scope and purpose of a hearing, cannot reasonably be drawn,
- it is unlikely that a witness would be able to give a rational or helpful response to a question, or
- the apparent line of inquiry is unlikely to inform the Integrity Commissioner in relation to the investigation to which the hearing relates.

## **7.5 Confidentiality directions**

The Integrity Commissioner can direct that hearing material may not be used or disclosed, or may only be used or disclosed in a prescribed manner (s 90). Hearing material includes evidence given during a hearing and documents produced, as well as information that might enable a witness to be identified, or information about the fact a person has given or may be about to give evidence at a hearing (s 8A(1)).

If a hearing is held in private then the Integrity Commissioner must give a confidentiality direction where he or she is satisfied that failure to do so might prejudice a person's safety or would reasonably be expected to prejudice the witness's fair trial in circumstances where the witness has been charged with a related offence, or a charge is imminent (s 90(2)).

A legal representative, witness or other person whose interests may be affected by a hearing may make a submission to the Integrity Commissioner that evidence should be received in a private hearing, or that material not be used or disclosed. The submission may be made at any time prior to or during the hearing. The submission should refer to relevant sections of the LEIC Act and should explain why it is desirable that an order restricting publication of evidence should be made.

## **7.6 Responding to adverse evidence**

### **7.6.1 General**

It is not the practice of the Integrity Commissioner to notify a person in advance that evidence adverse to them may, or is likely to, be given at a public or a private hearing. Nor do the rules of procedural fairness impose an obligation upon the Integrity Commissioner to provide advance notice in those circumstances.<sup>5</sup>

There is a prima facie requirement in section 51 of the LEIC Act that, before including an opinion or finding that is critical of a person in a report, the Integrity Commissioner must give the person a reasonable opportunity to appear before him or her and make submissions in relation to the opinion or finding. Section 51 ensures that, if a witness cannot or does not respond to adverse evidence in the course of a hearing, the witness will still be given an opportunity to comment on such evidence where it is material to the Integrity Commissioner's report.

### **7.6.2 Public hearings**

If evidence given at a public hearing were adverse to the interests or reputation of a person, the Integrity Commissioner will afford that person an opportunity to respond to that evidence or to make a submission regarding it. However, it may not always be appropriate or practicable to provide an opportunity to be heard in public or in a further formal hearing, particularly if to do so would needlessly lengthen or complicate the public hearing or investigation, or the adverse evidence will not form part of the Integrity Commissioner's findings.

### **7.6.3 Private hearings**

If evidence adverse to a person were given at a private hearing, given the range of people present and the existence of non-disclosure requirements, there may be less of a need to provide that person with an opportunity to respond. The main issue guiding the Integrity

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<sup>5</sup>*National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296.

Commissioner will be the importance and relevance to the investigation of allowing an opportunity to respond.

## **7.7 Closing submissions**

At the conclusion of a hearing the Integrity Commissioner may set a timetable for written submissions to be made by interested persons. A party given leave to make a written submission is expected to comply with the timetable set by the Integrity Commissioner. The Integrity Commissioner may not accept submissions lodged after the closing date.

## **8 SELF-INCRIMINATION INDEMNITY**

### **8.1 Rules against self-incrimination do not apply**

A hearing by the Integrity Commissioner forms part of an investigation and is not for the purpose of making final decisions as to criminal liability. Consequently, a witness who has been summoned to a hearing of the Integrity Commissioner is not excused from answering a question or producing a document or thing on the ground that doing so would tend to incriminate the person or expose him or her to a penalty.

### **8.2 Direct use indemnity does apply**

The LEIC Act provides that the information given, or the document or thing produced, at a hearing cannot be admitted in evidence against the person in criminal proceedings, or any other proceedings for imposition or recovery of a penalty (s 96(4)). This protection means that, except for certain specified exceptions, none of the evidence given by the witness in a hearing is admissible in evidence against the person in criminal proceedings, or any other proceedings for the imposition or recovery of a penalty. There are three important points to note about this 'direct use indemnity'.

First, the indemnity applies automatically<sup>6</sup>. There is no need for a specific claim to be made.

Secondly, the indemnity is not available to a person in respect of a document the person is required to produce if the document forms part of a business record and the person is required to produce the document in the capacity of an officer of the corporation (s 96(3)).

Thirdly, there are a number of types of proceeding where, as an exception to the indemnity, the information, document or thing may be used or admitted in evidence against the person (s 96(4A)). These exceptions are:

- a prosecution for failure to comply with hearing directions and orders, and with any notation on the summons,
- a proceeding under Commonwealth or State/Territory law for confiscation of proceeds of crime if the proceeding has not commenced and is not imminent,
- a prosecution related to the LEIC Act for giving false or misleading information, producing a document that is false or misleading or obstructing a Commonwealth public official,
- disciplinary proceedings against the person, if the person is (or was<sup>7</sup>) a staff member of a LEIC Act agency, or
- an application for a person to be dealt with for being in contempt of ACLEI.

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<sup>6</sup> This has been the position since April 2012, when subsection 96(2) of the LEIC Act was repealed.

<sup>7</sup> Recent amendments to the *Public Service Act 1999* permit the taking of certain Code of Conduct action against Australian public service employees post-separation.

## 8.3 Pending and future charges

### 8.3.1 General

The Integrity Commissioner may issue a summons to a person who has been charged with an offence, or where a charge is imminent (ss 82(1A), 83(1)). The same applies where the person is, or imminently will be, the subject of confiscation proceedings under the *Proceeds of Crime Act 2002* (Cth).

The Integrity Commissioner may ask the witness questions which relate to the subject matter of the relevant charge or the confiscation proceedings (s83(2A)). The witness may also be required to produce documents or things that directly relate to the subject matter of an offence with which the witness has been charged (s 96AD(4)).

In determining whether a hearing is being conducted pre-charge, in circumstances where a charge is imminent, or whether a hearing is being conducted post-charge<sup>8</sup>, the following principles apply:

- A hearing will be treated as being ‘pre-charge’ where no charges are imminent and any charges which have been laid against the person have been resolved.
- A charge will be ‘imminent’ if:
  - the summoned person is a *protected suspect* under the *Crimes Act 1914* (Cth) (or would be, if that Act applied to State and Territory offences)
  - the summoned person has been arrested for an offence but is yet to be charged, or
  - a person with authority to initiate the criminal process for the summoned person’s prosecution has decided to initiate the process, but has not yet done so (s 5(1)).
- A hearing is “post-charge” if the relevant prosecuting body has formally laid charges. A charge is “resolved”, and therefore the conduct of a hearing is no longer post-charge, if (s 8B):
  - The charge is withdrawn or dismissed,
  - The person is not committed on the charge following a committal hearing,
  - The person is acquitted, sentenced or is dealt with by being the subject of an order made as a consequence of a finding of guilt,
  - The charge is otherwise finally dealt with,
  - There is an appeal against a decision relating to the charge and that appeal lapses or is finally determined, or
  - There is no appeal against a decision lodged within the timeframe for lodging appeals.

### 8.3.2 Protections and Limitations

The Integrity Commissioner must issue a direction limiting or prohibiting the use or disclosure of hearing material if failure to do so would reasonably be expected to prejudice the witness’s fair trial (s90(1)-(2)). However, a person’s trial will not be unfair merely because he or she has been a witness appearing before the Integrity Commissioner.

Any use or disclosure of information by ACLEI is limited by sections 142, 143, 146 and 147 of the LEIC Act. The use and disclosure permitted by these provisions is outlined below at Paragraph 13.2. In addition to these limitations, the use or disclosure of hearing material or derivative material which relates to a witness who is the subject of an existing or pending charge may be further limited by sections 96AA-96AE, discussed below at Paragraph 13.3.

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<sup>8</sup> These terms are defined in s 5 of the LEIC Act. “Resolved” is defined in s 8B.

These limitations supplement the inadmissibility of self-incriminating evidence under section 96(4) of the LEIC Act.

## **9 LEGAL PROFESSIONAL PRIVILEGE**

### **9.1 Extent of preservation of legal professional privilege**

Section 96(6) of the LEIC Act preserves the right of a person to make a claim of legal professional privilege, subject to some exceptions.

A legal practitioner who is required by summons to attend a hearing may refuse to answer a question or produce a document or thing if to do so would breach a privileged communication made by or to the legal practitioner (s 95(1)). This protection can be waived by a person to or by whom the privileged communication was made (s 95(3)). There are, however, several exceptions, as set out below.

#### **9.1.1 Exceptions**

- A legal practitioner may disclose that he or she has received a for the purpose of seeking permission to release documents or answer a question (s 92(2)(e)).
- The Integrity Commissioner can require a legal practitioner to disclose the name and address of a person in respect of whose communications legal professional privilege is claimed (s 95(4)), and
- A claim of legal professional privilege cannot be made in respect of legal advice to or from an Australian Government agency (s 96(5)(c)). However, in such a case, the privilege will still apply to communications which were not made in an official capacity (and the position in s 95(1),(2) and (5) will still apply).

A witness may assert legal professional privilege on behalf of a third party. In such a case it is for the witness to seek instructions from a third party as to whether to assert legal professional privilege in a document covered by the request.<sup>9</sup>

### **9.2 Procedures for asserting legal professional privilege**

The procedures for a witness to assert legal professional privilege in a hearing will depend upon whether the issue arises in respect of documents that the witness is summoned to produce, or in relation to particular questions during the course of the hearing.

#### **9.2.1 Documents**

If a witness has received a summons that, on its face, would require the person to produce a document or thing that would reveal the content of a communication, being a communication in which the person believes that he or she holds legal professional privilege, and the person is not prepared to disclose that communication to the Integrity Commissioner voluntarily in advance of the hearing, the witness must still attend the hearing with all the documents and/or things requested. Any document (including a statement of information) or thing for which the person wishes to claim legal professional privilege should be provided in a sealed envelope marked with the words 'Response to Request No. [X] of [year]—Claim for Legal Privilege'. The documents or things that are the subject of the claim should be accompanied by:

- a list identifying each such document or thing,

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<sup>9</sup> *MM v Australian Crime Commission* [2007] FCA 2026, at [30]-[39].

- a written submission to the Integrity Commissioner to the effect that the request purports to require production of documents or things that are subject to legal professional privilege and that the person is not prepared to disclose voluntarily, and
- a statutory declaration by the person in support of the claim of legal professional privilege, setting out particulars of the grounds for the claim and whether or not he or she has sought legal advice as to the validity of the claim.

The witness will be called before the hearing and invited to tender the above materials. The Integrity Commissioner may also permit a legal practitioner to make oral submissions in support of the claim of legal professional privilege at this time.

### **9.2.2 Oral Evidence**

If the issue of legal professional privilege arises in the course of a hearing as to particular questions, the Integrity Commissioner will make a determination as to whether he or she will direct the witness to answer the questions asked. Should the Integrity Commissioner insist upon an answer to the questions, and the claim of privilege is maintained, the Integrity Commissioner will require the witness to address him or her on the following matters:

- confirmation that the question asked will require information which is subject to legal professional privilege to be disclosed, and
- particulars of the grounds for the claim and whether or not the person has sought legal advice as to the validity of their claim.

The Integrity Commissioner may adjourn the hearing to permit the witness to seek legal advice, and/or to be legally represented in relation to the claim.

### **9.2.3 Claim accepted**

The Integrity Commissioner will consider the claim on the basis of the submission and the statutory declaration. If, on the basis of that consideration, the Integrity Commissioner were satisfied that the person has legal professional privilege in the documents and/or things, or in the likely response to the questioning, the sealed envelope will be returned unopened to the person or that line of questioning will be abandoned.

### **9.2.4 Claim not accepted**

If the Integrity Commissioner is not satisfied that the person has legal professional privilege in all of the documents and/or things, or in the likely answer to the proposed questioning, the Integrity Commissioner will invite further oral submissions as to why the claim of legal professional privilege should not be rejected.

If the Integrity Commissioner finds against the claim, the Integrity Commissioner will stand down the hearing for a specified time, and where relevant, direct that the sealed envelope not be opened before the expiry of a specified period. This direction is intended to give the claimant a reasonable opportunity to initiate any legal action to vindicate the claim of legal professional privilege. While the specified period would normally be 28 days, consistent with the period for making an application prescribed in subparagraph 11(3)(b)(iii) of the *Administrative Decisions (Judicial Review) Act 1977*, the Commissioner may allow a longer or shorter period.

If the time for taking any such action expires without the action being initiated, the hearing will be recommenced, and where relevant, the sealed envelope will be opened and the



contents examined. Any continued failure to comply with a requirement of the Integrity Commissioner would then be considered for prosecution action, or initiation of contempt proceedings.

### **9.2.5 Claim partially accepted**

In the specific case of the production of documents, if the Integrity Commissioner decides that legal professional privilege attaches to only some of the documents in the sealed envelope and the decision is not subject to further challenge, ACLEI legal staff will make mutually acceptable arrangements for the opening of the envelope in circumstances where the documents found to be privileged can be removed, and the identity of those documents confirmed, including an undertaking by the individual/s involved that they will not disclose the identity or nature of any documents.

## **10 OTHER PRIVILEGES**

### **10.1 Parliamentary privilege**

The Integrity Commissioner's power to require information from a person or to make use of a document produced by a person does not extend to information or documents covered by Parliamentary privilege. This includes advice prepared for or given to a person as to the transaction of any Parliamentary business.

Conversely, there is no obstacle to the Integrity Commissioner requiring evidence about other kinds of documents or advice provided to a Minister to assist in the performance of executive functions, such as information briefs or submissions as to how the Minister should exercise a statutory power.

### **10.2 Other**

The Integrity Commissioner takes the preliminary view that privileges other than legal professional privilege and parliamentary privilege are overridden by section 93 of the LEIC Act, including any privilege against spousal incrimination that may be considered to be extant.<sup>10</sup> However, the Integrity Commissioner will consider submissions on this point in relation to any notice to which it is relevant. An application for this purpose should be made in the same manner as an application for recognition of legal professional privilege.

## **11 SECRECY PROVISIONS**

The LEIC Act expressly provides that a person is not excused from answering a question, or producing a document or thing, when summoned to do so at a hearing on the ground that compliance would breach a secrecy provision of or under any Commonwealth law or would be otherwise contrary to the public interest (s 96(5)).

This rule expressly preserves two types of Commonwealth secrecy provisions—taxation secrecy provisions and law enforcement secrecy provisions (s 96(5)(d) — the terms are defined in s 5). However, provisions of this type permit disclosures to be made for the purposes of the LEIC Act, so the exception does not necessarily mean that a person with access to official information and documents relating to taxation or law enforcement can refuse to answer questions or provide a document or thing to the Integrity Commissioner.

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<sup>10</sup> Following the decision of the High Court in *Australian Crime Commission v Stoddart* [2011] HCA 47, the Integrity Commissioner considers that no such privilege can be raised against the obligation to comply imposed by section 93.

When classified evidence, documents or things are produced to the Integrity Commissioner, arrangements will be made to ensure that, in accordance with the requirements of the Australian Government Protective Security Policy Framework, the material will only be accessed by ACLEI staff members who have appropriate security clearance.

## **12 SECTION 149 CERTIFICATES**

The Attorney-General may certify that the disclosure of particular information would be contrary to the public interest (s 149). If the Attorney-General prohibits or restricts the disclosure of documents or information in this way he or she will issue a 'section 149 certificate.' The grounds for issuing a section 149 certificate are listed in section 149(2) of the LEIC Act.

A person does not have to give information or produce a document at a hearing of the Integrity Commissioner if that information or document is covered by a section 149 certificate.

If a summons were issued to a person and the person or their agency believes that the required disclosure to the Integrity Commissioner, or subsequent public or other onward disclosure, could satisfy the requirements of section 149, the person or their agency should first raise relevant concerns with the ACLEI contact officer nominated in the request as soon as possible. The ACLEI contact officer will be able to discuss withdrawal of the summons or, where appropriate, agreement as to the purview of questioning at the hearing and/or an undertaking by the Integrity Commissioner as to the security and limits upon further disclosure of the information or document.<sup>11</sup>

If agreement cannot be reached and the person/agency proposes to apply to the Attorney-General for issue of a section 149 certificate, the person should advise the ACLEI contact officer of his or her intention. In such a case, the Integrity Commissioner will allow a reasonable extension of time for the application to be made and dealt with, subject to receiving regular advice of progress in the matter.

Anyone proposing to make such an application should consult with the Attorney-General's Department and the Office of the Minister administering the LEIC Act before submitting an application as there is no standard procedure.

## **13 DEALING WITH HEARING MATERIAL**

### **13.1 Possessing and copying material**

If a document or thing is produced to the Integrity Commissioner at a hearing, the Integrity Commissioner is entitled to take possession of the document and retain it for as long as is necessary for the purposes of the corruption investigation to which the document or thing relates. In addition, the Integrity Commissioner may take a copy of a document or thing, or make an extract from a document (s 102(1)).

The Integrity Commissioner takes the view that the power to retain a document or thing includes the power to submit it to forensic testing of any kind, or deal with it in any other lawful way, that serves the purposes of the relevant corruption investigation and does not cause the destruction of the document or thing.

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<sup>11</sup> There is no express provision in the LEIC Act for withdrawal of a notice to produce, but subsection 33(3) of the *Acts Interpretation Act 1901* provides authority for revocation of an instrument.



All information obtained by the Integrity Commissioner is subject to a rigorous confidentiality regime. Details are set out in the separate ACLEI *Information Guidelines* which are available on ACLEI's website, [www.aclei.gov.au](http://www.aclei.gov.au).

## **13.2 Use and Disclosure**

### **13.2.1 General**

The Integrity Commissioner may share information obtained during an investigation as follows:

- to pass evidence that would be admissible in a criminal prosecution, civil penalty proceedings or a proceeds of crime action to the relevant head of policing agency or an authority that can initiate the prosecution, proceedings or action (s 142 and s 143),
- to bring evidence of a breach of duty or other misconduct by a staff member of an agency to the notice of the head of that agency and the head of any relevant integrity agency (s 146), and
- to bring evidence of a wrongful conviction to the notice of the Minister administering the LEIC Act (s 147).

### **13.2.2 Exceptions**

The Integrity Commissioner must not use or share information or material which is the subject of a non-disclosure order or where the principle of the inadmissibility of self-incriminating evidence applies.

## **13.3 Special rules for use and disclosure if witness is the subject of a charge**

In addition to the general rules on use and disclosure, special rules apply to the use and disclosure of information obtained from a hearing in instances where a witness is also the subject of a charge, or imminently will be charged, for a criminal offence. These special rules are based around the definition of 'hearing material' and 'derivative material'.

### **13.3.1 Definition of 'hearing material' and 'derivative material'**

'Hearing material' is defined in the Act to mean the evidence which is given or produced to the Integrity Commissioner during a hearing (s 8A(1)(a),(b)). This would include the answers to the Integrity Commissioner's questions, the transcript or an electronic recording of those answers, and any documents or things produced under a summons. 'Hearing material' also includes information that reveals the identity of a person who has given evidence at a hearing or reveals that a person has given or may be about to give evidence at a hearing (s 8A(1)(c),(d)).

Documents or things that are obtained otherwise than at a hearing are excluded from the definition of 'hearing material' (s 8A(2)), even if those documents or things are also given during a hearing.

'Derivative material' is defined in section 5 of the LEIC Act to mean any evidence, information, document or thing obtained directly or indirectly from hearing material.

### 13.3.2 Who may use or disclose

The rules around disclosure and use of hearing material and derivative material depend on the purpose for which the material is being disclosed and whether it is being disclosed pre-charge, post-charge or where a charge is imminent. For a guide on determining whether a hearing is pre-charge or post charge, see Paragraph 8.3.1 above.

An 'entity' may disclose or use hearing or derivative material in accordance with the LEIC Act. An 'entity' is (s 96AB(3)):

- A staff member of ACLEI,
- A person or body investigating whether the witness committed a Commonwealth, State or Territory offence,
- A prosecutor of the witness,
- A prosecuting authority,
- A proceeds of crime authority, and
- Any other person or body who is lawfully in possession of the hearing material.

However, certain types of hearing material and derivative material may always be provided to the prosecution. Subsection 96AE(1) allows a person or body to disclose to the prosecutor of a witness the fact that the witness has given evidence in a hearing, however, it does not authorise the disclosure of any information about the witness provided at the hearing.

### 13.3.3 Disclosure and use of hearing material

Hearing material or derivative material may only be disclosed in the particular circumstances outlined below if it would otherwise satisfy the requirements for general use and disclosure, outlined above at Paragraph 13.2. If these requirements are satisfied then an 'entity' may use or disclose hearing material for the purpose of obtaining derivative material as follows (ss 96AA, 96AB):

Timing of hearing	Timing of disclosure	Is use or disclosure limited?
Pre-charge	Pre-charge	No, unless the Integrity Commissioner imposes a non-disclosure order.
Pre-charge	Post-charge	Yes, information may only be disclosed to a prosecutor of the witness with a court order.
Post-charge	Post-charge	Yes, information may only be disclosed to a prosecutor of a witness with a court order.

### 13.3.4 Disclosure and use of derivative material

Timing of hearing	Timing of disclosure	Limitations or exceptions
Pre-charge	Pre-charge	No, unless the Integrity Commissioner imposes a non-disclosure order.
Pre-charge	Post-charge	No, unless the Integrity Commissioner imposes a non-disclosure order.
Post-charge	Post-charge	Yes, information may only be disclosed to a prosecutor of a witness with a court order.

It is important to bear in mind that the rule against the admissibility of self incriminating evidence still applies (s 96(4)) and no material may be used or disclosed if it is the subject of a non-disclosure order from the Integrity Commissioner. Further, the special rules outlined above only apply where the information satisfy the requirements for sharing under sections 142, 143, 146 or 147 of the LEIC Act **and** the witness is the subject of a current or imminent charge.

### 13.4 Access to document or thing retained

If the Integrity Commissioner keeps a document or thing and a person would normally be entitled to examine the document or view the thing, the Integrity Commissioner must allow the person do so at the times when the person would ordinarily be allowed to do so (s 102(2)).

If a person claims to be entitled to examine a document, or view a thing, that the Integrity Commissioner has retained after it was provided under a summons, the person should make a written application to the Integrity Commissioner for access to the document or thing. The application should include the following information:

- the identity of the person,
- a description of the document or thing,
- the date when, and the person by whom, it was produced to the Integrity Commissioner,
- a statement of the legal basis for the person's claim to be entitled to examine the document or view the thing, together with any supporting documents,
- if return of the document or thing is sought—a statement of the reasons why provision of a copy would not meet the person's needs, and
- if access to the document or thing is sought—a statement of the time or times at which the person wishes to examine the document or view the object, and the reasons for the request.

Applications should be made when, or as soon as possible after, the document or thing is produced, or as soon as possible after the applicant becomes aware of the fact that the document or thing has been produced to and retained by the Integrity Commissioner. Any urgency should be indicated clearly in the application.

The Integrity Commissioner notes that, for a person producing a document or thing in response to a summons, there is nothing in the LEIC Act that would prevent the person from making a copy of the document or thing before producing it.

### **13.5 Return of document or thing retained**

The Integrity Commissioner has an implied obligation to return a document or thing that has been produced at a hearing under a summons when retention of the document or thing ceases to be necessary for the purposes of the corruption investigation to which it relates. That obligation may be displaced by the Integrity Commissioner's express obligations to use or share the document or thing for the purposes set out in Paragraph 13.2 above.

The Integrity Commissioner will assume, unless an application for return is made, that ACLEI can in practice retain things of low value. However, items that are clearly of significant value will normally be returned as a matter of course when the implied obligation arises. In any case, when an item is returned to the owner, ACLEI will retain such hard or electronic copies, photographs, forensic analysis reports or other records of the item as the Integrity Commissioner considers necessary for the adequate recording of the investigation.

In a case when there is uncertainty as to who has the immediate right to possession, the Integrity Commissioner will undertake such inquiries as seem reasonable in the circumstances and seek the views of all persons who, to the Integrity Commissioner's knowledge, may have a claim to possession, before making a decision as to who should receive the document or thing. In such a case, the Integrity Commissioner will ordinarily notify all the affected persons of the decision at least seven days before putting it into effect. It will then be a matter for any person aggrieved by the decision to initiate proceedings in an appropriate court to prevent the Integrity Commissioner from carrying out the decision and to vindicate his or her claims.

## **14 PROTECTION OF WITNESSES**

A person who is required to attend a hearing and give evidence is given certain protections in return for his or her assistance.

A person who answers a question at a hearing or produces a document or thing, in accordance with a summons does not commit an offence and is not liable to a penalty by reason of doing so (s 96(7)), except in circumstances where a taxation or law enforcement secrecy provision operates.

There is additional and supplementary protection for any person who gives evidence at a hearing, produces a document or thing at a hearing, or makes a submission to a public inquiry. Such a person has the same protection as a witness in proceedings in the High Court (s 104A(1)). In essence, the person is protected against an action for defamation or breach of confidence, and against victimisation or intimidation, by reason of giving evidence. However, the person is still liable to prosecution for giving false evidence or for disrupting a hearing (ss 94, 96A).

Protection against criminal conduct against the witness is provided independently by the existence of criminal offences under Part III of the *Crimes Act 1914* (e.g. s 36A of that Act) and the offence of victimisation established by the LEIC Act (s 220(1)(d) and (e)). The LEIC Act also provides that a person is not liable to any ‘action, suit or proceeding’ for harm suffered by another person merely because information was given, or a document or thing was produced, to the Integrity Commissioner (s 222(5)).

The Integrity Commissioner may make special arrangements to protect the safety of a person who is to give evidence or to prevent him or her being intimidated or harassed (s 81(3)). These powers are distinct from the protection that may be available in extreme cases under the National Witness Protection Plan (s 81(5)).

## **15 SPECIAL ISSUES**

### **15.1 Submissions on jurisdiction**

A submission framed as a challenge to or question concerning the jurisdiction of the Integrity Commissioner to conduct an investigation, hearing or examination in a particular manner, should ordinarily be done by way of written submission provided in advance of a hearing.

### **15.2 Challenges to warrants**

The LEIC Act and other Commonwealth legislation confer powers on the Integrity Commissioner or authorised ACLEI officers to apply for warrants including conducting a search of premises, a surveillance device warrant, or a telecommunications interception warrant. Information or evidence obtained by such processes can be used by the Integrity Commissioner in an investigation into a corruption issue, including in a hearing. The warrant is granted in each instance by an officer independent of ACLEI (for example, a judge or tribunal member) on application made by the Integrity Commissioner or an authorised ACLEI officer. The Integrity Commissioner is also authorised by legislation to issue authorities to conduct a controlled operation or an integrity test, and for ACLEI officers to use assumed identities.

The Integrity Commissioner will not entertain, in the course of a hearing, any question, submission or challenge concerning the grant or execution of a warrant or authority. Any issue of that kind should be raised either in another forum, or with the Integrity Commissioner independently of a hearing. Similarly, any request for access to a warrant or authority or certificate, or any documents relating thereto, should be made independently of a hearing. Any such request will be dealt with by ACLEI in accordance with the LEIC Act and other relevant statutes, including the *Freedom of Information Act 1982* (FOI Act), bearing in mind that the FOI Act contains exemption provisions, including to protect the enforcement of the law.

### **15.3 Non-compellability of ACLEI staff**

Section 211 of the LEIC Act provides that a person who is or has been a staff member of ACLEI is not compellable in proceedings before a court or tribunal to disclose information or produce documents obtained in the performance of the functions conferred on ACLEI by the LEIC Act. It is the practice of the Integrity Commissioner to invoke this immunity whenever the issue arises.

There are three exceptions stated in subsection 211(3) of the LEIC Act when an ACLEI staff member can be required to provide information or documents for the purpose of court or tribunal proceedings, namely:

- proceedings to which the Integrity Commissioner or a delegate or authorised person is a party,
- proceedings that give effect to the provisions of the LEIC Act, and
- a prosecution, civil penalty proceeding or confiscation proceeding that arises from a corruption investigation or inquiry conducted, managed or overseen by the Integrity Commissioner.

Integrity Commissioner

15 October 2019