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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

LAW ENFORCEMENT LEGISLATION AMENDMENT (POWERS) BILL 2015

EXPLANATORY MEMORANDUM

Circulated by authority of the
Minster for Justice, the Hon Michael Keenan MP

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GENERAL OUTLINE

This Bill primarily amends the *Australian Crime Commission Act 2002* (ACC Act) and the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) to clarify the powers of Australian Crime Commission (ACC) examiners to conduct examinations, and the Integrity Commissioner, supported by the Australian Commission for Law Enforcement Integrity (ACLEI), to conduct hearings. The powers of these bodies to conduct examinations and hearings have been affected by a number of recent cases, including *R v Seller and McCarthy* (2013) 273 FLR 155 (Seller and McCarthy), *X7 v Australian Crime Commission* (2013) 248 CLR 92 (X7), *Lee v NSW Crime Commission* (2013) 251 CLR 196 (Lee No. 1) and *Lee v R* (2014) 88 ALJR 656 (Lee No. 2).

This Bill responds to those cases and more clearly sets out the circumstances in which the ACC and Integrity Commissioner are able to use their powers to conduct examinations and hearings, to disclose information obtained directly and indirectly from examinations and hearings and the uses to which such information may be put. These amendments are based on the ‘principle of legality’, identified by the majority of judges in X7, which requires ‘that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be expressed with irresistible clearness’.¹

The coercive powers of ACC examiners and the Integrity Commissioner are expressed similarly in the ACC Act and the LEIC Act. The Schedules of this Bill will make similar amendments to each Act.

Schedule 1 is split into two Parts. Part 1 will amend the ACC Act to clarify the coercive powers of ACC examiners. It will enable an ACC examiner to conduct an examination of a person who has been charged with an offence and to ask that person questions that relate to the subject matter of the charge. Part 1 will specifically enable the ACC and its partners to use examination material to obtain derivative evidence against the examinee and others, and will set out the circumstances in which this material may be used in criminal and other proceedings against the examinee.

Part 1 of Schedule 1 will also clarify the safeguards that apply to examinations to ensure that they do not affect the fair trial of the examinee. These safeguards will:

- clarify the circumstances in which an ACC examiner must issue a direction to ensure the confidentiality of evidence given at an examination
- restrict the circumstances in which examination material may be provided to the persons prosecuting an examinee, and
- ensure that courts continue to have appropriate powers to ensure that examination material and material derived from it do not prejudice the examinee’s fair trial.

This Part will also clarify when ACC examiners may conduct examinations in the context of confiscation proceedings against the examinee under the *Proceeds of Crime Act 2002* (POC Act) and equivalent State and Territory legislation, as well as the circumstances in which examination material may be used in such proceedings. These measures will respond to recommendations 3 and 4 of the Parliamentary Joint Committee on Law Enforcement’s

¹ *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153 per Kiefel J.

(PJCLE) 2012 report on its inquiry into *Commonwealth unexplained wealth legislation and arrangements* (PJCLE Report). These recommendations concerned the use of ACC examinations to support unexplained wealth proceedings under the POC Act.

Part 1 also makes a range of amendments to more clearly articulate the role of examinations in supporting ACC special investigations and special operations, and the consequences for breaching confidentiality provisions in relation to examinations.

Part 2 of Schedule 1 will move the provisions relating to an examiner's power to issue a notice to produce documents or things from Division 2 of Part II of the ACC Act, which is about examinations, into Division 1A of Part II, which is about the performance of the ACC's functions and the exercise of its powers.

This Part will make clear that a notice to produce is a mechanism of gathering information that is separate to an examination. This change will confirm the position under current subsection 29(2), which provides that the notice to produce must relate to a special operation or special investigation, but does not require an examiner to be holding an examination for the purposes of that operation or investigation.

This Part will also make a consequential amendment to the definition of 'designated publication restriction' under the *Public Interest Disclosure Act 2013* (PID Act) to ensure that it refers to the new provisions about notices to produce.

Schedule 2 will make similar amendments to the LEIC Act to clarify the powers of the Integrity Commissioner to conduct coercive hearings. It will enable the Integrity Commissioner to conduct a hearing and question a witness who has been charged with an offence and to ask that person questions that relate to the subject matter of the charge. The Schedule will specifically enable the Integrity Commissioner, ACLEI and other bodies to use hearing material to obtain derivative evidence against the witness and others, and will set out the circumstances in which this material may be used in criminal and other proceedings against the witness.

Schedule 2 will also clarify the safeguards that apply to hearings to ensure that they do not affect the fair trial of the witness. These safeguards will:

- clarify the circumstances in which the Integrity Commissioner must issue a direction to ensure the confidentiality of evidence given at a hearing
- restrict the circumstances in which hearing material may be provided to the persons prosecuting a witness, and
- ensure that courts continue to have appropriate powers to ensure that hearing material and material derived from it do not prejudice the witness's fair trial.

This Schedule also clarifies when the Integrity Commissioner may conduct hearings in the context of confiscation proceedings against the witness under the POC Act and equivalent State and Territory legislation, as well as the circumstances in which hearing material may be used in such proceedings.

Schedule 2 also makes a range of amendments to improve the effectiveness of hearings and make the consequences for breaching confidentiality provisions in relation to hearings more consistent with similar Commonwealth legislation.

FINANCIAL IMPACT STATEMENT

The measures in this Bill will have no impact on Government revenue.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the measures in this Bill, as the proposed changes have a minor impact on business, community organisations and individuals.

ACRONYMS

ACC	Australian Crime Commission
ACC Act	<i>Australian Crime Commission Act 2002</i>
ACLEI	Australian Commission for Law Enforcement Integrity
AFP	Australian Federal Police
AFP Act	<i>Australian Federal Police Act 1979</i>
CDPP	Commonwealth Director of Public Prosecutions
CEO	Chief Executive Officer
ICCPR	International Covenant on Civil and Political Rights
LEIC Act	<i>Law Enforcement Integrity Commissioner Act 2006</i>
NCA	National Crime Authority
NCA Act	<i>National Crime Authority Act 1984</i>
PID Act	<i>Public Interest Disclosure Act 2013</i>
PJCLE	Parliamentary Joint Committee on Law Enforcement
POC Act	<i>Proceeds of Crime Act 2002</i>

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Law Enforcement Legislation Amendment (Powers) Bill 2015

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

The Bill will amend the *Australian Crime Commission Act 2002* (ACC Act) and the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) to clarify the ability of Australian Crime Commission (ACC) examiners to conduct examinations, and the Integrity Commissioner, supported by the Australian Commission for Law Enforcement Integrity (ACLEI), to conduct hearings.

These powers allow:

- ACC examiners to compel a person to answer questions about matters, or produce documents or things, relating to an ACC special operation or special investigation into serious and organised criminal activity, and
- the Integrity Commissioner to compel a person to answer questions about matters, or produce documents or things, relating to an investigation into law enforcement corruption.

A person cannot refuse to answer a question, or produce a document or thing, in an examination or a hearing on the basis that it might incriminate them, or expose them to a penalty. However, there are limitations on the circumstances in which answers can be used in evidence against the person in criminal proceedings or proceedings for the imposition of a penalty.

Examinations and hearings are powerful tools. They enable the ACC, the Integrity Commissioner and ACLEI to obtain information that would not otherwise be available, or which could only be obtained after long and complex investigations. Examination material, for example, plays an important role in assisting the ACC to develop an understanding of how serious and organised crime operates, to analyse this information with other relevant information and to disseminate it to Commonwealth, State and Territory partner agencies as part of an intelligence product.

Hearings are similarly important in the context of law enforcement corruption, where suspects are likely to be well-versed in law enforcement methods, and may be skilled at countering them to avoid scrutiny. Hearing material plays an important role in furthering investigations and prosecutions of corruption matters, in identifying corruption risks and in remedying systemic vulnerabilities in law enforcement agencies.

However, there are limits on the circumstances in which an ACC examiner or the Integrity Commissioner may use these powers. An examiner may only conduct an examination for the purposes of a special operation or special investigation. The ACC Board may only determine that an intelligence operation or investigation is ‘special’ where ordinary police methods of

collecting intelligence or investigating offences have not been effective. These investigations and operations cover a range of extremely serious criminal activities, which cause significant harm to individuals in the Australian community, to Australian society and the economy, and ultimately undermine Australia's national security.

Similarly, the Integrity Commissioner may only conduct a hearing for the purposes of investigating a law enforcement corruption issue. Law enforcement corruption is a key enabler of serious and organised crime and has the capacity to cause significant harm to individuals in the Australian community, to Australian society and the economy, and ultimately undermine Australia's national security.

The powers of these bodies to conduct examinations and hearings have been affected by a number of recent cases, including *R v Seller and McCarthy* (2013) 273 FLR 155 (Seller and McCarthy), *X7 v Australian Crime Commission* (2013) 248 CLR 92 (X7), *Lee v NSW Crime Commission* (2013) 251 CLR 196 (Lee No. 1) and *Lee v R* (2014) 88 ALJR 656 (Lee No. 2).

This Bill will respond to these cases, and will make a range of related amendments to the powers of ACC examiners and the Integrity Commissioner.

This Statement uses a range of key terms in relation to examinations and hearings and material obtained from them. They are set out in the following table:

Term	Meaning
<i>Examinee</i>	The person who gives evidence in an examination conducted by an ACC examiner.
<i>Witness</i>	The person who gives evidence in a hearing conducted by the Integrity Commissioner.
<i>Examination or hearing material</i>	Material that comes directly out of the examination of a person or a hearing in relation to the person.
<i>Derivative material</i>	Any information, document or thing that is identified, understood or created because of, or based on, examination or hearing material.
<i>Pre-charge</i>	The time before a person is charged with an offence or the time after those criminal charges have been resolved.
<i>Post-charge</i>	The time when the person has been charged with an offence (or such charges are imminent).
<i>Pre-charge material</i>	Examination or hearing material that comes from the examination of a person, or a hearing in relation to a person, which took place pre-charge.
<i>Pre-charge derivative material</i>	Derivative material that was derived from pre-charge examination or hearing material.
<i>Post-charge material</i>	Examination or hearing material that comes from the examination of a person, or a hearing in relation to a person, which took place post-

	charge.
<i>Post-charge derivative material</i>	Derivative material that was derived from post-charge material.
<i>Pre-confiscation application</i>	The time before confiscation proceedings under proceeds of crime legislation have commenced against a person or the time after those proceedings have been resolved.
<i>Post-confiscation application</i>	The time when confiscation proceedings under proceeds of crime legislation are ongoing against a person (or such proceedings are imminent).
<i>Pre-confiscation application material</i>	Examination or hearing material that comes from the examination of a person, or a hearing in relation to a person, which took place pre-confiscation application.
<i>Post-confiscation application material</i>	Examination or hearing material that comes from the examination of a person, or a hearing in relation to a person, which took place post-confiscation application.

As the powers of ACC examiners and the Integrity Commissioner are expressed in a very similar manner in the ACC Act and LEIC Act, the Bill will make similar amendments to both Acts. The measures in the Bill will:

- allow examinations and hearings to be conducted post-charge and post-confiscation application
- allow an examiner or the Integrity Commissioner to ask questions about the subject matter of any pending charges against the examinee or witness
- place limitations on the ways that examination material and hearing material may be disclosed or used so as to protect the examinee or witness's right to a fair trial
- specifically authorise the derivative use of examination and hearing material
- place limitations on the circumstances in which examination material, hearing material and post-charge derivative material may be provided to a person involved in the prosecution of the examinee or witness
- modify the categories of proceedings in which self-incriminatory examination material and hearing material may be used against the examinee or witness
- increase the penalties for breaching secrecy and non-disclosure obligations to be consistent with penalties for similar offences in other Commonwealth legislation, and
- make a range of other minor amendments to improve the clarity and operation of the ACC Act and LEIC Act.

These amendments are necessary to ensure that the ACC and the Integrity Commissioner have appropriate powers to understand, disrupt and prevent both serious and organised criminal activity and law enforcement corruption.

Human rights implications

The measures in this Bill engage the following human rights:

- the right to a fair trial and a fair hearing under article 14 of the International Covenant on Civil and Political Rights (ICCPR)
- minimum guarantees in criminal proceedings under article 14(3) of the ICCPR
- the prohibition on interference with privacy under article 17 of the ICCPR, and
- the right to freedom of expression under article 19(2) of the ICCPR.

The right to a fair trial and fair hearing

Article 14 of the ICCPR guarantees equality before courts and tribunals, and, in the determination of criminal charges, or any suit at law, the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law. This guarantee includes respect for the principle of ‘equality of arms’, which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings.

Two measures in the Bill will engage this right:

- authorising post-charge examinations and hearings, and
- authorising post-confiscation application examinations and hearings.

Post-charge examinations and hearings

Schedule 1 authorises an ACC examiner to conduct a post-charge examination of an examinee and to ask him or her questions about the charged offence. Similarly, Schedule 2 authorises the Integrity Commissioner to conduct a post-charge hearing in relation to a witness and to ask him or her questions about the charged offence.

These amendments will engage the right to a fair trial. As noted above, an examinee or witness cannot refuse to answer questions in an examination or hearing on the grounds that the answer may tend to incriminate him or her (dealt with further, below). Where an examination or hearing occurs after the examinee or witness has been charged with an offence, answers that he or she gives about the subject matter of that offence may affect his or her fair trial and the equality of arms principle, which is described above. This is particularly the case if the examination or hearing material were to be provided to the prosecutors of the examinee or witness. This questioning may require the examinee or witness to provide a version of events that limits his or her choices in how to defend the charges at trial.

Further, new subsection 25E(4) of the ACC Act and new subsection 96AD(4) of the LEIC Act clarify that a person’s trial will not be unfair simply because he or she has been examined or participated in a hearing, including where that examination or hearing occurred post-charge. These provisions confirm existing case law that a person must demonstrate that compulsory questioning by an executive agency caused actual unfairness in the person’s trial before the court will order a stay.²

² See *Bartlett v R* (2014) 287 FLR 402.

However, the amendments in Schedule 1 and 2 also contain a number of safeguards to ensure that an examinee or witness receives a fair trial, whether he or she is questioned pre- or post-charge.

First, there are limitations on the purposes for which an examination or a hearing may be conducted. As noted above, under the ACC Act, an examiner may only conduct an examination in support of a special operation or special investigation (section 24A). He or she may only ask questions about matters relevant to the special operation or special investigation (subsection 25A(6)). An examination may occur post-charge (new subsection 24A(2)), and questioning may cover the subject matter of any charges the examinee faces (new subsection 25A(6A)), but it must always relate to the relevant special investigation or special operation.

Similarly, under the LEIC Act, the Integrity Commissioner may only conduct a hearing in support of an investigation into a corruption issue (subsection 82(1)). Under subsection 83(3), the Commissioner may only ask questions about matters relevant to the corruption issue (or another corruption issue). While a hearing may occur post-charge (new subsection 82(1A)), and questioning may cover the subject matter of any charges the witness faces (new subsection 83(2A)), these must always relate to an investigation into a broader corruption issue.

These provisions in the ACC Act and LEIC Act mean that examiners and the Integrity Commissioner cannot exercise their powers for the purposes of bolstering a prosecution against an examinee or witness. While material from examinations and hearings may ultimately assist in a prosecution, these powers serve a broader purpose in understanding, disrupting and preventing serious and organised crime and law enforcement corruption.

Secondly, there are additional considerations that an examiner or the Integrity Commissioner must take into account before summoning a person who has been charged with an offence to attend an examination or hearing. Under new paragraph 28(1)(d) of the ACC Act, before issuing a post-charge summons, an examiner must be satisfied that issuing the summons is reasonably necessary for the purposes of the relevant special operation or special investigation even though the examinee has been charged with an offence. Under new subsection 83(1)(d) of the LEIC Act, the Integrity Commissioner must similarly have reasonable grounds to suspect that the evidence, documents or things produced under the summons are necessary for the purpose of the investigation, even though the witness has been charged with an offence.

Thirdly, the Schedules require that examination and hearing material must not be disclosed in a way that would prejudice the fair trial of the examinee or witness. New subsection 25A(9A) of the ACC Act requires an examiner to issue a direction preventing the disclosure of examination material if, amongst other things, the examinee has been charged with an offence (or a charge is imminent) and the failure to make the direction would reasonably be expected to prejudice his or her fair trial. Under new subsection 25A(14A), it will be a criminal offence punishable by 2 years imprisonment, a fine of 120 penalty units or both to use or disclose examination material contrary to an examiner's direction.

Similarly, new subsection 90(2) of the LEIC Act requires the Integrity Commissioner to issue a direction preventing the disclosure of hearing material if, amongst other things, the witness has been charged with an offence (or a charge is imminent) and the failure to make the direction would reasonably be expected to prejudice his or her fair trial. Under new

subsection 90(6), it will be a criminal offence punishable by 2 years imprisonment, a fine of 120 penalty units or both to use or disclose hearing material contrary to the Integrity Commissioner's direction.

These provisions will ensure that, where an examinee or witness has been charged with an offence (or a charge is imminent), examination or hearing material cannot be disclosed in a way that would foreseeably undermine the fair trial of the examinee or witness. While a person who has been charged with an offence may be required to answer questions in a way that would incriminate them, new subsection 25A(9A) of the ACC Act and new subsection 90(2) of the LEIC Act contain strong obligations to prevent those answers from affecting the fairness of the person's trial.

The Schedules also contain additional protections to limit the circumstances in which examination and hearing material can be provided to a prosecutor of the examinee or witness. Under new section 25C of the ACC Act, once an examinee has been charged with an offence (or such a charge is imminent), examination material cannot be disclosed to a prosecutor of the examinee without an order from the court hearing the charges. Under subsection 25E(1), the court may only order the disclosure of examination material to a prosecutor if it would be in the interests of justice.

Similarly, under new section 96AB of the LEIC Act, once a witness has been charged with an offence (or such a charge is imminent), hearing material cannot be disclosed to a prosecutor of the witness without an order from the court hearing the charges. Under new subsection 96AD(1), the court may only order the disclosure of hearing material to a prosecutor if it would be in the interests of justice.

These provisions operate in addition to the safeguards in new subsection 25A(9A) of the ACC Act and new subsection 90(6) of the LEIC Act. They also operate in addition to any other conditions that a person or body may have to satisfy in order to disclose material. For example, before he or she could disclose examination material to the Commonwealth Director of Public Prosecutions under section 12 of the ACC Act, the CEO of the ACC would have to ensure that the disclosure complied with a direction under subsection 25A(9), the requirements of new section 25C and those in subsection 12(1).

Finally, new subsection 25E(3) of the ACC Act and new subsection 96AD(3) of the LEIC Act specifically preserve a court's powers to make any orders necessary to ensure that an examinee or witness's fair trial is not prejudiced by the prosecutor's possession or use of examination or hearing material. These provisions ensure that the court hearing the charges against the examinee or witness retains control over its proceedings to ensure that they are fair.

Necessary

The measures in Schedule 1 to authorise ACC examiners to conduct post-charge examinations are necessary to achieve the legitimate aim of protecting the community from serious and organised crime. ACC examinations are used in support of special operations and special investigations that deal with some of the most serious criminal activities, including drug trafficking, child sex offences, cybercrime, superannuation fraud and other financial crime, and terrorism. These activities cause significant harm to individuals in the Australian community, to Australian society and the economy, and ultimately undermine Australia's national security.

The measures in Schedule 2 to authorise the Integrity Commissioner to conduct post-charge hearings are necessary to achieve the legitimate aim of preventing corruption in law enforcement agencies. Law enforcement corruption is a key enabler of serious and organised crime and has the capacity to assist in the commission of offences that attract the most serious penalties, such as drug trafficking and the importation of firearms. As above, these activities cause significant harm to individuals in the Australian community, to Australian society and the economy, and ultimately undermine Australia's national security.

Reasonable

These measures are reasonable in all the circumstances. The ACC has found that its inability to conduct post-charge examinations following X7 has reduced its effectiveness in tackling serious and organised crime and assisting with efforts to combat the threat of foreign fighters. While the ACC is unable to conduct post-charge examinations, it must either:

- examine a person before he or she is charged, or
- wait until all charges against the person have been resolved before examining him or her.

Both of these outcomes adversely impact on the ACC and its partners' ability to understand, disrupt and prevent serious and organised crime. Examining a person who is a member of an organised crime group before they are charged may alert the person to law enforcement interest and allow them to dispose of incriminating material and notify others in the group. In addition, an examinee who is a member of an organised crime group and has been charged with an offence will hold a significant amount of information about the contemporary activities, operations and practices of the organised criminal group, the value of which will be almost entirely lost if examinations cannot occur until all charges against the person are resolved.

The Integrity Commissioner's inability to conduct post-charge hearings in relation to a person is similarly hampering its effectiveness in tackling law enforcement corruption. The Integrity Commissioner must similarly question the person either before he or she is charged (which may alert them to law enforcement interest in their activities), or wait until all charges against the person have been resolved. Post-charge hearings are particularly important for the Integrity Commissioner, where anti-corruption investigations are often undertaken covertly and into a group of people with connections to organised crime. Alerting such people to the existence of an investigation by conducting a hearing may significantly undermine that investigation.

These measures will enable the ACC to more effectively carry out its statutory mandate to collect, analyse and disseminate intelligence about, and to undertake intelligence operations and investigations into, serious and organised crime. They will also enable the Integrity Commissioner to more effectively carry out his or her statutory functions of detecting and investigating law enforcement corruption, identifying corruption risks and remedying systemic corruption vulnerabilities in law enforcement agencies.

Proportionate

These measures are proportionate to the end sought to be achieved. They only allow an examination to occur where it is relevant to the purposes of an ACC special operation or special investigation. Similarly, a hearing may only occur where it is relevant to the purposes

of an investigation into law enforcement corruption. Neither the examiner nor the Integrity Commissioner can question a person for the sole purpose of bolstering the prosecution of that person.

Further, as detailed above, the Bill contains a number of safeguards to minimise the prejudice that any post-charge examination or hearing may cause to an examinee or witness's fair trial. To the extent that such an examination or hearing may cause prejudice, the amendments expressly preserve a court's ability to make all necessary orders to manage and remove that prejudice.

Authorising post-confiscation application examinations and hearings

Schedule 1 authorises an ACC examiner to conduct a post-confiscation application examination of an examinee and to ask him or her questions about the confiscation proceedings. Similarly, Schedule 2 authorises the Integrity Commissioner to conduct a post-confiscation application hearing in relation to a witness and to ask him or her questions about the confiscation proceedings.

These amendments will engage the right to a fair hearing. As noted above, an examinee or witness cannot refuse to answer questions in an examination or hearing on the grounds that the answer may tend to incriminate him or her (dealt with further, below). Where an examination or hearing occurs after confiscation proceedings have commenced against the examinee or witness, answers that he or she gives about the subject matter of those proceedings may affect the equality of arms principle, which is described above. While confiscation proceedings are civil and not criminal, the ability to use examination or hearing material and derivative material in proceedings against the examinee or witness engages the right to a fair hearing.

However, the amendments in Schedule 1 and 2 contain a number of safeguards to ensure that confiscation proceedings against an examinee or witness are fair, whether he or she is questioned before or after their commencement.

First, there are limitations on the purposes for which an examination or a hearing may be conducted. As noted above, under the ACC Act, an examiner may only conduct an examination in support of a special operation or special investigation (section 24A). He or she may only ask questions about matters relevant to the special operation or special investigation (subsection 25A(6)). An examination may occur post-confiscation application (new subsection 24A(2)), and questioning may cover the subject matter of any confiscation proceedings against the examinee (new subsection 25A(6A)), but it must always relate to the relevant special investigation or special operation.

Similarly, under the LEIC Act, the Integrity Commissioner may only conduct a hearing in support of an investigation into a corruption issue (subsection 82(1)). Under subsection 83(3), the Commissioner may only ask questions about matters relevant to the corruption issue (or another corruption issue). While a hearing may occur post-confiscation application (new subsection 82(1A)), and questioning may cover the subject matter of any confiscation proceedings against the witness (new subsection 83(2A)), these must always relate to an investigation into a corruption issue.

These provisions in the ACC Act and LEIC Act mean that examiners and the Integrity Commissioner cannot exercise their powers for the purposes of bolstering a confiscation

proceeding against an examinee or witness. While material from examinations and hearings may ultimately assist in a confiscation proceeding, these powers serve a broader purpose in understanding, disrupting and preventing serious and organised crime and law enforcement corruption.

Secondly, there are additional considerations that an examiner or the Integrity Commissioner must take into account before summoning a person against whom confiscation proceedings have commenced to attend an examination or hearing. Under new paragraph 28(1)(d) of the ACC Act, before issuing a post-confiscation application summons, an examiner must be satisfied that issuing the summons is reasonably necessary for the purposes of the relevant special operation or special investigation even though confiscation proceedings have commenced against the examinee. Under new subsection 83(1)(d) of the LEIC Act, the Integrity Commissioner must similarly have reasonable grounds to suspect that the evidence, documents or things produced under the summons are necessary for the purpose of the investigation, even though the confiscation proceedings have commenced against the witness.

Further, under new subsections 30(5) and (5A) of the ACC Act, there is a direct use immunity for examination material obtained from the post-confiscation application examination of a person. No such immunity exists under current subsection 30(5) of the ACC Act, which authorises the use of any examination material (including material over which the examinee has claimed the privilege against self-incrimination or self-exposure to a penalty) in confiscation proceedings against the examinee.

Similarly, under new subsections 96(4) and (4A) of the LEIC Act, there is a direct use immunity for examination material obtained from the post-confiscation application hearing in relation to a person. No such immunity exists under current subsection 96(4) of the LEIC Act, which authorises the use of any hearing material in confiscation proceedings against the examinee.

Making post-confiscation application examination and hearing material inadmissible against the examinee or witness minimises the risk that any post-confiscation application examination or hearing will interfere in the proceedings and affect the fairness of the hearing.

Finally, new subsections 25H(3) and 30(5A) of the ACC Act and new subsections 96(4A) and 96AG(3) of the LEIC Act clarify that these amendments do not affect whether or not examination material, hearing material and derivative material is admitted into evidence in a confiscation proceeding more generally: the material will only be admissible in accordance with the rules of evidence and procedure.

Necessary

The measures in Schedule 1 to authorise post-confiscation application examinations are necessary to achieve the legitimate aim of depriving serious and organised criminal groups from accessing the proceeds of their crimes. The measures in Schedule 2 to authorise post-confiscation application hearings are similarly necessary to achieve the legitimate aim of depriving corrupt law enforcement officials and their associates in serious and organised criminal groups from profiting from their criminal behaviour.

Reasonable

The measures are reasonable in all the circumstances. Without the ability to examine a person or conduct a hearing post-confiscation application, the ACC and Integrity Commissioner must either question the person before confiscation proceedings commence or only after they are complete. As outlined above, both of these options are undesirable and would frustrate the statutory functions of both the ACC and the Integrity Commissioner. A premature indication of law enforcement interest in an examinee or witness may give them the opportunity to disperse or hide criminal proceeds and unexplained wealth and to frustrate any special operation, special investigation or corruption investigation. Waiting until the conclusion of confiscation proceedings would diminish the value of any intelligence gained out of the examination or hearing about the contemporary activities, operations and practices of the organised criminal group.

The amendments will allow the conduct of post-confiscation application questioning of examinees and witnesses and the disclosure of information from those examinations and hearings to proceeds of crime authorities, like the Australian Federal Police (AFP). In this sense, they will assist authorities in investigating the source of individuals' criminal wealth and in ultimately confiscating the profits of their criminal activities. The measures will discourage individuals from engaging in serious and organised criminal activity or corrupt conduct.

Proportionate

These measures are also proportionate to the end sought to be achieved. They only allow an ACC examination to occur where it is relevant to the purposes of a special operation or special investigation. Similarly, a hearing may only occur where it is relevant to the purposes of an investigation into law enforcement corruption. Neither an examiner nor the Integrity Commissioner is able to question a person for the sole purpose of bolstering confiscation proceedings against that person.

Further, as detailed above, the Bill contains a number of safeguards to minimise any unfairness that a post-confiscation application examination or hearing may cause in confiscation proceedings against an examinee or witness. To the extent that such an examination or hearing may cause unfairness, the amendments expressly preserve the operation of the rules of evidence and procedure to ensure that the court retains ultimate control over the conduct of the confiscation proceedings.

Minimum guarantees in criminal proceedings

Article 14(3)(g) of the ICCPR provides the right to be free from self-incrimination, in that a person may not be compelled to testify against him or herself or to confess guilt. Provisions which abrogate the privilege against self-incrimination engage Article 14(3)(g) of the ICCPR.

Two measures in the Bill will engage this right:

- the measure to modify the categories of criminal proceedings in which hearing material may be used against the witness, and
- the measure to authorise the derivative use of examination and hearing material.

A further measure, to modify the circumstances in which self-incriminatory examination material and hearing material may be used in confiscation proceedings against the examinee or witness, relates to this right but will not engage it. However, discussion has been included about the relationship between this measure and the privilege against self-incrimination.

Circumstances where hearing material may be used in criminal proceedings

Subsection 96(4) of the LEIC Act currently provides a limited use immunity for answers, documents or things given in or produced during a hearing. The use immunity operates automatically: the witness does not have to claim the privilege against self-incrimination in order to access it. Under current subsection 96(4) of the LEIC Act, hearing material is admissible in proceedings for offences against:

- section 77B of the LEIC Act, which relates to the disclosure of a notice to produce
- section 92 of the LEIC Act, which relates to the disclosure of a summons
- section 93 of the LEIC Act, which relates to failure to attend or do certain things in a hearing
- sections 137.1 and 137.2 of the *Criminal Code*, which relate to false or misleading evidence, and
- section 149.1 of the *Criminal Code*, which relates to the obstruction of Commonwealth public officials.

Hearing material is not currently admissible in contempt proceedings under section 96A of the LEIC Act.

Schedule 2 will expand the categories of criminal proceedings in which hearing material is admissible.

Under new subsection 96(4A) of the LEIC Act, hearing material will now be admissible in proceedings for offences against new section 94, which contains a new offence of obstructing or hindering the Integrity Commissioner in a hearing, disrupting a hearing or threatening a person present at a hearing. Hearing material will also be admissible in all contempt proceedings under section 96A of the LEIC Act. These proceedings mirror the offences for which hearing material will be admissible under new subsection 96(4A).

Necessary

The amendments to allow hearing material to be used in evidence in an expanded range of criminal and contempt proceedings are necessary to ensure the effectiveness of hearings. As outlined above, hearings are a key component of the Integrity Commissioner's powers and important in allowing him or her to achieve the objectives set out in the LEIC Act.

Reasonable

These amendments are also reasonable in all the circumstances. Hearing material will often be a crucial part of proving the offences listed in new subsection 96(4A) of the LEIC Act and their associated contempt provisions. For example, answers given by a witness in a hearing may be the conduct that obstructs or hinders an examiner in contravention new section 94 of the LEIC Act. If the position in current subsection 96(4) of the LEIC Act remained, those answers would not be admissible in a prosecution of the witness for an offence against new section 94.

The offences listed in these subsections, along with the contempt provisions in section 96A of the LEIC Act, provide powerful backing to ensure compliance with the Integrity Commissioner's powers. These powers are significantly less effective when important evidence is inadmissible in prosecutions for those offences or associated contempt proceedings.

Proportionate

The amendments about the admissibility of hearing material are proportionate to the end sought. They only allow hearing material to be used in specific proceedings where it is likely to be a crucial part of the evidence – in some cases, the only evidence – available against the witness. These offences are designed to ensure the effectiveness of the Integrity Commissioner's powers. They are not corruption issues that the Integrity Commissioner could investigate in his or her own right

Further, these amendments will not affect whether hearing material can be used as evidence against the witness in a particular case. Under new subsection 96(4A) of the LEIC Act, hearing material will only be admissible where it satisfies the rules of evidence and procedure. Similarly, new subsection 96AD(3) clarifies that, while hearing material may be admissible under subsection 96(4A), the court will still be able to make appropriate orders to ensure that this material is not used in a way so as to prejudice the witness's fair trial.

Authorising derivative use of examination material and hearing material

As noted above, Schedules 1 and 2 authorise the disclosure and use of examination material and hearing material to obtain derivative material, which may then be used in criminal proceedings against the examinee or witness.

These amendments will engage the right against self-incrimination in criminal proceedings. As noted above, currently under the ACC Act and LEIC Act, an examinee or witness cannot refuse to answer questions in an examination or hearing on the grounds that the answer may tend to incriminate him or her (dealt with further, below). New subsections 30(5) and (5A) of the ACC Act and new subsections 96(4) and (4A) of the LEIC Act contain a limited use immunity over answers given, or documents or things produced, in an examination or hearing. However, new subsections 25B(1), 25D(1) and 25G(2) of the ACC Act and new subsections 96AA(1), 96AC(1) and 96AF(2) of the LEIC Act specifically authorise the disclosure of derivative material to a prosecutor of the examinee or witness and its use in evidence against that person (subject to the rules of evidence and procedure).

These provisions will limit the effectiveness of a person's ability to claim the privilege against self-incrimination. While examination and hearing material may not itself be admissible against the examinee or witness, material derived from it will be able to be used in the prosecution of the examinee or witness.

However, the amendments in Schedule 1 and 2 also contain a number of safeguards to minimise the impact that derivative material has on the effectiveness of a person's ability to claim the privilege against self-incrimination.

First, the Schedules contain limitations on the circumstances in which material derived from the post-charge questioning of an examinee or witness can be disclosed to a prosecutor of that examinee or witness. Under new section 25D of the ACC Act and new section 96AC of the

LEIC Act, post-charge derivative material cannot be disclosed to a prosecutor of the examinee or witness without an order from the court hearing the charges. Under new subsection 25E(1) of the ACC Act and new subsection 96AD(1) of the LEIC Act, the court may only order the disclosure of post-charge derivative material to a prosecutor if it would be in the interests of justice.

These limitations do not apply to material derived from the pre-charge examination of the examinee, or the pre-charge hearing in relation to a person.

Secondly, new subsection 25E(3) of the ACC Act and new subsection 96AD(3) of the LEIC Act specifically preserve a court's powers to make any orders necessary to ensure that an examinee or witness's fair trial is not prejudiced by the prosecutor's possession or use of derivative material. Further, new subsection 25G(2) of the ACC Act and new subsection 96AF(2) of the LEIC Act preserve the operation of the rules of evidence and procedure in relation to the use of derivative material in a trial. These provisions ensure that the court hearing the charges against the examinee or witness retains control over its proceedings to ensure that they are fair.

Necessary

The measures in Schedule 1 to specifically authorise the derivative use of examination material are necessary to achieve the legitimate aim of protecting the community from serious and organised crime. ACC examinations are used in support of special operations and special investigations that deal with some of the most serious criminal activities, including drug trafficking, child sex offences, cybercrime, superannuation fraud and other financial crime, and terrorism. These activities cause significant harm to individuals in the Australian community, to Australian society and the economy, and ultimately undermine Australia's national security.

The measures in Schedule 2 to specifically authorise the derivative use of hearing material are necessary to achieve the legitimate aim of preventing corruption in law enforcement agencies. Law enforcement corruption is a key enabler of serious and organised crime and has the capacity to assist in the commission of offences that attract the most serious penalties, such as drug trafficking and the importation of firearms. As above, these activities cause significant harm to individuals in the Australian community, to Australian society and the economy, and ultimately undermine Australia's national security.

Reasonable

These measures are reasonable in all the circumstances. Both the ACC Act and the LEIC Act have always been intended to allow for the derivative use of examination and hearing material in investigations into the examinee or witness's activities and that of their associates, and in criminal prosecutions of those people.

Further, examinations and hearings are used in support of investigations into serious and organised criminal activities and law enforcement corruption issues, both of which have demonstrated a long-standing resistance to traditional law enforcement methodologies. While it is appropriate that self-incriminatory examination and hearing material should not be admissible against the examinee or witness, it is reasonable that this material can be used in the further investigation of the person's activities. It is also appropriate that this evidence can

be used to find additional evidence that can be used to disrupt and prevent serious harm to the community, including in any prosecution of the examinee or witness.

Proportionate

The measures are also proportionate to the end sought to be achieved. They contain a number of safeguards to preserve the integrity of an examinee or witness's privilege against self-incrimination. As set out above, material derived from a post-charge examination or hearing cannot be disclosed to a prosecutor of the examinee or witness without a court order. The amendments also make clear that a court retains its ability to make all orders necessary to ensure that the prosecution's possession and use of derivative material does not prejudice the examinee or witness's fair trial, and that the admissibility of derivative material depends upon the ordinary rules of evidence and procedure.

Further, it would not be appropriate to include a derivative use immunity in these provisions. Previous experience under the *National Crime Authority Act 1984* (NCA Act) demonstrated that providing a derivative use immunity for examination material undermined the capacity of the National Crime Authority (NCA) to assist in the investigation of serious criminal activities. Prior to its removal under the *National Crime Authority Legislation Amendment Act 2001*,³ the derivative use immunity in the NCA Act required the prosecution to prove the provenance of every piece of evidence in the trial of a person that the NCA had examined before it could be admitted. This position was unworkable and did not advance the interests of justice as pre-trial arguments could be used to inappropriately delay the resolution of charges against the accused.

Similarly, it would not be appropriate to require a person to seek a court order to disclose all derivative material to a prosecutor after the examinee or witness had been charged with an offence. Such a requirement would allow an examinee or witness to challenge every post-charge disclosure of material to a prosecutor and to require proof that the material was not derivative material. Given the breadth of the definition of derivative material, and the fact that it may cover material that is many steps removed from an examination or hearing, this would be an unnecessarily and disproportionately onerous task. It would effectively result in the situation described above with respect to the derivative use previously contained in the NCA Act. As noted above, to the extent that there is any prejudice to the examinee or witness's fair trial resulting from the prosecutor's possession or use of derivative material, this is more appropriately managed by the court under its existing powers and processes.

Circumstances where self-incriminatory examination material and hearing material may be used in confiscation proceedings

The United Nations Human Rights Committee has stated that criminal charges primarily encompass acts that are declared to be punishable under domestic criminal law, but may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal. Relevant factors in considering whether charges are criminal include whether proceedings are brought by a public authority, whether there is a

³ The Parliamentary Joint Committee on the National Crime Authority recommended the removal of the derivative use immunity in its report on the National Crime Authority Legislation Amendment Bill 2000 in March 2001.

punitive element to the process and whether there are potentially serious consequences such as imprisonment.⁴

Confiscation proceedings are brought by a public authority and have the punishment and deterrence of breaches of Commonwealth law as one of their stated objects. However, these proceedings are civil proceedings only and are not criminal in nature. Proceeds of crime orders imposed via proceeds of crime proceedings cannot create any criminal liability, do not result in any finding of criminal guilt and do not expose people to any criminal sanctions. As a result, these measures do not engage Article 14(3)(g). However, a brief discussion of the protections of Article 14(3)(g) and the measures to authorise the use of examination, hearing and derivative material in confiscation proceedings is included below for information.

Subsection 30(5) of the ACC Act currently authorises the use of answers, documents or things given in or produced during an examination and over which the examinee has claimed the privilege against self-incrimination (referred to in this Statement as self-incriminatory examination material) in all confiscation proceedings against the examinee. The use immunity in current subsection 30(5) of the Act does not apply to material used in confiscation proceedings.

Similarly, subsection 96(4) of the LEIC Act currently authorises the use of hearing material in all confiscation proceedings against the examinee. The use immunity in current subsection 96(4) of the Act does not apply to material used in confiscation proceedings.

Under both sets of provisions, whether the examiner conducted the examination pre-confiscation application or post-confiscation application does not affect the admissibility of the material.

Under Schedules 1 and 2, self-incriminatory examination material obtained in a post-confiscation application examination and post-confiscation application hearing material will not be admissible in those confiscation proceedings. However, material obtained in a pre-confiscation application examination or hearing and all derivative material will continue to be admissible in confiscation proceedings against the examinee or witness.

Necessary

The amendments to allow pre-confiscation application self-incriminatory examination material and hearing material to be used in evidence in confiscation proceedings are necessary to achieve the legitimate aim of depriving serious and organised criminal groups and the corrupt law enforcement officials who enable their activities from accessing the proceeds of their crimes.

Reasonable

The measures are reasonable in all the circumstances. Confiscating the proceeds of crime has proved to be an effective method of combatting serious and organised crime. By allowing both the use and derivative use of examination and hearing material, they will assist authorities like the AFP in both investigating the source of individuals' criminal wealth and in confiscating the profits of their criminal activities. In this sense, the measures will

⁴ See the Human Rights Committee's General Comment 32.

discourage individuals from engaging in serious and organised criminal activity or corrupt conduct.

Proportionate

The measures are proportionate to the end of combatting serious and organised crime and law enforcement corruption. In enacting the ACC Act and LEIC Act, Parliament has already determined that it was not appropriate to place either a use or derivative use immunity on self-incriminatory examination material or hearing material in these circumstances. These amendments do not change this position. However, they include a number of new safeguards to preserve, to the greatest extent possible, a person's privilege against self-incrimination in the context of confiscation proceedings.

First, under new subsection 30(5A) of the ACC Act and new subsection 96(4A) of the LEIC Act, the measures specifically make self-incriminatory examination material and hearing material inadmissible if it came from a post-confiscation application examination or hearing. This material can be used to further the investigation of the examinee or witness, but it cannot be directly used to bolster the confiscation proceedings against him or her.

These subsections emphasise that examinations and hearings are not used solely to bolster a proceeds of crime authority's case in confiscation proceedings. Rather, they can only be used to further the purposes of a special operation, special investigation or corruption investigation.

Secondly, new subsections 25H(3) and 30(5A) of the ACC Act and new subsections 96(4A) and 96AG(3) clarify that these amendments do not affect whether examination material, hearing material and derivative material is admitted into evidence in a confiscation proceeding more generally: the material will only be admissible in accordance with the rules of evidence and procedure.

In these circumstances, it is appropriate that self-incriminatory examination material and hearing material is admissible in confiscation proceedings against the examinee or witness. This material will be obtained incidentally to a special operation, special investigation or corruption investigation and should be available to be used to deprive the examinee or witness of his or her illicit profits.

The prohibition on interference with privacy

Article 17 of the ICCPR prohibits unlawful or arbitrary interference with a person's privacy, family, home and correspondence, and prohibits unlawful attack on a person's reputation. Lawful interference with the right to privacy will be permitted, provided it is reasonable in the particular circumstances. The UN Human Rights Committee has considered that 'any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case'.⁵

Two measures in the Bill will engage the right to privacy:

- the measure to change the circumstances in which a direction must be made about the disclosure or use of examination or hearing material, and

⁵ *Toonen v Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee, 4 April 1994.

- the measure to authorise the conduct of post-charge examinations and hearings.

Circumstances in which a direction must be made about disclosure and use of examination and hearing material

Schedules 1 and 2 of the Bill engage the right to privacy by removing the requirement for an ACC examiner or the Integrity Commissioner to issue a direction prohibiting the disclosure of examination material or hearing material, where a failure to do so might prejudice a person's reputation.

Under current subsection 25A(9) of the ACC Act an examiner must issue a direction prohibiting the publication of examination material if the failure to do so might prejudice a person's safety or reputation, or where it might prejudice a person's fair trial.

Similarly, under subsection 90(4) of the LEIC Act, the Integrity Commissioner must issue a direction prohibiting the publication of hearing material if the failure to do so might prejudice a person's safety or reputation, where it might prejudice a person's fair trial, or where it might lead to the disclosure of sensitive information the subject of a certificate under section 149 of the LEIC Act.

Schedules 1 and 2 will insert new subsection 25A(9A) into the ACC Act and new subsection 90(4A) into the LEIC Act to deal with the circumstances in which an examiner or the Integrity Commissioner must issue a direction about the non-disclosure of examination or hearing material. These new subsections will no longer require an examiner or the Integrity Commissioner to consider whether the disclosure of the material might prejudice a person's reputation.

Necessary

The removal of the requirement to consider reputation is necessary to promote the flow of intelligence and information about serious and organised crime and law enforcement corruption to relevant government agencies. It will enhance law enforcement and other appropriate agencies' ability to take action on the material that the ACC and ACLEI collect in support of their statutory functions.

Reasonable

These amendments are reasonable. They will allow government agencies to receive and benefit from valuable ACC and ACLEI information in a broader range of circumstances. The amendments will better enable the ACC and ACLEI to deploy their intelligence and analytical capabilities and disseminate intelligence to partner agencies about current and emerging threats from serious and organised crime and law enforcement corruption.

Proportionate

Removing the reference to a person's reputation in the non-disclosure direction provisions is a proportionate means to achieve the broader policy aim. As a general practice, the ACC and the Integrity Commissioner will not permit the disclosure of examination or hearing material to any person or body unless there is an operational need (and the disclosure would otherwise comply with any direction made under subsection 25A(9) of the ACC Act or subsection 90(4) of the LEIC Act).

Examinations and hearings will frequently involve serious and sensitive matters that may negatively impact on a person's reputation if disclosed to the public at large. However, in the context of disclosures between law enforcement and other government agencies, prejudice to a person's reputation should not stand in the way of the sharing of relevant and significant information about their involvement in serious and organised crime or law enforcement corruption. In these circumstances, requiring an examiner or the Integrity Commissioner to consider a person's reputation impedes the ability of agencies to effectively understand, disrupt and prevent serious and organised crime and law enforcement corruption.

Removing the requirement to consider a person's reputation when making an order about the confidentiality of examination material will not affect other provisions that operate to protect a person's privacy and reputation, such as those in sections 59AB and 60 of the ACC Act and sections 209 and 210 of the LEIC Act.

Post-charge examinations and hearings

Schedules 1 and 2 of the Bill also engage the right to privacy by specifically authorising the ACC and the Integrity Commissioner to conduct post-charge examinations and hearings, and disclose information obtained from them to the prosecution or a proceeds of crime authority in certain, limited circumstances.

As a result of the decision in X7, the ACC has ceased examining persons who have been charged with an offence where there is a possibility that any questioning could touch upon matters related to the charges. The Integrity Commissioner has similarly been unable to question witnesses who have been charged with corruption offences. These amendments engage the right to privacy of persons that cannot currently be examined because they have been charged with a relevant offence. These amendments will allow an examiner and the Integrity Commissioner to summon people who have been charged with an offence to attend an examination or hearing, and to require them to answer questions relating to a special operation, special investigation or corruption investigation. Inevitably, these questions will require the examinee or witness to provide personal information about themselves and their activities.

Necessary

The measures in Schedule 1 to authorise ACC examiners to conduct post-charge examinations are necessary to achieve the legitimate aim of protecting the community from serious and organised crime. ACC examinations are used in support of special operations and special investigations that deal with some of the most serious criminal activities, including drug trafficking, child sex offences, cybercrime, superannuation fraud and other financial crime, and terrorism. These activities cause significant harm to individuals in the Australian community, to Australian society and the economy, and ultimately undermine Australia's national security.

The measures in Schedule 2 to authorise the Integrity Commissioner to conduct post-charge hearings are necessary to achieve the legitimate aim of preventing corruption in law enforcement officers. Law enforcement corruption is a key enabler of serious and organised crime and has the capacity to assist in the commission of offences that attract the most serious penalties, such as drug trafficking and the importation of firearms. As above, these activities cause significant harm to individuals in the Australian community, to Australian society and the economy, and ultimately undermine Australia's national security.

Reasonable

These measures are reasonable in all the circumstances. The ACC has found that its inability to conduct post-charge examinations following X7 has reduced its effectiveness in tackling serious and organised crime and assisting with efforts to combat the threat of foreign fighters. While the ACC is unable to conduct post-charge examinations, it must either:

- examine a person before he or she is charged, or
- wait until all charges against the person have been resolved before examining him or her.

Both of these outcomes adversely impact on the ACC and its partners' ability to understand, disrupt and prevent serious and organised crime. Examining a person who is a member of an organised crime group before they are charged may alert the person to law enforcement interest and allow them to dispose of incriminating material and notify others in the group. In addition, an examinee who is a member of an organised crime group and who has been charged with an offence will hold a significant amount of information about the contemporary activities, operations and practices of the organised criminal group, the value of which will be almost entirely lost if examinations cannot occur until all charges against the person are resolved.

The Integrity Commissioner's inability to conduct post-charge hearings in relation to a person is similarly hampering its effectiveness in tackling law enforcement corruption. The Integrity Commissioner must similarly question the person either before he or she is charged (which may alert them to law enforcement interest in their activities), or wait until all charges against the person have been resolved. Post-charge hearings are particularly important for the Integrity Commissioner, where anti-corruption investigations are often undertaken covertly and into a group of people with connections to organised crime. Alerting such people to the existence of an investigation by conducting a hearing may significantly undermine that investigation.

These measures will enable the ACC to more effectively carry out its statutory mandate to collect, analyse and disseminate intelligence about, and to undertake intelligence operations and investigations into, serious and organised crime. They will also enable the Integrity Commissioner to more effectively carry out his or her statutory functions of detecting and investigating law enforcement corruption, identifying corruption risks and remedying systemic corruption vulnerabilities in law enforcement agencies.

Proportionate

These measures are proportionate to the objective sought. They will expand the categories of people in relation to whom existing questioning powers under the ACC Act and LEIC Act may be used so as to include persons who have been charged with an offence. This will restore the operation of the powers in these Acts to their position prior to the decision in X7.

There are a number of safeguards in the ACC Act and LEIC Act that will operate to limit the extent to which these powers may impact on a person's privacy.

First, as outlined above, an ACC examination may only occur where it is relevant to the purposes of a special operation or special investigation. Similarly, a hearing may only occur where it is relevant to the purposes of an investigation into law enforcement corruption. The

power to conduct post-charge examinations and hearings will only allow the ACC, the Integrity Commissioner and ACLEI to call for such information relating to an individual's private life as is necessary in the interests of protecting society from serious and organised crime and law enforcement corruption.

Secondly, there are a number of provisions in this Bill, the ACC Act and the LEIC Act that limit the uses to which examination and hearing material may be put, and the persons to whom it may be disclosed. These include:

- the ability to make an order to prevent the disclosure of examination (under subsection 25A(9) of the ACC Act) or hearing material (under subsection 90(4) of the LEIC Act)
- the requirement to make such an order in certain circumstances (see new subsection 25A(9A) of the ACC Act and new subsection 90(4A) of the LEIC Act), and
- other limitations about the use and disclosure of examination material and hearing material in new sections 25B to 25H of the ACC Act and new Subdivision EAA of Division 2 of Part 9 of the LEIC Act.

These provisions ensure that there are strict controls around the disclosure of examination and hearing material, particularly where it is obtained post-charge.

The right to freedom of expression

Article 19(2) of the ICCPR provides that everyone has the right to freedom of expression, including the freedom to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media. This includes the freedom to receive and impart information.

Schedules 1 and 2 of the Bill engage the right to freedom of expression by increasing the penalties for breaching certain secrecy and other non-disclosure provisions in the ACC Act and LEIC Act.

Necessary

These amendments are necessary to protect the integrity of sensitive law enforcement information. They reflect the importance of ensuring the confidentiality of ACC and ACLEI information, which may relate to the activities of, and investigations into, serious and organised crime and law enforcement corruption issues. These amendments are particularly important given the covert nature of operations and investigations undertaken by the ACC and ACLEI, and the coercive nature of the powers available to support these functions.

Reasonable

The increase in penalty levels is reasonable. These increased penalties will more adequately deter non-compliance with secrecy and confidentiality provisions under the ACC Act and LEIC Act. In the absence of serious consequences for breach, unauthorised disclosures of sensitive official information may jeopardise the effectiveness of ACC and ACLEI operations.

Proportionate

Increasing penalties is a proportionate method of ensuring compliance with these offences. At present, penalties in the ACC Act and LEIC Act are out of step with similar secrecy and non-disclosure provisions in the *Australian Federal Police Act 1979* and the *Crimes Act 1914*. As the offences in these Acts are intended to protect the integrity of similar law enforcement and other sensitive information, it is appropriate that they attract similar penalties.

Conclusion

Schedules 1 and 2 of the Bill are compatible with human rights. To the extent that the measures in those Schedules may limit human rights, those limitations are necessary, reasonable and proportionate.

NOTES ON CLAUSES

Preliminary

Clause 1 – Short title

This clause provides for the Act to be cited as the *Law Enforcement Legislation Amendment (Powers) Act 2014*.

Clause 2 – Commencement

This clause provides for the commencement of each provision in the Bill, as set out in the table. Item 1 in the table provides that sections 1 and 2 which concern the formal aspects of the Bill, as well as anything in the Bill not elsewhere covered by the table, will commence on the day on which the Act receives Royal Assent.

Both Schedules 1 and 2 will commence on the 28th day after the Act receives Royal Assent. This commencement provision has been included to ensure that the relevant agencies have sufficient time to put in place the necessary arrangements to give effect to the amendments in these Schedules.

Clause 3 – Schedules

This is a formal clause that provides that the Schedules to the Act amend the Acts as set out in the relevant Schedule.

Schedule 1 – Powers of the Australian Crime Commission

GENERAL OUTLINE

Schedule 1 is in two Parts. Part 1 makes amendments to the ACC Act to clarify the examination powers of ACC examiners. Part 2 makes amendments to the ACC Act to clarify that a notice to produce is a mechanism of gathering information that is separate to an examination. It also makes a consequential amendment to the PID Act.

Background to the ACC's coercive powers

Under the ACC Act, the ACC and ACC examiners have a range of information gathering powers that they may exercise in assisting investigations of, or in developing intelligence about, serious and organised crime. These powers include the ability to conduct examinations (section 24A) and the ability to require the production of documents or things (section 29, which will be replaced by new section 21A).

Examinations are a key part of the ACC's functions. They enable it to obtain information that would not otherwise be available, or which could only be obtained after long and complex investigations. Examination material plays an important role in assisting the ACC to develop an understanding of how serious and organised crime operates, to analyse this information with other relevant information and to disseminate it to Commonwealth, State and Territory partner agencies as part of an intelligence product.

Examinations are also a powerful tool. Section 30 of the ACC Act abrogates an examinee's privilege against self-incrimination during an examination. However, there are limitations on the circumstances in which self-incriminatory answers given in, or documents or things produced at, an examination may be used against the examinee in criminal proceedings and proceedings for the imposition of a penalty. The ACC Act also includes a number of safeguards on the disclosure of examination material, consistent with its sensitive nature. These include the requirement under subsection 25A(9) for an examiner to issue a direction restricting the publication of evidence given in, or produced at, an examination so as to protect the safety and fair trial of any person. The ACC's obligation and ability to share or disclose examination material under other sections (such as sections 12 or 59AA) will always be subject to the terms of a direction issued under subsection 25A(9).

Recent decisions

A number of recent decisions have affected the ACC's examination powers. These cases include:

- Seller and McCarthy, where the NSW Court of Criminal Appeal found that the use of evidence derived from examination material in criminal proceedings against the examinee could, in some circumstances, be unfair.
- X7, where a 3:2 majority of the High Court found that the ACC Act did not authorise the ACC to examine a person who had been charged with an offence about the subject matter of the charge (referred to here as a post-charge examination). The majority noted that such an examination would affect the fairness of the examinee's trial and could only be authorised if there were clear words indicating Parliament's intention.
- Lee No. 1, where a 4:3 majority of the High Court found that the *Criminal Assets Recovery Act 1990* (NSW) authorised the post-charge examination of a person. The

majority distinguished the decision in X7 on the basis that the relevant examination occurred as a result of a court order.

- Lee No. 2, where the High Court unanimously found that the NSW Crime Commission’s unlawful disclosure of the accused’s examination transcript to the prosecution rendered the trial fundamentally unfair and ordered a retrial. The examination occurred before the accused was charged with an offence.

These cases have had a significant operational impact on the ACC. For example, as a result of the decision in X7, the ACC has ceased examining persons who have been charged with an offence where there is a possibility that any questioning could touch upon matters related to the charges.

Summary of Part 1 of Schedule 1

The amendments in Part 1 are intended to reduce the uncertainty about the use of the coercive powers under the ACC Act. They are intended to make explicit the circumstances in which examination material and material derived from it may be disclosed to other persons, including the persons prosecuting the examinee for an offence. They are also intended to clearly set out how that material may be used against the examinee in a prosecution.

The amendments in Part 1 are also intended to ensure that examinations and the disclosure of examination and derivative material do not prejudice the fairness of any trial of the examinee. They achieve this in a number of ways. An examiner will still be required to issue a direction to ensure the confidentiality of examination material where its disclosure would, amongst other things, prejudice the examinee’s fair trial, in circumstances where he or she has been charged with an offence, or such a charge is imminent. The amendments also place a range of limitations on the circumstances in which examination and derivative material may be provided to a person prosecuting the examinee, in addition to the general secrecy and disclosure provisions which apply to all ACC information. The limitations that apply to the disclosure of examination and derivative material depend on the time at which the examination occurred, and the time at which the material is disclosed, with the determining factor being whether or not the person has been charged with an offence (or such a charge is imminent).

These additional limitations are set out in the below table:

Material	Position on disclosure to prosecutor
<i>Pre-charge</i> examination material disclosed <i>pre-charge</i>	Can be disclosed if non-disclosure direction allows it
<i>Pre-charge</i> derivative material disclosed <i>pre-charge</i>	No additional limitation on disclosure
<i>Pre-charge</i> examination material disclosed <i>post-charge</i>	Can only be disclosed with a court order
<i>Pre-charge</i> derivative material disclosed <i>post-charge</i>	No additional limitation on disclosure

<i>Post-charge</i> examination material	Can only be disclosed with a court order
<i>Post-charge</i> derivative material	Can only be disclosed with a court order

Further, the amendments in Part 1 are intended to make it clearer that examinations have an important role in ACC special operations and special investigations, and are not used simply to bolster the prosecution’s case against an accused, although information derived from information obtained in an examination may be used to assist in the examinee’s prosecution. Examinations play a crucial role in the ACC and are important in gathering intelligence and information that is used to understand, disrupt and prevent serious and organised criminal activity.

Part 1 also clarifies that ACC examiners may conduct examinations in the context of confiscation proceedings against the examinee under the POC Act and equivalent State and Territory legislation. It allows examination material and derivative material to be provided to a proceeds of crime authority at any time, irrespective of whether related confiscation proceedings are on foot or are imminent. While examination material and derivative material may generally be used as evidence in such proceedings, the amendments specifically provide that material from the examination of a person after confiscation proceedings have commenced is inadmissible in those proceedings. These measures will respond to recommendations 3 and 4 of the PJCLE Report, which concerned the use of ACC examinations to support unexplained wealth proceedings under the POC Act.

The amendments in Part 1 also make a range of other minor and consequential changes, including by making penalties for breaches of secrecy or confidentiality provisions in the ACC Act more consistent with similar penalties in other legislation, and to make the operation of other parts of the ACC Act clearer.

The amendments in Part 2 will move the provisions dealing with an examiner’s ability to issue a notice to produce documents or things from Division 2 of Part II, which is about examinations, into Division 1A of Part II, which is about the performance of the ACC’s functions and the exercise of its powers.

Moving the provisions to Division 1A will clarify the position under current subsection 29(2) that a notice to produce is not connected to an examination. It is a separate mechanism for gathering information for use in a special investigation or operation. In these circumstances, the power and related provisions more appropriately sit in Division 1A, which contains provisions about search warrants and dealing with items produced or seized in relation to a special operation or special investigation.

Part 1 – Main Amendments

Item 1 – Subsection 4(1)

This item will insert a number of new definitions that will apply in relation to examinations, examination material and material derived from it.

'against'

The term *against* is used to explain the circumstances when confiscation proceedings are against a person. This term is used in the definitions of *pre-confiscation application* and *post-confiscation application*. It relies on the existing definition in subsection 4(1) of *confiscation proceeding*, which includes both proceedings under the POC Act, the *Proceeds of Crime Act 1987* and equivalent State and Territory legislation.

Confiscation proceedings will be against a person where he or she is a suspect in those proceedings. The definition relies on the definition of 'suspect' in section 338 of the POC Act, which sets out the circumstances in which a person will be a suspect, depending on whether the relevant proceedings are for a restraining order, confiscation order, unexplained wealth restraining order or unexplained wealth order. In the case of proceedings for a restraining order or confiscation order, a person will be a suspect where they committed (or are suspected of having committed) the offence to which the order relates. In the case of proceedings for an unexplained wealth restraining order or unexplained wealth order, a person will be a suspect where he or she is the person whose wealth is suspected of being unexplained.

'charged'

The term *charged* is intended to capture a range of circumstances in which a person may be the subject of a prosecution for a criminal offence. In addition to including circumstances where the person has been charged with an offence, it is also intended to apply to situations where the person is the subject of a court process that may lead to the laying of charges and the commencement of a prosecution, such as where the person has been given a court attendance notice or has been summoned to appear before a court.

The term is not intended to apply to persons who are the subject of proceedings that are not criminal in nature even where they may be related to an offence, such as proceedings for the imposition of a control order, or proceedings relating to the investigation of an offence, such as proceedings for obtaining a search warrant.

'derivative material'

The term *derivative material* is used in relation to *examination material*. It is intended to be a broad definition and to capture all evidence, information, documents or things that have been obtained from examination material, including:

- things obtained directly from examination material (eg. a thing whose existence and location the examinee revealed in the examination, or an understanding of a particular set of financial transactions based on an explanation given at the examination)
- things obtained from a combination of examination material and other material (eg. a hoard of illicit drugs uncovered once evidence directly derived from examination material is fused and analysed with other relevant information), and
- things obtained indirectly from examination material (eg. child pornography material uncovered from a laptop after the examinee revealed the location of a storage facility, and the storage facility contained a document which recorded the password to the laptop).

'disclose'

The term *disclose* is intended to capture the ways in which the ACC may pass on or make available examination material or derivative material. This includes both direct disclosure of the material to another person, body or agency under the ACC Act (eg. under section 12 or sections 59-59AB), as well as circumstances in which it is shared with or otherwise made available to that person, body or agency (eg. under section 24AA).

The term is also defined so as to include the disclosure of copies, contents or descriptions of that material. This definition is necessary to ensure that the disclosure of copies, contents or descriptions of examination and derivative material is subject to the same restrictions and safeguards as the disclosure of the original material.

'examination'

The term *examination* is defined to mean an examination under Division 2 of Part II of the ACC Act.

'examination material'

This term is defined in new subsection 4B(1).

'examinee'

This term is defined in new subsections 4B(3).

'imminent'

The term *imminent* is used in relation to a charge or confiscation proceedings.

When it is used in relation to a charge, it is intended to capture the circumstances in which criminal proceedings are about to be brought against a person.

The term has been broadly defined to include three circumstances in which a charge will be imminent against a person:

- where the person is a *protected suspect* under the *Crimes Act 1914* (Crimes Act) (or would be, if that Act applied to State and Territory offences)
- where the person has been arrested for an offence but is yet to be charged, and
- where a person with authority to initiate the criminal process for the person's prosecution has decided to initiate the process, but has not yet done so.

The final dot point is intended to capture circumstances where there is sufficient evidence to initiate the relevant criminal process for the person's prosecution (eg. to lay a charge or issue a court attendance notice), and a person with authority (such as a senior officer) has decided to do so, but that process has not yet been initiated against the person. It is not intended to capture circumstances where a junior officer has made a preliminary decision to initiate a criminal process for the prosecution of a person, but a person with appropriate authority to initiate the process has not yet made a final decision. It is also intended to capture circumstances where a court has decided not to commit a person on a charge, but where the Director of Public Prosecutions has decided to file an *ex officio* indictment.

When the term *imminent* is used in relation to confiscation proceedings, it is intended to capture the circumstances in which those proceedings are about to be brought against a person, but have not yet commenced. As with a charge, those proceedings will be imminent where an officer with the relevant authority has decided to commence them, but where the proceedings have not yet been instituted.

The concept of ‘imminent’ is used to ensure that the obligations and restrictions that apply in relation to examinations and to the use and disclosure of examination and derivative material in circumstances where the examinee has been charged with an offence or where confiscation proceedings have commenced will also apply where those charges or proceedings are imminent. Using the concept of charges or proceedings being imminent makes it clear that when an examiner decides to commence an examination, he or she must take account of the fact that the potential examinee is about to be charged with an offence or confiscation proceedings are about to commence against him or her.

‘post-charge’

The term *post-charge* is used to describe the time at which:

- examination material or derivative material is used or disclosed
- material becomes examination material
- an examination commences, or
- a summons is issued to a person.

These events will occur post-charge if, at the time, charges are on foot against an examinee (or they are imminent). The events will not occur post-charge if charges against the examinee have been *resolved*, whether by conviction and sentence, withdrawal, quashing or otherwise.

The term relies on the concept of a *related offence*.

Under paragraph (a), in order for material to be used or disclosed post-charge, the subject matter of the examination from which that material came or was derived must relate to the subject matter of the offence with which the examinee has been charged.

Under paragraph (b), in order for material to be post-charge examination material, the subject matter of the examination from which that material came must relate to the subject matter of the offence with which the examinee has been charged. There does not have to be a connection between the subject matter of the examination material and the offence in order for it to be post-charge examination material. It is enough that there is a connection between the matters covered in the examination and the offence.

New sections 25C and 25F will set out additional obligations and restrictions on how to deal with post-charge examination material. These obligations and limitations are designed to protect the particularly sensitive status of this material and ensure that it does not prejudice the fair trial of the examinee.

Under paragraph (c), in order for an examination to be a post-charge examination, the subject matter of the examination must relate to the subject matter of the offence with which the examinee has been charged.

Under paragraph (d), in order for a summons to be issued post-charge, the subject matter of the examination to which the person has been summoned must relate to the subject matter of the offence with which the person has been charged.

The term post-charge will not apply where there is no relationship between the subjects canvassed in the examination and the subject matter of the offence with which the examinee has been charged.

For example, material used or disclosed in relation to a person who has been charged with driving without a licence will not be post-charge if the relevant material came from an examination about drug trafficking offences. In this case, such a use or disclosure would be *pre-charge*.

Similarly, material from the examination of a person about his or her involvement in drug trafficking offences would not generally be post-charge examination material if the person had been charged with driving without a licence. In this case, such material would be *pre-charge* examination material.

'post-confiscation application'

The term *post-confiscation application* is used to describe the time at which:

- examination material or derivative material is used or disclosed
- material becomes examination material
- an examination commences, or
- a summons is issued to a person.

These events will occur post-confiscation application if, at the time, confiscation proceedings are on foot against an examinee (or they are imminent). These events will not occur post-confiscation application if those proceedings have been resolved, whether by the making of a confiscation order, dismissal, discontinuance or settling of proceedings or otherwise.

The term relies on the concept of *related confiscation proceeding*.

Under paragraph (a), in order for material to be used or disclosed post-confiscation application, the subject matter of the examination from which that material came or was derived must relate to the subject matter of the confiscation proceedings against the examinee.

Under paragraph (b), in order for material to be post-confiscation application material, the subject matter of the examination from which that material came must relate to the subject matter of the confiscation proceedings against the examinee. There does not have to be a connection between the subject matter of the examination material and the confiscation proceedings in order for it to be post-confiscation application examination material. It is enough that there is a connection between the matters covered in the examination and the confiscation proceedings.

Under subsections 30(5) and (5A), post-confiscation application examination material cannot be used in evidence in confiscation proceedings against the examinee.

Under paragraph (c), in order for an examination to be a post-confiscation examination, the subject matter of the examination must relate to the subject matter of the confiscation proceedings against the examinee.

Under paragraph (d), in order for a summons to be issued post-confiscation application, the subject matter of the examination to which the person has been summoned must relate to the subject matter of the confiscation proceedings against the person.

The term *post-confiscation application* will not apply where there is no relationship between the subjects canvassed in the examination and the subject matter of the confiscation proceedings against the examinee.

'pre-charge'

The term *pre-charge* is used to describe the time at which:

- examination material or derivative material is used or disclosed
- material becomes examination material
- an examination commences, or
- when a summons is issued to a person.

These events will occur pre-charge if, at the time, there are no related charges against the examinee, and no related charges are imminent or contemplated.

The term relies on the concept of *related offence* and is intended to capture any time which is not *post-charge*. That is, using or disclosing material, providing material in an examination, commencing an examination, or issuing a summons, will be pre-charge where:

- the examinee is suspected of being involved in criminal activity that the examination has covered or will cover, but charges have not yet been laid against the person and are otherwise not imminent
- the examinee is not suspected of being involved in any criminal activity at all, but has some information that may be relevant or necessary in the relevant ACC special investigation or special operation
- the examinee has been charged with an offence that is not a related offence (or such a charge is imminent), or
- a charge for a related offence against the examinee has been resolved and he or she is later examined about the subject matter of the offence.

'pre-confiscation application'

The term *pre-confiscation application* is used to describe the time at which:

- examination material or derivative material is used or disclosed
- material becomes examination material
- an examination commences, or
- when a summons is issued to a person.

These events will occur pre-confiscation application if, at the time, there are no related confiscation proceedings against the examinee, and no related confiscation proceedings are imminent or contemplated.

The term relies on the concept of *related confiscation proceedings* and is intended to capture any time which not *post-confiscation application*. That is, using or disclosing material, providing material in an examination, commencing an examination or issuing a summons, will be pre-confiscation application where:

- the examinee is suspected of being involved in criminal activity that the examination has covered or will cover, and that may be the subject of some future confiscation proceedings, but those proceedings have not yet commenced (and are not imminent)
- the examinee is not suspected of being involved in any criminal activity at all, but has some information that may be relevant or necessary in the relevant ACC special investigation or special operation
- the examinee has had confiscation proceedings commenced against him or her that are not related proceedings (or such proceedings are imminent), or
- related confiscation proceedings against the examinee have been finalised and he or she is later examined about the matters the subject of the confiscation proceedings.

‘proceeds of crime authority’

The term *proceeds of crime authority* is intended to capture the bodies able to commence confiscation proceedings under the POC Act and equivalent State and Territory legislation. The term is used in new section 25H, which clarifies when examination and derivative material can be disclosed to proceeds of crime authorities.

‘prosecuting authority’

The term *prosecuting authority* is intended to capture all individuals or authorities that are authorised to conduct a prosecution for an offence. The term is intended to include the Commonwealth Director of Public Prosecutions (CDPP) and his or her State and Territory counterparts. It is also intended to extend to other bodies that may have prosecutorial functions, such as State or Territory police.

This term is used in sections 25B and 25G, which relate to the persons and bodies to whom examination material and derivative material may be disclosed, and the uses to which those persons and bodies may put the material.

‘prosecutor’

The term *prosecutor* is used in relation to an examinee. An individual will only be a prosecutor of an examinee if he or she satisfies both of the following two conditions:

- he or she must either be a prosecuting authority or employed or engaged by a prosecuting authority, and
- he or she must either make (or be involved in the making of) a decision to prosecute the examinee for a related offence, or engaged in the prosecution of the examinee for a related offence.

The definition is intended to capture only the persons who are directly involved in the prosecution of an examinee for a related offence or the decision about whether to prosecute the examinee. This would include:

- the Director of Public Prosecutions him or herself

- the prosecutors who have carriage of the prosecution of the examinee
- other prosecutors who assist that prosecutor in the prosecution of the examinee or who assist in making the decision to prosecute the examinee
- counsel engaged to assist in the prosecution of the examinee, and
- support staff who assist in the prosecution of the examinee.

The definition is not intended to capture the following:

- police or law enforcement officers involved in the investigation which led to the examinee being charged
- police or law enforcement officers who are witnesses in a prosecution of the examinee for a related offence
- persons involved in the prosecution of the examinee for unrelated offences (whether that prosecution is by the same prosecuting authority or another prosecuting authority)
- persons involved in the prosecution only of persons other than the examinee (including for offences that are related to the examinee's conduct).

This definition is used in sections 25B, 25C, 25D, 25F and 25G, which set out when examination material and derivative material can be disclosed to, and used by, the persons who are directly involved in the prosecution of the examinee. Persons who are not involved in the prosecution of the examinee should not be subject to the obligations set out in these sections. This is because the risk that the disclosure of examination or derivative material to these persons could prejudice the fair trial of the examinee is more appropriately dealt with by the relevant prosecuting authority placing internal restrictions on the disclosure or use of this material.

'protected suspect'

The term *protected suspect* is used in relation to the circumstances in which charges against an examinee are *imminent*. Subsection 23B(2) of the Crimes Act sets out when a person is a protected suspect. It only applies where the person is, amongst other things, being questioned about a Commonwealth offence.

The definition of protected suspect in this Bill is intended to include both persons who are protected suspects for the purposes of the Crimes Act, and persons who would be if the definition in that Act applied to State or Territory offences.

'related confiscation proceeding'

This definition sets out when a confiscation proceeding is related to an examination or a summons.

A confiscation proceeding will be related to an examination if the matters covered in the examination relate to the subject matter of the proceeding. There must be a connection between the activity, conduct or offences the subject of the examination and those that are the subject the confiscation proceedings. If the confiscation proceedings do not have such a connection to the subject matter of the examination, then the confiscation proceedings are not related to the examination.

If a confiscation proceeding is related to an examination, this will affect how material that was given in, or produced during, the examination (examination material) and material that

was derived from information, documents or things given in or produced during the examination (derivative material) can be used in relation to that proceeding.

Secondly, a confiscation proceeding will also be related to a summons if the matters to be covered in the relevant examination relate to the subject matter of the proceeding. There must be a connection between the activity, conduct or offences to be covered in the examination and those that are the subject of the confiscation proceedings. If the confiscation proceedings do not have such a connection to the subject matter to be covered in the examination, then the confiscation proceedings are not related to the summons.

'related offence'

This definition sets out when an offence is related to an examination or a summons.

An offence will be related to an examination if the matters covered in the examination relate to the subject matter of the offence. There must be a connection between the activity, conduct or offences the subject of the examination and those that constitute or are the subject of the offence. If the offence does not have such a connection to the subject matter of the examination, then the offence is not related to the examination.

If an offence is related to an examination, this will affect how material that was given in, or produced during, the examination (examination material) and material that was derived from information, documents or things given in or produced during the examination (derivative material) can be used in relation to the prosecution of the examinee for that offence.

An offence will also be related to a summons if the matters to be covered in the relevant examination relate to the subject matter of the offence. There must be a connection between the activity, conduct or offences to be covered in the examination and those that constitute or are the subject of the confiscation proceedings. If the offence does not have such a connection to the subject matter to be covered in the examination, then the offence is not related to the summons.

'resolved'

The term *resolved* is defined in new section 4C.

'use'

The term *use* is defined, in relation to examination and derivative material, to include the use of copies, contents or descriptions of that material. This definition is necessary to ensure that the use of copies, contents or descriptions of examination and derivative material are subject to the same restrictions and safeguards as the original material.

Item 2 – After section 4A

This item will insert new sections 4B and 4C, which contain additional definitions.

New section 4B – Examination material and examinee

New section 4B defines *examination material* and *examinee*. These terms are central to new sections 25B to 25H, which set out the circumstances in which examination material and

derivative material may be disclosed and the purposes for which it may be used when the disclosure or use relates to the person who gave evidence at the examination.

New subsection 4B(1) sets out the definition of *examination material*. It provides that there are four types of examination material. This definition has been drawn from current paragraphs 25A(9)(a) to (d), which set out the information which an examiner may direct not be published, or only be published in certain ways. Current paragraphs 25A(9)(a) to (d) will be repealed under item 14.

Under new paragraphs 4B(1)(a) and (b), examination material is the evidence given or produced to an examiner during an examination. This would include the answers to the examiner's questions, the transcript of those answers, any documents or things produced under the summons issued under subsection 28(1) or during the examination (under subsection 28(4)).

Under new paragraphs 4B(1)(c) and (d), examination material is also information that reveals the identity of a person who has been examined, as well as information that reveals the fact that a person has been or is about to be examined.

New subsection 4B(2) excludes from the definition of examination material information, documents or things that are obtained otherwise than at an examination. This subsection ensures that that information, or those documents or things, are not to be treated as examination material simply because they were also given during an examination.

For example, an officer may execute a search warrant under the ACC Act and seize copies of a person's bank statements. That person may then produce the originals of those bank statements at a subsequent examination. As a result of new subsection 4B(2), the copies of the bank statements will be dealt with under the returnable items provisions that govern the use, sharing and disclosure of seized material. The originals of the bank statements would be dealt with as examination material.

New subsection 4B(3) sets out the definition of *examinee*.

Paragraph 4B(3)(a) explains when a person is the examinee for the purposes of an examination or for examination material.

Paragraph 4B(3)(b) explains when a person is the examinee for the purposes of derivative material.

New section 4C – Resolved

New section 4C defines the term *resolved*. The term is used to describe when charges or confiscation proceedings against a person have concluded. It is intended to capture all circumstances in which charges or confiscation proceedings conclude. It is used to distinguish between circumstances that are pre-charge and those that are post-charge, and between circumstances that are pre-confiscation application and those that are post-confiscation application.

New subsection 4C(1) provides that a charge will be resolved where there is either:

- an appeal against a decision relating to the charge and that appeal lapses or is finally determined, or
- where no appeal against a decision is lodged within the timeframe for lodging appeals.

If a person lodges an appeal against a decision relating to a charge outside that period, then the charge will cease to be resolved.

Similarly, new subsection 4C(2) provides that confiscation proceedings will be resolved where there is either:

- an appeal against a decision relating to those proceedings and that appeal lapses or is finally determined, or
- where no appeal against a decision is lodged within the timeframe for lodging appeals.

If a person lodges an appeal against a decision relating to a confiscation proceeding outside that period, then the proceeding will cease to be resolved.

Once a charge has been resolved against a person, actions in relation to him or her will cease to be post-charge and will become pre-charge. Similarly, once confiscation proceedings have been resolved against a person, actions in relation to him or her will cease to be post-confiscation application and will become pre-confiscation application.

Item 3 – Subsection 7C(2)

This item clarifies the meaning of the term ‘effective’ in relation to the ACC Board’s decision to determine that an intelligence operation is a special operation.

Under subsection 7C(2), the ACC Board may determine that an intelligence operation is a special operation. Issuing a determination that an operation is a special operation allows the ACC and its examiners to use their coercive powers, such as conducting examinations, to obtain information relevant to the special operation.

Current subsection 7C(2) requires the Board to consider, before making a determination, whether methods of collecting the criminal information and intelligence that do not involve the use of powers in the ACC Act have been effective. However, the Act does not explain what ‘effective’ means in this circumstance.

This amendment is necessary to more fully articulate the purposes for which the ACC and examiners exercise their coercive powers. The amendment is intended to explain that these powers are to be exercised in support of the ACC’s broad role in understanding, disrupting or preventing serious and organised criminal activity. This item is intended to counteract the suggestion that the only purpose for which the ACC may be conducting a special operation is to assist in the laying of charges against one or more people. While special operations may ultimately result in the laying of such charges, their purpose is significantly broader. They allow the ACC to inquire proactively into the whole context in which organised crime groups operate, contributing to the disruption of ongoing criminal enterprises and the elimination of systemic vulnerabilities.

Item 4 – Subsection 7C(3)

As with item 3, this item clarifies the meaning of the term ‘effective’ in relation to the ACC Board’s decision to determine that an investigation is a special investigation.

Under subsection 7C(3), the ACC Board may determine that an investigation is a special investigation. Issuing a determination that an investigation is a special investigation allows the ACC and its examiners to use their coercive powers, such as conducting examinations, to obtain information relevant to the special investigation.

Current subsection 7C(3) requires the Board to consider, before making a decision, whether ordinary police methods of investigation into the matters are likely to be effective. However, the Act does not explain what ‘effective’ means in this circumstance.

As with item 3, this amendment is necessary to more fully articulate the purposes for which the ACC and examiners exercise their coercive powers. The amendment is intended to explain that those powers are to be exercised in support of the ACC’s broad role in understanding, disrupting or preventing serious and organised criminal activity. This item is intended to clarify that the word ‘effective’ in the context of subsection 7C(3) means more than ‘effective to permit the laying of charges against offenders’. While the laying of charges may be one outcome of the special investigation, it is not the only one. A special investigation may seek to disrupt or prevent the criminal activity to which it relates in a number of ways, including by supporting confiscation or other civil proceedings, supporting administrative proceedings, or by recommending legislative, administrative or policy changes to prevent persons from engaging in the relevant criminal conduct.

Item 5 – Subsection 12(1) (note 1)

This item is consequent upon the removal of the second note under subsection 12(1) by item 6.

Item 6 – Subsection 12(1) (note 2)

This item will repeal the second note under subsection 12(1). Subsection 12(1) places an obligation on the CEO of the ACC to provide evidence admissible in criminal proceedings to certain persons, including a prosecuting authority. The note states that this obligation is subject to a direction about the confidentiality of examination material under subsection 25A(9). This item is consequent on item 7, which will insert a new subsection 12(1AA) to set out the other provisions in the Act which may limit the disclosure of material under subsection 12(1).

Item 7 – After subsection 12(1)

This item will insert new subsection 12(1AA), which sets out the provisions in the Act which prevail over the CEO’s obligation to disclose in subsection 12(1). Subsection (1AA) will provide that the CEO’s obligation to provide admissible evidence to certain persons is subject to:

- subsection 25A(9), which allows an examiner to issue a direction to ensure the confidentiality of examination material, and

- the CEO complying with new subsections 25B to 25G, which set out additional rules for the disclosure and use of examination material and derivative material, particularly where that material is to be disclosed to a prosecutor of the examinee.

Item 8 – Subsection 12(1A) (note)

This item will repeal the note under subsection 12(1A). This note states that the ability to provide evidence admissible in confiscation proceedings to certain persons, including a proceeds of crime authority, is subject to a direction about the confidentiality of examination material under subsection 25A(9). This note is redundant. Subsection 12(2) makes the relationship between subsection 12(1A) and a direction under subsection 25A(9) clear.

Item 9 – Subsection 12(2)

This item repeals existing subsection 12(2) and replaces it with a new subsection. This change is consequent upon item 7 and on the introduction of new sections 25B and 25H. New subsection 12(2) sets out the provisions of the ACC Act that prevail over the CEO's ability to disclose material in subsection 12(1A). New subsection 12(2) will provide that the CEO's ability to provide admissible evidence to certain persons is subject to:

- subsection 25A(9), which allows an examiner to issue a direction to ensure the confidentiality of examination material, and
- the CEO complying with new subsections 25B and 25H, which set out the circumstances in which examination material and derivative material may be provided to a proceeds of crime authority.

Item 10 – At the end of section 24AA

This item will insert new subsection 24AA(10). New subsection 24AA(10) will provide that a person making available or using a returnable item must comply with:

- any direction under subsection 25A(9), which ensures the confidentiality of examination material, and
- new subsections 25B and 25H, which set out the circumstances in which examination material and derivative material may be provided to a prosecutor or proceeds of crime authority.

Item 11 – Section 24A

This item is consequent upon item 12.

Item 12 – At the end of section 24A

This item will insert new subsections 24A(2) and (3).

Section 24A provides that an examiner may conduct an examination for the purposes of a special ACC operation or investigation. New subsection 24A(2) specifically authorises an examiner to conduct an examination pre-charge, post-charge, pre-confiscation application or post-confiscation application.

This provision is intended to overcome the effect of the decision in X7, which held that the ACC Act did not provide an ACC examiner with the power to conduct an examination of a person who had been charged with an offence and to ask questions about the subject matter of the offence.

New subsection 24A(3) is a severability clause.

New paragraph 24A(3)(a) allows for paragraph 24A(2)(a) to be read down so as to only authorise pre-charge examinations, in the event that the provision is found to be beyond power.

New paragraph 24A(3)(b) allows for paragraph 24A(2)(b) to be read down so as to only authorise pre-confiscation application examinations, in the event that the provision is found to be beyond power.

Item 13 – After subsection 25A(6)

This item will insert new subsections 25(6A) and (6B).

Section 25A relates to the conduct of examinations. New paragraph 25A(6A)(a) specifically authorises an examiner to conduct an examination of an examinee who has been charged with an offence (or against whom such a charge is imminent). The subsection also authorises the examiner to ask questions that directly relate to the subject matter of the offence with which the examinee has been charged. This paragraph is intended to overcome the decision in X7.

New paragraph 25A(6A)(b) specifically authorises an examiner to conduct an examination of an examinee against whom confiscation proceedings have commenced (or against whom such proceedings are imminent). The subsection authorises the examiner to be able to ask questions that directly relate to the subject matter of those proceedings.

This paragraph is intended to address recommendation 4 of the PJCLE Report, that an ACC examiner be specifically empowered to conduct an examination in support of an unexplained wealth order after a court has made a restraining order. Constitutional considerations mean that full implementation of the recommendation is not possible.

Nothing in new subsection 25A(6A) is intended to limit or otherwise constrain the matters that an examiner may consider relevant to an ACC operation or investigation and about which he or she may examine or cross-examine a witness.

New subsection 25A(6B) is a severability clause.

New paragraph 25A(6B)(a) allows section 25A and the ACC Act to be read as if new subsection 25A(6A) had not been enacted, in the event that subsection 25A(6A) is found to be beyond power.

New paragraph 25A(6B)(b) allows subsection 25A(6A) to be read down so as to only authorise the examination to cover the subject matter of a current or imminent charge against the examinee, in the event that paragraph 25A(6A)(a) is found to be beyond power.

New paragraph 25A(6B)(b) allows subsection 25A(6A) to be read down so as to only authorise the examination to cover the subject matter of current or imminent confiscation

proceedings against the examinee, in the event that paragraph 25A(6A)(b) is found to be beyond power.

Item 14 – Subsection 25A(9), (10) and (11)

This item repeals existing subsection 25A(9), (10) and (11) and inserts new subsections 25A(9), (9A), (10) and (11). This item is intended to clarify the operation of an examiner's direction to ensure the confidentiality of examination material.

New subsection 25A(9)

New subsection 25A(9) will set out the examiner's power to issue a direction to ensure the confidentiality of examination material. Paragraph 25A(9)(a) allows the examiner to issue a direction that examination material not be disclosed or used. Paragraph 25A(9)(b) allows the examiner to issue a direction that allows examination material to be used by, or disclosed to, certain specified people. It is also intended to clarify that the examiner may limit the ways in which those persons may use the examination material and that the examiner may impose conditions on that use. For example, an examiner's direction may provide that examination material can be disclosed to a law enforcement agency, but that it can only be used for the purposes of developing intelligence, or that it cannot be used to inform the prosecution of the examinee or another person.

New subsection 25A(9) is intended to clarify a number of ambiguities in current subsection 25A(9).

First, the new subsection will use the term 'used or disclosed' instead of 'published'. This new term more accurately describes the purpose of an examiner's direction and the uses to which examination material is put: it is disclosed to other bodies (eg. under section 59AA); it may be shared or made available with those other bodies under section 24AA; and the ACC and those other bodies may use it for certain purposes (eg. investigating offences or developing intelligence). A direction restricts the bodies to which sensitive examination material can be disclosed and the uses to which they may put that material.

Secondly, new paragraph 25A(9)(b) is intended to clarify that an examiner's direction can limit the uses to which another body may put examination material. The limits which an examiner places on the disclosure and use of examination material under paragraph 25A(9)(b) will bind a body or person to which examination material has been disclosed.

New subsection 25A(9A)

New subsection 25A(9A) sets out the circumstances in which an examiner is required to make a direction under subsection 25A(9). The circumstances in which an examiner is required to make a direction were previously set out in subsection 25A(9). For clarity, they are now set out in a separate subsection.

There are two circumstances when an examiner is required to make a direction under subsection 25A(9). The first is where the failure to make the direction (or make it in such a way) might prejudice a person's safety. This is the same as the obligation in current subsection 25A(9).

The second circumstance is where the failure to make the direction (or make it in such a way) would reasonably be expected to prejudice the examinee's fair trial. This obligation only applies where:

- the examinee has been charged with an offence (or such a charge is imminent), and
- that offence is a 'related offence' (that is, the subject matter of the examination relates to the subject matter of the offence).

This obligation differs from current subsection 25A(9) in three key ways.

First, it applies where the failure to make the direction 'would reasonably be expected to prejudice' the examinee's fair trial. Current subsection 25A(9) applies where the failure 'might prejudice' a person's trial. This change is intended to give an examiner greater certainty about the circumstances in which he or she is required to make a direction under subsection 25A(9). An examiner should not be required to make a direction to protect against unforeseeable risks that the disclosure or use of examination material may prejudice the examinee's fair trial. The court's power to manage any risk to the examinee's fair trial will ensure that any unforeseeable risks will be appropriately mitigated.

Secondly, it applies only where the examinee has been charged with an offence (or such a charge is imminent) and the examination covered the subject matter of that offence. Current subsection 25A(9) applies where there might be prejudice to 'the fair trial of a person who has been, or may be, charged with an offence'. This change is intended to make clearer the examiner's obligation to issue a direction to protect a person's fair trial rights. The only person whose trial may be prejudiced by the disclosure or use of examination material is the examinee. The only time at which that prejudice could occur is where the examinee has either been charged with an offence or when such a charge is imminent.

Finally, under new subsection 25A(9A), an examiner will no longer be required to issue a direction where the failure to do so might prejudice a person's reputation. This change is intended to reflect the ACC and examiners' practice in relation to examination material and subsection 25A(9) directions. There are two factors which justify this change.

First, subsection 25A(9) directions only allow a limited range of persons to use examination material for specified purposes. An examiner will make an initial direction on the premise that only the persons involved in the examination should have access to the examination material. While the ACC CEO may expand this over time under subsections 25A(10) and (11), the ACC approaches this with caution and will only expand the persons to whom examination material may be disclosed and the purposes for which it may be used where there is an operational need.

Secondly, a person's reputation is adequately protected in other provisions that allow for the disclosure of ACC information (which includes examination material) to the public, such as sections 59AB and 60. Examinations will frequently involve serious and sensitive matters that may negatively impact on a person's reputation if disclosed to the public at large. However, in the context of disclosures between law enforcement and other government agencies, prejudice to a person's reputation should not stand in the way of the sharing of relevant and significant information about their involvement in serious and organised crime. In these circumstances, requiring an examiner to consider a person's reputation impedes the ability of agencies to effectively understand, disrupt and prevent serious and organised crime.

Subsection 25A(10)

New subsection 25A(10) allows either the CEO or an examiner to vary a direction under subsection 25A(9), subject to new subsection 25A(11).

Under current subsection 25A(10), the CEO has the power to vary or revoke a direction. New subsection 25A(10) also allows an examiner to vary or revoke a direction.

New paragraph 25A(10)(b) only allows an examiner to vary or revoke a direction if the examination is still ongoing. Once an examination has concluded—when the examinee is either excused or released from further attendance at the examination—only the CEO may vary or revoke a direction under subsection 25A(9).

Provided that the examination is ongoing, the examiner conducting the examination may vary or revoke a direction, even if it was made by another examiner. This is intended to allow for circumstances where the examination of a person continues over multiple days and with the possibility of multiple examiners presiding over it.

Further, new subsection 25A(10) is not intended to limit the times at which the CEO may exercise his or her power to vary or revoke a direction. The subsection allows the CEO to exercise this power at any time, including when the examination is ongoing, or when it has concluded.

Subsection 25A(11)

New subsection 25A(11) limits the circumstances in which the CEO or an examiner may vary or revoke a direction under subsection 25A(10). These circumstances are intended to mirror the circumstances in subsection 25A(9A).

New subsection 25A(11) operates in the same way as current subsection 25A(11). However, it has been modified to account for the changes made by this item to subsections 25A(9) and (10) and the introduction of subsection 25(9A).

Item 15 – Subsection 25A(14)

This item repeals subsection 25A(14) and substitutes it with new subsection 25A(14) and (14A).

The new subsection will update the offences to account for the change in terminology in subsections 25A(9) and (10) and will increase the penalties for breaching the confidentiality requirements in relation to examination material.

New subsection 25A(14) is based on the offence in current paragraph 25A(14)(a). It is not intended to operate differently to that offence.

New subsection 25A(14A) is based on the offence in current paragraph 25A(14)(b) and updates that offence so that it:

- is consistent with the structure of offences in the *Criminal Code*
- is consistent with the language of new subsections 25A(9) and (10), and

- more clearly sets out the fact that a person does not commit an offence where he or she discloses examination material in accordance with a court order under subsection 25A(12) (authorising disclosure to the court) or (13) (authorising disclosure to the accused), or under new paragraph 25C(1)(b) (authorising disclosure to a prosecutor).

The offences in new subsections 25A(14) and (14A) will also be punishable by 2 years imprisonment, a fine of 120 penalty units or both. This is an increase in the penalty in current subsection 25A(14), which is a summary offence punishable by 20 penalty units or imprisonment for 12 months.

The changed penalties for new subsections 25A(14) and (14A) will bring the penalties for these offences into line with similar provisions aimed at protecting the integrity and confidentiality of sensitive information in:

- section 60A of the *Australian Federal Police Act 1979* (AFP Act), which prohibits Australian Federal Police (AFP) members from making unauthorised records or disclosures of official information, and
- section 70 of the Crimes Act, which prohibits Commonwealth officers from making unauthorised disclosures of official information.

Both of these offences are punishable by imprisonment for two years.

The changed penalties will also make the offences indictable rather than summary. However, under section 4J of the Crimes Act, the offence may continue to be dealt with summarily provided that both the prosecutor and defendant agree.

The changed penalties are appropriate. They reflect the importance of ensuring the confidentiality of the evidence given at an examination, particularly where that information is sensitive and relates to the activities of serious and organised criminal groups.

Item 16 – After section 25A

This item will insert new sections 25B to 25H. These new sections set out the circumstances in which examination material and derivative material may lawfully be used or disclosed. There are special restrictions on circumstances in which this material may be disclosed to a prosecutor of the examinee.

New section 25B – Obtaining derivative material

New section 25B specifically authorises the use and disclosure of examination material to find other material (derivative material). Derivative material will be admissible in a prosecution of the examinee. However, there are restrictions on the circumstances in which some types of derivative material may be provided to a prosecutor of the examinee (see new paragraph 25D(1)(c)).

New section 25B does not create a new ability for a person or body to disclose or use examination material for the purposes of obtaining derivative material. Rather, that person or body must be permitted or required to make such a use or disclosure of the material under a law of the Commonwealth, a State or Territory (eg. under section 59AA of the ACC Act).

New subsection 25B(1) sets out the ability of a person or body lawfully in possession of examination material to use or disclose that material at any time for the purposes of obtaining derivative material, subject to subsection 25B(2). Subsection 25B(1) allows examination material to be used or disclosed irrespective of whether the examinee has been charged with a related offence (or whether such a charge is imminent) or whether confiscation proceedings have commenced against the examinee (or whether such proceedings are imminent).

New subsection 25B(2) provides that the ability to use or disclose examination material for the purposes of obtaining derivative material under subsection 25B(1) is subject to a range of other provisions which may affect the way in which the person or body can use, or the persons to whom they may disclose, that material, including a direction under subsection 25A(9).

New subsections 25B(1) and (2) do not limit the uses to which any person or body in possession of examination material may put that material. They only specify that one of the lawful uses of examination material is to obtain derivative material.

New subsection 25B(3) sets out those entities which may lawfully use or disclose examination material for the purposes of obtaining derivative material. Its effect is that any person or body lawfully in possession of examination material may use it in accordance with subsections 25B(1) and (2).

New subsection 25B(4) is a severability clause.

Paragraph 25B(4)(a) allows section 25B and the ACC Act to be read as if any or all of paragraphs 25B(1)(b), (c), (e) or (f) had not been enacted, in the event that any of the disclosures authorised by those paragraphs are found to be beyond power.

Paragraph 25B(4)(b) allows for subsection 25B(3) to be read as not authorising prosecutors of the examinee or proceeds of crime authorities to lawfully use or disclose examination material or derivative material in the event that such use or disclosure is found to be beyond power.

New section 25C – Disclosing examination material to prosecutors of the examinee

New section 25C sets out the circumstances in which examination material may be disclosed to a person prosecuting the examinee for an offence.

Consistent with the definition of ‘prosecutor’ in section 4, this provision only applies where the subject matter of the examination from which the material came is related to the subject matter of the offence.

New section 25C will apply to any disclosure of examination material from one person to another, even if they are in the same agency. For example, this would include:

- a disclosure of examination material from an investigator to a prosecutor of the examinee
- a disclosure of examination material from one prosecutor of the examinee to another, and
- a disclosure of examination material from a person engaged by a prosecuting authority who is not prosecuting the examinee to a prosecutor of the examinee.

New section 25C does not affect the disclosure of examination material to a person engaged in the prosecution of a person other than the examinee. It also does not affect or limit the use or disclosure of examination material to other persons or bodies for purposes other than the prosecution of the examinee.

New section 25C does not create a new ability for a person or body to disclose examination material to a prosecutor of the examinee. Rather, such a person or body must be permitted or required to make such a disclosure of the material under a law of the Commonwealth, a State or Territory (eg. under section 12 or 59AA of the ACC Act).

Under new subsection 25C(1), examination material may be disclosed to a prosecutor of the examinee before the examinee has been charged with a related offence (that is, to a person making a decision whether or not to prosecute the examinee, or a person assisting with that decision), when such a charge is imminent and after he or she has been charged with an offence. The conditions that the person or body will need to satisfy before making that disclosure will depend on the time of the disclosure.

Before the person has been charged with a related offence, new paragraph 25C(1)(a) allows the disclosure of examination material to a prosecutor without restrictions additional to those set out in new subsection 25C(2). This provision allows for the disclosure of relevant examination material to a person who is making a decision about whether or not to prosecute the examinee, and to allow for a prosecutor to give advice about the charges that may ultimately be laid against the examinee. Subsection 30(5) will operate to ensure that examination material over which the examinee has claimed the privilege against self-incrimination will still be inadmissible in most criminal proceedings against the examinee.

If the examinee is later charged with a related offence, it is expected that the prosecuting authority will take steps to ensure that the material is not available to the prosecutors of the examinee. This will minimise the risk that the examinee's fair trial may be prejudiced by the prosecutors having access to his or her examination material.

Once the person has been charged with a related offence or where such a charge is imminent, paragraph 25C(1)(b) allows the disclosure of examination material to a prosecutor, provided that the disclosure is in accordance with a court order under new subsection 25E(1). That subsection allows a court to authorise the disclosure of examination material to a prosecutor of the examinee where disclosure is in the interests of justice.

This provision will ensure that the court controls the circumstances in which examination material can be provided to a prosecutor once the examinee has been charged with a related offence (or such charges are imminent). This is appropriate, as a person cannot rely on the privilege against self-incrimination in answering questions or producing documents or things during an examination. Giving the court control of the circumstances in which examination material may be provided to a prosecutor of the examinee is intended to ensure the examinee's fair trial and that the prosecutor is given access to all relevant and appropriate material (such as where the examination material is exculpatory or where the examinee wishes the prosecutor to take matters in the examination into account in making a decision about whether to prosecute).

New subsection 25C(2) states that the ability to disclose examination material to a prosecutor under subsection 25C(1) is subject to any direction under subsection 25A(9).

New subsection 25C(3) ensures that paragraph 25C(1)(b) and its two subparagraphs are severable from one another, the other provisions in section 25C and the rest of the Act in the event that any provision is found to be beyond power. The validity of these provisions does not affect the validity of other provisions in section 25C or the Act.

New section 25D – Disclosing derivative material to prosecutors of the examinee

New section 25D sets out the circumstances in which derivative material may be disclosed to a prosecutor of the examinee.

Consistent with the definition of ‘prosecutor’ in section 4, this provision only applies where the subject matter of the examination from which the material was derived is related to the subject matter of the offence. New section 25D will apply to any disclosure of derivative material from one person to another, even if they are in the same agency. For example, this would include:

- a disclosure of derivative material from an investigator to a prosecutor of the examinee
- a disclosure of derivative material from one prosecutor of the examinee to another, and
- a disclosure of derivative material from a person engaged by a prosecuting authority who is not prosecuting the examinee to a prosecutor of the examinee.

New section 25D does not affect the disclosure of derivative material to a person engaged in the prosecution of a person other than the examinee. It also does not affect or limit the use or disclosure of derivative material to other persons or bodies for purposes other than the prosecution of the examinee.

New section 25D does not create a new ability for a person or body to disclose derivative material to a prosecutor of the examinee. Rather, such a person or body must be permitted or required to make such a disclosure of the material to the prosecutor under another law of the Commonwealth, a State or Territory (eg. under sections 12 or 59AA of the ACC Act).

Under new subsection 25D(1), derivative material may be disclosed to a prosecutor of the examinee before the examinee has been charged with a related offence, when such a charge is imminent and after he or she has been charged with an offence. The conditions that the person or body will need to satisfy before making that disclosure will depend on the time of the disclosure and when the relevant examination occurred.

New paragraphs 25D(1)(a) and (b) allow the disclosure of derivative material obtained from the pre-charge examination of the examinee to a prosecutor for use in any prosecution of the examinee. New paragraph 25G(2)(b) clarifies that derivative material is admissible in proceedings against the examinee.

The provision enables the disclosure of such material irrespective of whether the examinee has been charged with a related offence at the time of the disclosure (or such a charge is imminent) and whether the relevant derivative material was obtained before or after the examinee has been charged.

It is appropriate that material derived from the pre-charge examination of a person should be able to be provided to a prosecutor without additional restrictions. The ACC Act overrides the privilege against self-incrimination in an examination, but provides that examination material over which the examinee has claimed the privilege will be inadmissible in most

criminal proceedings against him or her (amongst other things). While it is appropriate to ensure that there are strict limits on the disclosure of examination material to a prosecutor of the examinee, material derived from the pre-charge examination of an examinee stands in a different category.

The ACC Act has always been intended to authorise the derivative use of examination material for a number of purposes, including for use in the investigation and prosecution of the examinee and other people. This is an important part of enabling the ACC to fulfil its role of understanding, disrupting and preventing serious and organised crime. ACC examinations are only used in support of those investigations and operations into serious and organised crime in which ordinary police methods of collecting intelligence or investigating offences have not been effective. These investigations and operations cover a range of extremely serious criminal activities, including drug trafficking, child sex offences, cybercrime, superannuation fraud and other financial crime, and terrorism. These activities cause significant harm to individuals in the Australian community, to Australian society and the economy, and ultimately undermine Australia's national security.

In light of the subject matter of examinations and the gravity of the criminal activities involved, it is important that material derived from them can be used to disrupt and prevent serious harm to the community, including by prosecuting persons who have been examinees.

Further, previous experience under the *National Crime Authority Act 1984* (NCA Act) demonstrated that providing a derivative use immunity for examination material was inappropriate as it undermined the capacity of the National Crime Authority (NCA) to assist in the investigation of serious criminal activities. Prior to its removal under the *National Crime Authority Legislation Amendment Act 2001*, the derivative use immunity in the NCA Act required the prosecution to prove the provenance of every piece of evidence in the trial of a person that the NCA had examined before it could be admitted. This position was unworkable and did not advance the interests of justice as pre-trial arguments could be used to inappropriately delay the resolution of charges against the accused.

These powers are not intended to derogate from a court's overriding power to make any orders necessary to ensure that the examinee's trial is fair (see new subsection 25E(3)).

New paragraph 25D(1)(c) imposes an additional requirement before a person or body can disclose certain types of derivative material to the prosecutor of the examinee. Under new paragraph 25D(1)(c), the person or body must first obtain a court order under new subsection 25E(1). The order will only be made if the court is satisfied that the disclosure is in the interests of justice.

This requirement only applies:

- where the person or body is looking to make a disclosure to the prosecutor after the examinee has been charged with a related offence (or when charges are imminent), and
- where the material sought to be disclosed is derivative material obtained from the post-charge examination of the examinee.

This provision is intended to ensure that the court controls the circumstances in which material derived from a post-charge examination can be provided to a prosecutor. Giving the court control of the circumstances in which this type of derivative material may be provided to a prosecutor of the examinee is intended to ensure the examinee's fair trial and that the

prosecutor is given access to all relevant and appropriate material (such as where the derivative material is exculpatory).

New subsection 25D(2) is a severability clause. It allows section 25D and the ACC Act to be read as if either or both of paragraphs 25D(1)(b) and (c) had not been enacted, in the event that either paragraph is found to be beyond power.

New section 25E – Court’s powers to order disclosure and to ensure a fair trial

New section 25E clarifies a court’s powers with respect to examination material and derivative material. This provision is protective and ensures that a person’s fair trial is not prejudiced by an examination or the use of examination material or derivative material. This is consistent with new subsection 25E(4), which confirms the current legal position that the fact that the ACC has examined an examinee, is not enough, on its own, to render a trial unfair; and that an examinee must demonstrate actual prejudice to the fairness of his or her trial before a stay can be ordered.

New subsection 25E(1) allows a person or body in possession of examination material or derivative material to apply to a court for an order authorising the disclosure of that material to a prosecutor of the examinee, in accordance with paragraphs 25C(1)(b) and 25D(1)(c). A court may also make such an order on its own initiative.

A court may order disclosure of the material to the prosecutor if it is satisfied that the disclosure is required in the interests of justice and despite any direction under subsection 25A(9). This provision allows the court flexibility in determining whether or not potentially prejudicial material should be disclosed to a prosecutor of the examinee. Whether or not a disclosure is in the interests of justice will depend on the nature and content of the material sought to be disclosed, the circumstances of the case and the extent to which disclosure of the material may prejudice the examinee’s fair trial or safety.

New subsection 25E(1) also allows a court to specify the prosecutors to whom the material may be disclosed either by class or position, or individually. The subsection allows the court to place appropriate limits on the prosecutors’ use of the material to ensure that they use it consistently with the interests of justice.

New subsection 25E(2) sets out the courts to which a person may apply for an order under subsection 25E(1). If the examinee has been charged with an offence, then the person or body should seek the order of the court hearing those charges. Where charges against a person are imminent but have not yet been laid, it is anticipated that a person or body would apply to the court that is likely to be hearing those charges for an order that material may be disclosed to the prosecution.

New subsection 25E(3) makes explicit that nothing in new sections 25B, 25C, 25D, 25F or 25G limits a court’s power to make all orders necessary to ensure the fair trial of the examinee, including to limit or remove any prejudice from the prosecution’s lawful possession or use of examination material or derivative material. This provision makes it clear that these amendments are not to be regarded as inhibiting a court’s ability to manage its own procedures and to make orders to prevent prejudice to the examinee’s fair trial. These orders could include refusing to admit evidence, temporarily staying the trial while a new prosecution team is appointed, or any other orders that the circumstances require.

New subsection 25E(4) clarifies that an examinee's fair trial is not to be considered unfair simply because the ACC had examined the ACC. This provision applies whether the examination occurred pre-charge, post-charge or when charges were imminent. This subsection confirms the existing law that an examinee must demonstrate that an examination has caused actual prejudice to the fairness of his or her trial.⁶

New subsection 25E(5) is a severability clause. It allows new section 25E and the ACC Act to be read as if new subsection 25E(4) or paragraph 25E(4)(d) had not been enacted, in the event that either provision is found to be beyond power.

New subsection 25F – Certain material may always be disclosed to prosecutors of the examinee

New section 25F clarifies that certain types of examination material may always be provided to the prosecution.

New subsection 25F(1) allows a person or body to disclose to the prosecutor of an examinee the fact that he or she has been examined. This provision is necessary to allow the prosecutor to understand the risk involved in the trial of the person that there may be applications for stays or to exclude particular evidence. This provision does not authorise the disclosure of any information about the evidence that the examinee provided at the examination (though this may be allowed under other sections). The prosecution's knowledge of the fact that a person has been examined should not affect the fairness of the examinee's trial.

New subsection 25F(2) allows the disclosure of examination material and derivative material to the prosecutor of an examinee for an offence against:

- subsection 30(1) – failure to attend an examination
- subsection 30(2) – failure to answer questions or produce documents or things at an examination
- subsection 30(3) – legal practitioner refusing or failing to provide the name and address of a client claiming legal professional privilege
- subsection 33(1) – false or misleading evidence at an examination, or
- subsection 35(1) – obstructing or hindering the ACC or an examiner.

This provision only allows for the disclosure of examination material and derivative material where the offence concerns the examination itself. It allows the disclosure of essential information about the examinee's conduct, answers, non-compliance with a direction, or non-attendance at an examination.

This provision complements subsection 30(5) and new subsection 30(5A), which provide for the admissibility of answers given in an examination over which the examinee has claimed the privilege against self-incrimination. Under new subsection 30(5A), these answers will be admissible in prosecutions for offences against subsection 33(1), but not in prosecutions for offences against subsections 30(1) to (3) or 35(1).

The categories of offences in relation to which examination material may always be disclosed to a prosecutor of the examinee (under subsection 25F(2)) are broader than the categories of offences in which answers given in an examination are admissible (under subsection 30(5A)).

⁶ See *Bartlett v R* (2014) 287 FLR 402.

This is because answers to questions in an examination are one type of examination material. While an answer may not be admissible in evidence against the examinee, it may be important for the prosecutor to see and tender the remainder of the transcript. This could occur, for example, in circumstances where the examinee is being prosecuted under subsection 30(1) for the examinee's failure to answer questions in an examination. There are no 'answers' over which the examinee may claim his or her privilege against self-incrimination, but the examination transcript will provide crucial evidence to demonstrate that the examiner asked the examinee questions, to which he or she failed to respond.

Neither subsection 25F(1) or (2) create a new ability for a person or body to disclose examination material to a prosecutor of the examinee. Rather, that person or body must be permitted or required to make such a disclosure of the material under a law of the Commonwealth, a State or Territory (eg. under section 12 or 59AA of the ACC Act).

New subsection 25F(3) clarifies that the ability of a person or body to disclose examination material to a prosecutor under subsection 25F(1) is subject to any direction under subsection 25A(9).

New subsection 25F(4) clarifies that a person or body may disclose examination material under subsection 25F(1), or examination material or derivative material under subsection 25F(2), at any time. It does not matter when the relevant examination occurred nor when the disclosure is to be made.

New subsection 25F(5) is a severability clause. It allows section 25F and the ACC Act to be read as if either or both of paragraphs 25F(4)(b) and (c) had not been enacted, in the event that either paragraph is found to be beyond power.

New section 25G – Other matters about prosecutors and examinees

New section 25G sets out a range of matters about the uses to which examination material and derivative material may be put.

New subsection 25G(1) allows a prosecutor of an examinee who is lawfully in possession of examination material or derivative material to be able to use that material for any lawful purpose. While subsection 25G(1) specifically states that a prosecutor may use examination or derivative material in making a decision about whether to prosecute the examinee, and in prosecuting the examinee, this does not limit the purposes for which the prosecutor may use that material. A prosecutor's use of examination material will always be subject to the terms of the relevant direction under subsection 25A(9) and the admissibility such material under subsection 30(5).

New subsection 25G(2) clarifies that examination material and derivative material that a prosecutor of the examinee lawfully possesses can be used in evidence in criminal proceedings against the examinee. This provision is intended only to allow examination material and derivative material to be tendered as evidence, subject to other sections in the ACC Act that may make it inadmissible (eg. subsection 30(5)). Whether it is ultimately admitted into evidence will be a matter for the court, to be decided according to the applicable laws of evidence. This is explicitly set out in the note following the subsection.

New subsection 25G(3) clarifies that subsections 25G(1) and (2) only apply to the use of derivative material by, and the disclosure of that material to, the prosecutor of the examinee.

Nothing in those subsections limits the circumstances in which derivative material can be provided to an individual who is not prosecuting the examinee. This includes investigators of the examinee (including for his or her involvement in a related offence), as well as the prosecutors of other people (including for offences related to those with which the examinee is charged) and persons prosecuting the examinee for unrelated offences.

New subsection 25G(4) clarifies that new section 25G operates subject to other laws of the Commonwealth, a State or Territory which may affect the way in which examination or derivative material can be used in a trial.

New section 25H – Proceeds of crime authorities and examinations

New section 25H authorises the disclosure of examination material and derivative material to a proceeds of crime authority at any time, and sets out the circumstances in which that material is admissible in confiscation proceedings against the examinee.

New subsection 25H(1) clarifies that a person or body may disclose examination material or derivative material to a proceeds of crime authority at any time. It does not matter when the relevant examination occurred or when the disclosure is to be made.

New subsection 25H(2) clarifies that the ability of a person or body to disclose examination material or derivative material to a proceeds of crime authority under subsection 25H(1) is subject to any direction under subsection 25A(9).

New subsection 25H(3) clarifies that examination material and derivative material that a proceeds of crime authority lawfully possesses can be used in evidence in confiscation proceedings against the examinee. This provision is intended only to allow examination material and derivative material to be tendered as evidence, subject to other sections in the ACC Act that may make it inadmissible (eg. subsection 30(5)). Whether it is ultimately admitted into evidence will be a matter for the court, to be decided according to the applicable laws of evidence. This is explicitly set out in a note following the subsection, and is reinforced by new subsection 25H(4).

New subsection 25H(4) makes explicit that nothing in new subsections 25H(3), 21E(3) or 30(5A) limits a court's power to make all orders necessary to ensure the administration of justice in the case. This provision makes it clear that these amendments are not to be regarded as inhibiting a court's ability to manage its own procedures and to make orders to prevent prejudice to the administration of justice, for example, by acting to prevent an abuse of process or contempt of court.

New subsection 25H(5) is a severability clause. It allows section 25H and the ACC Act to be read as if either or both of paragraphs 25H(1)(b) and (c) had not been enacted, in the event that either provision is found to be beyond power. s

Item 17 – Subsection 28(1)

This item will update subsection 28(1) to require an examiner to take into account additional considerations when he or she is considering issuing a summons to a person who has been charged with a related offence, or against whom related confiscation proceedings have commenced (or where such charges or proceedings are imminent).

New subsection 28(1) allows an examiner to issue a summons to a person to attend an examination and give evidence, or to produce documents or things, or both.

New paragraph 28(1) sets out the considerations an examiner must take into account when considering whether or not to issue a summons. In all cases, issuing the summons must be reasonable in all the circumstances. This requirement has been moved from current subsection 28(1A) into subsection 28(1).

When considering issuing a summons to a person after he or she has been charged with an offence or confiscation proceedings have been commenced (or where such charges or proceedings are imminent), the examiner must also be satisfied that issuing the summons is reasonably necessary for the purposes of the relevant special ACC operation or investigation. The examiner must consider the necessity for the summons in light of the fact that the person has been charged with an offence or that confiscation proceedings have commenced against him or her (or those charges or proceedings are imminent).

This paragraph provides additional assurance that an examiner is exercising his or her powers for a proper purpose, and that, in deciding to issue a summons, the examiner has paid due regard to the fact that the person has been charged with an offence or is the subject of confiscation proceedings. This paragraph reinforces the fact that an examination is not conducted solely for the purposes of bolstering the prosecution of an examinee, but that it is intended to serve the purposes of the relevant special operation or investigation, and to assist the ACC and its partners in understanding, disrupting and preventing serious and organised crime.

Item 18 – Subsection 28(1A)

This item is consequent on the amendments in item 17. The considerations an examiner must take into account in deciding to issue a summons will now be set out in subsection 28(1).

Item 19 – At the end of subsection 28(3)

This item will insert a note under subsection 28(3). This note highlights the relationship between an examiner's ability to ask questions in an examination about any matter related to a special investigation or operation in subsection 28(3) with his or her capacity to ask questions that may relate to the subject matter of any charge or confiscation proceeding against the examinee under subsection 25A(6A).

Item 20 – At the end of section 28

This item will insert a new subsection 28(9), which is a severability clause.

New paragraph 28(9)(a) allows section 28 and the ACC Act to be read as if new paragraph 28(1)(d) had not been enacted, in the event that that paragraph is found to be beyond power.

New paragraph 28(9)(b) allows section 28 and the ACC Act to be read down so as to only apply to circumstances in which the person to whom the summons is to be issued has been charged with a related offence (or such a charge is imminent).

New paragraph 29(9)(c) allows section 28 and the ACC Act to be read down so as to only apply to circumstances in which confiscation proceedings have commenced against the person to whom the summons is to be issued (or such a proceedings are imminent).

Item 21 – Subparagraphs 29A(2)(a)(ii) and (b)(ii)

This item will clarify the circumstances in which an examiner is required, or has a discretion, to include a notation on a summons prohibiting its disclosure. This item will remove the requirement to consider the effect of disclosure of the summons on the fair trial of a person who has been or may be charged with an offence. It will replace it with a requirement to consider the effect of disclosure on the examinee’s fair trial if he or she has been charged with a related offence (or such a charge was imminent). These amendments are consistent with item 14.

Item 22 – Subsection 29B(1) (penalty)

This item updates the penalty for an offence against subsection 29B(1), which relates to a disclosure in contravention of a notation made under section 29A. The offence in subsection 29B(1) will now be punishable by 2 years imprisonment, a fine of 120 penalty units or both. This is an increase from 20 penalty units or imprisonment for 12 months.

This amendment will bring the offence into line with similar provisions aimed at protecting the integrity and confidentiality of sensitive information in:

- (a) section 60A of the AFP Act, which prohibits AFP members from making unauthorised records or disclosures of official information, and
- (b) section 70 of the Crimes Act, which prohibits Commonwealth officers from making unauthorised disclosures of official information.

Both of these offences are punishable by imprisonment for two years.

The increased penalties will also make the offences indictable rather than summary. However, under section 4J of the Crimes Act, the offence may continue to be dealt with summarily provided that both the prosecutor and defendant agree.

The increased penalties are appropriate. They reflect the importance of ensuring the confidentiality of a summons and the examination. The fact that a person has been summoned to give evidence at an examination is sensitive and its inappropriate disclosure can lead to significant consequences for witnesses and investigations into serious offences. In these circumstances, the confidentiality of the existence of a summons should be protected in the same way that other sensitive law enforcement information is protected.

Item 23 – Subsection 29B(3) (penalty)

This item increases the penalty for an offence against subsection 29B(3), which relates to the obligations of a person to whom the existence of a summons has been disclosed under subsection 29B(2). The offence in subsection 29B(3) will now be punishable by 2 years imprisonment, a fine of 120 penalty units or both. This is an increase in the penalty in current subsection 29B(3) from 20 penalty units or imprisonment for 12 months.

This amendment will bring this offence into line with similar provisions aimed at protecting the integrity and confidentiality of sensitive information in:

- (a) section 60A of the AFP Act, which prohibits AFP members from making unauthorised records or disclosures of official information, and
- (b) section 70 of the Crimes Act, which prohibits Commonwealth officers from making unauthorised disclosures of official information.

Both of these offences are punishable by imprisonment for two years.

The increased penalties will also make the offences indictable rather than summary. However, under section 4J of the Crimes Act, the offence may continue to be dealt with summarily provided that both the prosecutor and defendant agree.

The increased penalties are appropriate. They reflect the importance of ensuring the confidentiality of a summons and the examination. The fact that a person has been summoned to give evidence at an examination is sensitive and its inappropriate disclosure can lead to significant consequences for witnesses and investigations into serious offences. In these circumstances, the confidentiality of the existence of a summons should be protected in the same way that other sensitive law enforcement information is protected.

Item 24 – Subsection 30(4)

This item is consequential on item 26.

Item 25 – Subparagraph 30(4)(a)(ii)

This item repeals subparagraph 30(4)(a)(ii) and replaces it with new subparagraphs 30(4)(a)(ii) and (iii). These subparagraphs make clear that paragraphs 30(4)(b) and (c) and subsections 30(5) and (5A) will apply to any document or thing that a person produces in an examination in response to an examiner's request under subsection 28(4) and over which the person claims the privilege against self-incrimination.

Item 26 – Subsection 30(5)

This item repeals subsection 30(5) and inserts new subsections 30(5), (5A) and (5B).

The item makes the operation of current subsection 30(5) clearer by separating it into two subsections. New subsection 30(5) will set out the general position that answers, documents or things over which an examinee has claimed the privilege against self-incrimination are not admissible in criminal proceedings, proceedings for the imposition of a penalty, or confiscation proceedings. New subsection 30(5A) will set out the exceptions to that general position, when such answers, documents or things are admissible in those proceedings.

These two subsections are intended to reproduce the effect of existing subsection 30(5), with one minor change.

The combined effect of new subsections 30(5) and (5A) is that answers, documents or things given in an examination over which the examinee has claimed the privilege against self-incrimination will be admissible against the examinee in most confiscation proceedings. The only circumstance where they will not be admissible is where the examination from which

those answers, documents or things came occurred after confiscation proceedings had commenced against the examinee (or such proceedings were imminent). This makes it clear that examinations are not conducted solely for the purpose of bolstering the case against an examinee in confiscation proceedings.

This position is slightly different to the position under current subsection 30(5). That provision was intended to allow those answers, documents or things to be admissible in all confiscation proceedings, irrespective of whether the examination occurred before or after those proceedings were commenced.

New subsection 30(5B) clarifies that subsection 30(5A) only applies to the admissibility in proceedings against the examinee of answers, documents or things produced or given in an examination and over which the examinee has claimed the privilege against self-incrimination. The subsection is not intended to affect the admissibility or relevance of the material for any other purpose, including the prosecution of another person..

The amendments made by this item respond to recommendation 3 of the PJCLE Report, that section 30 of the ACC Act be amended to clarify that examination material is admissible in confiscation proceedings. Constitutional considerations mean that full implementation of the recommendation is not possible.

Item 27 – At the end of paragraph 34A(a)

This item adds new paragraph 34A(a)(iv). This will provide that a person is in contempt of the ACC if he or she refuses or fails to comply with an examiner’s request to produce a document or thing under subsection 28(4). This item is necessary to ensure that the examiner’s power under subsection 28(4) is backed by appropriate sanctions. Failure to comply with such a request may also fall within paragraph 34A(d) on the grounds that it may obstruct or hinder an examiner in the performance of his or her functions.

Item 28 – Subsection 51(2)

This item updates the penalty for an offence against subsection 51(2), which sets out the secrecy obligations that apply to the CEO, members of the Board, ACC staff members and examiners. The offence in subsection 51(2) will now be punishable by 2 years imprisonment, a fine of 120 penalty units or both. This is an increase in the penalty in current subsection 51(2) of 50 penalty units or imprisonment for 12 months.

The increased penalty will bring this offence into line with similar provisions aimed at protecting the integrity and confidentiality of sensitive information in:

- (a) section 60A of the AFP Act, which prohibits AFP members from making unauthorised records or disclosures of official information, and
- (b) section 70 of the Crimes Act, which prohibits Commonwealth officers from making unauthorised disclosures of official information.

Both of these offences are punishable by imprisonment for two years.

The increased penalties will also make the offences indictable rather than summary. However, under section 4J of the Crimes Act, the offence may continue to be dealt with summarily provided that both the prosecutor and defendant agree.

The increased penalties are appropriate. They reflect the importance of ensuring the confidentiality of ACC information, which may relate to the activities of, and investigations into, serious and organised crime. Disclosure of this information should attract the same consequences as disclosure of other sensitive law enforcement or Commonwealth information.

Item 29 – Paragraph 59AB(1)(e)

This item will clarify the circumstances in which the ACC CEO may disclose ACC information to a prescribed body corporate. This item will remove the requirement to consider the effect of the disclosure of the information on the fair trial of a person who has been or may be charged with an offence. It will replace it with a requirement to consider the effect of disclosure on a person's fair trial if he or she has been charged with a related offence (or such a charge was imminent). These amendments are consistent with item 14.

Item 30 – Subsection 59AB(7) (penalty)

This item updates the penalty for an offence against subsection 59AB(7), which sets out the secrecy obligations that apply to a person who has been passed information under section 59AB. The offence in subsection 59AB(7) will now be punishable by 2 years imprisonment, a fine of 120 penalty units or both. This is an increase in the penalty in current subsection 59AB(7) of 50 penalty units or imprisonment for 12 months.

The increased penalty will bring this offence into line with similar provisions aimed at protecting the integrity and confidentiality of sensitive information in:

- (a) section 60A of the AFP Act, which prohibits AFP members from making unauthorised records or disclosures of official information, and
- (b) section 70 of the Crimes Act, which prohibits Commonwealth officers from making unauthorised disclosures of official information.

Both of these offences are punishable by imprisonment for two years.

The increased penalties will also make the offences indictable rather than summary. However, under section 4J of the Crimes Act, the offence may continue to be dealt with summarily provided that both the prosecutor and defendant agree.

The increased penalties are appropriate. They reflect the importance of ensuring the confidentiality of ACC information that has been disclosed to a private sector body, which may relate to the activities of, and investigations into, serious and organised crime. Disclosure of this information should attract the same consequences as disclosure of other sensitive law enforcement or Commonwealth information.

Item 31 – Subsection 59AB(7) (note)

This item will repeal the note under subsection 59AB(7). This note is redundant as it refers to a defence which appears nearby in subsection 59AB(9)..

Item 32 – subsection 59AB(8) (penalty)

This item updates the penalty for an offence against subsection 59AB(8), which requires a person to comply with conditions that the ACC CEO has placed on the disclosure of information under subsections 59AB(4) or (5). The offence in subsection 59AB(8) will now be punishable by 2 years imprisonment, a fine of 120 penalty units or both. This is an increase in the penalty in current subsection 59AB(8), of 50 penalty units or imprisonment for 12 months.

The increased penalty will bring this offence into line with similar provisions aimed at protecting the integrity and confidentiality of sensitive information in:

- (a) section 60A of the AFP Act, which prohibits AFP members from making unauthorised records or disclosures of official information, and
- (b) section 70 of the Crimes Act, which prohibits Commonwealth officers from making unauthorised disclosures of official information.

Both of these offences are punishable by imprisonment for two years.

The increased penalties will also make the offences indictable rather than summary. However, under section 4J of the Crimes Act, the offence may continue to be dealt with summarily provided that both the prosecutor and defendant agree.

The increased penalties are appropriate. They reflect the importance of ensuring that persons in the private sector to whom ACC information has been disclosed comply with the relevant conditions that ensure the integrity of personal information about individuals and the confidentiality of ACC information. This information is sensitive; it may relate to the activities of, and investigations into, serious and organised crime. Disclosure of this information should attract the same consequences as disclosure of other sensitive law enforcement or Commonwealth information.

Item 33 – Subsection 59AB(8) (note)

This item will repeal the note under subsection 59AB(8). This note is redundant as it refers to a defence, which appears in the next subsection.

Item 35 – Section 59AC

This item will repeal current section 59AC and replace it with a new section. New section 59AC clarifies the relationship between sections 59, 59AA and 59AB and the provisions which set out the limitations or obligations on a person in relation to the use and disclosure of examination material and derivative material.

New subsection 59AC(1) provides that, if a disclosure of information under section 59 contains examination material or derivative material, the Chair of the ACC Board and the ACC CEO must in making that disclosure comply with:

- any relevant direction under subsection 25A(9) (which deals with the confidentiality of examination material), and
- the applicable requirements of sections 25B to 25H (which deal with the circumstances in which examination material and derivative material may be used and disclosed).

New subsection 59AC(2) provides that, if a disclosure of information under sections 59AA or 59AB contains examination material or derivative material, the ACC CEO must in making that disclosure comply with:

- any relevant direction under subsection 25A(9) (which deals with the confidentiality of examination material), and
- the applicable requirements of sections 25B to 25H (which deal with the circumstances in which examination material and derivative material may be used and disclosed).

Item 35 – Subsection 60(5)

This item will clarify the circumstances in which the ACC Board may hold a public meeting, or in which the Board or CEO may issue a public bulletin. This item will remove the requirement to consider the effect of the disclosure of the information on the fair trial of a person who has been or may be charged with an offence. It will replace it with a requirement to consider the effect of disclosure on a person's fair trial if he or she has been charged with a related offence (or such a charge was imminent). These amendments are consistent with item 14.

Item 36 – Subsection 61(4)

This item will clarify the circumstances in which the Chair of the ACC Board may include information in his or her annual report of the ACC's operations. This item will remove the requirement to consider the effect of the inclusion of information in the report on the fair trial of a person who has been or may be charged with an offence. It will replace it with a requirement to consider the effect of the inclusion of that information on a person's fair trial if he or she has been charged with a related offence (or such a charge was imminent). These amendments are consistent with item 14.

Item 37 – Application of amendments

This item sets out the application of the amendments made by Part 1 of Schedule 1.

Under sub-item (1), the amendments will generally apply to all uses and disclosures of examination material and derivative material that are made, and summonses that are issued, after the amendments are made. In the case of uses and disclosures of examination material and derivative material, these amendments are intended to apply irrespective of whether the relevant examination occurred before or after the commencement of Part 1.

Under sub-item (2), the amendments will apply to all Board determinations that are issued after the amendments are made. Current Board determinations will continue in force and will not be affected by the amendments to section 7C.

Sub-item (3) provides that the new subsections 25A(10) and (11), which deal with the CEO and examiners' powers to vary or revoke a direction under subsection 25A(9), will apply to all decisions made at or after the commencement of Part 1. It does not matter whether the relevant examination occurred before or after the commencement of the Part.

Sub-item (4) provides that the offences in the new subsections 25A(14) and (14A) will only apply to conduct engaged in at or after the commencement of Part 1. Conduct engaged in before the commencement of the Part will continue to be dealt with by current subsection 25A(14).

Sub-item (5) provides that the amendments to section 30, which relate to the admissibility of examination material, will apply to all evidence sought to be adduced at or after the commencement of Part 1. It does not matter whether the answers, documents or things were provided at an examination that occurred before or after the commencement of the Part. This application provision is appropriate because the amendments to section 30 are mainly to clarify the existing operation of the section. They will specifically make inadmissible in confiscation proceedings answers, documents or things from the examinee's post-confiscation application examination.

Sub-item (6) provides that the increased penalties for the offences in subsections 51(2) and 59AB(7) and (8) will only apply to conduct engaged in at or after the commencement of Part 1. Conduct engaged in before the commencement of the Part will continue to be dealt with by the current subsection.

Item 37 – Transitional—existing directions, summonses and notices

This item is consequent on the repeal and replacement of current subsections 25A(1) and 28(1). This item provides that all directions and summonses issued under these provisions continue in force as made.

Part 2 – Amendments relating to notices to produce documents or things

This Part moves the provisions dealing with an examiner's ability to issue a notice to produce documents or things from Division 2 of Part II, which is about examinations, into Division 1A of Part II, which is about the performance of the ACC's functions and the exercise of its powers.

It is not appropriate for the provisions dealing with notices to produce to sit in Division 2. This is because an examiner may issue a notice to produce irrespective of whether an examination is currently being held. Under current subsection 29(2), the notice to produce must relate to a special operation or special investigation, but it does not require an examiner to be holding an examination for the purposes of that operation or investigation.

In these circumstances, the power to issue a notice to produce sits more appropriately in Division 1A. That Division sets out the ability for an eligible person to seek a search warrant, which must be connected with a special operation or special investigation. Further,

Division 1A also contains provisions about how the ACC is to deal with returnable items, a category of items which includes material produced in response to a notice to produce.

Amendments to the ACC Act

Item 39 – Subsection 4(1)

This item inserts definitions of *legal aid officer* and *official matter* into subsection 4(1). These definitions were previously in subsection 29B(7). However, they are to be moved into section 4(1) as they will now apply to new sections 21B and 21C, in addition to section 29B. This item does not change the definitions of those terms.

Item 40 – Subsection 4(1) (subparagraph (b)(i) of the definition of *returnable item*)

This item amends the definition of *returnable item* to refer to notices issued under new section 21A. This item is consequent upon the reproduction of current section 29 as new section 21A under items 41 and 44.

Item 41 – After section 21

This item inserts new sections 21A to 21F, which move the examiner's power to issue a notice to produce into Division 1A, and which reproduce a range of related provisions that protect the confidentiality of notices, ensure their effectiveness, deal with the admissibility of self-incriminatory material and allow the reimbursement of expenses involved in compliance with the notice.

New section 21A – Notices to produce a document or thing

New section 21A largely reproduces current section 29, which allows an examiner to issue a written notice requiring a person to produce documents or things.

New subsection 21A(1) differs slightly from current subsection 29(1). Under current subsection 29(1), a notice must specify a particular person, being an examiner or member of the staff of the ACC, to whom the document or thing should be produced. New subsection 21A(1) removes the requirement to produce the document or thing to a particular person. Instead, a notice may specify that a person must produce documents or things to an examiner or member of the staff of the ACC.

This is a technical change aimed at improving the efficiency of compliance with notices to produce. Under current subsection 29(1), persons have experienced difficulties where the examiner or ACC staff member specified in the notice was unavailable when the documents or things were produced. New subsection 21A(1) will make compliance by persons served with notices simpler in these circumstances.

New section 21A does not contain a provision comparable to current subsection 29(4), which applied subsections 30(3) to (5) and 30(9) to a person issued with a notice under section 29. Those provisions will now be set out in section 21E.

New section 21B – Notations prohibiting disclosures of information about a notice

New section 21B reproduces section 29A (as amended by item 21 above) as it applies to notices issued under section 29. Current section 29A deals with the inclusion of notations on a summons or notice that prevents the disclosure of information about the notice or summons.

New section 21B contains some differences in expression to section 29A (as amended by item 21 above) to make the operation of the section clearer. These changes do not make substantive changes to the manner in which section 29A (as amended by item 21 above) applies to notices.

New section 21C – offences of disclosure

New subsection 21C reproduces section 29B (as amended by items 22 and 23 above) as it applies to notices issued under section 29.

New section 21C contains some differences in expression to section 29B (as amended by items 22 and 23 above) to make the operation of the section clearer. These changes do not make substantive changes to the manner in which section 29B (as amended by items 22 and 23 above) applies to notices.

New section 21D – legal practitioner not required to disclose privileged communications

New section 21D deals with the circumstances in which a legal practitioner may refuse to produce a document or thing in response to a notice under section 21A.

This provision largely reproduces current subsection 30(3), which deals with a legal practitioner's obligations to answer questions or produce documents at an examination, and applies them to notices issued under section 21A. Under current subsection 29(4), subsection 30(3) applies to documents or things produced in response to a notice issued under section 29.

New section 21D contains some differences in expression to subsection 30(3) to make the operation of the section clearer. These changes do not make substantive changes to the manner in which subsection 30(3) applies to notices as a result of current subsection 29(4).

New section 21E – Notices—self-incrimination etc.

New section 21E deals with a person's ability to claim the privilege against self-incrimination over documents or things to be produced in response to a notice to produce.

This provision largely reproduces subsections 30(4) and (5) (as amended by items 25 and 26 above) and new subsection 30(5A) (inserted by item 26 above) and applies them to notices issued under section 21A. Under current subsection 29(4), current subsections 30(4) and (5) apply to documents or things produced in response to a notice issued under section 29.

New section 21E contains some differences in expression to subsections 30(4) and (5) (as amended by items 25 and 26 above) and new subsection 30(5A) (inserted by item 26 above) to make the operation of the section clearer. These changes do not make substantive changes to the manner in which subsections 30(4) and (5) apply to notices as a result of current subsection 29(4).

New section 21F – Notices—Reimbursement of expenses

New section 21F deals with the circumstances in which the CEO may reimburse the expenses a person incurs in complying with a notice under new section 21A. New section 21F largely reproduces subsection 26(2). However, under new section 21F, the ACC CEO no longer has the ability to determine an amount that the person producing a document or thing should be reimbursed as this should be done through regulations.

Item 42 – Subsection 26(1)

This item is consequent upon item 43, which will repeal subsection 26(2).

Item 43 – Subsection 26(2)

This item is consequent upon item 41, which will replace current subsection 26(2) with new section 21F.

Item 44 – Section 29

This item is consequent upon item 41, which will replace current section 29 with new subsection 21A.

As noted above, the provisions dealing with an examiner’s power to issue a notice to produce should not sit in Division 2 of Part II, which deals with examinations. This is because there is no requirement for an examiner to be holding an examination in order for a notice to produce to be issued. In these circumstances, provisions about notices to produce should sit within Division 1A, which deals with the ACC’s powers more generally.

Item 45 – Section 29A (heading)

This item is consequent upon items 46 to 51, which remove references to notices in section 29A. Section 29A now only applies to summonses issued under section 28.

Item 46 – Subsection 29A(1)

This item is consequent upon item 41, which will replace current section 29A as it applies to notices with new section 21B.

Item 47 – Subsections 29A(1), (2) and (3)

This item is consequent upon item 41, which will replace current section 29A as it applies to notices with new section 21B.

Item 48 – Subsection 29A(4)

This item is consequent upon item 41, which will replace current section 29A as it applies to notices with new section 21B.

Item 49 – Subsection 29A(5)

This item is consequent upon item 41, which will replace current section 29A as it applies to notices with new section 21B.

Item 50 – Subparagraph 29A(7)(a)(ii)

This item is consequent upon item 41, which will replace current section 29A as it applies to notices with new section 21B.

Item 51 – Subparagraph 29A(7)(a)(iii)

This item is consequent upon item 41, which will replace current section 29A as it applies to notices with new section 21B.

Item 52 – Subsection 29A(8)

This item is consequent upon items 39 and 62, which remove the definition of ‘official matter’ from subsection 29B(7) and insert it into subsection 4(1).

Item 53 – Section 29B (heading)

This item is consequent upon items 54 to 61, which remove references to notices from section 29B. Section 29B now only applies to summonses issued under section 28.

Item 54 – Subsection 29B(1)

This item is consequent upon item 41, which will replace current section 29B as it applies to notices with new section 21C.

Item 55 – Paragraphs 29B(2)(b) and (c)

This item is consequent upon item 41, which will replace current section 29B as it applies to notices with new section 21C.

Item 56 – Paragraphs 29B(2)(d) and (3)(a)

This item is consequent upon item 41, which will replace current section 29B as it applies to notices with new section 21C.

Item 57 – Paragraph 29B(3)(b)

This item is consequent upon item 41, which will replace current section 29B as it applies to notices with new section 21C.

Item 58 – Subparagraph 29B(4)(a)(i)

This item is consequent upon item 41, which will replace current section 29B as it applies to notices with new section 21C.

Item 59 – Subparagraphs 29B(4)(a)(ii) and (iii)

This item is consequent upon item 41, which will replace current section 29B as it applies to notices with new section 21C.

Item 60 – Paragraphs 29B(4)(b) and (c)

This item is consequent upon item 41, which will replace current section 29B as it applies to notices with new section 21C.

Item 61 – Subsection 29B(5)

This item is consequent upon item 41, which will replace current section 29B as it applies to notices with new section 21C.

Item 62 – Subsection 29B(7)

This item will repeal subsection 29B(7), which sets out definitions of *legal aid officer* and *official matter*. As a result of item 39, these terms will now be defined in subsection 4(1) as they will now apply to new sections 21B and 21C, in addition to section 29B.

Amendments to the PID Act

Item 63 – Section 8 (after paragraph (i) of the definition of *designated publication restriction*)

This item will insert a reference to new section 21C of the ACC Act into the definition of designated publication restriction in the PID Act. This amendment is consequent upon items 41 and 54 to 61, which will replace current section 29B of the ACC Act as it applies to notices with new section 21C of the ACC Act.

Item 64 – Transitional and application issues—existing notices

This item sets out the transitional and application arrangements for existing notices.

Subitem (1) provides that notices issued under subsection 29(1) will be treated as if they had been issued under new subsection 21A(1).

Subitem (2) provides that notations about a notice issued under subsection 29(1) will be treated as if they had been made under new section 21B.

Subitem (3) provides that section 21C applies to records or disclosures made at or after the commencement of this Part. It will not matter whether the relevant notice was issued or served before or after the commencement of this Part.

Subitem (4) provides that disclosures made before the commencement of this Part and which are covered by paragraph 29B(2)(e) (which allows a legal practitioner to make a disclosure about the existence of a notice under subsection 30(3)) are to be treated as if they were covered by new paragraph 21C(2)(e).

Schedule 2 – Powers of the Law Enforcement Integrity Commissioner

GENERAL OUTLINE

Schedule 2 makes amendments to the LEIC Act to clarify the hearing powers of the Integrity Commissioner.

Background to the Integrity Commissioner's coercive powers

Under the LEIC Act, the Integrity Commissioner has a range of information gathering powers that he or she may exercise in assisting investigations of, or in developing intelligence about, corruption issues relating to law enforcement agencies. These powers include the ability to issue a written notice to produce information, documents or things for the purpose of a corruption investigation (section 75) and the ability to summons attendance at a hearing (section 83).

Hearings are a key part of the Integrity Commissioner and ACLEI's functions. ACLEI faces a major challenge in that law enforcement officers subject to investigation by the Integrity Commissioner are likely to be well-versed in law enforcement methods, and may be skilled at countering them to avoid scrutiny. The Integrity Commissioner's coercive powers enable ACLEI to obtain information that would not otherwise be available, or which could only be obtained after long and complex investigations. Also, coercive material plays an important role in furthering investigations and prosecutions of corruption matters, in identifying corruption risks and in remedying systemic vulnerabilities in law enforcement agencies.

Hearings are also a powerful tool. Section 96 of the LEIC Act provides a protection against self-incrimination, whereby anything a witness says in answer to a question, or any document or thing the witness is required to produce, cannot be used against the witness in criminal proceedings, unless it falls within one of the exceptions in subsection 96(4). The LEIC Act also includes a number of safeguards on the disclosure of hearing material, consistent with its sensitive nature. These include the requirement under subsection 90(2) for the Integrity Commissioner to issue a direction restricting the publication of evidence given in, or produced at, a hearing so as to protect the safety and fair trial of the witness.

ACLEI's ability to share or disclose hearing material under other sections (such as sections 44 or 208) will always be subject to the terms of a direction issued under subsection 90(1).

Recent decisions

A number of recent decisions have affected the ACC's examination powers, and may have a consequential impact on the Integrity Commissioner's ability to conduct coercive hearings for the purpose of a corruption investigation. These cases include:

- *Seller and McCarthy* – the NSW Court of Criminal Appeal found that the use of evidence derived from examination material in criminal proceedings against the examinee could, in some circumstances, be unfair.
- *X7* – a 3:2 majority of the High Court found that the ACC Act did not authorise the ACC to examine a person who had been charged with an offence about the subject matter of the charge (referred to here as a post-charge examination). The majority noted that such an examination would affect the fairness of the examinee's trial and could only be authorised if there were clear words indicating Parliament's intention.

- Lee No. 1 – a 4:3 majority of the High Court found that the *Criminal Assets Recovery Act 1990* (NSW) authorised the post-charge examination of a person. The majority distinguished the decision in X7 on the basis that the relevant examination in Lee No. 1 occurred as a result of a court order.
- In Lee No. 2, the High Court unanimously found that the NSW Crime Commission’s unlawful disclosure of the accused’s examination transcript to the prosecution rendered the trial fundamentally unfair and ordered a retrial. The examination occurred before the accused was charged with an offence.

While these cases related to the powers of the ACC and New South Wales Crime Commission, the similarity between the legislation setting out those agencies’ coercive powers and the LEIC Act means that they are likely to affect the Integrity Commissioner and ACLEI in similar ways. For example, based on the judgment in X7, the Integrity Commissioner decided not to question in a hearing witnesses who have been charged with corruption offences.

Summary of Schedule

The amendments in this Schedule are intended to reduce the uncertainty about the use of the coercive powers under the LEIC Act. They are intended to make explicit the circumstances in which hearing material and material derived from it may be disclosed to other persons, including the persons prosecuting the witness for an offence. They are also intended to clearly set out how that material may be used against the witness in a prosecution.

The amendments in Schedule 2 are also intended to ensure that hearings and the disclosure of hearing and derivative material do not prejudice the fairness of any trial of the witness. They achieve this in a number of ways. The Integrity Commissioner will still be required to issue a direction to ensure the confidentiality of hearing material where its disclosure would, amongst other things, prejudice the witness’s fair trial in circumstances where he or she has been charged with an offence, or such a charge is imminent. The amendments also place a range of limitations on the circumstances in which hearing and derivative material may be provided to a person prosecuting the witness, in addition to existing provisions in the LEIC Act that govern the disclosure of information. The limitations that apply to the disclosure of hearing and derivative material depend on the time at which the hearing occurred, and the time at which the material is disclosed, with the determining factor being whether or not the person has been charged with an offence (or such a charge is imminent).

These additional limitations are set out in the below table:

Material	Position on disclosure to prosecutor
<i>Pre-charge</i> hearing material disclosed <i>pre-charge</i>	Can be disclosed if non-disclosure direction allows it
<i>Pre-charge</i> derivative material disclosed <i>pre-charge</i>	No additional limitation on disclosure
<i>Pre-charge</i> hearing material disclosed <i>post-charge</i>	Can only be disclosed with a court order

<i>Pre-charge</i> derivative material disclosed <i>post-charge</i>	No additional limitation on disclosure
<i>Post-charge</i> hearing material	Can only be disclosed with a court order
<i>Post-charge</i> derivative material	Can only be disclosed with a court order

Further, the amendments in this Schedule are intended to make it clearer that hearings have an important role in ACLEI corruption investigations, and are not used simply to bolster the prosecution’s case against an accused, although information derived from information obtained in a hearing may be used to assist in the witness’s prosecution. Hearings are a crucial part of the Integrity Commissioner and ACLEI’s functions, and are important in identifying corruption risks and in remedying systemic vulnerabilities in law enforcement agencies.

This Schedule also clarifies that the Integrity Commissioner may conduct hearings in the context of confiscation proceedings against the witness under the POC Act and equivalent State and Territory legislation. It allows hearing material and derivative material to be provided to a proceeds of crime authority at any time, irrespective of whether there are related confiscation proceedings on foot or are imminent. While hearing material and derivative material may generally be used as evidence in such proceedings, the amendments specifically provide that material from the hearing of a person after confiscation proceedings have commenced is inadmissible in those proceedings.

The amendments also make a range of other minor and consequential changes, including by making penalties for breaches of secrecy or confidentiality provisions in the LEIC Act more consistent with similar penalties in other legislation, and to clarify the Integrity Commissioner’s powers to require the production of documents or things at a hearing.

Item 1 – Subsection 4(1)

This item will insert a number of new definitions that will apply in relation to hearings, hearing material and material derived from it.

‘against’

The term *against* is used to explain the circumstances when confiscation proceedings are against a person. This term is used in the definitions of *pre-confiscation application* and *post-confiscation application*. It relies on the existing definition in subsection 4(1) of *confiscation proceeding*, which includes both proceedings under the POC Act, the *Proceeds of Crime Act 1987* and equivalent State and Territory legislation.

Confiscation proceedings will be against a person where he or she is a suspect in those proceedings. The definition relies on the definition of ‘suspect’ in section 338 of the POC Act, which sets out the circumstances in which a person will be a suspect, depending on whether the relevant proceedings are for a restraining order, confiscation order, unexplained wealth restraining order or unexplained wealth order. In the case of proceedings for a restraining order or confiscation order, a person will be a suspect where they committed (or are suspected of having committed) the offence to which the order relates. In the case of proceedings for an unexplained wealth restraining order or unexplained wealth order, a

person will be a suspect where he or she is the person whose wealth is suspected of being unexplained.

‘charged’

The term *charged* is intended to capture a range of circumstances in which a person may be the subject of a prosecution for a criminal offence. In addition to including circumstances where the person has been charged with an offence, it is also intended to apply to situations where the person is the subject of a court process that may lead to the laying of charges and the commencement of a prosecution, such as where the person has been given a court attendance notice or has been summoned to appear before a court.

The term is not intended to apply to persons who are the subject of proceedings that are not criminal in nature even where they may be related to an offence, such as proceedings for the imposition of a control order, or proceedings relating to the investigation of an offence, such as proceedings for obtaining a search warrant.

‘derivative material’

The term *derivative material* is used in relation to *hearing material*. It is intended to be a broad definition and to capture all evidence, information, documents or things that have been obtained from hearing material, including:

- things obtained directly from hearing material (eg. a thing whose existence and location the witness revealed in the hearing, or an understanding of a particular set of financial transactions based on an explanation given at the hearing)
- things obtained from a combination of hearing material and other material (eg. a hoard of illicit drugs uncovered once evidence directly derived from hearing material is fused and analysed with other relevant information, and
- things obtained indirectly from hearing material (eg. child pornography material uncovered from a laptop after the witness revealed the location of a storage facility, and the storage facility contained a document which recorded the password to the laptop).

‘disclose’

The term *disclose* is intended to capture the ways in which the Integrity Commissioner may pass on or make available hearing material or derivative material.

This includes both direct disclosure of the material to another person, body or agency under the LEIC Act (eg. under sections 208 or 209), as well as circumstances in which it is shared with or otherwise made available to that person, body or agency (eg. under sections 44 or 50).

The term is also defined so as to include the disclosure of copies, contents or descriptions of that material. This definition is necessary to ensure that the disclosure of copies, contents or descriptions of hearing and derivative material is subject to the same restrictions and safeguards as the disclosure of the original material.

‘hearing material’

This term is defined in new subsection 8A(1).

'imminent'

The term *imminent* is used in relation to a charge or confiscation proceedings.

When it is used in relation to a charge, it is intended to capture the circumstances in which criminal proceedings are about to be brought against a person.

The term has been broadly defined to include three circumstances in which a charge will be imminent against a person:

- where the person is a *protected suspect* under the Crimes Act (or would be, if that Act applied to State and Territory offences)
- where the person has been arrested for an offence but is yet to be charged
- , and
- where a person with authority to initiate the criminal process for the person's prosecution has decided to initiate the process, but has not yet done so.

The final dot point is intended to capture circumstances where there is sufficient evidence to initiate the relevant criminal process for the person's prosecution (eg. to lay a charge or issue a court attendance notice), and a person with authority (such as a senior officer) has decided to do so, but that process has not yet been initiated against the person. As above, it is not intended to capture circumstances where a junior officer has made a preliminary decision to initiate a criminal process for the prosecution of a person, but a person with appropriate authority to initiate the process has not yet made a final decision. It is also intended to capture circumstances where a court has decided not to commit a person on a charge, but where the Director of Public Prosecutions has decided to file an *ex officio* indictment.

When the term *imminent* is used in relation to confiscation proceedings, it is intended to capture the circumstances in which those proceedings are about to be brought against a person, but have not yet commenced. As with a charge, those proceedings will be imminent where an officer with the relevant authority has decided to commence them, but where the proceedings have not yet been instituted.

The concept of 'imminent' is used to ensure that the obligations and restrictions that apply in relation to hearings and to the use and disclosure of hearing and derivative material in circumstances where the witness has been charged with an offence or where confiscation proceedings have commenced will also apply where those charges or proceedings are imminent. Using the concept of charges or proceedings being imminent makes it clear that when the Integrity Commissioner decides to commence a hearing, he or she must take account of the fact that the potential witness is about to be charged with an offence or confiscation proceedings are about to commence against him or her.

'post-charge'

The term *post-charge* is used to describe the time at which:

- hearing material or derivative material is used or disclosed
- material becomes hearing material
- a hearing commences, or
- a summons is issued to a person.

These events will occur post-charge if, at the time, charges are on foot against a witness (or they are imminent). The events will not occur post-charge if charges against the witness have been *resolved*, whether by conviction, withdrawal, quashing or otherwise.

The term relies on the concept of a *related offence*.

Under paragraph (a), in order for material to be used or disclosed post-charge, the subject matter of the hearing from which that material came or was derived must relate to the subject matter of the offence with which the witness has been charged.

Under paragraph (b), in order for material to be post-charge hearing material, the subject matter of the hearing from which that material came must relate to the subject matter of the offence with which the witness has been charged. There does not have to be a connection between the subject matter of the hearing material and the offence in order for it to be post-charge hearing material. It is enough that there is a connection between the matters covered in the hearing and the offence.

New sections 96AB and 96AE will set out additional obligations and restrictions on how to deal with post-charge hearing material. These obligations and limitations are designed to protect the particularly sensitive status of this material and ensure that it does not prejudice the fair trial of the witness.

Under paragraph (c), in order for a hearing to be a post-charge hearing, the subject matter of the hearing must relate to the subject matter of the offence with which the witness has been charged.

Under paragraph (d), in order for a summons to be issued post-charge, the subject matter of the hearing to which the person has been summoned must relate to the subject matter of the offence with which the person has been charged.

The term post-charge will not apply where there is no relationship between the subjects canvassed in the hearing and the subject matter of the offence with which the witness has been charged.

For example, material used or disclosed in relation to a person who has been charged with driving without a licence will not be post-charge if the relevant material came from a hearing in relation to corruption allegations. In this case, such a use or disclosure would be *pre-charge*.

Similarly, material from the hearing of a person in relation to corruption allegations would not generally be post-charge hearing material if the person had been charged with driving without a licence. In this case, such material would be *pre-charge* hearing material.

'post-confiscation application'

The term *post-confiscation application* is used to describe the time at which:

- hearing material or derivative material is used or disclosed
- material becomes hearing material
- a hearing commences, or
- a summons is issued to a person.

These events will occur post-confiscation application if, at the time, confiscation proceedings are on foot against a witness (or they are imminent). These events will not occur post-confiscation application if those proceedings have been resolved, whether by the making of a confiscation order, dismissal, discontinuance or settling of proceedings or otherwise.

The term relies on the concept of *related confiscation proceeding*.

Under paragraph (a), in order for material to be used or disclosed post-confiscation application, the subject matter of the hearing from which that material came or was derived must relate to the subject matter of the confiscation proceedings against the witness.

Under paragraph (b), in order for material to be post-confiscation application material, the subject matter of the hearing from which that material came must relate to the subject matter of the confiscation proceedings against the witness. There does not have to be a connection between the subject matter of the hearing material and the confiscation proceedings in order for it to be post-confiscation application hearing material. It is enough that there is a connection between the matters covered in the hearing and the confiscation proceedings.

Under subsections 96(4) and (4A), post-confiscation application hearing material cannot be used in evidence in confiscation proceedings against the witness.

Under paragraph (c), in order for a hearing to be a post-confiscation hearing, the subject matter of the hearing must relate to the subject matter of the confiscation proceedings against the witness.

Under paragraph (d), in order for a summons to be issued post-confiscation application, the subject matter of the hearing to which the person has been summoned must relate to the subject matter of the confiscation proceedings against the person.

The term post-confiscation application will not apply where there is no relationship between the subjects canvassed in the hearing and the subject matter of the confiscation proceedings against the witness.

'pre-charge'

The term *pre-charge* is used to describe the time at which:

- hearing material or derivative material is used or disclosed
- material becomes hearing material
- a hearing commences, or
- when a summons is issued to a person.

These events will occur pre-charge if, at the time, there are no related charges against the witness, and no related charges are imminent or contemplated.

The term relies on the concept of *related offence* and is intended to capture any time which is not *post-charge*. That is, using or disclosing material, providing material in a hearing, commencing a hearing, or issuing a summons, will be pre-charge where:

- the witness is suspected of being involved in criminal activity that the hearing has covered or will cover, but charges have not yet been laid against the person and are otherwise not imminent
- the witness is not suspected of being involved in any criminal activity at all, but has some information that may be relevant or necessary to ACLEI's investigation of a corruption issue or the conduct of a public inquiry
- the witness has been charged with an offence that is not a related offence (or such a charge is imminent), or
- a charge for a related offence against the witness has been resolved and a hearing is later held about the subject matter of the offence.

'pre-confiscation application'

The term *pre-confiscation application* is used to describe the time at which:

- hearing material or derivative material is used or disclosed
- material becomes hearing material
- a hearing commences, or
- when a summons is issued to a person.

These events will occur pre-confiscation application if, at the time, there are no related confiscation proceedings against the witness, and no related confiscation proceedings are imminent or contemplated.

The term relies on the concept of *related confiscation proceedings* and is intended to capture any time which is not *post-confiscation application*. That is, using or disclosing material, providing material in a hearing, commencing a hearing, or issuing a summons, will be pre-confiscation application where:

- the witness is suspected of being involved in criminal activity that the hearing has covered or will cover, and that may be the subject of some future confiscation proceedings, but those proceedings have not yet commenced (and are not imminent)
- the witness is not suspected of being involved in any criminal activity at all, but has some information that may be relevant or necessary to ACLEI's investigation of a corruption issue or the conduct of a public inquiry
- the witness has had confiscation proceedings commenced against him or her that are not related proceedings (or such proceedings are imminent), or
- related confiscation proceedings against the witness have been finalised and a hearing is later held about the matters the subject of the confiscation proceedings.

'proceeds of crime authority'

The term *proceeds of crime authority* is intended to capture the bodies able to commence confiscation proceedings under the POC Act and equivalent State and Territory legislation. The term is used in new section 96AG, which clarifies when hearing and derivative material can be disclosed to proceeds of crime authorities.

‘prosecuting authority’

The term *prosecuting authority* is intended to capture all individuals or authorities that are authorised to conduct a prosecution for an offence. The term is intended to include the CDPP and his or her State and Territory counterparts. It is also intended to extend to other bodies that may have prosecutorial functions, such as State or Territory police.

This term is used in sections 96AA and 96AF, which relate to the persons and bodies to whom hearing material and derivative material may be disclosed, and the uses to which those persons and bodies may put the material.

‘prosecutor’

The term *prosecutor* is used in relation to a witness. A person will only be a prosecutor of a witness if he or she satisfies both of the following two conditions:

- he or she must either be a prosecuting authority, or employed or engaged by a prosecuting authority, and
- he or she must either make (or be involved in the making of) a decision to prosecute the witness for a related offence, or be engaged in the prosecution of the witness for a related offence.

The definition is intended to capture only the persons who are directly involved in the prosecution of a witness for a related offence or the decision about whether to prosecute the witness. This would include:

- the Director of Public Prosecutions him or herself
- the prosecutors who have carriage of the prosecution of the witness
- other prosecutors who assist that prosecutor in the prosecution of the witness, or who assist in making the decision to prosecute the witness
- counsel engaged to assist in the prosecution of the witness, and
- support staff who assist in the prosecution of the witness.

The definition is not intended to capture the following:

- police or law enforcement officers involved in the investigation which led to the witness being charged
- police or law enforcement officers who are witnesses in a prosecution of the witness for a related offence
- persons involved in the prosecution of the witness for unrelated offences (whether that prosecution is by the same prosecuting authority or another prosecuting authority), and
- persons involved in the prosecution only of persons other than the witness (including for offences that are related to the witness’s conduct).

This definition is used in sections 96AA, 96AB, 96AC, 96AE and 96AF, which set out when hearing material and derivative material can be disclosed to, and used by, the persons who are directly involved in the prosecution of the witness. Persons who are not involved in the prosecution of the witness should not be subject to the obligations set out in these sections. This is because the risk that the disclosure of hearing or derivative material to these persons

could prejudice the fair trial of the witness is more appropriately dealt with by the relevant prosecuting authority placing internal restrictions on the disclosure or use of this material.

'protected suspect'

The term *protected suspect* is used in relation to the circumstances in which charges against a witness are *imminent*. Subsection 23B(2) of the Crimes Act sets out when a person is a protected suspect. It only applies where the person is, amongst other things, being questioned about a Commonwealth offence.

The definition of protected suspect in this Bill is intended to include both persons who are protected suspects for the purposes of the Crimes Act, and persons who would be if the definition in that Act applied to State or Territory offences.

'related confiscation proceeding'

This definition sets out when a confiscation proceeding is related to a hearing or a summons.

A confiscation proceeding will be related to a hearing if the matters covered in the hearing relate to the subject matter of the proceeding. There must be a connection between the conduct or offences the subject of the hearing and those that are the subject of the confiscation proceedings. If the confiscation proceedings do not have such a connection to the subject matter of the relevant hearing, then the confiscation proceedings are not related to the hearing.

If a confiscation proceeding is related to a hearing, this will affect how material that was given in or produced during the hearing (hearing material) and material that was derived from information, documents or things given in or produced during the hearing (derivative material) can be used in relation to that proceeding.

A confiscation proceeding will also be related to a summons if the matters to be covered in the relevant hearing relate to the subject matter of the proceeding. There must be a connection between the conduct or offences to be covered in the hearing and those that are the subject of the confiscation proceedings. If the confiscation proceedings do not have such a connection to the subject matter to be covered in the hearing, then the confiscation proceedings are not related to the summons.

'related offence'

This definition sets out when an offence is related to a hearing or a summons.

An offence will be related to a hearing if the matters covered in the hearing relate to the subject matter of the offence. There must be a connection between the conduct or offences the subject of the hearing and those that constitute or are the subject of the offence. If the offence does not have such a connection to the subject matter of the relevant hearing, then the offence is not related to the hearing.

If an offence is related to a hearing, this will affect how material that was given in or produced during the hearing (hearing material) and material that was derived from information, documents or things given in or produced during the hearing (hearing material) can be used in relation to the prosecution of the witness for that offence.

An offence will also be related to a summons if the matters to be covered in the relevant hearing relate to the subject matter of the offence. There must be a connection between the conduct or offences to be covered in the hearing and those that are the subject of the offence. If the offence does not have such a connection to the subject matter to be covered in the hearing, then the offence is not related to the summons.

'resolved'

The term *resolved* is defined in new section 8B.

'use'

The term *use* is defined, in relation to hearing and derivative material, to include the use of copies, contents or descriptions of that material. This definition is necessary to ensure that the use of copies, contents or descriptions of hearing and derivative material are subject to the same restrictions and safeguards as the original material.

'witness'

This term is defined in new subsection 8A(3).

Item 2 – After section 8

This item will insert new sections 8A and 8B, which contain additional definitions.

New section 8A – Meaning of hearing material and witness

New section 8A defines *hearing material* and *witness*. These terms are central to new sections 96AA to 96AG, which set out the circumstances in which hearing material and derivative material may be disclosed and the purposes for which it may be used when the disclosure or use relates to the person who gave evidence at the hearing.

New subsection 8A(1) sets out the definition of hearing material. It provides that there are four types of hearing material. This definition has been drawn from current paragraphs 90(1)(a) to (d), which set out the information which the Integrity Commissioner may direct not be published, or only be published in certain ways. Current paragraphs 90(1)(a) to (d) will be repealed under item 17.

Under new paragraphs 8A(1)(a) and (b), hearing material is the evidence given or produced to the Integrity Commissioner during a hearing. This would include the answers to the Integrity Commissioner's questions, the transcript or an electronic recording of those answers, and any documents or things produced under the summons issued under subsection 83(1) or during the hearing (under new subsection 83(5A), below).

Under new paragraphs 8A(1)(c) and (d), hearing material is also information that reveals the identity of a person who has given evidence at a hearing, as well as information that reveals the fact that a person has given or may be about to give evidence at a hearing.

New subsection 8A(2) excludes from the definition of hearing material information, documents or things that are obtained otherwise than at a hearing. This subsection ensures that that information, or those documents or things, are not to be treated as hearing material simply because they were also given during a hearing.

For example, an officer may execute a search warrant under the LEIC Act and seize copies of a person's bank statements. That person may then produce the originals of those bank statements at a subsequent hearing. As a result of new subsection 8A(2), the copies of the bank statements will be dealt with under Division 4 of the LEIC Act. The originals of the bank statements would be dealt with as hearing material.

New subsection 8A(3) sets out the definition of *witness*.

Paragraph 8A(3)(a) explains when a person is the witness for the purposes of a hearing or for hearing material.

Paragraph 8A(3)(b) explains when a person is the witness for the purposes of derivative material.

New section 8B – Resolved

New section 8B defines the term *resolved*. The term is used to describe when charges or confiscation proceedings against a person have concluded. It is intended to capture all circumstances in which charges or confiscation proceedings conclude. It is used to distinguish between circumstances that are pre-charge and those that are post-charge, and between circumstances that are pre-confiscation application and those that are post-confiscation application.

New subsection 8B(1) provides that a charge will be resolved where there is either:

- an appeal against a decision relating to the charge and that appeal lapses or is finally determined, or
- where no appeal against a decision is lodged within the timeframe for lodging appeals.

If a person lodges an appeal against a decision relating to a charge outside that period, then the charge will cease to be resolved.

Similarly, new subsection 8B(2) provides that confiscation proceedings will be resolved where there is either:

- an appeal against a decision relating to those proceedings and that appeal lapses or is finally determined, or
- where no appeal against a decision is lodged within the timeframe for lodging appeals.

If a person lodges an appeal against a decision relating to a confiscation proceeding outside that period, then the proceeding will cease to be resolved.

Once a charge has been resolved against a person, actions in relation to him or her will cease to be post-charge and will become pre-charge. Similarly, once confiscation proceedings have been resolved against a person, actions in relation to him or her will cease to be post-confiscation application and will become pre-confiscation application.

Item 3 – Paragraph 77A(3)(b)

This item will clarify the circumstances in which the Integrity Commissioner is required to include a notation on a notice prohibiting its disclosure. This item will remove the requirement to consider the effect of disclosure of the notice on the fair trial of a person who has been or may be charged with an offence. It will replace it with a requirement to consider the effect of disclosure on the witness's fair trial if he or she has been charged with a related offence (or such a charge is imminent). This amendment is consistent with item 17.

Item 4 – Subparagraph 77A(4)(a)(ii)

This item will clarify the circumstances in which the Integrity Commissioner has a discretion to include a notation on a notice prohibiting its disclosure. This item will remove the requirement to consider the effect of disclosure of the notice on the fair trial of a person who has been or may be charged with an offence. It will replace it with a requirement to consider the effect of disclosure on the witness's fair trial if he or she has been charged with a related offence (or such a charge is imminent). This amendment is consistent with item 17.

Item 5 – Subsections 77B(1), (3) and (5) (penalty)

This item will update the offences in subsections 77B(1), (3) and (5), which relate to a disclosure in contravention of a notation made under section 77A.

The offences in subsections 77B(1), (3) and (5) will be punishable by 2 years imprisonment, a fine of 120 penalty units or both. This is an increase from 12 months imprisonment.

This amendment will bring the offence into line with similar provisions aimed at protecting the integrity and confidentiality of sensitive information in:

- (a) section 60A of the AFP Act, which prohibits AFP members from making unauthorised records or disclosures of official information, and
- (b) section 70 of the Crimes Act, which prohibits Commonwealth officers from making unauthorised disclosures of official information.

Both of these offences are punishable by imprisonment for two years.

The increased penalties are appropriate. They reflect the importance of ensuring the confidentiality of information relating to a notice, particularly where that information is sensitive and relates to law enforcement corruption issues.

Item 6 – Subsection 80(3)

This item is consequent upon item 7.

Item 7 – Subsection 80(4)

This item makes the operation of current subsection 80(4) clearer by separating it into two subsections. Subsection 80(4) automatically provides a person with a limited use immunity over information, documents or things obtained through a notice issued under section 75, without requiring the witness to expressly claim the privilege.

New subsection 80(4) will set out the general position that information, documents or things produced in response to a notice under section 75 are not admissible in criminal proceedings, proceedings for the imposition of a penalty and confiscation proceedings. New subsection 80(4A) will set out the exceptions to that general position, when such information, documents or things are admissible in those proceedings.

These two subsections are intended to reproduce the effect of existing subsection 80(4), with some minor changes.

First, the combined effect of new subsections 80(4) and (4A) is that information, documents or things produced in response to a notice under section 75 will be admissible against the witness in most confiscation proceedings. The only circumstance where they will not be admissible is where the notice compelling the production of information, documents or things was issued after confiscation proceedings had commenced against the witness (or such proceedings were imminent). This makes it clear that notices are not issued solely for the purpose of bolstering the case against a witness in confiscation proceedings.

This position is slightly different to the position under current subsection 80(4). That provision was intended to allow the relevant information, documents or things to be admissible in all confiscation proceedings, irrespective of whether the notice was issued before or after those proceedings were commenced.

Secondly, information, documents or things will now be admissible against the witness in prosecutions for section 77B, which relates to an unauthorised disclosure of the existence of a notice.

New subsection 80(4B) clarifies that subsection 80(4A) only applies to the admissibility of material produced in response to a notice under section 75 against the person who produced the material. The subsection is not intended to affect the admissibility or relevance of the material for any other purpose, including the prosecution of another person.

Item 8 – After subsection 82(1)

This item will insert new subsections 82(1A) and (1B).

Section 82 provides that the Integrity Commissioner may conduct a hearing for the purposes of investigating a corruption issue or conducting a public inquiry. New subsection 82(1A) specifically authorises the Integrity Commissioner to conduct a hearing pre-charge, post-charge, pre-confiscation application or post-confiscation application.

This provision is intended to overcome the effect of the decision in X7, which held that the ACC Act did not provide an ACC examiner with the power to conduct an examination of a person who had been charged with an offence and to ask questions about the subject matter of the offence.

New subsection 82(1B) is a severability clause.

New paragraph 82(1B)(a) allows for paragraph 82(1A)(a) to be read down so as to only authorise pre-charge hearings, in the event that the provision is found to be beyond power.

New paragraph 82(1B)(b) allows for paragraph 82(1B)(b) to be read down so as to only authorise pre-confiscation application hearings, in the event that the provision is found to be beyond power.

Item 9 – Subsection 83(1)

This item will update subsection 83(1) to require the Integrity Commissioner to take into account additional considerations when he or she is considering issuing a summons to a person who has been charged with a related offence, or against whom related confiscation proceedings have commenced (or where such charges or proceedings are imminent).

New subsection 83(1) allows the Integrity Commissioner to issue a summons to a person to attend a hearing and give evidence, or to produce documents or things, or both.

New subsection 83(1) sets out the considerations the Integrity Commissioner must take into account when considering whether or not to issue a summons. In all cases, the Integrity Commissioner must have reasonable grounds to suspect that the evidence, documents or things specified in the summons will be relevant to the investigation of a corruption issue or the conduct of a public inquiry.

When considering issuing a summons to a person after he or she has been charged with an offence or confiscation proceedings have been commenced (or where such charges or proceedings are imminent), the Integrity Commissioner must also be satisfied that issuing the summons is necessary for the purposes of the relevant investigation or public inquiry. The Integrity Commissioner must consider the necessity for the summons in light of the fact that the person has been charged with an offence or that confiscation proceedings have commenced against him or her (or those charges or proceedings are imminent).

This paragraph provides additional assurance that the Integrity Commissioner is exercising his or her powers for a proper purpose and that, in deciding to issue a summons, the Integrity Commissioner has paid due regard to the fact that the person has been charged with an offence or is the subject of confiscation proceedings. This paragraph reinforces the fact that a hearing is not conducted solely for the purposes of bolstering the prosecution of a witness, but that it is intended to serve the purposes of the relevant investigation or public inquiry, and to assist ACLEI and its partners in detecting and preventing corrupt conduct and in investigating corruption issues in law enforcement agencies.

Item 10 – At the end of subsection 83(2)

This item will require the Integrity Commission to record in writing his or her reasons for deciding to issue a summons, either before issuing the summons or at the same time as he or she issues it.

This change is intended to provide greater assurance that the Integrity Commissioner is conducting post-charge hearings for proper purposes, and not to bolster the case against the person.

Under section 211 of the Act, there are limitations on the circumstances in which staff members of ACLEI are compellable in legal proceedings to disclose information or produce documents that the person acquired in the course of his or her duties.

Item 11 – After subsection 83(2)

This item will insert new subsection 83(2A).

Section 83 relates to the conduct of hearings. New paragraph 83(2A)(a) specifically authorises the Integrity Commissioner to conduct a hearing in relation to a witness who has been charged with an offence (or against whom such a charge is imminent). The subsection also authorises the Integrity Commissioner to ask questions or require the production of documents or things that directly relate to the subject matter of the offence with which the witness has been charged.

This paragraph is intended to overcome the decision in X7. In that case, a majority of the High Court held stated that the ACC Act did not provide an ACC examiner with the power to conduct an examination of a person who had been charged with an offence and to ask questions about the subject matter of the offence. While X7 related to an examination conducted by the ACC, the comparable nature of the coercive powers under the ACC Act and the LEIC Act means that the decision is likely to affect the Integrity Commissioner and ACLEI in similar ways.

New paragraph 83(2A)(b) specifically authorises the Integrity Commissioner to conduct a hearing in relation to a witness against whom confiscation proceedings have commenced (or against whom such proceedings imminent). The subsection authorises the Integrity Commissioner to ask questions or require the production of documents or things that directly relate to the subject matter of those proceedings.

Nothing in new subsection 83(2A) is intended to limit or otherwise constrain the matters that the Integrity Commissioner may consider relevant to a corruption investigation and about which he or she may examine or cross-examine a witness.

Item 12 – After subsection 83(5)

This item will allow that the Integrity Commissioner to require a witness at a hearing to produce a document or thing that was not specified in the summons to attend the hearing.

The Integrity Commissioner currently has the power to compel a witness to produce documents or things under a written notice or as specified in the summons. However, allowing the Integrity Commissioner to require the production of items (such as a mobile phone) at a hearing and without notice would enhance the Commissioner's intelligence-gathering and investigative capabilities and reduce the scope for witnesses to tamper with or destroy information.

Item 13 – Subsection 83(6)

This item is consequent upon the introduction of the term 'witness' under item 2.

Item 14 – At the end of section 83

This item will insert a new subsection 83(7), which is a severability clause.

New paragraph 83(7)(a) allows section 83 and the LEIC Act to be read as if new paragraph 83(1)(d) and subsection 83(2A) had not been enacted, in the event that these provisions are found to be beyond power.

New paragraph 83(7)(b) allows paragraph 83(1)(d) and subsection 83(2A) to be read down so as to only authorise a hearing to cover the subject matter of a current or imminent charge against the witness, in the event that paragraph 83(7)(c) is found to be beyond power.

New paragraph 83(7)(c) allows paragraph 83(1)(d) and subsection 83(2A) to be read down so as to only authorise a hearing to cover the subject matter of a current or imminent confiscation proceeding against the witness, in the event that paragraph 83(7)(b) is found to be beyond power.

Item 15 – Paragraph 86(3)(a)

This item is consequent upon the introduction of the term ‘witness’ under item 2.

Item 16 – Subsection 86(5)

This item will update the offence in subsection 86(5), which relates to attendance at a private hearing without the Integrity Commissioner’s authorisation.

The offence in subsection 86(5) will be punishable by 2 years imprisonment, a fine of 120 penalty units or both. This is an increase from 12 months imprisonment.

This amendment will bring the offence into line with similar provisions aimed at protecting the integrity and confidentiality of sensitive information in:

- (a) section 60A of the AFP Act, which prohibits AFP members from making unauthorised records or disclosures of official information, and
- (b) section 70 of the Crimes Act, which prohibits Commonwealth officers from making unauthorised disclosures of official information.

Both of these offences are punishable by imprisonment for two years.

The increased penalty is appropriate. It reflects the importance of ensuring the confidentiality of evidence given at a hearing, particularly where that information is sensitive and relates to law enforcement corruption issues.

Item 17 – Subsections 90(1), (2) and (3)

This item repeals existing subsections 90(1), (2) and (3) and inserts new subsections 90(1), (2), (3) and (3A). This item clarifies the operation of the Integrity Commissioner’s direction to ensure the confidentiality of hearing material.

Subsection 90(1)

Subsection 90(1) will set out the Integrity Commissioner’s power to issue a direction to ensure the confidentiality of hearing material. Paragraph 90(1)(a) allows the Integrity Commissioner to issue a direction that hearing material is not be disclosed or used.

Paragraph 90(1)(b) allows the Integrity Commissioner to issue a direction that allows hearing

material to be used by, or disclosed to, certain specified people. It is also intended to clarify that the Integrity Commissioner may limit the ways in which those persons may use the hearing material and that the Integrity Commissioner may impose conditions on that use.

For example, the Integrity Commissioner's direction may provide that hearing material can be disclosed to a law enforcement agency, but that it can only be used for the purposes of developing intelligence, or that it cannot be used to inform the prosecution of the witness or another person.

New subsection 90(1) clarifies a number of ambiguities in the current provision.

First, the new subsection will use the term 'used or disclosed' instead of 'published'. This new term more accurately describes the purpose of the Integrity Commissioner's direction and the uses to which hearing material is put. For example, hearing material may be disclosed to other Government agencies (eg. under section 208), who may in turn use it for the purpose of investigating an offence or developing intelligence. A direction restricts the bodies to which sensitive hearing material can be disclosed and the uses to which they may put that material.

Secondly, new paragraph 90(1)(b) clarifies that a direction by the Integrity Commissioner can limit the uses to which another body may put hearing material. The limits which the Integrity Commissioner places on the disclosure and use of hearing material under paragraph 90(1)(b) will bind a body or person to which or to whom hearing material has been disclosed.

Subsection 90(2)

Subsection 90(2) sets out the circumstances in which the Integrity Commissioner is required to make a direction under subsection 90(1).

There are three circumstances when the Integrity Commissioner is required to make a direction under new subsection 90(2). The first is where the failure to make the direction (or make it in such a way) might prejudice a person's safety. This is the same as the obligation in current paragraph 90(2)(a).

The second circumstance is where the failure to make the direction (or make it in such a way) would reasonably be expected to prejudice the witness's fair trial. This obligation only applies where:

- the witness has been charged with an offence (or such a charge is imminent), and
- that offence is a 'related offence' (that is, the subject matter of the hearing relates to the subject matter of the offence).

The third circumstance is where the failure to give the direction might lead to the disclosure of information that is the subject of a certificate under section 149.

This obligation differs from current subsection 90(2) in three key ways.

First, it applies where the failure to make the direction 'would reasonably be expected to prejudice' the witness's fair trial. Current paragraph 90(2)(a) applies where the failure 'might prejudice' a person's trial. This change is intended to give the Integrity Commissioner greater certainty about the circumstances in which he or she is required to make a direction

under subsection 90(2). The Integrity Commissioner should not be required to make a direction to protect against unforeseeable risks that the disclosure or use of hearing material may prejudice the witness's fair trial. The court's power to manage any risk to the witness's fair trial will ensure that any unforeseeable risks will be appropriately mitigated.

Secondly, it applies only where the witness has been charged with an offence (or such a charge is imminent) and the hearing covered the subject matter of that offence. Current subsection 90(2) applies where there might be prejudice to 'the fair trial of a person who has been, or may be, charged with an offence'. This change is intended to make clearer the Integrity Commissioner's obligation to issue a direction to protect a person's fair trial rights. The only person whose trial may be prejudiced by the disclosure or use of hearing material is the witness. The only time at which that prejudice could occur is where the witness has either been charged with an offence or when such a charge is imminent.

Finally, under new subsection 90(2), the Integrity Commissioner will no longer be required to issue a direction where the failure to do so might prejudice a person's reputation. This change is intended to reflect the Integrity Commissioner's practice that he or she will not consider allowing the disclosure of hearing material to any person under a subsection 90(1) direction unless he or she has an operational need.

Further, a person's reputation is adequately protected in other provisions that allow for the disclosure of ACLEI information (which includes hearing material) to the public, such as sections 209 and 210. Hearings will frequently involve serious and sensitive matters that may negatively impact on a person's reputation if disclosed to the public at large. However, in the context of disclosures between law enforcement and other government agencies, prejudice to a person's reputation should not stand in the way of the sharing of relevant and significant information about their involvement in law enforcement corruption. In these circumstances, requiring the Integrity Commissioner to consider a person's reputation impedes the ability of agencies to further investigate and prosecute corruption matters, identify corruption risks and remedy systemic vulnerabilities in law enforcement agencies..

Subsection 90(3)

New subsection 90(3) will split current subsection 90(3) into two separate subsections. This will make it consistent with the approach in subsections 90(1) and (2).

New subsection 90(3) allows the Integrity Commissioner to vary or revoke a direction under subsection 90(1), subject to new subsection 90(3A).

New subsection 90(3A)

New subsection 90(3A) limits the circumstances in which the Integrity Commissioner may vary or revoke a direction under subsection 90(3). These circumstances are intended to mirror the circumstances in subsection 90(2).

The obligations in new subsection 90(3A) were previously set out in subsection 90(3). For clarity, they are now set out in a separate subsection and have been modified to account for the changes made by this item to subsection 90(2).

Item 18 – Subsection 90(6)

This item will update the offence in subsection 90(6) so that it:

- is consistent with the structure of offences in the *Criminal Code*
- is consistent with the language of new subsections 90(1) and (3)
- more clearly sets out the fact that a person does not commit an offence where he or she discloses hearing material in accordance with a court order under subsection 90(4) or (5) or new paragraph 96AB(1)(b), and
- attracts the same penalty as similar Commonwealth offences.

Under this item, the offence in subsection 90(6) will be punishable by 2 years imprisonment, a fine of 120 penalty units or both. This is an increase from 12 months imprisonment, a fine of 60 penalty units or both.

This amendment will bring the offence into line with similar provisions aimed at protecting the integrity and confidentiality of sensitive information in:

- (a) section 60A of the AFP Act, which prohibits AFP members from making unauthorised records or disclosures of official information, and
- (b) section 70 of the Crimes Act, which prohibits Commonwealth officers from making unauthorised disclosures of official information.

Both of these offences are punishable by imprisonment for two years.

The increased penalty is appropriate. It reflects the importance of ensuring the confidentiality of evidence given at a hearing, particularly where that information is sensitive and relates to law enforcement corruption issues.

Item 19 – Paragraph 91(1)(b)

This item will clarify the Integrity Commissioner’s obligation to issue a non-disclosure direction in circumstances where a hearing is held partially in public and partially in private.

This may occur, for example, where one part of a witness’s evidence involves the disclosure of confidential information or is likely to cause unfair prejudice to a person’s reputation.

Certain types of evidence must be given in private under subsection 89(1). These include communications protected by legal professional privilege and disclosures in breach of prescribed secrecy provisions.

In the context of a public hearing, the Integrity Commissioner may also decide to hear part of the evidence in private on his or her own initiative under subsection 82(3), or at the request of a witness under subsection 89(2).

Item 20 – Paragraph 91(3)(b)

This item will clarify the circumstances in which the Integrity Commissioner is required to include a notation on a summons prohibiting its disclosure. This item will remove the requirement to consider the effect of disclosure of the summons on the fair trial of a person

who has been or may be charged with an offence. It will replace it with a requirement to consider the effect of disclosure on the witness's fair trial if he or she has been charged with a related offence (or such a charge is imminent). This amendment is consistent with item 17.

Item 21 – Subparagraph 91(4)(a)(ii)

This item will clarify the circumstances in which the Integrity Commissioner has a discretion to include a notation on a summons prohibiting its disclosure. This item will remove the requirement to consider the effect of disclosure of the summons on the fair trial of a person who has been or may be charged with an offence. It will replace it with a requirement to consider the effect of disclosure on the witness's fair trial if he or she has been charged with a related offence (or such a charge is imminent). This amendment is consistent with item 17.

Item 22 – Subsections 92(1), (3) and (5) (penalty)

This item will update the offences in subsections 92(1), (3) and (5), which relate to a disclosure in contravention of a notation made under section 91.

The offences in subsections 92(1), (3) and (5) will be punishable by 2 years imprisonment, a fine of 120 penalty units or both. This is an increase from 12 months imprisonment.

This amendment will bring the offences into line with similar provisions aimed at protecting the integrity and confidentiality of sensitive information in:

- (a) section 60A of the AFP Act, which prohibits AFP members from making unauthorised records or disclosures of official information, and
- (b) section 70 of the Crimes Act, which prohibits Commonwealth officers from making unauthorised disclosures of official information.

Both of these offences are punishable by imprisonment for two years.

The increased penalties are appropriate. They reflect the importance of ensuring the confidentiality of information relating to a summons. The fact that a person has been summoned to give evidence at a hearing is sensitive and its inappropriate disclosure can lead to significant consequences for witnesses and investigations into corruption and other serious offences. In these circumstances, the confidentiality of the existence of a summons should be protected in the same way that other sensitive law enforcement information is protected.

Item 23 - Section 94

This item will update the offences in section 94 to criminalise any conduct that obstructs the Integrity Commissioner in the performance of his or her functions and powers under the Act, or constitutes a threat against any person present at a hearing. This change will also increase the penalty associated with this offence.

Current section 94 largely relates to insulting and disruptive behaviour against the Integrity Commissioner, or during the course of a hearing. New section 94 will apply to a broader range of conduct, and ensure that any attempts to impede or frustrate a corruption investigation or the conduct of a public inquiry are captured under the updated offences. This could include a refusal to comply with a direction from the Integrity Commissioner under

new subsection 83(5A). This change will also improve the conduct of hearings, and more adequately protect the safety of persons appearing at them. An equivalent offence of obstructing or hindering the ACC or an examiner is contained within section 35 of the ACC Act. The offences in section 94 will be punishable by 2 years imprisonment, a fine of 120 penalty units or both. This is an increase from 6 months imprisonment.

The increased penalties are appropriate and consistent with the penalty level for similar offences relating to the conduct of hearings under the LEIC Act. Furthermore, these penalties reinforce the central role of the Integrity Commissioner, and the use of his or her coercive powers, in furthering investigations and prosecutions of corruption matters, in identifying corruption risks and in remedying systemic vulnerabilities in law enforcement agencies.

Item 24 – Subsection 96(1)

This item is consequent upon item 12. This change will extend the application of subsection 96(1) to documents or things produced pursuant to a direction by the Integrity Commissioner under new subsection 83(5A). Subsection 96(1) abrogates the privilege against self-incrimination for a person answering a question or producing a document or thing in a hearing.

Item 25 – Subsection 96(3)

This item is consequent upon item 26.

Item 26 – Subsection 96(4)

This item makes the operation of current subsection 96(4) clearer by separating it into two subsections. New subsection 96(4) will set out the general position that answers, documents or things given or produced in a hearing are not admissible in criminal proceedings, proceedings for the imposition of a penalty, or confiscation proceedings. New subsection 96(4A) will set out the exceptions to that general position, when such answers, documents or things are admissible in those proceedings.

These two subsections are intended to reproduce the effect of existing subsection 96(4), with some minor changes.

First, the combined effect of new subsections 96(4) and (4A) is that answers, documents or things given in a hearing will be admissible against the witness in most confiscation proceedings. The only circumstance where they will not be admissible is where the hearing from which those answers, documents or things came occurred after confiscation proceedings had commenced against the witness (or such proceedings were imminent). This makes it clear that hearings are not conducted solely for the purpose of bolstering the case against a witness in confiscation proceedings.

This position is slightly different to the position under current subsection 96(4). That provision was intended to allow those answers, documents or things given or produced in a hearing to be admissible in all confiscation proceedings, irrespective of whether the hearing occurred before or after those proceedings were commenced.

Secondly, answers, documents or things will now be admissible against the witness in prosecutions for hindering or obstructing the conduct of hearings in contravention of new

section 94, as well as in all contempt proceedings. This will be in addition to the criminal proceedings currently listed in paragraph 96(4)(c) in which hearing material is already admissible.

This change is necessary to ensure the effectiveness of hearings. Hearing material will often be a crucial part of proving the offences listed in new subsection 96(4A) of the LEIC Act and their associated contempt provisions. For example, answers given by a witness in a hearing may be the conduct that obstructs or hinders an examiner in contravention new section 94 of the LEIC Act. If the position in current subsection 96(4) of the LEIC Act remained, those answers would not be admissible in a prosecution of the witness for an offence against new section 94.

The offences listed in these subsections, along with the contempt provisions in section 96A of the LEIC Act, provide powerful backing to ensure compliance with the Integrity Commissioner's powers. These powers are significantly less effective when important evidence is inadmissible in prosecutions for those offences or associated contempt proceedings.

New subsection 96(4B) clarifies that subsection 96(4A) only applies to the admissibility in proceedings against the witness of answers, documents or things produced or given in a hearing. The subsection is not intended to affect the admissibility or relevance of the material for any other purpose, including the prosecution of another person.

Item 27 – Subsection 96(5)

This item is consequential on item 12. This change will extend the application of subsection 96(5) to answers, documents or things given pursuant to a direction by the Integrity Commissioner under new subsection 83(5A).

Item 28 – Paragraph 96(7)(b)

This item is consequent upon item 12. This change will extend the application of subsection 96(7), which overrides certain law enforcement secrecy provisions, to documents or things produced pursuant to a direction by the Integrity Commissioner under new subsection 83(5A).

Item 29 – After Subdivision E of Division 2 of Part 9

This item will insert new sections 96AA to 96AG. These new sections set out the circumstances in which hearing material and derivative material may lawfully be used or disclosed. There are special restrictions on circumstances in which this material may be disclosed to a prosecutor of the witness.

New section 96AA – Obtaining derivative material

New section 96AA specifically authorises the use and disclosure of hearing material to find other material (derivative material). Derivative material will be admissible in a prosecution of the witness. However, there are restrictions on the circumstances in which some types of derivative material may be provided to a prosecutor of the witness (see new paragraph 96AC(1)(c)).

New section 96AA does not create a new ability for a person or body to disclose or use hearing material for the purposes of obtaining derivative material. Rather, that person or body must be permitted or required to make such a use or disclosure of the material under a law of the Commonwealth, a State or Territory (eg. under section 208 of the LEIC Act).

New subsection 96AA(1) sets out the ability of a person or body lawfully in possession of hearing material to use or disclose that material at any time for the purposes of obtaining derivative material, subject to subsection 96AA(2). Subsection 96AA(1) allows hearing material to be used or disclosed irrespective of whether the witness has been charged with a related offence (or whether such a charge is imminent) or whether confiscation proceedings have commenced against the witness (or whether such proceedings are imminent).

New subsection 96AA(2) provides that the ability to use or disclose hearing material for the purposes of obtaining derivative material under subsection 96AA(1) is subject to a range of other provisions which may affect the way in which the person or body can use, or the persons to whom they may disclose, that material, including a direction under subsection 90(2).

New subsections 96AA(1) and (2) do not limit the uses to which any person or body in possession of hearing material may put that material. They only specify that one of the lawful uses of hearing material is to obtain derivative material.

New subsection 96AA(3) sets out those entities which may lawfully use or disclose hearing material for the purposes of obtaining derivative material. Its effect is that any person or body lawfully in possession of hearing material may use it in accordance with subsections 96AA(1) and (2).

New subsection 96AA(4) is a severability clause.

Paragraph 96AA(4)(a) allows section 96AA and the LEIC Act to be read as if any or all of paragraphs 96AA(1)(b), (c), (e) or (f) had not been enacted, in the event that any of the disclosures authorised by those paragraphs are found to be beyond power.

Paragraph 96AA(4)(b) allows for subsection 96AA(3) to be read as not authorising prosecutors of the witness or proceeds of crime authorities to lawfully use or disclose hearing material or derivative material in the event that such use or disclosure is found to be beyond power.

New section 96AB – Disclosing hearing material to prosecutors of the witness

New section 96AB sets out the circumstances in which hearing material may be disclosed to a person prosecuting the witness for a related offence.

Consistent with the definition of ‘prosecutor’ in section 5, this provision only applies where the subject matter of the hearing from which the material came is related to the subject matter of the offence.

New section 96AB will apply to any disclosure of hearing material from one person to another, even if they are in the same agency. For example, this would include:

- a disclosure of hearing material from an investigator to a prosecutor of the witness

- a disclosure of hearing material from one prosecutor of the witness to another, and
- a disclosure of hearing material from a person engaged by a prosecuting authority who is not prosecuting the witness to a prosecutor of the witness.

New section 96AB does not affect the disclosure of hearing material to a person engaged in the prosecution of a person other than the witness. It also does not affect or limit the use or disclosure of witness material to other persons or bodies for purposes other than the prosecution of the witness.

New section 96AB does not create a new ability for a person or body to disclose hearing material to a prosecutor of the witness. Rather, such a person or body must be permitted or required to make such a disclosure of the material under a law of the Commonwealth, a State or Territory (eg. under section 208 of the LEIC Act).

Under new subsection 96AB(1), hearing material may be disclosed to a prosecutor of the witness before the witness has been charged with a related offence (that is, to a person making a decision whether or not to prosecute the witness, or a person assisting with that decision), when such a charge is imminent and after he or she has been charged with an offence. The conditions that the person or body will need to satisfy before making that disclosure will depend on the time of the disclosure.

Before the person has been charged with a related offence, new paragraph 96AB(1)(a) allows the disclosure of hearing material to a prosecutor without restrictions additional to those set out in new subsection 96AB(2). This provision allows for the disclosure of relevant hearing material to a person who is making a decision about whether or not to prosecute the witness, and to allow for a prosecutor to give advice about the charges that may ultimately be laid against the witness. Hearing material will still be inadmissible in most criminal proceedings against the witness under subsection 96(4).

If the witness is later charged with a related offence, it is expected that the prosecuting authority will take steps to ensure that the material is not available to the prosecutors of the witness. This will minimise the risk that the witness's fair trial may be prejudiced by the prosecutors having access to his or her hearing material.

Once the person has been charged with a related offence or where such a charge is imminent, paragraph 96AB(1)(b) allows the disclosure of hearing material to a prosecutor provided that the disclosure is in accordance with a court order under new subsection 96AD(1). That subsection allows a court to authorise the disclosure of hearing material to a prosecutor of the witness where disclosure is in the interests of justice.

This provision will ensure that the court controls the circumstances in which hearing material can be provided to a prosecutor once the witness has been charged with a related offence (or such charges are imminent). This is appropriate, as a person cannot rely on the privilege against self-incrimination to refuse to answer questions or produce documents or things during a hearing. Giving the court control of the circumstances in which hearing material may be provided to a prosecutor of the witness is intended to ensure the witness's fair trial and that the prosecutor is given access to all relevant and appropriate material (such as where the hearing material is exculpatory or where the witness wants the prosecutor to take matters in the hearing into account in making decisions about whether to prosecute).

New subsection 96AB(2) states that the ability to disclose hearing material to a prosecutor under subsection 96AB(1) is subject to any direction under subsection 90(1).

New subsection 96AB(3) ensures that paragraph 96AB(1)(b) and its two subparagraphs are severable from one another, the other provisions in section 96AB and the rest of the Act in the event that any provision is found to be beyond power. The validity of these provisions does not affect the validity of other provisions in section 96AB of the Act.

New section 96AC – Disclosing derivative material to prosecutors of the witness

New section 96AC sets out the circumstances in which derivative material may be disclosed to a prosecutor of the witness.

Consistent with the definition of ‘prosecutor’ in section 5, this provision only applies where the subject matter of the hearing from which the material was derived is related to the subject matter of the offence. New section 96AC will apply to any disclosure of derivative material from one person to another, even if they are in the same agency. For example, this would include:

- a disclosure of derivative material from an investigator to a prosecutor of the witness
- a disclosure of derivative material from one prosecutor of the witness to another, and
- a disclosure of derivative material from a person engaged by a prosecuting authority who is not prosecuting the witness to a prosecutor of the witness.

New section 96AC does not affect the disclosure of derivative material to a person engaged in the prosecution of a person other than the witness. It also does not affect or limit the use or disclosure of derivative material to other persons or bodies for purposes other than the prosecution of the witness.

New section 96AC does not create a new ability for a person or body to disclose derivative material to a prosecutor of the witness. Rather, such a person or body must be permitted or required to make such a disclosure of the material under a law of the Commonwealth, a State or Territory (eg. under section 208 of the LEIC Act).

Under new subsection 96AC(1), derivative material may be disclosed to a prosecutor of the witness before the witness has been charged with a related offence, when such a charge is imminent and after he or she has been charged with an offence. The conditions that the person or body will need to satisfy before making that disclosure will depend on the time of the disclosure and when the relevant hearing occurred.

New paragraphs 96AC(1)(a) and (b) allow the disclosure of derivative material obtained from the pre-charge hearing of a witness to a prosecutor for use in any prosecution of the witness. New paragraph 96AC(2)(b) clarifies that derivative material is admissible in proceedings against the witness.

The provision enables the disclosure of such material irrespective of whether the witness has been charged with a related offence at the time of the disclosure (or such a charge is imminent) and whether the relevant derivative material was obtained before or after the witness has been charged.

It is appropriate that material derived from the pre-charge hearing of a person should be able to be provided to a prosecutor without additional restrictions. The LEIC Act overrides the privilege against self-incrimination in a hearing, but provides that hearing material over which the witness has claimed the privilege will be inadmissible in most criminal proceedings against him or her (amongst other things). While it is appropriate to ensure that there are strict limits on the disclosure of hearing material to a prosecutor of the witness, material derived from the pre-charge hearing of a witness stands in a different category.

The LEIC Act has always been intended to authorise the derivative use of hearing material for a number of purposes, including for use in the investigation and prosecution of the witness and other people. This is an important part of enabling ACLEI to fulfil its statutory role in detecting and preventing corrupt conduct and in investigating corruption issues in law enforcement agencies.

Law enforcement corruption is a very serious issue. It is a key enabler of serious and organised crime and has the capacity to assist in the commission of offences that attract the most serious penalties, such as drug trafficking and the importation of firearms. These activities cause significant harm to individuals in the Australian community, to Australian society and the economy, and ultimately undermine Australia's national security.

In light of the subject matter of hearings and the gravity of the criminal activities involved, it is important that material derived from them can be used to disrupt and prevent serious harm to the community, including by prosecuting persons who have been witnesses.

Further, previous experience under the NCA Act demonstrated that providing a derivative use immunity for examination material was inappropriate as it undermined the capacity of the NCA to assist in the investigation of serious criminal activities. Prior to its removal under the *National Crime Authority Legislation Amendment Act 2001*, the derivative use immunity in the NCA Act required the prosecution to prove the provenance of every piece of evidence in the trial of a person that the NCA had examined before it could be admitted. This position was unworkable and did not advance the interests of justice as pre-trial arguments could be used to inappropriately delay the resolution of charges against the accused.

These powers are not intended to derogate from a court's overriding power to make any orders necessary to ensure that the witness's trial is fair (see new subsection 96AD(3)).

New paragraph 96AC(1)(c) imposes an additional requirement before a person or body can disclose certain types of derivative material to the prosecutor of the witness. Under new paragraph 96AC(1)(c), the person or body must first obtain a court order under new subsection 96AD(1). The order will only be made if the court is satisfied that the disclosure is in the interests of justice.

This requirement only applies:

- where the person or body is looking to make a disclosure to the prosecutor after the witness has been charged with a related offence (or when charges are imminent), and
- where the material sought to be disclosed is derivative material obtained from the post-charge hearing in relation to the witness.

This provision is intended to ensure that the court controls the circumstances in which material derived from a post-charge hearing can be provided to a prosecutor. Giving the

court control of the circumstances in which this type of derivative material may be provided to a prosecutor of the witness is intended to ensure the witness's fair trial and that the prosecutor is given access to all relevant and appropriate material (such as where the derivative material is exculpatory or where the witness wants the prosecutor to take matters in the hearing into account in making decisions about whether to prosecute).

New subsection 96AC(2) is a severability clause. It allows section 96AC and the LEIC Act to be read as if either or both of paragraphs 96AC(1)(b) and (c) had not been enacted, in the event that either paragraph is found to be beyond power.

New section 96AD – Court's powers to order disclosure and to ensure a fair trial

New section 96AD clarifies a court's powers with respect to hearing material and derivative material. This provision is protective and ensures that a person's fair trial is not prejudiced by a hearing or the use of hearing material or derivative material.

New subsection 96AD(1) allows a person or body in possession of hearing material or derivative material to apply to a court for an order authorising the disclosure of that material to a prosecutor of the witness, in accordance with paragraphs 96AB(1)(b) and 96AC(1)(c). A court may also make such an order on its own initiative.

A court may order disclosure of the material to the prosecutor if it is satisfied that the disclosure is required in the interests of justice and despite any direction under subsection 90(1). This provision allows the court flexibility in determining whether or not potentially prejudicial material should be disclosed to a prosecutor of the witness. Whether or not a disclosure is in the interests of justice will depend on the nature and content of the material sought to be disclosed, the circumstances of the case and the extent to which disclosure of the material may prejudice the witness's fair trial or safety.

New subsection 96AD(1) also allows a court to specify the prosecutors to whom the material may be disclosed either by class or position, or individually. The subsection allows the court to place appropriate limits on the prosecutors' use of the material to ensure that they use it consistently with the interests of justice.

New subsection 96AD(2) sets out the courts to which a person may apply for an order under subsection 96AD(1). If the witness has been charged with an offence, then the person or body should seek the order of the court hearing those charges. Where charges against a person are imminent but have not yet been laid, it is anticipated that a person or body would apply to the court that is likely to be hearing those charges for an order that material may be disclosed to the prosecution.

New subsection 96AD(3) makes explicit that nothing in new sections 96AA, 96AB, 96AC, 96AE or 96AF limits a court's power to make all order necessary to ensure the fair trial of the witness, including to limit or remove any prejudice from the prosecution's lawful possession or use of hearing material or derivative material. This provision makes it clear that these amendments are not to be regarded as inhibiting a court's ability to manage its own procedures and to make orders to prevent prejudice to the witness's fair trial.

New subsection 96AD(4) clarifies that a witness's fair trial is not to be considered unfair simply because the Integrity Commissioner had conducted a hearing in relation to the witness. This provision applies whether the hearing occurred pre-charge, post-charge or

when charges were imminent. This subsection confirms existing law about the effect of an ACC examination on a person's trial: an examinee must demonstrate that an examination has caused actual prejudice to the fairness of his or her trial before a stay can be ordered.⁷

New subsection 96AD(5) allows new section 96AD and the LEIC Act to be read as if new subsection 96AD(4) or paragraph 96AD(4)(d) had not been enacted, in the event that any provision is found to be beyond power.

New subsection 96AE – Certain material may always be disclosed to prosecutors of the witness

New section 96AE clarifies that certain types of hearing material and derivative material may always be provided to the prosecution.

New subsection 96AE(1) allows a person or body to disclose to the prosecutor of a witness the fact that he or she has given evidence in a hearing. This provision is necessary to allow the prosecutor to understand the risks involved in the trial of the person that there may be applications for stays or to exclude particular evidence. This provision does not authorise the disclosure of any information about the evidence that the witness provided at the hearing (though this may be allowed under other sections). The prosecution's knowledge of the fact that a person has given evidence should not affect the fairness of the witness's trial.

New subsection 96AE(2) allows the disclosure of hearing material and derivative material to the prosecutor of a witness for an offence against:

- section 77B – offences of disclosure (notice)
- section 92 – offences of disclosure (summons)
- section 93 – attendance at hearings etc.
- section 94 – obstructing or hindering the conduct of hearings etc.
- section 137.1 of the Criminal Code – false or misleading information, and
- section 137.2 of the Criminal Code – false or misleading documents.

This provision only allows for the disclosure of hearing material and derivative material where the offence concerns the hearing itself. It allows the disclosure of essential information about the witness's conduct, answers, non-compliance with a direction, or non-attendance at a hearing.

Neither subsection 96AD(1) or (2) create a new ability for a person or body to disclose hearing material to a prosecutor of the witness. Rather, that person or body must be permitted or required to make such a disclosure of the material under a law of the Commonwealth, a State or Territory (eg. under section 208 of the LEIC Act).

New subsection 96AE(3) sets out the limitations on the disclosure of hearing material. The ability to disclose hearing material to a prosecutor under subsection 96AB(1) is subject to any direction under subsection 90(1).

New subsection 96AE(4) clarifies that a person or body may disclose hearing material under subsection 96AE(1), or hearing material or derivative material under subsection 96AE(2), at

⁷ See *Bartlett v R* (2014) 287 FLR 402.

any time. It does not matter when the relevant hearing occurred nor when the disclosure is to be made.

New subsection 96AE(5) is a severability clause. It allows section 96AE and the LEIC Act to be read as if either or both of paragraphs 96AE(4)(b) and (c) had not been enacted, in the event that any provision is found to be beyond power.

New section 96AF – Other matters about prosecutors and witnesses

New section 96AF sets out a range of matters about the uses to which hearing material and derivative material may be put.

New subsection 96AF(1) allows a prosecutor of a witness who is lawfully in possession of hearing material or derivative material to be able to use that material for any lawful purpose. While subsection 96AF(1) specifically states that a prosecutor may use hearing material or derivative material in making a decision about whether to prosecute the witness and in prosecuting the witness, this does not limit the purposes for which the prosecutor may use that material. A prosecutor's use of hearing material will always be subject to the terms of the relevant direction under subsection 90(1) and the admissibility of such material under subsection 96(4).

New subsection 96AF(2) clarifies that hearing material and derivative material that a prosecutor of the witness lawfully possesses can be used in criminal proceedings against the witness. This provision is intended only to allow hearing and derivative material to be tendered as evidence, subject to other sections in the LEIC Act that may make it inadmissible (eg. subsection 96(4)). Whether it is ultimately admitted into evidence will be a matter for the court, to be decided according to the applicable laws of evidence. This is explicitly set out in the note following the subsection.

New subsection 96AF(3) clarifies that subsections 96AF(1) and (2) only apply to the use of derivative material by, and the disclosure of that material to, the prosecutor of the witness. Nothing in those subsections limits the circumstances in which derivative material can be provided to an individual person who is not prosecuting the witness. This includes investigators of the witness (including for his or her involvement in a related offence), as well as the prosecutors of other people (including for offences related to those with which the witness is charged) and persons prosecuting the witness for unrelated offences.

New subsection 96AF(4) clarifies that new section 96AF operates subject to other laws of the Commonwealth, a State or Territory which may affect the way in which hearing or derivative material can be used in a trial.

New section 96AG – Proceeds of crime authorities and hearings

New section 96AG authorises the disclosure of hearing material and derivative material to a proceeds of crime authority at any time, and sets out the circumstances in which that material is admissible in confiscation proceedings against the witness.

New subsection 96AG(1) clarifies that a person or body may disclose hearing material or derivative material to a proceeds of crime authority at any time. It does not matter when the relevant hearing occurred or when the disclosure is to be made.

New subsection 96AG(2) clarifies that the ability of a person or body to disclose hearing material or derivative material to a proceeds of crime authority under subsection 96AG(1) is subject to any direction under subsection 90(1).

New subsection 96AG(3) clarifies that hearing material and derivative material that a proceeds of crime authority lawfully possesses can be used in evidence in confiscation proceedings against the witness. This provision is intended only to allow hearing material and derivative material to be tendered as evidence, subject to other sections in the LEIC Act that may make it inadmissible (eg. subsection 96(4)). Whether it is ultimately admitted into evidence will be a matter for the court, to be decided according to the applicable laws of evidence. This is explicitly set out in a note following the subsection, and is reinforced by new subsection 96AG(4).

New subsection 96AG(4) makes explicit that nothing in new subsections 96AG(3), 80(4A) or 96(4A) limits a court's power to make all orders necessary to ensure the administration of justice in the case. This provision makes it clear that these amendments are not to be regarded as inhibiting a court's ability to manage its own procedures and to make orders to prevent prejudice to the administration of justice, for example, by acting to prevent an abuse of process or contempt of court.

New subsection 96AG(5) is a severability clause. It allows section 96AG and the LEIC Act to be read as if either or both of paragraphs 96AG(1)(b) and (c) had not been enacted, in the event that either provision is found to be beyond power.

Item 30 – At the end of paragraph 96A(1)

This item is consequent upon item 12. This item will provide that a person is in contempt of ACLEI if he or she refuses or fails to comply with the Integrity Commissioner's request to produce a document or thing under subsection 83(5A). This item is necessary to ensure that the Integrity Commissioner's power under subsection 83(5A) is backed by appropriate sanctions. Failure to comply with such a request may also fall within paragraph 96A(1)(f) on the grounds that it may obstruct or hinder the Integrity Commissioner in the performance of his or her functions.

Item 31 – Paragraph 96A(1)(f)

This item is consequent upon item 23, which changes the terminology of the obstructing or hindering offence in section 94.

Item 32 – Paragraph 96A(1)(g)

This item is consequent upon item 23, which changes the terminology of the obstructing or hindering offence in section 94.

Item 33 – Subsection 102(1)

This item is consequential on item 12. This item will extend the application of subsection 102(1), which allows the Integrity Commissioner to retain documents or things produced to him under a summons, to documents or things produced pursuant to a direction under new subsection 83(5A).

Item 34 – Subsection 207(1) (penalty)

This item updates the penalty for an offence against subsection 207(1), which relates to an unauthorised record or disclosure of official information by an ACLEI staff member.

The offence in subsection 207(1) will now be punishable by 2 years imprisonment, a fine of 120 penalty units or both. This is an increase from 12 months' imprisonment, a fine of 60 penalty units or both.

This amendment will bring the offence into line with similar provisions aimed at protecting the integrity and confidentiality of sensitive information in:

- (a) section 60A of the AFP Act, which prohibits AFP members from making unauthorised records or disclosures of official information, and
- (b) section 70 of the Crimes Act, which prohibits Commonwealth officers from making unauthorised disclosures of official information.

Both of these offences are punishable by imprisonment for two years.

The increased penalties are appropriate. They reflect the importance of ensuring the confidentiality of ACLEI information, which may relate to the activities of, and investigations into, corruption in law enforcement agencies. Disclosure of this information should attract the same consequences as disclosure of other sensitive law enforcement or Commonwealth information.

Item 35 – After paragraph 208(1)(b)

This item will insert new paragraph 208(1)(c). Where a person is divulging or communicating hearing material or derivative material under subsection 208(1), new paragraph 208(1)(c) provides that he or she must do so in accordance with any applicable obligations under a direction under subsection 90(2) and the provisions which set out the limitations or obligations on a person in relation to the use and disclosure of hearing material and derivative material in new Subdivision EAA of Division 2 of Part 9.

Item 36 – After paragraph 208(2)(b)

This item will insert new paragraph 208(2)(c). Where a person is communicating hearing material or derivative material under subsection 208(2), new paragraph 208(2)(c) provides that he or she must do so in accordance with any applicable obligations under a direction under subsection 90(2) and the provisions which set out the limitations or obligations on a person in relation to the use and disclosure of hearing material and derivative material in new Subdivision EAA of Division 2 of Part 9.

Item 37 – Subsection 208(3)

This item will repeal current subsection 208(3) and replace it with a new subsection 208(3). New subsection 208(3) differs from current subsection 208(3) in only one respect. New paragraph 208(3)(h) clarifies that, where the Integrity Commissioner is disclosing hearing material or derivative material under subsection 208(3), he or she must do so in accordance with any applicable obligations under direction under subsection 90(2) and the provisions

which set out the limitations or obligations on a person in relation to the use and disclosure of hearing material and derivative material in new Subdivision EAA of Division 2 of Part 9.

Item 38 – Application of amendments

This item sets out the application of the amendments made by Schedule 2.

Under sub-item (1), the amendments will generally apply to all uses and disclosures of hearing material and derivative material, and summonses that are issued, after the amendments are made.

In the case of uses and disclosures of hearing material and derivative material, these amendments apply irrespective of whether the relevant hearing occurred before or after the commencement of this Schedule.

Sub-item (2) provides that the amendments to section 77A, which deal with the circumstances in which the Integrity Commissioner is required to, or has a discretion, to include a notation on a notice prohibiting its disclosure, will apply to all notices issued at or after the commencement of the Schedule.

Sub-item (3) provides that the changed penalties for the offences in subsections 77B(1), (3) and (5), relating to the disclosure of information about a notice, will only apply to conduct engaged in at or after the commencement of the Schedule. Conduct engaged in before the commencement of the Schedule will continue to be dealt with by the current subsections.

Sub-item (4) provides that the amendments to section 80, which relate to the admissibility of material produced pursuant to a notice, will apply to all evidence sought to be adduced at or after the commencement of the Schedule. It does not matter whether the information, documents or things were provided under a notice issued before or after the commencement of the Schedule. This application provision is appropriate because the amendments to section 80 are mainly to clarify the existing operation of the section. They will specifically make inadmissible in confiscation proceedings information, documents or things where the relevant notice was issued after the commencement of related confiscation proceedings (or such proceedings are imminent).

However, sub-item (5) provides that sub-item (4) will not apply in relation to the amendment to make produced material admissible in prosecutions of a person for an offence against section 77B of the Act. This material will only be admissible in such a prosecution where the relevant notice was issued after the commencement of the Schedule. It is appropriate that limitations on the use immunity in section 80 are not effectively retrospective.

Sub-item (6) provides that new subsection 83(5A), which deals with the Integrity Commissioner's power to require material to be produced at a hearing, will apply to all hearings conducted at or after the commencement of the Schedule.

Sub-item (6) also provides that the increased penalty for the offence in subsection 86(5), and the new offence of obstructing or hindering the Integrity Commissioner in section 94, will apply to all hearings held at or after the commencement of the Schedule. Hearings conducted before the commencement of the Schedule will continue to be dealt with by the current provisions. It does not matter whether the summons to attend the relevant hearing was issued before or after the commencement of the Schedule.

Sub-item (7) provides that subsection 90(3) and new subsection 90(3A), which deal with the Integrity Commissioner's power to vary or revoke a direction under subsection 90(1), will apply to all decisions made at or after the commencement of the Schedule. It does not matter whether the relevant hearing occurred before or after the commencement of the Schedule.

Sub-item (8) provides that the amended offence in subsection 90(6), relating to the disclosure of hearing material in contravention of a direction by the Integrity Commissioner, will only apply to conduct engaged in at or after the commencement of the Schedule. Conduct engaged in before the commencement of the Schedule will continue to be dealt with by current subsection 90(6).

Sub-item (9) provides that the increased penalties for the offences in subsections 92(1), (3) and (5), relating to the disclosure of information about a summons, will only apply to conduct engaged in, at or after the commencement of the Schedule. Conduct engaged in before the commencement of the Schedule will continue to be dealt with by the current subsections.

Sub-item (10) provides that the amendments to section 96, which relate to the admissibility of hearing material, will apply to all evidence sought to be adduced at or after the commencement of the Schedule. It does not matter whether the information, documents or things were provided at a hearing that occurred before or after the commencement of the Schedule. This application provision is appropriate because the amendments to section 96 are mainly to clarify the existing operation of the section. They will specifically make inadmissible in confiscation proceedings information, documents or things from the witness's post-confiscation application hearing.

However, sub-item (10) provides that sub-item (11) will not apply in relation to the amendment to make hearing material admissible in prosecutions of a person for an offence against section 94 of the Act or in contempt proceedings under section 96A. This material will only be admissible in such a prosecution or in such proceedings where the relevant hearing occurred after the commencement of the Schedule. It is appropriate that limitations on the use immunity in section 96 are not effectively retrospective.

Sub-item (12) provides that the increased penalty for the offence in subsection 207(1), relating to confidentiality requirements for ACLEI staff, will apply to all records, communications or disclosures made at or after the commencement of the Schedule. Conduct engaged in before the commencement of the Schedule will continue to be dealt with by the current subsection.

Item 36 – Transitional—existing directions, summonses and notices

This item is consequent on the repeal and replacement of current subsections 83(1) and 90(1). This item provides that all directions, summonses and notices issued under these provisions continue in force as made.