



**A report on the Commonwealth
Ombudsman's activities in
monitoring controlled operations**

**CONDUCTED BY THE AUSTRALIAN CRIME COMMISSION
AND THE AUSTRALIAN FEDERAL POLICE**

Report by the Commonwealth Ombudsman
under Part 1AB Division 2A of the *Crimes Act 1914*

2005–06

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INTRODUCTION

Part 1AB of the *Crimes Act 1914* (the Act) prescribes the process for applying for, granting, and ending a controlled operation certificate. Where a controlled operation is authorised by such a certificate, Australian law enforcement officers (ALEOs) and certain other persons are exempt from any criminal liability arising in the course of the operation and are indemnified from civil liability where certain conditions are met. Under s 15UB of the Act, I am required to inspect the controlled operations records of the Australian Federal Police (AFP) and the Australian Crime Commission (ACC) at least once every 12 months to ascertain their compliance with Part 1AB of the Act.

Under s 15UC of the Act, I am required to prepare an annual report of my work and activities under Part 1AB of the Act and to give copies of the report to the President of the Senate and the Speaker of the House of Representatives for presentation to the Senate and House of Representatives respectively. This report covers the period 1 August 2005 to 31 July 2006 (the reporting period).

This report is divided into three main parts:

- an overview of the activities of my office and the methodology used to assess compliance by law enforcement agencies with Part 1AB of the Act, as well as the methodology used to assess the adequacy and comprehensiveness of the reports provided to Parliament by those agencies through the Minister
- an assessment of compliance by law enforcement agencies with the requirements of Part 1AB of the Act and of the adequacy and comprehensiveness of the reports provided to Parliament by those law enforcement agencies through the Minister
- a list of the recommendations made in my reports during the inspection period and the agency responses to those recommendations.

In the past year both the AFP and the ACC have continued to work towards enhancing their level of compliance with the Act. Both agencies are in the process of reviewing their practices and procedures. I believe that the issues brought to the attention of the agencies by my office have assisted them in identifying areas where the management of controlled operations can improve. I would like to take this opportunity to thank both agencies for their cooperation during the inspections conducted during the course of 2005–2006.

INSPECTIONS OF CONTROLLED OPERATIONS RECORDS

The Act requires my office to inspect the records of the AFP and the ACC at least once every 12 months. Essentially, my task is to ascertain whether the agencies have complied with the requirements specified in Part 1AB of the Act relating to the authorisation, conduct and reporting of controlled operations.

As a matter of policy, I generally refrain from inspecting records relating to controlled operation certificates that are current. I therefore limited my inspection to records associated with:

- (a) applications for controlled operation certificates made prior to, or within, the inspection period that are declined within that inspection period
- (b) controlled operation certificates issued within the inspection period where the controlled operation has ended in the inspection period
- (c) controlled operation certificates issued prior to the inspection period where the controlled operation has ended within the inspection period.

I refer to these records as 'eligible records'.

It is my policy to conduct two inspections of each agency's records per calendar year. During this reporting period, the first inspection of each agency covered eligible records for the period 1 August 2005 to 31 January 2006. The second inspection covered eligible records for the period 1 February to 31 July 2006. Inspections of the ACC's records occurred at the ACC's Sydney office in February and September 2006. Inspections of the AFP's records occurred at AFP Headquarters in Canberra in March and August 2006.

A separate inspection of the records held by the AFP was conducted in April 2006 to check the comprehensiveness and adequacy of the AFP's annual report.

During the inspection period, the AFP had 18 eligible records and the ACC had 12 eligible records, all of which were inspected.

Table 1: Number of records inspected

AGENCY	FIRST INSPECTION	SECOND INSPECTION
Australian Crime Commission	7	5
Australian Federal Police	9	9

Inspection methodology

The inspection considers two elements of controlled operations:

- (a) the agencies' compliance with Part 1AB of the Act
- (b) the comprehensiveness and adequacy of reports.

Compliance with Part 1AB of the Act

The inspection involves checking that:

- the application for a controlled operation certificate was made by an ALEO to an authorising officer of the relevant agency (s 15J)
- the form and content of the application for a certificate met the requirements of s 15K
- any urgent applications were made in appropriate circumstances, accompanied by sufficient information to enable an agency authorising officer to make a decision, and met the requirements of s 15L
- certificates were issued on appropriate grounds (s 15M)
- the form and content of the certificate met the requirements of s 15N
- any applications to vary certificates were made by an ALEO to an authorising officer, the variation was appropriate and the documentation met the requirements of s 15NA
- the surrender of any certificate met the requirements of s 15O
- the termination of any certificate was carried out where appropriate and notice was given as required by s 15OA
- a certificate did not extend beyond three months from the date of issue unless a nominated member of the Administrative Appeals Tribunal (AAT) had reviewed the certificate and decided that it should be in force for six months, and accurate and comprehensive information had been provided to the AAT member (s 15OB)
- a certificate did not remain in force beyond the period prescribed by s 15P
- the Chief Executive Officer (CEO) of the Australian Customs Service (the ACS) was notified where appropriate, and the notification met the requirements of s 15Q.

The inspection also reviews whether the agencies are implementing best practice in their processes and procedures.

Comprehensiveness and adequacy of reports

The inspection of the compliance of **quarterly reports** with the Act is conducted by:

- (a) checking that quarterly reports are submitted within the time frame specified in s 15R
- (b) checking that quarterly reports contain the information required by ss 15R and 15S
- (c) comparing the information contained in agency files (particularly the report on the conduct of a controlled operation) against the information contained in the quarterly report to ensure that the information is accurate and comprehensive.¹

The inspection of the comprehensiveness and adequacy of the **annual report** is conducted by:

- (a) checking that the annual report was submitted to Parliament within the time frame prescribed by s 15T
- (b) checking that the annual report includes the information required by s 15T(2) and excludes information as required by s 15T(3) and (4)
- (c) comparing the information contained in agency files and quarterly reports against the information contained in the agency's annual reports.

INSPECTION RESULTS

The inspections noted both the ACC and AFP were generally compliant with the Act.

However, a number of issues were identified in the inspections where strict compliance with the Act had not been achieved. These issues resulted in my making recommendations to each agency aimed at ensuring future compliance with the Act. These recommendations are set out in Annexure A to this report.

¹ At the completion of a controlled operation, the ALEO to whom the certificate is issued prepares a 'report on the conduct of a controlled operation', which captures the information required by ss 15R and 15S of the Act. This report is a useful information source for assessing the adequacy and comprehensiveness of the AFP's quarterly reports prepared under ss 15R and 15S of the Act, although there is no requirement under the Act for them to be prepared. They are also a key measure of the extent to which the operation was conducted as described in the application and approved in the certificate.

Australian Federal Police

Two reports were provided to the AFP based on the inspections carried out in the inspection period.

The AFP was assessed in both reports as:

- (a) generally complying with the requirements of Part 1AB of the Act
- (b) providing comprehensive and adequate information in the quarterly and annual reports.

The records held by the AFP Operations Performance Monitoring and Analysis (OPMA) team provided a detailed and comprehensive record of controlled operations conducted under Part 1AB of the Act. I note also that the quality assurance role played by OPMA was a critical factor in enabling the AFP to achieve a satisfactory level of compliance with the requirements of the Act.

The impact of the AFP's quality assurance measures referred to in my last report has been visible in the inspections in 2006 and the AFP is in the process of further refining its administrative practices to improve compliance with the Act. However, there is a need for the AFP to ensure that:

- section 15M(f) – which deals with the operation not endangering the health or safety of people and not resulting in damage to property – is fully addressed in all applications
- notification is given to the CEO of the ACS under s 15Q of the Act when required
- each certificate states, to the extent known and if relevant, 'the foreign countries through which any such illicit goods have passed, or are likely to pass, in the course of the operation' on all relevant certificates (s 15N(2)(c)(iii)).

I commend the AFP on its openness to change and willingness to develop new administrative procedures to further improve compliance and achieve administrative best practice.

Australian Crime Commission

Two inspections were carried out during the inspection period. The ACC was assessed following both inspections as:

- (a) generally complying with the requirements of Part 1AB of the Act
- (b) providing comprehensive and adequate information in quarterly and annual reports.

The inspection found that the ACC's applications and certificates were of a generally high standard, and that the oversight provided by ACC lawyers was an important factor in enabling the ACC to meet the requirements of the Act.

In most instances, inconsistencies identified in controlled operations documentation were of a minor administrative nature and did not affect the validity of the certificates or compliance with the Act. I note that the ACC has undertaken positive developments in its administration to improve its compliance with the Act.

The main issues identified by my office over the year were the need to ensure that:

- section 15M – the grounds on which an authorising officer may issue a certificate authorising a controlled operation – is fully addressed in all applications
- notification is given to the CEO of the ACS under s 15Q of the Act when required
- the procedures for the making of urgent applications are improved.

Prof. John McMillan
Commonwealth Ombudsman

ANNEX A—RECOMMENDATIONS AND AGENCY RESPONSES

The recommendations I made in 2005–2006 aimed at improving compliance with the Act, and the agency's responses to those recommendations, are set out below.

Australian Federal Police—First Inspection

Recommendation 1

The AFP should ensure that, in all cases where an applicant for a certificate believes that there is a possibility that illicit goods may be dealt with by the ACS, a notification is sent to the CEO of the ACS within five working days of the certificate being issued.

AFP Response: The AFP agrees with this recommendation. To ensure continued compliance with this provision, the Operations Performance Monitoring and Analysis Team will provide written advice to applicants of their obligations under this provision wherever a controlled operation is authorised in respect of illicit goods. In cases involving illicit goods where no notice is issued, the applicant will be required to keep a written record of his or her reasons, and this record will be available for review by the Ombudsman during inspections.

Recommendation 2

The AFP should intensify efforts to ensure that all applications adequately address the requirements of s 15M(f) by setting out the reasons why an operation will not involve the risks referred to in that provision.

AFP Response: The AFP agrees with this recommendation and will undertake a further revision of its quality assurance processes to ensure that the requirements of this section are met to the fullest extent in future controlled operations.

The AFP respectfully does not agree with the Ombudsman's comment that none of the applications falling within the inspection provided sufficient information to enable authorising officers to be satisfied as to the requirements of s 15M(f), with a number of applications addressing initiatives such as monitoring of activities by physical and electronic means, acknowledgement that conduct will be in accordance with the listed AFP National Guidelines, a statement as to the estimated risk level of the operation, and proposed action if risks were to escalate.

The AFP considers that generally, the information in the applications submitted to authorising officers within the inspection period as a whole provided sufficient information to establish that the risks referred to in the provision would not arise or that if there was any possibility of the risks arising, that there would be

appropriate strategies in place to address those risks. The AFP notes that, due to the inspection timetable established in the *Crimes Act 1914*, some of the certificates inspected were issued more than 12 months ago, with seven of the eight certificates issued prior to receipt of the Ombudsman's last inspection report. It is anticipated that continued improvement will be seen in subsequent inspections.

Recommendation 3

The AFP should detail in a certificate the route by which illicit goods have passed or are likely to pass in the course of an operation or explain in the certificate why the information is not included.

AFP Response: The AFP agrees with this recommendation. The AFP notes the Ombudsman's acknowledgement that there is an issue as to when a controlled operation commences which influences the interpretation of the requirement established by s 15N(2)(c)(iii). The AFP does not believe that this provision requires a certificate to state the route through which the illicit goods travelled prior to the commencement of the controlled operation, although the AFP considers it might be appropriate to include this information in the application where known and if relevant.

Nevertheless, the AFP will give further consideration to including such information in the certificate as well as the application.

Australian Federal Police—Second Inspection

No recommendations were made.

Australian Crime Commission—First Inspection

Recommendation 1

The ACC should again review its procedures to ensure that its staff have adequate guidance in applying s 15Q, including an awareness that s 15Q(1) requires an assessment of possibility, not probability; that a positive assessment of possibility can be made despite not knowing the place and time at which the goods may be dealt with by the ACS; and that maintaining informal channels of communication is not an acceptable substitute for a formal process of notification if this is required by Parliament.

ACC Response: The ACC has previously advised that the ACC's procedures were amended to ensure that staff provide an explanation for the absence of a s 15Q(2) notice where the initial circumstances suggested that such a notice would be appropriate. The ACC advises that in some cases a controlled

operation may change direction and no longer involve activities that require notification to be provided to the CEO of the ACS.

In regard to this inspection the ACC has advised that notification is only made when the ACC has a reasonable belief that goods will pass through the ACS. This, in some cases, entails letting the operation proceed to establish whether the illicit goods in question will pass through the ACS. The ACC also advised that notifications are not made at an earlier stage due to the fact that it may interfere with operational requirements. However, informal lines of communication are kept open with the ACS through which such matters are discussed.

In regard to the case referred to above, the ACC stated that at the working level the ACS was well familiar with events unfolding, but the required precondition for the formal s 15Q notification did not take place. The report on conduct of the operation refers to unsuccessful contact with the target during the period of the certificate and noted that notification under s 15Q was '... not required. The ACS are a part of a joint agency agreement in the operation, but the applicant did not have the requisite belief in terms of s 15Q(1)(b) of the Act (belief that illicit goods involved in the operation may be dealt with by the ACS) ...'.

Recommendation 2

The ACC should intensify efforts to ensure that all applications adequately address the requirements of s 15M(f) by setting out the reasons why an operation will not involve the risks referred to in s 15M(f).

ACC Response: The ACC has addressed this issue by re-stating the requirements in the Act in recent draft revisions of the ACC Policy and Procedures Manual, and has drawn the issue to the attention of investigative staff through forums such as meetings and induction sessions. The ACC, however, suggests that this is not an issue going to non-compliance.

The ACC advised that authorising officers are experienced law enforcement officers who would be aware that, in the conduct of controlled operational activity, certain arrangements are made to manage the potential risks to staff, targets and members of the public. The view of the ACC is that a statement to the effect that such arrangements will be made meets the requirements, at least at the minimum level, for compliance. The ACC acknowledges, however, that provision of more detailed information would increase the transparency of these processes and facilitate inspection by the Ombudsman.

Australian Crime Commission—Second Inspection

Recommendation 1

That the ACC clarify its guidelines for the making of an urgent application and ensure that any staff making an urgent application for a controlled operation have access to appropriate advice and support.

ACC Response: The internal working group will oversight ongoing enhanced awareness training and the preparation of a checklist to address the specific requirements of urgent applications.

Recommendation 2

That the ACC ensure that applications and certificates acknowledge and detail the involvement of all persons who are not law enforcement officers in a controlled operation.

ACC Response: The ACC takes the view that the conduct of covert human intelligence sources (CHIS), known in other agencies as informants, does not fall within the terms of s 15I(2) and therefore such persons are not permitted to participate in, or be involved in the controlled operation under Part 1AB, given the intention flowing from the definition of controlled operation in s 15H to manage conduct of law enforcement officers and specified persons—which excludes informants. The ACC further takes the view that ‘since they are not permitted to be involved in the controlled operation, there is no requirement to identify such persons in accordance with s 15N(2)(cb) and (cc)’.

Nevertheless, it is the practice of the ACC to issue a ‘common law instruction’ in respect of persons the ACC considers are not permitted to be involved in the controlled operation. This instruction is issued in parallel to the controlled operation certificate and is signed by either of the two delegates of the CEO that are also authorised to approve Part 1AB applications.

The ACC’s practice is that, towards transparency and to facilitate inspection by Ombudsman staff, where an application for a certificate under Part 1AB is made, and there is a parallel application for a common law instruction, the Part 1AB application and the report to the Minister should mention the parallel process.

Each of the reports to the Minister under s 15R should mention the activities of the relevant CHIS and the standard application for a controlled operation certificate should note that a common law instruction has been or will be issued. Whilst these reports and the application documents could have more clearly and consistently emphasised the distinction between the conduct regarded as falling within the Part 1AB controlled operation on the one hand, and the parallel activity of the CHIS under the common law instruction on the other, this

does not detract from the ACC's interpretation and intention to develop appropriate accountable investigative practices in the current absence of legislative coverage. Additional training and quality control will be undertaken to clarify the distinction.

Recommendation 3

That the ACC review the training given to officers responsible for preparing controlled operation applications and provide supplementary training to those officers and regions which appear to have ongoing difficulties in understanding the requirements of the Act in reference to s 15HB and generally.

ACC Response: Enhanced instructions had previously been included in ACC policies and procedures requiring applicants to address this issue. The focus of the internal working group on the quality of the applications and the development of the application checklists should further enhance consistency in relation to this issue.

Note: The two issues that were the subject of recommendations in the first inspection for 2005–2006 remained matters of concern in the second inspection for 2005–2006. However the ACC would not have had time to implement any of the recommendations from the first inspection and I did not therefore reiterate the recommendations. In its response to the second report the ACC commented that these matters had been addressed in revisions to the policy and procedures manual and informed me that further awareness training was underway. The ACC advised that an internal working group would focus on the quality of applications and the development of application checklists with the aim of further enhancing consistency in relation to the requirements of s 15M(f) and s 15Q.