



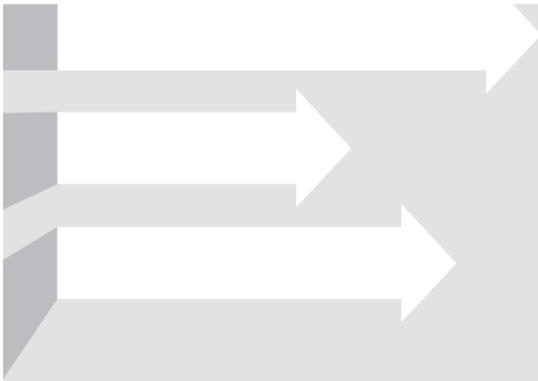
Australian Government
**Australian Commission for
Law Enforcement Integrity**

INVESTIGATION REPORT

**Operation Marcks—an investigation
into a DIBP official who travelled
overseas without a passport**

A report to the Attorney-General, under section 55 of
the *Law Enforcement Integrity Commissioner Act 2006*

Report 01/2018



Enquiries about this report can be directed to the
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Investigation Reports published by the Integrity Commissioner
and summaries of reports which have not been made public
can be found on the ACLEI website: www.aclei.gov.au.

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About ACLEI Reports

Investigations and reports by the Integrity Commissioner

The Law Enforcement Integrity Commissioner Act

The *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) establishes 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 and prevent corrupt conduct and investigate corruption issues, in designated agencies—presently the:

- Australian Criminal Intelligence Commission (including the Australian Crime Commission and the former CrimTrac Agency)
- Australian Federal Police (including ACT Policing)
- Australian Transaction Reports and Analysis Centre (AUSTRAC)
- Department of Immigration and Border Protection (including the Australian Border Force)
- prescribed aspects of the Department of Agriculture and Water Resources, 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

A staff member of a law enforcement agency 'engages in corrupt conduct' if the staff member:

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

The Integrity Commissioner may decide to: have ACLEI 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 also 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 force/service or integrity agency for investigation. A joint investigation can also be undertaken by ACLEI and that agency.

Investigation powers

When conducting an investigation, the Integrity Commissioner can:

- issue a summons or notice, requiring law enforcement personnel and other people to provide information and documents,
- obtain and execute a search warrant, and
- obtain a warrant to intercept telecommunications or conduct other electronic surveillance.

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.

Standard of proof

The Integrity Commissioner makes findings about whether a person has engaged in corrupt conduct, based on the balance of probabilities. Those findings may not be the same as those that would be made by a court deciding on criminal guilt beyond a reasonable doubt.

Before making a finding, the Integrity Commissioner is required to be ‘reasonably satisfied’, based on relevant facts, that conduct occurred which fell within the meaning of the LEIC Act. In considering whether or not the Integrity Commissioner is ‘reasonably satisfied’ of relevant facts, he applies the reasoning set out by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362; *Rejtek v McElroy* (1965) 112 CLR 517 at 521 and *Re Day* [2017] HCA 2 (27 January 2017) at paragraphs 14 to 18 inclusive.

Grades of corruption

The relevant provisions of the LEIC Act are based on the Integrity Commissioner's finding on a single question—did a person engage in corrupt conduct? While all corrupt conduct is wrong and should be eliminated, some instances are less grave than others in terms of, for example, motives, pre-meditation and planning, concealment and deceptive conduct, corrupt collaboration, the effects on public confidence in the law enforcement agency, the effect on other agency staff and the steps required to rectify the problem.

The Integrity Commissioner may reflect on this question of relative gravity in a report.

Reporting

The LEIC Act establishes the means by which the Integrity Commissioner may report to the Minister or to members of the public about issues related to the performance of his or her functions.

For instance, investigations conducted by the Integrity Commissioner may culminate in a report prepared under section 54 of the LEIC Act. The Integrity Commissioner's report must be given to the Minister and to the head of the relevant law enforcement agency.

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.

In addition, if the Integrity Commissioner were satisfied that it is in the public interest to do so, he or she may publish information.

When a report is to be tabled in Parliament, or otherwise published, 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.

Investigation Report

Integrity

1. Government officials—particularly senior officials—sometimes find themselves in a position where they can exert influence (whether explicitly or impliedly) to be exempted from the rules or norms that apply to other citizens. Such practices—which can draw on a more-detailed knowledge of laws or their application—might sometimes also have a private benefit, and rightly raise the prospect of an abuse of power.
2. Accordingly, care needs to be taken in the conduct of professional interactions and with the exercise of discretions to avoid inferences of misconduct or corruption.

Introduction

3. In April 2017, the Deputy Secretary Intelligence and Capability Group of the Department of Immigration and Border Protection (DIBP) notified the Acting Integrity Commissioner, Mr John Harris SC, of a “course of action undertaken by an Immigration and Border Protection (IBP) worker, which may have an integrity element involved”. The Deputy Secretary did not believe the issue to be a ‘significant corruption issue’ pursuant to subsection 5(1) of the *Law Enforcement Integrity Commissioner Act 2006*, but nevertheless notified the Acting Integrity Commissioner in accordance with subsection 19(1) of the LEIC Act.
4. Specifically, a senior DIBP officer (Officer A) had travelled overseas on official business without a passport in January 2017. The issue is whether Officer A improperly used the status of senior government office to cause DIBP officers or airline employees to allow travel without a passport.
5. Having regard to the seniority of the officer whose conduct was in doubt, the Integrity Commissioner, Mr Michael Griffin AM, decided to investigate the issue jointly with DIBP.

Jurisdiction

6. The information received raised a possible corruption issue for the purposes of the LEIC Act—namely an abuse of office (subsection 6(1)(a)), or corruption of any other kind (subsection 6(1)(c)).
7. Subsection 5 includes DIBP as a ‘law enforcement agency’ for the purposes of the LEIC Act. Officer A falls within the scope of ‘staff member’ as defined in section 10(2A) of the LEIC Act.

Investigation process

8. The joint investigation took into account:
 - (a) recollections of relevant DIBP officers (as witnesses), recorded during interviews conducted by DIBP’s Integrity and Professional Standards (I&PS) Branch
 - (b) copies of relevant emails from DIBP officers to and from foreign officials
 - (c) relevant documents produced by Officer A, and
 - (d) evidence obtained during two private hearings (conducted pursuant to Part 9, Division 2 of the LEIC Act), one of which was with Officer A.
9. The investigation also had regard to Australia’s immigration laws and practices, and those of the foreign nation.
10. As the evidence unfolded, it was judged not necessary to seek evidence from foreign officials or airline staff.

What the investigation showed

Background

11. Early on the morning of 25 January 2017, Officer A arrived at Brisbane International Airport to travel overseas for official DIBP business. Upon arrival, the officer had a current entry visa for the foreign nation, but was without an Australian passport (which, inadvertently, had been left interstate).

12. So as not to interrupt planned meetings, Officer A sought assistance from departmental colleagues to make arrangements to travel without a passport. Officer A also obtained approval from the airline to board the aircraft and travel, but had to insist upon the escalation of the matter to a senior manager to achieve that outcome. However, upon arrival overseas, Officer A was denied entry and was required to return to Australia.
13. The following day, Officer A—who had since recovered the passport and recommenced travel—was again refused entry by the foreign nation and returned to Australia.

Analysis

14. Given Officer A's experience in this policy area, the officer knew that it was technically permissible to travel without a passport in some circumstances. Indeed, the inquiry heard from witnesses that it is not unprecedented for travellers, including government officials, to be allowed to travel to and from Australia in circumstances similar to Officer A's situation.
15. Clearly such circumstances are subject to strict checks and controls and, more often than not, require immigration approval at both ends of a journey. In this instance, Officer A admitted to being overly "task focused" and not paying sufficient regard to the broader relationship considerations between Australia and the foreign nation, or how the actions might have been perceived by others.
16. Despite any official embarrassment or other unintended consequences of Officer A's actions, the evidence available to the investigation does not disclose any breach of Australian or the foreign nation's migration laws or conduct which could reasonably be regarded as amounting to an abuse of office or other form of corrupt conduct. The evidence also does not suggest that Officer A employed the seniority of office to bring improper pressure to bear to achieve an undue outcome or personal benefit. Nor does the evidence disclose bullying or overbearing conduct.

Part 10 actions

17. Part 10 of the LEIC Act provides for what the Integrity Commissioner may or must do with evidence and information obtained during an investigation—such as providing it to a prosecuting authority, or referring it to an agency head for disciplinary action.
18. Since the investigation was undertaken jointly with DIBP, the material gathered is already available to the Department for consideration. There is no cause for ACLEI to provide evidence or information to other parties in this instance.

Findings

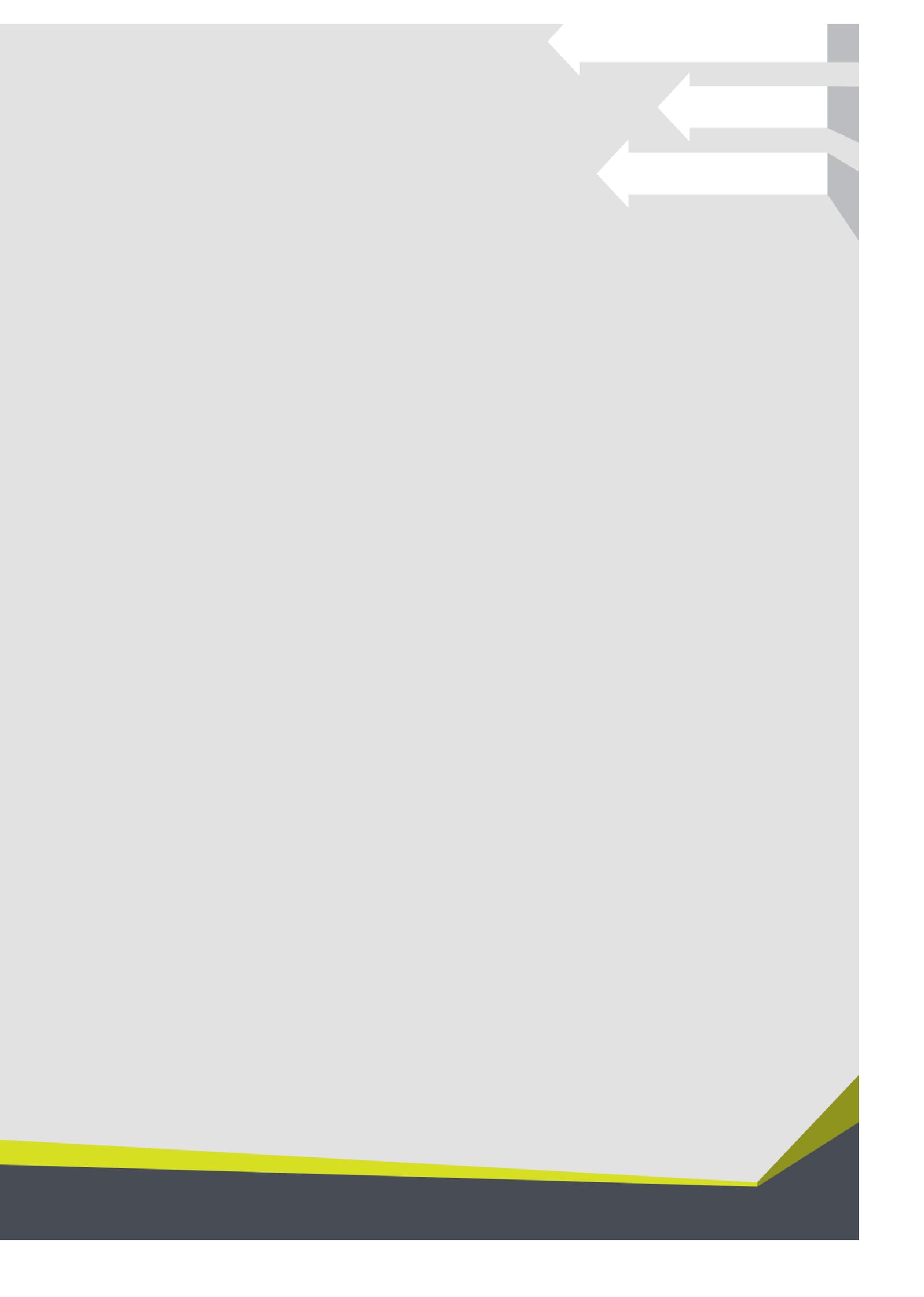
19. The LEIC Act requires the Integrity Commissioner to report any findings relating to the corruption issues investigated.
20. I am satisfied that Officer A did not engage in corrupt conduct.

Concluding remarks

21. I acknowledge the assistance and cooperation of DIBP and the Department of Foreign Affairs and Trade during this investigation.

Michael Griffin AM
Integrity Commissioner

23 March 2018





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