



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

NOTICE GUIDELINES

These Notices Guidelines are intended to inform recipients of notices to produce of their rights and obligations in respect of the notice to produce.

Separate guidelines apply in the case of LEIC Act summonses to attend hearings.

These Notice Guidelines are published as part of ACLEI's operational information under the Information Publication Scheme created under Part II of the *Freedom of Information Act 1982*.

February 2016

The current Notice Guidelines, as amended from time to time, may be downloaded from the Australian Commission for Law Enforcement Integrity website at www.aclei.gov.au or requested from ACLEI on **(02) 6141 2300** or via email, legal@aclei.gov.au.

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A brief note

You may have received a copy of this Guideline because the Integrity Commissioner has issued a Notice to you under the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act).

The Guideline contains detailed information about your rights and obligations.

The Integrity Commissioner issued the Notice because he or she believes you would be in a position to provide the information, documents or other things set out in the Notice that are relevant to an investigation under the LEIC Act.

The Notice compels you to provide the information, documents or things set out before the date and time specified.

If the notice includes a “Notation”, you are prohibited from telling other people about the Notice. Serious legal consequences can apply if you do not comply with the Notice on or before the due date or if you make a disclosure not permitted by the Notation. You are not subject to any legal liability if you comply with the notice and provide information, documents or things to the Integrity Commissioner, even if you would normally not be permitted to do so.

You have the right to seek independent legal advice and assistance and can do that despite the Notation.

If, after reviewing the Guidelines, you have any questions about the Notice or any Notation it includes, or if you believe you cannot comply with it for any reason, please contact the Australian Commission for Law Enforcement Integrity at (02) 6141 2300 or via email, legal@aclei.gov.au.

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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 Crime Commission (ACC), the Australian Federal Police (AFP), the CrimTrac Agency, AUSTRAC, the Department of Immigration and Border Protection and designated parts of the Department of Agriculture.

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 issue notices to produce.

If the Integrity Commissioner issues a notice to produce to a person then that person must comply with that notice by producing the specified documents or information. Unless an exemption applies, failure to comply with a notice to produce is a federal criminal offence. A notice to produce may only be issued if prescribed investigation thresholds are met.

These Notice Guidelines provide information about notices to produce for recipients and their legal representatives. The following statutes are referred to in these Notice Guidelines:

- [*Acts Interpretation Act 1901 \(Cth\)*](#)
- [*Administrative Decisions \(Judicial Review\) Act 1977 \(Cth\)*](#)
- [*Crimes Act 1914 \(Cth\)*](#)
- [*Criminal Code Act 1995 \(Cth\)*](#)
- [*Law Enforcement Integrity Commissioner Act 2006 \(Cth\) \('LEIC Act'\)*](#)
- [*Privacy Act 1988 \(Cth\)*](#)
- [*Public Service Act 1999 \(Cth\)*](#)

1.0 Introduction

1.1 Purpose of Notice Guidelines

These Notice Guidelines are intended to inform a person who receives a notice to produce, and a legal practitioner who represents such a person, of the person's rights and obligations.

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 section references in these Notice 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. 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 Crime Commission (ACC), the Australian Federal Police (AFP), the CrimTrac Agency, AUSTRAC, the Department of Immigration and Border Protection and certain designated parts of the Department of Agriculture (s 5(1)). 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, and
- public inquiries under Part 8 of the LEIC Act.

The ability to issue notices to produce only arises in the case of corruption investigations. The Integrity Commissioner cannot issue a notice to produce in the case of a public inquiry (although he or she may summon a person to attend a hearing of a public inquiry and there produce a document or thing: ss 83(1)(b), 83(5A)).

1.6 Assistant Integrity Commissioner

The Integrity Commissioner may delegate to an Assistant Integrity Commissioner any power under the LEIC Act. Unless otherwise indicated, a reference to the Integrity Commissioner in these Notice Guidelines includes an Assistant Integrity Commissioner acting under such a delegation.

2.0 Issuing a notice to produce

2.1 Threshold for issuing a notice to produce

The Integrity Commissioner may issue a notice to produce if he or she has reasonable grounds to suspect that the information, documents or things required will be relevant to the investigation of a corruption issue. A notice to produce can require a person to:

- (i) give to the Integrity Commissioner or a staff member of ACLEI specified information, and/or
- (ii) produce to the Integrity Commissioner or a staff member of ACLEI specified documents or things.

2.2 Form of a notice to produce and reply

A notice to produce must be in writing signed by the Integrity Commissioner and served on the person (ss 75(1) and (3)).

The Integrity Commissioner may require that requested information be provided in writing (s 75(2)). If the Integrity Commissioner does not require the person to provide the information in writing, arrangements will normally be made to make a record of the person's oral statement.

3.0 Context and nature of notices to produce

3.1 ACLEI investigations are different to court proceedings

The Integrity Commissioner does not perform a judicial function or form part of the administration of justice. The Integrity Commissioner does not make conclusions or findings in regard to criminal or civil liability, although corruption investigations can examine issues of criminal law and justice.

Unlike a party to court proceedings, a person who is asked to provide evidence to 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.¹

Notices to produce may thus be characterised as part of an investigation process, with the purpose of enabling the Integrity Commissioner to be informed on relevant matters in order to get to the truth of an allegation. The Integrity Commissioner may require persons and organisations to provide information and produce documents, despite the privilege against self-incrimination and most other forms of privilege which are normally applicable.

At the completion of an investigation, the Integrity Commissioner may make recommendations, express opinions, refer material to relevant prosecutorial authorities and communicate the results of an investigation to Parliament (see ss 54, 55, 57, 73, 74, 142–147).

¹ Sir Richard Scott, 'Procedures at Inquiries – The Duty to be Fair', 111 *Law Quarterly Review* 596 at 604.

3.2 Scope of investigations and notices to produce

The jurisdiction of the Integrity Commissioner to conduct an investigation and to issue a notice to produce is defined broadly in the LEIC Act. The Integrity Commissioner has power to investigate a 'corruption issue' that relates to a law enforcement agency (eg. ss 7, 9, 15, 26). The issue under investigation can be notified to the Integrity Commissioner by a law enforcement agency, or referred by the Minister, any person or government agency (ss 18, 19, 23). An investigation can also be commenced on the Integrity Commissioner's own initiative (s 38).

The LEIC Act places no obligation on the Integrity Commissioner to define or publish terms of reference for an investigation. While the Integrity Commissioner must have reasonable grounds to suspect that the information or documents sought by a notice to produce are relevant to a corruption investigation, the Integrity Commissioner is not obliged to advise a recipient of the details of that corruption investigation, nor of the use to which the material will be put.

3.3 Obtaining evidence by way of testimony rather than notice to produce

Separate from notices to produce, the Integrity Commissioner may, by summons served on a person, require that person to attend and give evidence (including by producing a document or thing) before a hearing (s 83). Similar principles apply to a summons under section 83 as apply to notices to produce. See the separate *Hearing Guidelines* which are available on the ACLEI website, www.aclei.gov.au.

4.0 Restrictions on disclosure of notice: notations

4.1 General

The Integrity Commissioner may include a 'notation' in a notice to produce. This prohibits the recipient of the notice from disclosing any information about the notice or associated 'official matter' (s 77A(2)) unless certain limited exceptions apply (which are detailed below at Para 6.2.1). An official matter includes, but is not limited to, an investigation, a hearing or court proceedings.

The Integrity Commissioner *must* include a notation if he or she is satisfied that failure to do so would reasonably be expected to prejudice (s 77A(3)):

- a person's safety or reputation
- a person's fair trial, if the person has been charged with an offence or such a charge is imminent, or
- a corruption investigation and any related action.

The Integrity Commissioner has a discretion to include a notation if he or she is satisfied that the above consequences *may* manifest should a notation not be included, or if failure to issue a notation would otherwise be contrary to the public interest (s 77A(4)).

When a notation is included in a notice to produce, the Integrity Commissioner must provide an accompanying written statement setting out the recipient's rights and obligations under section 77B.

4.2 Breach of a notation is an offence

Unless an exception applies, breaching a notation is a criminal offence, punishable by 2 years' imprisonment (ss 77B(1), (3) and (5)). A breach may be proved when either:

- information about the notice or ‘official matter’ was expressly disclosed, or
- even though there was no express disclosure, another person could reasonably be expected to infer the existence of the notice or matter from information that was disclosed (s 77B(6)).

The exceptions to the offence are set out below.

4.2.1 Exceptions

Disclosing information about a notice will *not* be an offence if (s 77B(2)):

- the notation itself permits disclosure to a particular person
- the information is disclosed to a legal practitioner or legal aid officer for the purpose of obtaining or giving legal advice, representation or assistance in relation to the notice
- a legal practitioner who receives a notice requiring disclosure of information that is subject to legal professional privilege discloses the matter to the relevant client to seek waiver of the privilege, or
- the notice is issued to a body corporate and information is disclosed to an officer or agent of the body corporate for the purpose of ensuring compliance

A person who lawfully receives information about a notice to produce, themselves commit an offence if they on-disclose the information unlawfully (s 77B(3)). However, On-disclosure will not be unlawful in the following circumstances (s 77B(4)):

- Where an officer or agent of a body corporate on-discloses information about a notice to produce for the purposes of compliance or seeking legal advice, or
- Where a legal practitioner or legal aid officer on-discloses information about a notice to produce for the purposes of obtaining or giving legal advice, representation or assistance in relation to the notice.

4.3 Varying a notation

The Integrity Commissioner will consider applications to vary a notation to allow an additional exception if this is 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. The application and variation must occur before any disclosure is made that would not be permitted under the original notice.

4.4 Cancelling a notation

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 notice recipient when this occurs (ss 77A(7) and (8)). In any case, a person cannot be prosecuted where a notation was included in a notice served more than five years previously (s 77B(1)(d)(ii)).

4.5 Credit reporting agencies

Credit reporting agencies are ordinarily required by subsection 18K(5) of the *Privacy Act 1988* (Cth) 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 notice to produce 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 77A(9)).

5.0 Complying with a notice to produce

5.1 Not complying with a notice to produce is an offence

It is an offence for a person to fail to comply with a notice to produce within the time ultimately allowed for compliance, punishable by two years' imprisonment (s 78(1)). It is a defence to a charge of failure to comply with a notice to produce that compliance was not reasonably practicable (s 78(2)).

A person who fails to comply with a notice to produce may, in the alternative, be charged with obstructing a Commonwealth public official under s 149.1 of the *Criminal Code Act 1995* (Cth). This offence is also punishable by two years' imprisonment.

5.2 Time allowed to comply

A notice to produce will specify the time period in which the notice must be complied with. This period will normally be at least 14 days from the date on which the notice is served (ss 75(4) and 76(1)). Subject to the following comments, strict adherence to this deadline will be expected and immediate consideration will be given to prosecuting cases of non-compliance.

If the Integrity Commissioner were to decide that a delay of 14 days would significantly prejudice a corruption investigation, he or she may specify a shorter period in the notice (s 75(4)). In that case the Integrity Commissioner is required to make a written record of the reasons for the decision (s 75(5)). It should be noted that the record of reasons is not made for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* and the Integrity Commissioner is not required to give it to the recipient of the notice on a request made by that person under section 13 of that Act.²

5.3 Extending the time to comply

The Integrity Commissioner may allow additional time for compliance if satisfied that there are good reasons for doing so (ss 76(2) and (3)). Applications for additional time should set out in full the reasons why the request cannot be complied with within the specified period.

An application for an extension of time for compliance should be made as early as possible in order to allow time for the Integrity Commissioner to give proper consideration to the application. Applications received on or after the day on which the specified period expires will only be considered in circumstances where it was clearly not practicable to have made an earlier application.

² See subparagraph (eaa), Schedule 2, *Administrative Decisions (Judicial Review) Act 1977*.

5.4 Time to seek legal advice

There is no statutory requirement for the Integrity Commissioner to give a person on whom a notice to produce is served an opportunity to obtain legal advice before complying with the request. Fourteen days would normally be sufficient time for the recipient of the notice to seek any legal advice the person thought necessary. If, however, for reasons of operational necessity, a notice requires compliance within a shorter period, the recipient may not have an opportunity to seek legal advice.

In either case, a person on whom a notice is served may consider that he or she is unfairly disadvantaged by the issue of a notice, as opposed to a summons to appear as a witness at a hearing, on the basis the person would be entitled to legal representation at a hearing. In such a case, the person should consult with the contact officer specified in the request as a matter of urgency.

5.5 Non-compliance on medical grounds

A claim that a person is unable to comply with a notice to produce 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 producing information, documents or things at the time required, and when it is expected that the person will be able to comply with the notice to produce. 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 notice to produce, notwithstanding the contrary opinion of a medical practitioner.

5.6 Varying a notice

If a person who is issued a notice to produce does not have the relevant information, document or thing in his or her control or possession, the person should apply to the Integrity Commissioner for a variation of the notice to exclude that information, document or thing. The application should be made in good time before the specified period for compliance expires. The application should set out all relevant circumstances, including, where known, the identity of the person who has the information or has control of the document or thing.

If the information, document or thing is in the possession or control of a third party and that third party acts under the direction of the recipient of the notice, the Integrity Commissioner will insist on production unless satisfied that in practice the person cannot obtain the information, document or thing by means of any lawful and practicable action. Where demonstrably necessary, the Integrity Commissioner may grant an extension of time to allow for recovery of the information, document or thing.

5.7 Obligation to give truthful evidence

Various criminal offences may be invoked if the material supplied under a notice to produce is not truthful, including:

- giving false or misleading evidence (s 137.1 *Criminal Code Act 1995* (Cth))
- giving false or misleading documents (s 137.2 *Criminal Code Act 1995* (Cth)), and
- obstructing of Commonwealth public officials (s 149.1 *Criminal Code Act 1995* (Cth)).

In addition to those legal requirements, the Integrity Commissioner expects that witnesses and other persons assisting in corruption investigations will do so in a spirit of cooperation that assists the Integrity Commissioner to conduct an efficient and effective investigation.

5.8 Acknowledgment of compliance

When ACLEI receives all information, documents and/or things required by a notice to produce, the Integrity Commissioner will provide a written acknowledgement of compliance (s 76(4)).

If the Integrity Commissioner is not satisfied that there has been full compliance, he or she will not issue an acknowledgement of compliance, but will confine him or herself to acknowledging receipt of the information, documents and/or things actually produced. In such a case, the notice recipient may consult with the ACLEI contact officer nominated in the notice as to ACLEI's understanding of the scope of the notice. If the recipient of the notice believes that they have complied with the notice to the full extent possible, they may make an application to the Integrity Commissioner for a variation to the acknowledgement of compliance, supported by evidence that nothing has been withheld that falls within the scope of the notice.

6.0 Self-incrimination indemnity

6.1 Rules of self-incrimination do not apply

An investigation by the Integrity Commissioner is not for the purpose of making final decisions as to criminal liability. Consequently, a witness who has been issued a notice cannot refuse to give information or produce a document or thing on the ground that doing so would tend to incriminate the person or expose him or her to a penalty (s 80(1)).

A person issued with a notice also cannot refuse to give information or produce a document on the basis that doing so would disclose legal advice to or from an Australian Government agency, would be contrary to a secrecy provision (unless it is a taxation or law enforcement secrecy provision), or would otherwise be contrary to the public interest (s 80(1),(5)).

6.2 Direct use indemnity does apply

The LEIC Act provides that the information given, or the document or thing produced, in compliance with a notice cannot be admitted in evidence against the person in criminal proceedings, or any other proceedings for imposition or recovery of a penalty (s 80(4) LEIC Act). This protection means that, except for certain specified exceptions, nothing produced by the person in response to the notice 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 automatically³. No specific request is necessary.

³ This has been the position since April 2012, when subsection 96(2) of the LEIC Act was repealed.

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 80(3)).

Thirdly, there are a number of types of proceeding where, as an exception to the indemnity, the information, document or thing may be admitted in evidence against the person (s 80(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, or
- disciplinary proceedings against the person, if the person is (or was⁴) a staff member of a LEIC Act agency

6.3 Pending and future charges

The High Court has held that legislation which confers a general power of coercive questioning on an administrative tribunal does not, without an explicit intention otherwise, confer a power to compel a person to answer questions about the subject matter of a charge that has been laid against that person⁵.

These principles are more apposite in the case of hearings and, in that context, the LEIC Act explicitly confers a power on the Integrity Commissioner to compel a witness at a hearing to answer questions about the subject matter of a pending or current charge (ss 96AA-96AG). The subsequent use and disclosure of this material is restricted in circumstances where it may reasonably be expected to prejudice the fair trial of the witness. Full details can be found in ACLEI's *Hearing Guidelines*, available on the ACLEI website (www.aclei.gov.au).

The Integrity Commissioner considers that the principles set out above may also have application when material is sought under a notice to produce. Relevantly, there is no explicit power in the LEIC Act which enables the Integrity Commissioner to use a notice to produce to require a person to provide information, documents or things related to the subject matter of a charge which has been laid against that person. As such, the Integrity Commissioner will seek to avoid issuing a notice to produce to persons of interest or potential defendants.

When a person gives material in response to a notice to produce and related charges are subsequently laid against that person, or there is a real possibility that such charges will be laid, the Integrity Commissioner will consider the implications for the fair trial of the person before using or disclosing the material.

⁴ Recent amendments to the *Public Service Act 1999* permit the taking of certain Code of Conduct action against Australian public service employees post-separation.

⁵ *X7 v Australian Crime Commission* [2013] HCA 29. The same principle was subsequently applied, but with a different outcome, in *Lee v New South Wales Crime Commission* [2013] HCA 39. The LEIC Act provisions are closer to the ACC Act provisions so the *X7* decision remains the relevant precedent for hearings by the Integrity Commissioner.

7.0 Dealing with legal professional privilege

7.1 Extent of preservation of legal professional privilege

Section 80(6) of the LEIC Act preserves the right of a person to make a claim of legal professional privilege in response to a notice to produce.

A legal practitioner who is issued a notice to produce may refuse to provide information, a document or a thing if to do so would breach a privileged communication made by or to the legal practitioner (s 79(1)). This protection can be waived by a person to or by whom the privileged communication was made (s 79(3)). Waiver of privilege for the purposes of responding to a notice to produce issued by the Integrity Commissioner does not result in general loss of privilege (s 79(5)).

7.1.1 Exceptions

- A legal practitioner may make a disclosure for the purpose of seeking permission to answer a question or produce a document or thing (s 77B(2)(e)).
- The Integrity Commissioner can require a legal practitioner to disclose the name and address of the person to whom, or by whom, the communication was made (s79(4)), and
- A claim of legal professional privilege cannot be made in respect of legal advice given to a Commonwealth Government agency or Minister and associated communications which would otherwise be protected (s 80(5)(c)).

7.2 Procedures for asserting legal professional privilege

If a person has received a notice to produce and believes that legal professional privilege would apply to the information, document or thing which they are required to produce, the person should act in accordance with the following procedure.

1. Even where the recipient of a notice to produce believes that legal professional privilege applies, they must reply to the Integrity Commissioner within the time period stipulated in the notice.
2. All statements, documents or things which are requested in the notice, and which are not subject to legal professional privilege, should be provided to the Integrity Commissioner. 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'.
3. The documents or things that are the subject of the claim for legal professional privilege should be accompanied by:
 - (a) a list identifying each such document or thing
 - (b) a written submission to the Integrity Commissioner to the effect that the notice purports to require production of documents or things that are subject to legal professional privilege and that the person is not prepared to disclose these voluntarily, and
 - (c) 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.

7.3 Consideration of Claim

7.3.1 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 is satisfied that the person has legal professional privilege in the documents and/or things, the sealed envelope will be returned unopened to the person.

7.3.2 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, the Integrity Commissioner will invite the person to make oral submissions to the Integrity Commissioner as to why the claim of legal professional privilege in respect of the documents and/or things in contention should not be rejected. The person may be legally represented during this process. If, on the basis of this process, the Integrity Commissioner is satisfied that the documents and/or things in contention are privileged, the sealed envelope will be returned to the person unopened.

If the Integrity Commissioner finds against the claim, the Integrity Commissioner will 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. 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*.

If the time for taking any such action expires without the action being initiated, the sealed envelope will be opened and the contents examined. If action is initiated, the sealed envelope will be dealt with in accordance with the directions of the court.

7.3.3 Claim only accepted for some information/documents/things

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. ACLEI legal staff involved will undertake that they will not disclose the identity or nature of any documents.

8.0 Other privileges

8.1 Parliamentary privilege

The Integrity Commissioner's power to require information, document or things from a person does not extend to material covered by Parliamentary privilege. This includes advice prepared for, or being given to a person, for the purpose of any Parliamentary business.

For example, evidence of the drafting or content of a Question Time Brief or other proposed statement to Parliament, or of briefing for a person to appear before a Parliamentary Committee, would be covered by Parliamentary privilege. Conversely, advice, information briefs or submissions

as to how a Minister should exercise other aspects of their executive function would not be covered by Parliamentary privilege.

8.2 Other

The Integrity Commissioner takes the preliminary view that privileges other than legal professional privilege and parliamentary privilege are overridden by section 78 of the LEIC Act, including privilege against spousal incrimination.⁶ However, the Integrity Commissioner will consider submissions on this point if relevant. An application for this purpose should be made in the same manner as an application for recognition of legal professional privilege.

9.0 Secrecy provisions

The LEIC Act expressly provides that a person who is served with a notice to produce is not excused from giving information or producing a document or thing on the ground that compliance would breach a secrecy provision of any Commonwealth law or would be otherwise contrary to the public interest (s 80(5) LEIC Act).

This rule expressly preserves two types of Commonwealth secrecy provisions—taxation secrecy provisions and law enforcement secrecy provisions (s 80(5)(d) LEIC Act). However, provisions of this type may 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 comply with a notice to produce.

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.

10.0 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 or thing pursuant to a notice to produce if that information, document or thing is covered by a section 149 certificate (s 150(2)).

If the recipient of a notice to produce or their agency believes that the required disclosure to the Integrity Commissioner, or subsequent public or other onward disclosure, could satisfy the requirements of s 149, the person or their agency should first raise relevant concerns with the ACLEI contact officer nominated in the notice as soon as possible. The ACLEI contact officer will be able to discuss withdrawal of the notice or, where appropriate, agreement as to the purview of the notice

⁶ 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.

and/or an undertaking by the Integrity Commissioner as to the security and limits upon further disclosure of the information, documents or things.⁷

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 this 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 on 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.

11.0 Use and dealing

11.1 Possessing and copying material

If a document or thing is produced to the Integrity Commissioner in response to a notice to produce, the Integrity Commissioner is entitled to take possession of the document or thing and retain it for as long as is necessary for the purposes of:

- the corruption investigation to which the document or thing relates, or
- other use and disclosure obligations, as outlined below.

In addition, the Integrity Commissioner may take a copy of a document or thing, or make an extract from a document (s 77(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 intentionally cause the destruction of the document or thing.

All information obtained by the Integrity Commissioner is subject to a rigorous confidentiality regime. Details are set out in the separate ACLEI *Information Guidelines*, available on ACLEI's website at www.aclei.gov.au.

11.2 Use and Disclosure

11.2.1 General

The Integrity Commissioner may share information obtained during an investigation, including material obtained using notice to produces, 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 police commissioner or an authority that can initiate the prosecution, proceedings or action (ss 142 and 143)

⁷ 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.

- 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).

11.2.2 Exceptions

The Integrity Commissioner must not use or share information or material which is the subject of a non-disclosure order (s77A(2)) or where the principle of the inadmissibility of self-incriminating evidence applies (s80(1)).

In instances where material has been produced pursuant to a notice to produce and the person who provided that information is subsequently charged with an offence, the Integrity Commissioner will not share that information if he or she reasonably expects that to do so would prejudice that person's fair trial.

11.3 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 77(2)).

If a person claims to be entitled to examine a document or view a thing which the Integrity Commissioner has retained, 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 person who produced it to the Integrity Commissioner
- the date when 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 notice to produce, there is nothing in the LEIC Act that would prevent the person from making a copy of the document or thing before producing it.

11.4 Return of document or thing retained

The Integrity Commissioner has an implied obligation to return a document or thing that has been produced in response to a notice to produce when 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 13.2.1 above.

The Integrity Commissioner will assume, unless an application for return is made, that ACLEI can retain things of low intrinsic value, such as most paper documents. However, items that are clearly of significant value (for example, mobile telephones or other devices) 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.

12.0 Protection of notice recipient

A person who is required to give information or to produce a document or thing is given certain protections in return for his or her assistance.

12.1 Compliance not an offence

A person who provides information, a document or a thing in accordance with a notice to produce does not commit an offence and is not liable to a penalty by reason of doing so (s 80(7)).

12.2 Civil and criminal considerations

Further, a person who complies with a notice to produce has the same protection as a witness in proceedings in the High Court (s 81(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 (though is still liable to prosecution for giving false evidence (s 80(4))).

Protection against criminal conduct against the notice recipient is provided independently by the existence of criminal offences under Part III of the *Crimes Act 1914* (e.g. Intimidation of a witness under s 36A) 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)).

12.3 Recipient's safety

The Integrity Commissioner may make special arrangements to protect the safety of a person who complies with a notice to produce 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)).

13.0 Special issues

13.1 Submissions on jurisdiction

The Integrity Commissioner will not ordinarily entertain—in relation to the issue of a notice to produce—any question, submission or challenge concerning the issuance or want of jurisdiction of a notice to produce. Any issue of that kind should be raised in another forum.

13.2 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.

Michael Griffin AM
Integrity Commissioner

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