



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

INVESTIGATION REPORT

A joint investigation into the conduct of an Australian Crime Commission employee who avoided a drug test

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

REPORT 03/2014

Enquiries about this report can be directed to the
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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) 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 Crime Commission (and the former National Crime Authority);
- Australian Customs and Border Protection Service;
- Australian Federal Police (AFP);
- Australian Transaction Reports and Analysis Centre (AUSTRAC);
- CrimTrac Agency; and
- prescribed aspects of the Department of Agriculture.

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 when 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.

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 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 requires comfortable satisfaction, based on real evidence, that conduct occurred which fell within the meaning of the LEIC Act. This approach applies the reasoning of the High Court of Australia in *Briginshaw v Briginshaw* [1938] HCA 34 (per Dixon and Rich JJ) and *Neat Holdings P/L v Karajan Holdings P/L* [1992] HCA 66.

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.

THE INVESTIGATION



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INTEGRITY PRINCIPLE

1. One known source of potential compromise of law enforcement agencies and the integrity of their staff members is the “private” use of illicit drugs, which—irrespective of their immediate source—are often linked to the activities of organised crime groups. If the illicit use of drugs were to become known by a criminal group, the potential arises for the officer to be manipulated, and agency systems and information to be compromised.
2. Instances of illicit use of drugs—particularly within an agency with law enforcement functions—also expose issues relating to misalignment of values between an agency and its staff member, and create the potential for misplaced loyalty to arise. These are factors that may cause a person to disregard a duty owed to his or her employer in favour of a personal gain or perceived benefit.
3. Personal drug use also illustrates the problem of the “enduring lie”—whereby a prospective employee may lie about past or current drug use, in order to secure and retain employment. This problem—at best—means that an employer is never properly informed of the risk factors and vulnerabilities it may need to manage (noting that a history of some drug use, when declared, does not always result in an employment offer being withheld).
4. An emerging risk, now seen in a number of ACLEI investigations, is that “back office” staff—administrative and other support staff who have access to sensitive information—may be as vulnerable to compromise as operational staff. In addition, since they may be less prepared to respond to improper approaches, it is arguable that these support staff may be more exposed to risk than previously considered to be the case.

JURISDICTION

5. In February 2014, the ACC informed me that one of its officers had resigned suddenly—possibly to avoid a random drug test.
6. In view of the risks arising from the use of illicit drugs by staff members of law enforcement agencies, I decided to investigate the circumstances of the resignation.
7. The conduct investigated falls within the definition of “engages in corrupt conduct” in section 6 of the *Law Enforcement Integrity Commissioner Act 2006* (the LEIC Act)—namely, “conduct that, having regard to the duties and powers of the staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind”. Section 7 of the LEIC Act provides that a corruption issue may relate to a person who is, or has been, a staff member of a law enforcement agency.

8. I decided to investigate this corruption issue jointly with the ACC, to identify any corrupt conduct and—as importantly—any corruption risks relating to the former officer, about which the agency may otherwise be unaware. In particular, my interest was to:
 - (a) establish the extent of drug use, if any;
 - (b) determine what access to sensitive information and law enforcement databases the officer may have had; and
 - (c) understand if any compromise by criminals had occurred or was likely.

WHAT THE INVESTIGATION FOUND

9. The duties of the former officer (Officer A) included a variety of administrative and corporate functions.
10. Mindful of the integrity risks that may arise if illicit drug-taking were to occur among its staff, the ACC had extended its drug testing regime to apply to all staff members, instead of only to those in operational roles.
11. Some days after attending an information session on the new ACC drug testing policy, Officer A was informed by e-mail of having been selected for a random drug test that afternoon. Officer A left the ACC premises soon after reading the e-mail and resigned the same day.
12. At a private hearing, held under Part 9 of the LEIC Act, Officer A admitted to a history of illicit drug-taking, both prior to and during employment with the ACC. It follows that Officer A had withheld that information during security screening interviews.
13. The investigation found no indication that Officer A had handled or disclosed ACC information without authority, or that other ACC officers were implicated in the behaviour.

FINDINGS

14. The LEIC Act requires the Integrity Commissioner to report any findings relating to the corruption issues investigated.
15. Despite withholding relevant material from the security clearance process upon engagement and subsequently, there is no indication that Officer A had any connection to organised crime—even through inadvertence.

OBSERVATIONS

16. Although I have not made any finding of corrupt conduct, some circumstances were present which may inform corruption prevention practice in agencies that operate in high corruption-risk environments.

INCONGRUITY OF VALUES

17. Officer A appears to have disagreed with the new ACC drug testing policy and considered that drug tests ought not to apply to officers performing non-operational support and administrative functions.
18. This situation—whereby an employee’s beliefs and practices do not align with an organisation’s values and norms—underlines the importance (at least in a high-risk agency) of maintaining programs that routinely check employee behaviour and values alignment. Drug testing is a necessary part of such a regime.

THE ENDURING LIE

19. The Officer’s decision to hide a history of drug use meant maintaining the deception—the so-called “enduring lie”.
20. Stringent recruitment and vetting processes—including psychological profiling—are used in the ACC to guard against this prospect, as is integrity awareness training, which aims to increase the likelihood that officers will report concerns about the possible misconduct of others. However, such measures are not infallible, as this case illustrates.
21. To the extent that drug testing is a means to shape cultural values in the ACC and expose wrong-doing, it had its desired effect on this occasion.

RECOMMENDATIONS

22. Having regard to the role of the ACC as a primary law enforcement agency of the Australian Government, consideration should be given to placing its drug testing program on a stronger legislative footing.
23. Consideration should also be given as to whether there are other high-risk Australian Government agencies or programs to which a drug testing program should be introduced. For example, it may be desirable to create a legal framework, whereby a condition of maintaining a security clearance brings with it—at least in particular instances—the obligation to submit to a drug testing program.

CONCLUDING REMARKS

24. Officer A acknowledged that other ACC staff supported the extended drug-testing regime. Accordingly, I consider that the ACC culture as a whole is one that is largely aware of the integrity risks that would arise if staff members—in any role—were to consume illicit drugs.
25. Throughout the investigation, the ACC showed concern for Officer A's wellbeing. Upon hearing the evidence, the ACC arranged for Officer A—although no longer an employee—to make use of its Employee Assistance Program, which is available to all staff members for free, professional counselling on a confidential basis. I commend the ACC for its actions to support the welfare of a former employee.
26. In light of this investigation, the heads of agencies that have drug testing programs—namely the ACC, the Australian Customs and Border Protection Service and the Australian Federal Police—have agreed to advise the Integrity Commissioner of instances of drug tests failed, refused or evaded. The purpose of this commitment is that, when warranted by the individual case, the Integrity Commissioner's powers can be applied to expose instances of corrupt compromise and their related vulnerabilities.



Philip Moss
Integrity Commissioner

21 July 2014



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