



Australian Government

**Australian Commission for
Law Enforcement Integrity**

**Parliamentary Joint Committee
on Law Enforcement**

Inquiry into Illicit Tobacco

**Submission by the
Australian Commission for
Law Enforcement Integrity**

27 January 2016

1. Introduction

The Australian Commission for Law Enforcement Integrity (ACLEI) welcomes the opportunity to make a submission to the Parliamentary Joint Committee's *Inquiry into Illicit Tobacco*.

One of the effects of corruption in law enforcement is to impede or undermine an agency's ability to achieve its legitimate objectives. Several of the agencies in the Integrity Commissioner's jurisdiction are entrusted by the Government with a role in protecting Australia's borders. Accordingly, tackling corruption-enabled border crime is a focus for ACLEI and its partners. This submission puts forward past cases (occurring outside of ACLEI's jurisdiction) which illustrate that the trafficking of illicit tobacco—among a range of other licit and illicit commodities—can be associated with public sector corruption.

To assist the Review, [Part 2](#) of this submission provides background about ACLEI's role and responsibilities. [Part 3](#) addresses issues which may be relevant to the Committee's consideration of its Terms of Reference.

2. ACLEI's role and responsibilities

Establishment

The office of Integrity Commissioner, and ACLEI, are established by the LEIC Act. The objects of the LEIC Act (at section 3) are:

- (a) *to facilitate:*
 - (i) *the detection of corrupt conduct in law enforcement agencies and*
 - (ii) *the investigation of corruption issues that relate to law enforcement agencies and*
- (b) *to enable criminal offences to be prosecuted, and civil penalty proceedings to be brought, following those investigations and*
- (c) *to prevent corrupt conduct in law enforcement agencies, and*
- (d) *to maintain and improve the integrity of staff members of law enforcement agencies.*

The agencies subject to the Integrity Commissioner's jurisdiction under the LEIC Act are the Australian Crime Commission (ACC), the Australian Federal Police (AFP), the Australian Transaction Reports and Analysis Centre (AUSTRAC), the CrimTrac Agency, prescribed parts of the Department of Agriculture, and the Department of Immigration and Border Protection (DIBP—incorporating the Australian Border Force).

ACLEI's role

ACLEI's primary role is to investigate law enforcement-related corruption issues, giving priority to systemic and serious corruption. ACLEI also collects intelligence about corruption in support of the Integrity Commissioner's functions.

The Integrity Commissioner must consider the nature and scope of corrupt conduct revealed by investigations, and report annually on any patterns and trends concerning corruption in law enforcement agencies.

ACLEI also aims to understand corruption and prevent it. When, as a consequence of performing his or her functions, the Integrity Commissioner identifies laws of the Commonwealth or the administrative practices of government agencies with law enforcement functions that might contribute to corrupt practices or prevent their early detection, he or she may make recommendations for these laws or practices to be changed.

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Under section 71 of the LEIC Act, the Minister may also request the Integrity Commissioner to conduct a public inquiry into all or any of the following:

- a corruption issue
- an issue about corruption generally in law enforcement, or
- an issue or issues about the integrity of staff members of law enforcement agencies.

Independence

ACLEI is a statutory authority, and part of the Attorney-General's portfolio. The Minister for Justice is responsible for ACLEI.

Impartial and independent investigations are central to the Integrity Commissioner's role. Although the Minister may request the Integrity Commissioner to conduct public inquiries, the Minister cannot direct how inquiries or investigations will be conducted.

The LEIC Act contains measures to ensure that the Integrity Commissioner and ACLEI remain free from political interference and maintain an independent relationship with government agencies. Accordingly, the Integrity Commissioner:

- is appointed by the Governor-General and cannot be removed arbitrarily
- is appointed for up to five years, with a maximum sum of terms of seven years
- can commence investigations on his or her own initiative, and
- can make public statements, and can release reports publicly.

Receiving and disseminating information about corrupt conduct

The LEIC Act establishes a framework whereby the Integrity Commissioner and the relevant agency heads can prevent and deal with corrupt conduct jointly and cooperatively. The arrangement recognises both the considerable work of the agencies in the Integrity Commissioner's jurisdiction to introduce internal corruption controls (including detection and deterrence-focussed mechanisms) and the continuing responsibility that the law enforcement agency heads have for the integrity of their staff members.

An important feature of the LEIC Act is that it requires the head of an agency in ACLEI's jurisdiction to notify the Integrity Commissioner of any information or allegation that raises a corruption issue in his or her agency (section 19).

The LEIC Act also enables any other person, including members of the public, other government agencies or the Minister, to refer a corruption issue to the Integrity Commissioner.

Further, ACLEI is authorised under the *Telecommunications (Interception and Access) Act 1979* to receive information about any corruption issue involving an agency within the LEIC Act jurisdiction that may be identified by other integrity agencies or law enforcement agencies as a result of their telecommunications interception activities.

Special legislative arrangements make it lawful for 'whistle-blowers' to provide information about corruption direct to ACLEI. The LEIC Act provides for ACLEI to arrange protection for witnesses.

The Integrity Commissioner may disclose information to the head of a law enforcement agency, or other government agency, if satisfied that, having regard to the functions of the agency concerned, it is appropriate to do so.

The Integrity Commissioner is exempt from the operation of the *Privacy Act 1988*, reflecting the importance of ACLEI's collection and intelligence-sharing role.

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Investigation options

The Integrity Commissioner decides independently how to deal with any allegations, information or intelligence about corrupt conduct concerning the agencies in ACLEI's jurisdiction.

The Integrity Commissioner is not expected to investigate every corruption issue that arises in Commonwealth law enforcement. Rather, the Integrity Commissioner's role is to ensure that indications and risks of corrupt conduct in law enforcement agencies are identified and addressed appropriately.

The Integrity Commissioner can choose from a range of options in dealing with a corruption issue. The options are to:

- investigate the corruption issue
- refer the corruption issue to the law enforcement agency for internal investigation (with or without management or oversight by ACLEI) and to report findings to the Integrity Commissioner
- refer the corruption issue to the AFP (if the corruption issue does not relate to the AFP)
- investigate the corruption issue jointly with another government agency or an integrity agency for a State or Territory, or
- take no further action.

Section 27 of the LEIC Act sets out the matters to which the Integrity Commissioner must have regard in deciding how to deal with a corruption issue.

With these matters in mind, the Integrity Commissioner will investigate when there is advantage in ACLEI's direct involvement. Under the LEIC Act, the Integrity Commissioner must also give priority to serious or systemic corruption. Accordingly, the Integrity Commissioner gives priority to corruption issues that may:

- indicate a link between law enforcement and organised crime
- involve suspected conduct, such as the private use of illicit drugs, which would undermine an agency's law enforcement functions
- bring into doubt the integrity of senior law enforcement managers
- relate to law enforcement activities that have a higher inherent corruption risk
- warrant the use of the Integrity Commissioner's information-gathering powers, including hearings, or
- would otherwise benefit from independent investigation.

ACLEI prioritises corruption issues that have a nexus to the law enforcement character of the agencies in its jurisdiction, having regard to the objects of the LEIC Act.

In this way, ACLEI aims to pursue those investigations which are most likely to yield the highest strategic contribution to maintaining and improving integrity in law enforcement agencies.

Investigation powers

A challenge facing ACLEI is that law enforcement officers subject to investigation by the Integrity Commissioner are likely to be familiar with law enforcement methods, and may be skilled at countering them in order to avoid scrutiny. As a consequence, ACLEI has access to a range of special law enforcement powers.

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The key investigative powers available to the Integrity Commissioner and ACLEI are:

- notices to produce information, documents or things
- summons to attend an information-gathering hearing, answer questions and give sworn evidence, and/or to produce documents or things
- intrusive information-gathering (covert)
 - telecommunications interception
 - electronic and physical surveillance
 - controlled operations
 - assumed identities
 - integrity testing (only in relation to the ACC, AFP and DIBP/ABF)
 - scrutiny of financial transactions, and
 - access to specialised information databases for law enforcement purposes
- search warrants
- right of entry to law enforcement premises and associated search and seizure powers, and
- arrest (relating to the investigation of a corruption issue).

It is an offence not to comply with notices, not to answer truthfully in hearings, or otherwise to be in contempt of ACLEI.

Purpose of coercive powers

Investigations of law enforcement corruption often involve suspects and witnesses who are well-versed in law enforcement methods and therefore may be skilled in avoiding or countering them to avoid detection. Indeed, their counter-surveillance skills or an ability to hide their tracks may be the commodity that makes a criminal conspiracy possible or attractive to undertake.

A particular challenge in this context is to ensure that anti-corruption investigations are able to uncover the full network of people involved (law enforcement officials and their criminal counterparts) rather than stop at the point of having identified a 'bad apple'. It is also important to seek to gain contemporary information about what methods are being exploited to compromise systems, so that 'target hardening' can take place.

To help meet these challenges, Part 9 of the LEIC Act establishes arrangements for the Integrity Commissioner to use coercive information-gathering powers during an ACLEI investigation or joint investigation. These powers require a person to produce documentary evidence or appear as a witness and answer questions truthfully at a hearing. It is an offence not to comply with a notice or summons, not to answer questions, or not to answer truthfully. The Integrity Commissioner may also issue a confidentiality notation in relation to notices, summonses and any information provided. This measure assists ACLEI to continue to investigate a matter covertly.

Coercive powers are an important part of the suite of investigation powers available to the Integrity Commissioner. 'Notices to produce'—for instance, to obtain bank account details—assist ACLEI to build an intelligence picture early in an investigation. Hearings—particularly when combined with other law enforcement investigation methods and notices to produce—enable ACLEI to further investigations that might otherwise stall through lack of conventional investigation options.

3. Comments

ACLEI’s “commodity neutral” approach

A key corruption risk in border law enforcement relates to the prospect that one or more public officials may enable the improper importation or distribution of licit and illicit goods, rather than working to levy appropriate duties and prevent criminal activity.

Some examples of corrupt conduct that may enable border crime include:

- assisting criminals to avoid detection of illicit imports (such as by providing tip-offs about law enforcement activity or disclosing law enforcement methods)
- providing assistance to evade payments of import duties or taxes (for instance by colluding in the false description of a cargo manifest)
- altering the value of a cargo manifest as part of a money-laundering scheme, or
- advantaging (fast-tracking or green-lighting) one legitimate trader over another to give a competitive advantage, despite there being no illicit goods involved.

To counter these and other manifestations of corruption, ACLEI takes a “commodity neutral” approach to its targeting of corrupt conduct at the border (and in other law enforcement environments). ACLEI’s intention is that there should be no perception of one type of commodity being “safer” (or less likely to be detected) than another.

Nevertheless, due to the higher potential for organised crime groups to arrange the compromise of officials on either an opportunistic or systematic basis—for instance through bribery or by facilitating access to an illicit market for corrupt insiders to participate in—ACLEI gives priority to investigating those corruption issues that are likely to disrupt linkages with organised crime groups (irrespective of the commodity).

Tobacco-related corruption

The types of goods or “commodities” that are most associated with corruption-enabled border crime include a variety of illicit drugs. However, other forms of contraband or counterfeited goods—including tobacco—can also be subject to corrupt dealing.

Through interdictions and other forms of information gathering, law enforcement agencies monitor changes in illicit commodity markets to look for changes in threat level. In ACLEI’s experience, the importation of illicit drugs continues to have the highest correlation with use of corrupt methods or insider compromise.

The involvement of organised crime groups in importing and distributing illicit tobacco in Australia is a known threat.¹ Such importations are often interdicted by law enforcement and border officers, yet some importations are successful. Corruption relating to tobacco importation has occasionally been observed, as indicated in the following (non-ACLEI) case studies.

Afiouny case

An example of an attempt to bribe officials to facilitate the importation of illicit tobacco is reported in the case of *Commonwealth Director of Public Prosecutions v Afiouny* [2014] NSWCCA 176.² In that matter, the Court found that Mr Afiouny had paid bribes in excess of \$352,190 to facilitate the imports and evade customs duties worth around \$27 million.³

¹ <https://www.crimecommission.gov.au/sites/default/files/FINAL-ACC-OCA2015-180515.pdf>, accessed 21 December 2015 (page 68).

² http://www.supremecourt.justice.nsw.gov.au/Documents/Judgment%20Summaries/2014/afiouny_04092014.pdf, accessed 16 December 2015.

³ <https://www.cdpp.gov.au/case-reports/bilal-afiouny>, accessed 16 December 2015.

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In the circumstances of that matter, the Customs and Border Protection officers had informed the Australian Federal Police of the first bribery attempt and subsequently participated in a controlled operation to gather evidence about the criminal conduct, and to disrupt the enterprise. Since no corrupt conduct was evident on the part of the officers, ACLEI did not have a role to play in the investigation itself.

The case illustrates how bribery can form part of an organised crime business model, irrespective of the commodity.

Operation Lantana

A second example of law enforcement corruption relating to illicit tobacco is provided in Operation Lantana, a report of the Police Integrity Commission (NSW).⁴

In that instance, the Commission found that two New South Wales police officers had been involved in corrupt dealings, whereby they purported to seize illicit tobacco being sold unlawfully by retailers in Sydney, but in fact on-sold the tobacco to other distributors.

The corrupt method apparent in this case is similar to that used in relation to the regulation of controlled commodities over decades and centuries—such as, “confiscation” of alcohol in Prohibition, or theft of drugs from drug dealers. This case serves to illustrate how the illegal trader has an incentive not to report the corrupt dealings, for fear of prosecution, thereby making detection a difficult proposition.

Conclusion

The trafficking of illicit tobacco—among a range of other licit and illicit commodities—can be associated with corruption-enabled border crime in the Commonwealth jurisdiction, and with corruption in the law enforcement and regulatory aspects of State responsibilities.

The cost to the economy and society of successful importations of illicit tobacco comprises:

- potential adverse health outcomes (by circumventing the orderly control of a regulated product)
- loss of government revenue (by evasion of customs duty and taxes), and
- harms to law and order (facilitated by the illicit enrichment and increase in capacity and capability of organised crime groups).

The involvement of organised crime groups in the illicit tobacco trade increases the likelihood that public sector corruption may occur. Law enforcement and anti-corruption agencies remain alert to this prospect.

⁴ <https://www.pic.nsw.gov.au/files/reports/Lantana%20Report.pdf>, accessed 21 December 2015.