



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

conducted by the
Australian Crime Commission
Australian Federal Police
Australian Commission for
Law Enforcement Integrity

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

2008–09

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INTRODUCTION

Part 1AB of the *Crimes Act 1914* (the Act) prescribes the process of applying for, granting, and ending a controlled operation certificate. Where a controlled operation is authorised by such a certificate, law enforcement officers (LEOs) and certain other people are exempt from criminal liability arising in the course of such an operation, and are indemnified from civil liability where certain conditions are met.

Under s 15UB of the Act, the Ombudsman is required to inspect the controlled operations records of the Australian Federal Police (AFP), the Australian Crime Commission (ACC) and the Australian Commission for Law Enforcement Integrity (ACLEI) at least once every 12 months to examine their compliance with Part 1AB of the Act.

Under s 15UC(1) the Ombudsman must, as soon as practicable after 30 June each year, prepare a report of the Ombudsman's work and activities monitoring controlled operations during the preceding 12 months. Copies of the report are then provided to the President of the Senate and the Speaker of the House of Representatives for presentation to the Senate and the House of Representatives respectively.

Section 15UC(2) of the Act requires that the Ombudsman's annual report to Parliament also include comments on the comprehensiveness and adequacy of the reports provided to Parliament by each law enforcement agency.

Content of this report

This report covers the office's activities in monitoring controlled operations during the period 1 July 2008 to 30 June 2009 and includes:

- an overview of the activities of this office and the methodology used to assess law enforcement agencies' compliance with Part 1AB of the Act, including the comprehensiveness and adequacy of the reports provided to Parliament by those agencies through the Minister
- an assessment of the levels of compliance demonstrated by the AFP and ACC with the requirements of Part 1AB of the Act (ACLEI records were not inspected as no controlled operations were undertaken)

- comments on the comprehensiveness and adequacy of the reports provided to the Minister and to Parliament by those law enforcement agencies
- the recommendations made by the Ombudsman during the inspection period.

Overview of agency compliance

Overall, the AFP and the ACC demonstrated a high level of compliance with Part 1AB of the Act during the period July 2008 to June 2009. These agencies appear to make use of their powers under Part 1AB appropriately and with due restraint. However, there is a tendency for agencies to satisfy the technical requirements of each provision without fully considering the purpose of each provision in the accountability framework and satisfying that broader requirement. This has led to a number of observations and recommendations by this office for agencies to increase the level of detail or provide additional information in records and reports.

ACLEI did not undertake any controlled operations during the period July 2008 to June 2009. Consequently, there was no inspection of its records.

During the reporting period, Ombudsman staff undertook to gain a better understanding of agency mechanisms for managing information relating to controlled operations, with a view to more fully testing the veracity and accuracy of information provided in quarterly and annual reports. I would like to note that my powers are limited under current legislation, and I rely to a large extent on the cooperation of the agencies in such endeavours. Both the AFP and the ACC were very helpful in this regard. Even so, the effort was not entirely successful.

With respect to the AFP, a report on the controlled operation is compiled by an appropriate investigator on completion of the operation, which is then used for management purposes, but which also provides valuable insight for my staff and some level of assurance that information reported is correct. The assurance comes from the information being attributable to an individual who holds out to his or her superiors its veracity and accuracy.

The ACC, like the AFP, holds information relating to an operation on a number of systems, but does not appear to consolidate this information in the same way as the AFP. Consequently, we were not always able to test that the information reported was correct. To the ACC's credit, it has in place its own internal audit regime, and material generated by this process has proved helpful to my inspectors where it was used. I have discussed this issue in more detail later in the report.

INSPECTIONS OF CONTROLLED OPERATIONS RECORDS

The Ombudsman is required to report to both houses of Parliament on the work and activities undertaken by this office during the period 1 July to 30 June each year. The primary purpose of this inspection function is to ascertain whether agencies have complied with the requirements of Part 1AB of the Act relating to the authorisation, conduct and reporting of controlled operations.

While only one inspection of each law enforcement agency is required by the Act within this period, it is the practice of this office to conduct two inspections each financial year. This ensures more contemporaneous identification and reporting of issues.

The first inspection is conducted after receipt of the quarterly report delivered mid-August, and examines eligible records from the inspection period of February to July. The second inspection is conducted after receipt of the quarterly report delivered mid-February and examines eligible records from the inspection period of August to January.

We refer to the following as eligible records:

- an application for a controlled operation certificate made prior to or within the inspection period that is declined or withdrawn within the inspection period, and records associated with that application
- a controlled operation certificate issued within the inspection period where the controlled operation has ended within the inspection period, and records associated with that certificate
- a controlled operation certificate issued prior to the inspection period where the controlled operation ended within the inspection period, and records associated with that certificate.

Inspections of the eligible records held by the AFP were conducted on 1 and 2 September 2008, and from 18 to 20 May 2009. The records of the ACC were inspected on 30 September and 1 October 2008, and from 17 to 19 June 2009.

There were a total of 62 eligible records held by the AFP and the ACC, as represented in the following table. Ombudsman staff inspected 100% of these records.

Table 1: Number of records inspected

AGENCY	FIRST INSPECTION PERIOD 1 February 2008 to 31 July 2008	SECOND INSPECTION PERIOD 1 August 2008 to 31 January 2009
ACC	8	9
AFP	20	25
ACLEI	N/A	N/A

Inspection methodology

When inspecting eligible records, this office considers two aspects of compliance:

- (a) compliance with Part 1AB of the Act
- (b) comprehensiveness and adequacy of reports to the Minister and Parliament.

Such an examination involves the identification of both compliance and best practice issues. Generally speaking, compliance issues are those inspection findings that indicate the requirements of the Act have not been followed in part or in full. Best practice issues are raised when the Act has been complied with, however the records indicate that practices and procedures are not sufficiently robust to mitigate the risk of future non-compliance. A best practice issue may also relate to improving recordkeeping to provide evidence of compliance with the Act.

Compliance—Part 1AB of the Act

The inspections involved checking that:

- the application for a controlled operation certificate was made by a LEO to an appropriate authorising officer, meeting the requirements of s 15J
- the form and content of the application for a certificate met the requirements of s 15K
- all urgent applications were made in appropriate circumstances, were accompanied by sufficient information to enable an authorising officer to make a decision and met the requirements of s 15L
- certificates were issued on appropriate grounds under s 15M
- the form and content of the certificates met the requirements of s 15N

- any applications to vary certificates were made by a LEO 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
- certificates 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 as required by s 15OB
- no certificate remained in force beyond the period prescribed by s 15P
- the Chief Executive Officer (CEO) of the Australian Customs and Border Protection Service (Customs) was notified where appropriate, and the notification met the requirements of s 15Q.

Compliance—comprehensiveness and adequacy of reports

The inspection assesses the comprehensiveness and adequacy of reports provided to Parliament. Under s 15T of the Act, the Minister is required to provide Parliament with an annual report about controlled operations. The annual report must include the information under s 15R of the Act, which requires each agency to provide quarterly reports to the Minister on controlled operations, and provide a copy of the quarterly report to the Ombudsman (s 15UA(1)). As such, an examination of the comprehensiveness and adequacy of annual reports presented to Parliament indirectly examines the comprehensiveness and adequacy of quarterly reports under s 15R of the Act, although these quarterly reports are not provided to Parliament.

The assessment of the comprehensiveness and adequacy of reports involved:

- checking that quarterly reports were submitted to this office within the time frame specified in s 15UA
- examining the quarterly reports to determine whether they contained the information required by ss 15R and 15S

- examining the annual report to determine whether it contained the information required by s 15T(2) and excluded only that information allowed by ss 15T(3)–(4)
- comparing the information contained within the file, quarterly report and annual report entries to ensure that the information was accurate and comprehensive
- considering the information provided to the Minister regarding the reasons that the AFP and the ACC sought to have information excluded from the annual report under s 15T(4).

AUSTRALIAN FEDERAL POLICE

Based on the results of the inspection conducted on 1 and 2 September 2008, the AFP was assessed as:

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

Based on the results of the inspection conducted from 18 to 20 May 2009, the AFP was assessed as:

- (a) generally compliant with the requirements of Part 1AB of the Act
- (b) generally providing comprehensive and adequate information in quarterly reports to the Minister
- (c) generally providing comprehensive and adequate information in the 2007–08 annual report.

Four recommendations were made to the AFP. The AFP generally agreed with these recommendations and undertook to review the relevant policies, procedures and training programs to improve compliance.

AFP improvements

Overall the records held by the AFP were detailed and comprehensive. The AFP continues to refine its processes, notably redeveloping its templates in consultation with this office to better meet the requirements of Part 1AB of the Act and to implement some of the practices recommended by this office.

The AFP have also made improvements in:

- keeping more detailed records of non-LEO (or civilian) involvement in operations
- reporting on the conduct of non-LEOs (or civilians) involved in operations in quarterly reports.

AFP compliance issues

The AFP was assessed as generally compliant with Part 1AB of the Act in the two inspections. However, a number of issues were identified for AFP attention. Those issues considered to be of most significance are discussed below:

- The AFP should ensure that certificates issued in relation to urgent applications specify both the time and date the certificate was given in accordance with s 15N(2)(e), and the time and date the applicant was informed of the decision to give the certificate in accordance with s 15N(3). The distinction is important in order to establish the point in time at which the applicant has been authorised to participate in a controlled operation and provided with the protection of the certificate, which is necessarily prior to the certificate being drawn up.
- Where the applicant for a certificate authorising a controlled operation believes that illicit goods involved in the conduct of the operation may be dealt with by Customs, the AFP should ensure that a notice which satisfies s 15Q(2) of the Act is provided to the CEO of Customs or another person nominated by the CEO. Although the notice was provided in most cases, there were several exceptions.
- The AFP should ensure that each controlled operation that is ongoing or was finalised in the quarter is reported in the appropriate quarterly report to the Minister and our office, pursuant to s 15R(1) of the Act. One particular controlled operation was initially reported in February 2008 as an ongoing operation, and in such circumstances few details are required. However, no entry was made in the May 2008 quarterly report despite completion of the operation, and the full details were not reported until November 2008. The requirements of the Act relating to the reporting of operations ensure transparency and accountability.
- The AFP should ensure that illicit goods dealt with in controlled operations are accurately reported in terms of their quantities, and in particular that care is taken to record whether the weight of

narcotic goods is gross or net. This office also noted quarterly report entries that only provided approximate weights of narcotic goods, despite the AFP having custody of the goods at the end of those operations. The accurate recording of illicit and narcotic goods dealt with in controlled operations is an essential accountability mechanism. These problems arose in five records inspected.

- The AFP should ensure that certificates authorising controlled operations state, with some specificity, the nature of activities covered by the certificate, as required by s 15N(2)(ca). The intent of s 15N(2)(ca) would seem to be the identification of those actions the participants are authorised to take. Two of the certificates inspected stated that authority was given to conduct a controlled operation involving money laundering without any reference to activities. Such statements only identify, very broadly, the nature of the crime that is to be investigated, and place no bounds on participants. Given the extraordinary authority a controlled operations certificate provides, the nature of activities permitted under a certificate needs to be well considered and set out clearly on the face of the certificate.
- In one instance, the AFP did not include all of the details in the annual report required by s 15S(2) or provide an explanation for excluding that information which complies with ss 15T(3) or (4). When reporting to the Minister, the AFP must not provide any information about a person that is not already in the public domain. The missing information related to persons targeted by the operation and persons covered by the certificate which had not been made public. Therefore, the AFP was correct to not release this information, but should have provided an explanation for excluding it.

Recommendations to the AFP

The following recommendations were made based on the results of the inspection of AFP records conducted on 1 and 2 September 2008.

Recommendation 1

The Australian Federal Police should ensure that the certificates issued in relation to urgent applications specify both the time and date the certificate was given and the time and date the applicant was informed of the decision to give the certificate.

Recommendation 2

The Australian Federal Police should ensure that an appropriate quarterly report is provided to the Minister within two weeks of the end of each quarter, pursuant to section 15R(1).

The following recommendations were made based on the results of the inspection of AFP records conducted from 18 to 20 May 2009.

Recommendation 3

The Australian Federal Police should ensure that the certificates issued in relation to urgent applications specify both the time and date the certificate was given and the time and date the applicant was informed of the decision to give the certificate.

Recommendation 4

The Australian Federal Police should ensure that each annual report entry includes sufficient detail to satisfy section 15S(2) or provide an explanation for excluding that information which complies with section 15T(3) or (4).

AUSTRALIAN CRIME COMMISSION

Based on the results of the inspection conducted on 30 September and 1 October 2008, the ACC was assessed as:

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

Based on the results of the inspection conducted from 17 to 19 June 2009, the ACC was assessed as:

- (a) compliant with the requirements of Part 1AB of the Act
- (b) generally providing comprehensive and adequate information in quarterly reports to the Minister
- (c) generally providing comprehensive and adequate information in the 2007–08 annual report.

Three recommendations were made to the ACC. The ACC generally agreed with these recommendations and undertook to review the relevant policies and procedures, as well as training programs to improve compliance.

ACC improvements

The ACC records inspected by this office reflected a continued commitment to procedural review and quality assurance. Of particular note:

- The ACC has reviewed and enhanced its internal guidelines relating to controlled operations, taking into account past recommendations made by this office.
- The ACC commenced the implementation of a program whereby applicants may only apply for controlled operations certificate if they have undergone appropriate training.
- We noted a large number of exclusions in the section of the Minister's annual report that related to controlled operations authorised by the ACC. Under s 15T(4) of the Act, the Minister may exclude information if, on advice provided by the ACC, he is of the view that the inclusion of any information in the report may endanger the safety of a person or prejudice an investigation or prosecution. We expressed interest in the ACC's procedures in relation to exclusions based on s 15T(4) of the Act, and the information provided by the ACC to the Minister. At a subsequent inspection, Ombudsman staff sighted the ACC's brief to the Minister, in which the ACC sought approval for the exclusion of certain information in the 2007–08 annual report. We noted that the grounds on which the exclusions had been based were explained in the brief.

ACC compliance issues

The ACC was assessed as compliant with Part 1AB of the Act in the two inspections. However, a number of issues were identified for ACC attention. Those issues considered to be of most significance are discussed below.

- Sections 15S(2) and (3) require quarterly reports to contain information on completed operations, including details on the handling and possession of illicit goods. In order to test the accuracy of the information recorded in the quarterly reports, as a function of testing compliance with the Act, this office needs to inspect relevant source documents. However, the ACC could not readily show a means to verify the accuracy of quarterly reports prepared by the ACC. The difficulty is not entirely surprising as operations are complex and information relating to an operation is often recorded on different systems or held separately due to the particular sensitivities involved. As we noted earlier, the ACC has in place its own internal audit regime, and material generated by this process has proved helpful on occasion. It is a matter that we are

working with the ACC to resolve to better ensure compliance with Part 1AB of the Act.

- In one instance, a certificate authorising a controlled operation was issued subject to a number of conditions which, for the most part, related to internal business practices. From the records, it appeared that some of these conditions had not been met. I appreciate that the conditions in this particular certificate were imposed for want of additional transparency and oversight. Indeed, the level of internal oversight given to operations by the ACC is, on the whole, considerable. However, as the ACC acknowledged, it would be preferable for conditions in a certificate to be limited to those of an operational nature, as failure of a participant to abide by a condition can limit the protection provided by the certificate (ss 151A and 151B of the Act).
- The authority granted by a controlled operation certificate can be ended prior to its expiry by either the surrender of the certificate by the LEO in charge of the operation or by an authorising officer terminating the certificate under s 150A. It would seem preferable, in terms of public policy, that the performance of otherwise unlawful conduct should be limited to the time required to perform the activities contemplated by the certificate. Such practice is reflected in the ACC's internal guidelines. However, two records inspected by this office indicated that the controlled conduct was completed a month prior to the expiry date of the certificates.
- One record inspected covered an operation where it was apparent that illicit goods would pass into the control of Customs. While the files indicated that the ACC provided information to Customs officers beforehand to assist it in identifying the relevant goods, the obligation to provide Customs with a formal notice under s 15Q of the Act is unqualified.
- In two instances, information contained in the ACC's annual report entries was inconsistent with that contained in the corresponding quarterly reports. Although these inconsistencies were minor and were the result of administrative oversight, it is important that the Minister's published annual report to Parliament is accurate.

Recommendations to the ACC

The following recommendations were made based on the results of the inspection of ACC records conducted between 30 September and 1 October 2008.

Recommendation 1

The Australian Crime Commission should ensure that a notice pursuant to section 15Q of the Act is issued in relation to each certificate where the applicant has reason to believe that the illicit goods involved in the conduct of the operation may be dealt with by the Australian Customs and Border Protection Service.

Recommendation 2

The Australian Crime Commission should ensure that controlled operation certificates are validly terminated or surrendered once the controlled operation component of an investigation is complete.

The following recommendation was made based on the results of the inspection of ACC records conducted between 17 and 19 June 2009.

Recommendation 3

The Australian Crime Commission should ensure that information contained in controlled operations annual report entries is consistent with those in the relevant quarterly reports.

Prof. John McMillan
Commonwealth Ombudsman