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Australian Government
**Australian Commission for
Law Enforcement Integrity**

INVESTIGATION REPORT

**An investigation into allegations
about the Australian Crime Commission
relating to compliance with a Direction
made under section 25A(9) of the
*Australian Crime Commission Act 2002***

A report to the Minister for Home Affairs, issued under
section 55 of the *Law Enforcement Integrity Commissioner Act 2006*

REPORT 02/2010

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TABLE OF CONTENTS

PART ONE – ABOUT ACLEI REPORTS	
INVESTIGATIONS AND REPORTS BY THE INTEGRITY COMMISSIONER	iv
PART TWO – THE INVESTIGATION	
BACKGROUND	1
CORRUPTION ISSUE	2
FINDING	2
CONSIDERATION OF THE ISSUES	3
Issue (a)	3
Issue (b)	3
Issue (c)	4
OBSERVATIONS	5
RECOMMENDATIONS	5

ABOUT ACLEI REPORTS

INVESTIGATIONS AND REPORTS BY THE INTEGRITY COMMISSIONER

THE LAW ENFORCEMENT INTEGRITY COMMISSIONER ACT 2006

The *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act) established the office of Integrity Commissioner, supported by a statutory agency, the Australian Commission for Law Enforcement Integrity (ACLEI).

THE ROLE OF THE INTEGRITY COMMISSIONER AND ACLEI

The role of the Integrity Commissioner and ACLEI is to detect, investigate and prevent corruption in the Australian Crime Commission, the Australian Federal Police (AFP) and the former National Crime Authority. Other Australian Government agencies with law enforcement functions may be prescribed by regulation as coming within the jurisdiction of the Integrity Commissioner.

CORRUPT CONDUCT

'Corrupt conduct' is where a staff member of a law enforcement agency:

abuses his or her office;

perverts the course of justice; or

having regard to his or her duties and powers, otherwise engages in corruption.

The Integrity Commissioner is to give priority to dealing with serious corruption and systemic corruption.

DEALING WITH CORRUPTION ISSUES

A corruption investigation, conducted by ACLEI, can commence in different ways.

The Minister may refer to the Integrity Commissioner an allegation or information that raises a corruption issue.

The head of a law enforcement agency within ACLEI's jurisdiction must notify the Integrity Commissioner of any allegation or information that raises a corruption issue which relates to that agency.

Any person or government agency (eg the Commonwealth Ombudsman) can refer to the Integrity Commissioner an allegation or information that raises a corruption issue. A referral may be anonymous, or on behalf of another person. A person in custody can make a referral by a secure communication channel.

The Integrity Commissioner can commence an investigation on his or her own initiative.

ABOUT ACLEI REPORTS

The Integrity Commissioner may decide that ACLEI will investigate a corruption issue, allow a law enforcement agency to conduct its own investigation, conduct a joint investigation with a law enforcement agency, or decide that an investigation is not warranted. The Integrity Commissioner can manage or oversee an investigation that has been referred to a law enforcement agency. If the law enforcement agency were not the AFP, the Integrity Commissioner can refer the issue to the AFP for investigation and may manage or oversee that investigation.

An allegation concerning an employee of a State or Territory agency (the home agency), seconded to an Australian Government law enforcement agency, can be referred to the home agency or to the relevant State or Territory police service or integrity agency for investigation. A joint investigation can also be undertaken by ACLEI and that agency.

HEARINGS

The Integrity Commissioner may conduct a hearing for the purposes of a corruption investigation. A hearing, or part of a hearing, may be conducted in public or in private.

The word 'hearing', as used 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 an investigation. The purpose of a 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.

REPORTING

Investigations conducted by the Integrity Commissioner culminate in a report made under section 54 of the LEIC Act.

The Integrity Commissioner's report must be provided to the Minister and to the head of the relevant law enforcement agency. Where an investigation relates to a person seconded from another Government agency, the report must be provided to the head of the home agency and to a State or Territory integrity agency, as the circumstances warrant.

If a public hearing were held, the LEIC Act requires the Minister to present the Integrity Commissioner's report to both Houses of Parliament within 15 sitting days of receiving it. It follows that a report of a public inquiry requested by the Minister must also be presented to Parliament by the Minister.

Where a report is to be tabled in Parliament, the Integrity Commissioner must exclude information covered by a certificate issued by the Attorney-General under section 149 of the LEIC Act.

The Integrity Commissioner may exclude other information from a report if the Integrity Commissioner were satisfied that it is desirable to do so. In coming to a decision, the Integrity Commissioner must seek to achieve an appropriate balance between the public interest that would be served by including the information in the report, and the prejudicial consequences that might result from that disclosure.

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BACKGROUND

1. This investigation was occasioned by a letter dated 13 September 2007 to the Australian Commission for Law Enforcement Integrity (ACLEI) from a solicitor (the informant) making a “formal complaint”¹ on behalf of a client. The informant was concerned that a Direction made by an Australian Crime Commission (ACC) Examiner under section 25A(9) of the *Australian Crime Commission Act 2002* (the ACC Act) had been breached by an officer or officers of the ACC.
2. The informant advised that in July 2007 he had raised his concerns with the ACC (addressed to the Examiner), and in the absence of any response had subsequently written to the then Minister for Justice and Customs, but had received no response from the Minister. (In fact, at the time the informant wrote to me, the ACC had commenced an internal investigation of his concerns.)
3. In his letter, the informant does not specifically allege corrupt conduct on the part of the ACC or its officers. Notwithstanding that situation, because of the nature of his allegations and the context in which they were made, I decided that the issues raised should be investigated in accordance with section 26 of the *Law Enforcement Integrity Commissioner Act 2006*.
4. The Direction made by the Examiner prohibited the publication of certain evidence adduced during examinations² into the affairs of the informant’s client. These examinations were conducted as part of an ongoing investigation run jointly by the ACC and the Commissioner of Taxation.
5. The subject matter of the examinations was related to issues also before the Federal Court of Australia in which the ACC was resisting claims made on behalf of the informant’s client that certain documents should be subject to legal professional privilege. The documents in question had been obtained by the ACC pursuant to a notice issued under section 29 of the ACC Act.
6. The original Direction, which was made by the Examiner on 11 September 2007, stated that:

“The evidence given thus far and any further evidence given by --- [the informant’s client] ---, the contents of the documents and the description of any things produced to the Commission during this examination shall not be published in particular to the Counsel for the Australian Crime Commission’s legal team in the matters --- [being the matters before the Federal Court] ---“.

¹ The term “complaint” is used here to convey the nature of the informant’s approach to ACLEI, and that, in the informant’s view, the issue raised had a detrimental effect on his clients. ACLEI is not a complaint-handling agency, but may use information provided by any person to inform investigations about corruption issues.

² An examination is a coercive hearing which is presided over by an ACC Examiner and held under Division 2 of the ACC Act.

7. It appears that the purpose of the Examiner's Direction was to give an assurance to the informant's client (who was being examined) that the ACC would take appropriate measures to prevent any contempt of court from coming into real prospect, given that similar subject matter was being heard both by the Federal Court and the Examiner.
8. The concerns raised by the informant, both initially and during the course of the investigation, are that the Direction of 11 September 2007, and subsequent Directions made by the Examiner, had not been complied with, in that:
 - (a) an officer or officers, who were not authorised by the Examiner to attend examinations at which his client had been examined, had access to those proceedings;
 - (b) an officer or officers, who provided material for use in the Federal Court proceedings, had access to the evidence given at those examinations; and
 - (c) an officer who had access to that evidence, and who had sworn affidavits for use in the Federal Court proceedings, was a member of the ACC's legal team for those proceedings.

CORRUPTION ISSUE

9. The informant's specific concerns reflect his view that the purpose of the Direction was to ensure that information from the examination of his client was not to be made available to any person associated with the ACC side of the Federal Court proceedings.
10. Having regard to the jurisdiction of the Integrity Commissioner, namely to investigate corruption issues, my investigation needed to address whether corrupt conduct may have played a part if there had been a breach of the Direction.
11. In my view, the most efficient way of resolving this question was to address directly the issues raised by the informant.

FINDING

12. As a result of the investigation into the issues raised by the informant, I find that officers of the ACC did not engage in corrupt conduct in relation to those issues.

CONSIDERATION OF THE ISSUES

ISSUE (a) – that an officer or officers, who were not authorised by the Examiner to attend examinations at which his client had been examined, had access to those proceedings

13. The informant's concern that an unauthorised officer had attended the examinations was based on circumstantial evidence which suggested to the informant that the officer was not authorised and had attended. In fact, the officer concerned was authorised by the Examiner to attend the examinations, but had not done so.
14. The investigation has established that the officer in question was interstate at the time of the relevant examinations and was fully engaged on matters other than the examination.

ISSUE (b) – that an officer or officers, who provided material for use in the Federal Court proceedings, had access to the evidence given at those examinations

15. The informant and the ACC have very different views as to the intent and effect of the Direction.
16. As previously identified, the informant contends that the Direction was designed to ensure that information from the examination process was not available to any person associated with the ACC's side of the Federal Court proceedings.
17. The ACC, on the other hand, viewed the Direction as prohibiting only the provision of evidence arising from the examination process to a more confined group, namely the Counsel for the ACC and any member of the ACC's legal team involved with the Federal Court proceedings.
18. For the record, I set out below my views on this issue:
 - (a) The problem lies in the use of the words "in particular" in the Direction. Without those words, the prohibition would be clear and would be as the ACC contends.
 - (b) In the course of the ACC's initial investigation of the informant's "complaint", an officer of the ACC enquired of the Examiner as to his intention at the time of issuing the Direction. The Examiner advised that he "never intended to exclude any other ACC staff member except legal officers associated with the litigation". Notwithstanding his advice, the question remains as to whether what he intended is what was achieved.
 - (c) I am satisfied however that the Direction cannot be taken literally to prohibit publication of evidence, documents and things altogether, or even to prohibit publication to officers of the ACC other than members of the legal team involved in the Federal Court proceedings. To interpret it as imposing such a blanket prohibition would make a nonsense of the

examination, the object of which is to establish evidence which can be used in the investigation to which the examination relates.

- (d) A Direction which prohibited the communication of such material to the legal team involved with the Federal Court proceedings does however seem both sensible and appropriate. The effect of such a Direction would be to prohibit officers who were not members of that legal team from disclosing that material to those members.
- (e) That interpretation of the Direction of 11 September 2007 is also consistent with the two variations made by the Examiner during his further examination of the informant's client:
 - (i) on 14 September 2007, the Examiner exempted from the Direction of 11 September 2007 "the CEO, Examiners and members of staff of the Commission, also any prosecuting authority for use in any matter, including a prosecution for which they are responsible, arising from this investigation"; and
 - (ii) on 13 December 2007, when the examination concluded, that exemption was repeated in a further Direction.

- 19. However, in the context of an investigation into corrupt conduct, the dispute I have outlined is a semantic one.
- 20. More salient is that my investigation found no evidence that:
 - (a) supports the contention that material used in the Federal Court proceedings relied on a prohibited disclosure from the examinations; or
 - (b) suggests that any disclosure was made to the legal team involved with the Federal Court proceedings.
- 21. Accordingly, the allegation fails for want of evidence.

ISSUE (c) – that an officer who had access to that evidence, and who had sworn affidavits for use in the Federal Court proceedings, was a member of the ACC's legal team for those proceedings

- 22. The informant is also concerned that the Direction was breached because it appeared that an officer involved in the examination process, whom he identified as a person who had sworn affidavits for use in the Federal Court matter, was a member of the ACC's legal team.
- 23. During the course of ACLEI's investigation, the informant alerted ACLEI to an amendment to the Examiner's Direction, in which a footnote listed the members of the legal team for the first time. The informant argues that the sudden appearance of the footnote supports his contention that the officer he identified was once a member of that team.

24. While I understand the informant's concern about the abrupt and unexplained appearance of the footnote, I am satisfied that it simply reflected what was and always had been the ACC's view about the membership of its legal team in the Federal Court proceedings. As an aid to compliance with the Direction, the inclusion of the footnote is better viewed as a good governance measure.
25. The officer identified by the informant is employed by the ACC as an investigator who was, and is, closely involved in the investigation. Contrary to the informant's conjecture, that officer was not regarded by the ACC (or apparently by the Examiner) as being a member of any legal team. In fact, he is not legally qualified.
26. My investigation found no evidence that the officer made use of, or even needed to made use of, any information derived from the examination process in his sworn affidavits.

OBSERVATIONS

27. The quarantining, from criminal proceedings, of self-incriminatory information gathered through coercive questioning is a fundamental doctrine of Australian law. The prospect that an agency with coercive examination powers might act intentionally to circumvent that doctrine is anathema.
28. Having explored this issue thoroughly during the course of my investigation, I am satisfied that the ACC was conscious of the need to sequester the evidence obtained through the examination process from those matters being dealt with by the Federal Court, and took steps to do so.

RECOMMENDATIONS

29. I make no recommendations in relation to this issue.



Philip Moss
Integrity Commissioner

30 April 2010



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