

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

Australian Commission for Law Enforcement Integrity

Australian Crime Commission

Australian Federal Police

2013–14

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

December 2014

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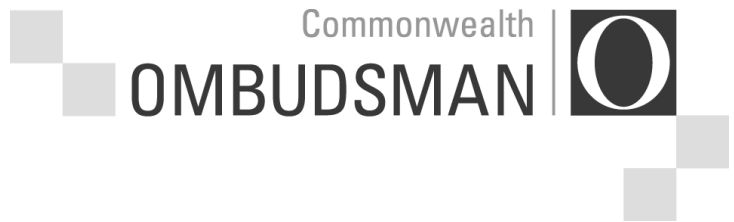
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INTRODUCTION

Part 1AB of the *Crimes Act 1914* (the Act) prescribes the process of applying for, granting, and ending an authority to conduct a controlled operation. A controlled operation is a covert operation carried out by law enforcement officers under the Act for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious offence. The operation may result in law enforcement officers engaging in conduct that would otherwise constitute an offence.

Given the extraordinary powers Part 1AB of the Act grants law enforcement agencies, under s 15HS of the Act, the Commonwealth Ombudsman is required to inspect the controlled operations records of the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Crime Commission (ACC) and the Australian Federal Police (AFP) at least once every 12 months to determine the extent of each agency's compliance with Part 1AB of the Act. The Ombudsman must also inspect the records of the ACC to determine the extent of compliance with corresponding state controlled operations laws, if it has used them.

Section 15HO of the Act requires the Ombudsman to submit a report to the Minister for Justice (the Minister) as soon as practicable after 30 June each year on inspections conducted during the preceding 12 months.

INSPECTION OBJECTIVE AND SCOPE

The primary purpose of our inspections is to ascertain whether agencies have complied with the requirements of Part 1AB of the Act, which relates to the authorisation, conduct and reporting of controlled operations. Authorities are internally issued to ACLEI, ACC and AFP investigators by authorised officers in each agency.

This report covers inspections conducted between 1 July 2013 and 30 June 2014. We inspected all 136 authorities that expired or were cancelled in 2013. For security reasons, we do not inspect records relating to authorities which are still in force. The table below provides further details.

Table 1: Dates of inspections and records considered

AGENCY	Inspection date/s	Period during which the authorities ceased to be in force	Number of records inspected
ACLEI	12 February 2014	1 July to 31 December 2013	1 out of 1
ACC	7 April 2014	1 July to 31 December 2013	7 out of 7
AFP	14 to 16 October 2013	1 January to 30 June 2013	64 out of 64
AFP	14 to 17 April 2014	1 July to 31 December 2013	64 out of 64

Inspection methodology

The following criteria were applied to assess compliance:

1. Were applications for authorities to conduct controlled operations properly made and were authorities were properly granted?

2. Were applications for variations to authorities by appropriate authorising officers properly made and decided?
3. Were applications for variations to authorities by nominated members of the Administrative Appeals Tribunal (AAT) properly made?
4. Were reported activities covered by authorities?
5. Were cancellations of authorities properly made?
6. Were reports properly made and were the required records kept by the agency.

Reporting Requirements

Section 15HO(4) of the Act requires the Ombudsman to include comments on the comprehensiveness and adequacy of the reports provided by agencies under ss 15HM and 15HN, to the Minister and Ombudsman.

Under s 15HM, agencies are required to submit six-monthly reports to the Ombudsman and Minister as soon as practicable after 30 June and 31 December each year providing certain details on controlled operations.

Under s 15HN, as soon as practicable after 30 June each year, agencies are required to submit a report to the Minister and Ombudsman setting out certain details in relation to controlled operations. Section 15HN requires that sensitive information must not be included in this report. The Minister is required to table this report in Parliament.

SUMMARY OF INSPECTION RESULTS

This report provides each agency's performance against the inspection criteria and discusses the predominant exceptions to compliance (including where we were unable to determine compliance) for each agency.

No recommendations were made as a result of these inspections. However, we made some suggestions as to how agencies can better comply with the relevant provisions of the Act. All three agencies demonstrated a strong culture of compliance and a high standard of record keeping.

The inspection of ACLEI undertaken in February 2014 examined records relating to its first controlled operation conducted under Part 1AB of the Act.

No inspections were conducted of the ACC's activities under corresponding state controlled operations laws in this period as the ACC advised that it did not use corresponding state controlled operations laws.

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

Inspection Results

Criteria	Assessment
1. Were applications for authorities properly made and authorities properly granted?	Compliant.
2. Were applications for variations to authorities properly made to and decided by appropriate authorising officers?	N/A
3. Were applications for variations to authorities properly made to nominated Administrative Appeals Tribunal members?	N/A
4. Were the reported activities covered by the authorities?	N/A
5. Were authorities properly cancelled?	Compliant.
6. Were reports properly made and the required records kept by the agency?	Compliant, except in one instance.

No recommendations were made as a result of the inspection carried out in February 2014. However, we noted one instance where ACLEI may not have complied with the Act (discussed below).

Exception noted under criterion 6

Six-monthly reports under s 15HM of the Act

Section 15HM(2)(i) requires that for each authority that was in force at any time during the period to which the report relates, agencies must provide the date the controlled operation commenced and the last day of the period of effect of the authority. Sections 15HM(2)(j) and (l) also require that for each authority varied during the period to which the report relates, agencies must provide the date of the application for a variation and the date of the variation.

ACLEI submitted its six-monthly report for 1 July to 31 December 2013 to this office on 28 February 2014, however, it did not provide all the details required under s 15HM(2)(i)(j) and (l) for two authorities that were granted and three variations that were made in this period.

After we brought this to ACLEI's attention, ACLEI provided an addendum to the six-monthly report to the Ombudsman and to the Minister providing all details required under s 15HM.

Comprehensiveness and adequacy of reports

Six-monthly reports

The finding for the six-monthly report, required under s 15HM, is discussed above.

Annual report

As ACLEI did not undertake any controlled operations under the Act in 2012-13, it was not required to submit an annual report after 30 June 2013. We will assess ACLEI's 2013-14 annual report submission during inspections conducted in 2014-15 and will report on this in the next annual report.

AUSTRALIAN CRIME COMMISSION

Inspection Results

Criteria	Assessment
1. Were applications for authorities properly made and authorities properly granted?	Compliant, except in two instances.
2. Were applications for variations to authorities properly made to and decided by appropriate authorising officers?	Compliant, except in one instance.
3. Were applications for variations to authorities properly made to nominated Administrative Appeals Tribunal members?	N/A
4. Were the reported activities covered by the authorities?	Nothing to indicate otherwise, except in three instances.
5. Were authorities properly cancelled?	Compliant.
6. Were reports properly made and the required records kept by the agency?	Compliant, except in two instances.

No recommendations were made as a result of the inspection carried out in April 2014. However we noted five instances of non-compliance and three instances where we were unable to determine compliance. Six of these instances are discussed below. The two instances not discussed were non-compliances relating to keeping the general register (s 15HQ) and keeping required documents (s 15HP) which occurred as a result of administrative errors. We also made one best practice suggestion to the ACC concerning the recording of activities conducted under authorities, so it may better demonstrate compliance with criterion 4.

Exceptions noted under criterion 1

Applications not compliant with the Act

Section 15GH(2)(b) of the Act enables an applicant who has reason to believe that the delay caused by making a formal application may affect the success of the controlled operation, to make an urgent application orally, in person or by telephone.

Section 15GH(6) states that as soon as practicable after making an urgent application that was not made in writing, the applicant must make a written record of the application and give a copy of it to the authorising officer to whom the application was made.

The ACC self-disclosed that, for one authority, it did not make a written record of the urgent application in accordance with s 15GH(6) of the Act.

Additionally, s 15GP(3)(a) of the Act provides that an application for a variation to an authority may be made by means of a written document signed by the applicant.

The ACC also self-disclosed that there was no written application for the formal variation of one authority.

Exception noted under criterion 2

Period of validity of authority

Section 15GK(1)(h) of the Act provides that a formal authority must specify the period of effect of the authority, being a period not exceeding three months.

The ACC self-disclosed that the period of effect for one authority exceeded the maximum three month period by one day.

The ACC advised that that it has implemented a process to ensure that the period of validity of an authority will not exceed three months, and that it will undertake further review of its processes in relation to this issue.

Exceptions noted under criterion 4

Conducting activities in accordance with authorities

The controlled operations regime was established to protect participants in a controlled operation from criminal responsibility. Section 15HA of the Act provides protection if the participant engages in conduct in accordance with an authority.

The ACC requires its law enforcement participants to complete a report on conduct within one month of the expiry or cancellation of an authority (report on conduct). The report on conduct identifies the controlled operation, contains information in relation to the controlled conduct engaged in during the operation, and details any illicit goods involved.

The reports on conduct provide the best available evidence to demonstrate the actions taken by the ACC under its authorities. From an examination of the information contained in the reports, nothing came to our attention to suggest that conduct engaged in by participants was not covered by an authority. However, we noted some issues with the information contained in the reports.

For two authorities involving civilian participants, there were no records to demonstrate that a law enforcement officer had directed the civilian participants to undertake such conduct. Section 15HA(2)(e) of the Act provides protection for civilian participants if they act in accordance with the instructions of a law enforcement officer.

For a separate authority, we noted records on file that indicated a person who was not listed as a participant on the authority may have engaged in controlled conduct.

In all three of these instances, we were unable to determine whether conduct undertaken was in accordance with authorities.

To ensure that all controlled conduct engaged in under an authority is linked to an authorised participant, we suggested that the ACC may wish to consider reporting all activity undertaken by each participant, including when a participant did not undertake any controlled conduct.

The ACC noted this suggestion and advised it will review what information is needed to be collected by operational areas in order to demonstrate compliance.

Comprehensiveness and adequacy of reports

Six-monthly reports

The ACC submitted its first six-monthly report in September 2013 for the period 1 January to 30 June 2013 and the second report in April 2014 for the period 1 July to 31 December 2013. Both reports provided comprehensive and accurate information about the ACC's controlled operations in 2013.

Annual report

The ACC submitted its annual report for 2012-13 in October 2013¹ which provided comprehensive and accurate information about its controlled operations. The report appeared to be consistent with the information provided by the ACC the corresponding six-monthly reports.

It also appeared that the ACC's advice to the Minister to exclude information from the annual report was made in accordance with ss 15HN(2) and (4).

Progress made since previous report

No recommendations were made and no issues requiring follow up were identified as a result of our inspections during 1 July 2012 to 30 June 2013.

¹ The AFP prepared the *Controlled Operations Annual Report 2012-13* in consultation with ACLEI and the ACC.

AUSTRALIAN FEDERAL POLICE

Inspection Results

Criteria	First Inspection	Second Inspection
1. Were applications for authorities properly made and authorities properly granted?	Compliant, with a number of exceptions.	Compliant, except in six instances.
2. Were applications for variations to authorities properly made to and decided by appropriate authorising officers?	Compliant, with a number of exceptions. Unable to determine compliance in one instance.	Compliant, except in two instances.
3. Were applications for variations to authorities properly made to nominated Administrative Appeals Tribunal members?	Compliant.	N/A
4. Were the reported activities covered by the authorities?	Nothing to indicate otherwise, except for conduct reported under two authorities.	Nothing to indicate otherwise except in two instances.
5. Were authorities properly cancelled?	Compliant.	Compliant.
6. Were reports properly made and the required records kept by the agency?	Compliant, except in one instance regarding the general register.	Compliant, except in six instances.

Although no recommendations were made as a result of either inspection, we noted a number of instances of non-compliance and two instances where we could not determine compliance. The most significant instances of non-compliance are discussed below.

Exceptions noted under criterion 1

Authority did not list participants or conduct (first AFP 2013–14 inspection)

Under ss 15GK(1)(e) and (f), an authority must state the identity of the persons authorised to engage in controlled conduct and specify the nature of the controlled conduct in which participants may engage.

The AFP self-disclosed that one authority, and the associated application, did not state any persons who were authorised to engage in controlled conduct or identify the controlled conduct that was to be engaged in, as required by ss 15GK(1)(e) and (f) of the Act. Records available on file showed that despite these omissions, conduct was undertaken by law enforcement officers.

The AFP advised that due to these omissions, it determined the authority to be defective - a position we agree with. As a consequence, the law enforcement officers appear not to have been covered by an authority when they undertook reported activities.

The AFP advised that it has integrated internal review processes to mitigate the risk of these issues occurring in the future.

Properly granting and keeping records of urgent authorities (first and second AFP 2013–14 inspections)

Under section 15GK(2)(h) of the Act, an urgent authority must specify the period of effect, being a period not exceeding seven days. Under section 15GL, the authorising officer who

granted the urgent authority must issue a written record of the urgent authority within seven days to the principal law enforcement officer.

At the first inspection, the AFP self-disclosed that an urgent authority specified a period of effect of eight days, one day longer than permitted under s 15GK(2)(h). The AFP also self-disclosed that for two authorities the authorising officer did not issue a written authority within the seven day period, as required under s 15GL.

At the second inspection, the AFP self-disclosed one urgent authority where the authorising officer did not issue a written authority within the seven day period.

In response to these findings, the AFP advised that it has reviewed its internal guidance material to ensure appropriate information is provided to its staff. The AFP further advised that it will provide practical education regarding this issue to applicants and principal law enforcement officers to avoid such instances reoccurring in the future.

Exception noted under criterion 2

Formal variation granted after expiry of authority (second AFP 2013–14 inspection)

Section 15GP of the Act enables the principal law enforcement officer for a controlled operation to apply for a variation in respect of an authority, including extending the period of effect of that authority.

The AFP self-disclosed that it applied to extend an authority one day after the authority expired.

We note that the AFP is aware that the actions taken under the authority after its expiry were not covered by a valid authority and it advised that it will enhance guidance material and training in this area to avoid such instances reoccurring in the future.

Exception noted under criterion 4

Unable to determine whether controlled conduct was engaged in prior to the granting of the authority (second AFP 2013–14 inspection)

As previously stated, s 15HA provide protection for participants in a controlled operation, if they act in accordance with an authority. For one authority that authorised civilian participants to engage in controlled conduct, it appears that law enforcement participants directed a civilian participant to undertake actions, which could be considered to be controlled conduct, prior to the authority being granted.

In response to this finding, the AFP advised that it agreed the civilian participant should have been covered prior to engaging in the actions described above.

Exception noted under criterion 6

Notification to the Chief Executive Officer of Australian Customs and Border Protection Service (second AFP 2013–14 inspection)

Under s 15J of the Act, where an applicant for an authority believes that illicit goods involved in the conduct of an operation may be dealt with by the Australian Customs and Border Protection Service (Customs), the applicant must, as soon as practicable after the authority is granted, notify Customs about the details of the controlled operation. A notification under

s 15J must be in writing and include the applicant's name, the date the authority was granted, and to the extent it is known, the time and place the goods are expected to pass into the control of Customs.

For one authority, a controlled operation was conducted by a joint taskforce which included Customs. The AFP advised that in this instance, a notification was not provided to Customs, as the applicant did not believe a notification was required because Customs was involved in the joint taskforce.

The Act does not provide any exceptions to the requirement outlined in s 15J where it is expected that illicit goods will be dealt with by Customs. Accordingly, it appears that despite being in a joint taskforce, the AFP was still required to notify Customs under s 15J.

In response to this finding, the AFP advised that it agreed that Customs should have been notified in accordance with s 15J and will ensure that staff are fully aware of this requirement for future applications.

Comprehensiveness and adequacy of reports

Six-monthly reports

The AFP submitted its first six-monthly report in August 2013 for the period 1 January to 30 June 2013 and the second report in February 2014 for the period 1 July to 31 December 2013. Apart from some minor administrative errors, both reports provided comprehensive and accurate information about the AFP's controlled operations in 2013.

Annual report

The AFP submitted its annual report for 2012-13 in October 2013, which provided comprehensive and accurate information about its controlled operations. The report appeared to be consistent with the information provided by the AFP in its six-monthly reports. However, we identified five inconsistencies between the annual report and the corresponding six-monthly report. The AFP advised that these inconsistencies were administrative errors in the six-monthly reports and the information contained in the annual report was correct.

It also appeared that the AFP's advice to the Minister to exclude information from the annual report was made in accordance with ss 15HN(2) and (4).

Progress made since previous report

No recommendations were made as a result of our inspections during 1 July 2012 to 30 June 2013. In the 2012-13 annual report, we noted eight instances where we were unable to determine whether the AFP conducted activities in accordance with authorities. During 2013-14, the AFP provided additional information in relation to two of these authorities to suggest that the conduct engaged in was authorised.

We have noted an improvement in the records kept by the AFP in relation to the conduct engaged in under an authority.

Colin Neave
Commonwealth Ombudsman

