



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

conducted by the  
Australian Crime Commission  
Australian Federal Police

2009–10

Report by the Commonwealth Ombudsman  
under Part 1AB Division 4 of the *Crimes Act 1914*

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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 controlled operations.

Where an authority to conduct a controlled operation is issued, law enforcement officers and certain other persons 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 15HS 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 determine the extent of 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.

Section 15HO requires the Ombudsman to submit a report to the Minister as soon as possible after 30 June each year on the work and activities of the proceeding 12 months. A consequence of this arrangement is that there may be some delay after 30 June each year, particularly where an inspection occurs close to this date, in order to reconcile inspection finding, discuss those findings with agencies and make recommendations.

Part 1AB of the Act was amended in February 2010. This report relates to controlled operations that concluded prior to the commencement of the new legislation. Therefore, further references to legislative provisions in this report, unless otherwise stated, are made to sections under the Part IAB prior to the February changes.

### Content of this report

This report covers the Ombudsman's work and activities in monitoring controlled operations during the period 1 July 2009 to 30 June 2010 and includes:

- an overview of the methodology used to assess law enforcement agencies' compliance with Part 1AB of the Act
- an assessment of the levels of compliance demonstrated by the AFP and the ACC with the requirements of Part 1AB of the Act

- the recommendations made by the Ombudsman to the AFP and the ACC during the inspection period.

During the reporting period, ACLEI did not undertake any controlled operations under the Act. Therefore, this office did not conduct any inspections of ACLEI records. The ACC did not use corresponding State controlled operations laws.

## **Overview of agency compliance**

Overall, the majority of controlled operations records held by the AFP and the ACC during 2009-10 demonstrated compliance with Part 1AB of the Act. Both agencies made progress towards addressing this office's previous recommendations, including:

- improved compliance in relation to the AFP's annual reporting to the Minister. All of the details required by the Act were included in the AFP's annual report and where information was excluded an explanation was provided, as required by ss 15T(3) and (4)
- improved access at inspections to documentation which verifies information contained in the ACC's quarterly reports to the Minister
- improved internal management of controlled operations by the ACC, including changes to the types of conditions placed on operations.

However, there were some areas where improvements were required. The most significant issues related to:

- the ACC exceeding the maximum permitted duration of controlled operations and not seeking external review by the Administrative Appeals Tribunal (AAT)
- inaccurate reporting of illicit goods involved in controlled operations by the AFP
- the AFP not identifying on the certificate the activities permitted or the civilian participants in the controlled operation.

## INSPECTIONS OF CONTROLLED OPERATIONS RECORDS

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.

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

We refer to the following as eligible records:

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

Inspections of the eligible records held by the AFP and the ACC were conducted on the following dates.

**Table 1: Dates and periods of inspection**

| AGENCY | FIRST INSPECTION PERIOD<br>1 February 2009 to 31 July 2009 | SECOND INSPECTION PERIOD<br>1 August 2009 to 31 January 2010 |
|--------|--|--|
| AFP    | 29 September to<br>1 October 2009                          | 22 to 24 February 2010                                       |
| ACC    | 17 and 18 November 2009                                    | 3 to 5 May 2010  |

There were a total of 68 eligible records held by the AFP and the ACC, as represented in the table below. We inspected 100% of these records.

**Table 2: Number of records inspected**

| AGENCY | FIRST INSPECTION PERIOD<br>1 February 2009 to 31 July 2009 | SECOND INSPECTION PERIOD<br>1 August 2009 to 31 January 2010 |
|--------|--|--|
| AFP    | 21   | 28   |
| ACC    | 8  | 11   |

## Inspection methodology

The inspections involved checking that:

- the application for a controlled operation certificate was made by a law enforcement officer to an appropriate authorising officer, and met 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 law enforcement officer 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 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

- 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 any information excluded was allowed by ss 15T(3) and (4)
- comparing the information contained within the files, quarterly reports 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 from 29 September to 1 October 2009, the AFP was assessed as generally compliant with the requirements of Part 1AB of the Act.

Based on the results of the inspection conducted from 22 to 24 February 2010, the AFP was assessed as compliant with the requirements of Part 1AB of the Act.

Six recommendations were made to the AFP as a result of the two inspections. The AFP generally agreed with these recommendations and undertook to review the relevant policies, procedures and training programs to improve compliance.

### **Progress made by the AFP to address previous recommendations**

In the Ombudsman's 2008-09 controlled operations annual report, this office identified that 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) of the Act. No further issue was noted in relation to this matter during the inspections in 2009–10.

However, some issues from previous inspections continue require attention by the AFP:

- the need to ensure that illicit goods are properly identified and accounted for in accordance with the requirements of the Act
- in relation to urgent applications for certificates, the need to record both the time and date the certificate was drawn up (s 15N(2)(e)) and the time and date the applicant was informed of the decision to give the certificate (s 15N(3))
- the need to notify the CEO of Customs under s 15Q of the Act, when it is expected that illicit goods involved in the controlled operation may be dealt with by Customs
- the need to provide the Minister with quarterly reports within the timeframe required by the Act.

There is considerable risk to the reputation of the AFP and the successful conduct of operations if these matters are not addressed.

## **Recommendations to the AFP**

Six recommendations were made to the AFP as a result of the office's inspections during 2009–10.

### ***Recommendation 1: Reporting of illicit goods (first inspection)***

For each operation involving illicit goods that ceased to be in force during the quarter to which a quarterly report relates, the AFP should ensure that each quarterly report satisfies the requirements of s 15S(2)(d) of the Act.

### ***Recommendation 2: Reporting of illicit goods (second inspection)***

The AFP should ensure that any illicit goods involved in a controlled operation are correctly identified and recorded to satisfy, where applicable, the requirements of ss 15M(e), 15N(2)(c), 15S(2)(d) and (e) of the Act.

### ***Recommendation 3: Identifying civilian participants in a certificate***

The AFP should ensure that all civilians involved in a controlled operation are listed on the certificate, and where applicable, seek variations to the certificate to ensure that additional civilian participants can be afforded the appropriate exemption under s 15I and indemnity under s 15IA of the Act.

### ***Recommendation 4: Nature of activities covered by the certificate***

The AFP should ensure that all controlled operations certificates comply with sections 15N(2)(ca) and (cc) of the Act in that they state the nature of activities covered by the certificate, and where relevant, state the nature of activities covered by the certificate in relation to each civilian participant.

### ***Recommendation 5: Provision of quarterly reports to the Minister***

The AFP 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) of the Act.

***Recommendation 6: Termination notice sent to law enforcement officer in charge of controlled operation***

In order to demonstrate compliance with section 15OA(4) of the Act, the AFP should ensure that it is clear from its records that the officer receiving the written notice of termination is the Australian law enforcement officer in charge of the controlled operation.

## **Discussion of issues**

### *Reporting of illicit goods*

The Act contains a number of requirements relating to illicit goods that are involved in an operation.

- Under s 15M(e), the authorising officer may give a certificate authorising an operation if he or she is reasonably satisfied that the operation will be conducted in a way that ensures that, to the maximum extent possible, any illicit goods involved in the operation will be under the control of an Australian LEO at the end of the operation.
- Under s 15N(2)(c), the certificate authorising an operation must briefly describe (to the extent to which they are known and are relevant), certain details about any illicit goods.
- Under s 15S(2)(d) of the Act, for each controlled operation that involved illicit goods and ceased to be in force during a particular quarter, the relevant quarterly report must state, to the extent known, the route through which the illicit goods passed in the course of the operation, and the nature and quantity of the illicit goods.
- Section 15S(2)(e) further imposes reporting requirements on illicit narcotic goods.

These requirements ensure that illicit goods are properly handled and can be accounted for. To comply with these requirements, it is necessary to first determine whether the controlled operation will involve any illicit goods. Section 3 of the Act defines illicit goods as 'goods the possession of which is a contravention of a law of the Commonwealth, a State or a Territory'.

At both inspections, a total of three instances were noted where these requirements were not met either in part or in full.

For one operation, the quarterly report stated the route through which illicit goods passed prior to the operation. The quarterly report should have detailed the route through which the illicit goods passed in the course of the operation. It seems that there may have been a simple error in transcribing information from working documents to the quarterly report. However, it could also indicate that there is a misunderstanding of the requirements of s 15S(2)(d) of the Act.

For another operation, illicit goods were not identified by the AFP as illicit goods under s 3 of the Act, and therefore the requirements of the Act in relation to the reporting of illicit goods were not satisfied. In the second inspection, a similar issue was again noted for one operation.

This office recommended that for each operation involving illicit goods that ceased to be in force during the quarter to which a quarterly report relates, the AFP should ensure that it meets, where applicable, the requirements of ss 15M(e), 15N(2)(c), 15S(2)(d) and (e) of the Act. It was further suggested that the AFP's law enforcement officers responsible for the application of controlled operation certificates carefully consider whether illicit goods will be involved in an operation and obtain legal advice if necessary.

#### *Identifying civilian participants in a certificate*

Section 15N(cb) requires that a certificate identify each person who is permitted to be involved in an operation and who is not a law enforcement officer. A civilian is only afforded protection from criminal liability if, among other things, the certificate identifies the person as being permitted to be involved in the operation (s 15IB(2)(b)).

In one operation, the certificate identified that civilian participants A and B would be involved in receiving delivery of illicit goods at their place of work. However, the quarterly report later stated that civilian C was involved in the operation, but did not mention civilians A or B. Civilian C was not listed on the certificate as a participant in the operation. This situation arose when civilians A and B were absent from work on the day of the controlled operation and civilian C was rostered in their place. The quarterly report correctly identified civilian C as a participant in the operation, however, as this person was not identified on the certificate, they may not be covered for criminal liability.

The Act provides a mechanism under s 15NA to vary the certificate. A variation of the certificate to include the additional civilian participant would have been appropriate in the above situation.

*Nature of activities covered by the certificate*

Section 15N(2)(cc) requires the certificate to state the nature of activities covered by the certificate in relation to each person identified in the certificate. This would seem to require a detailed description of the otherwise unlawful activities purported to be conducted by each of the participants listed in the certificate, for the purposes of ensuring that the protection afforded by the Act works effectively.

One certificate issued by an AFP authorising officer stated: 'I certify that you are authorised to conduct a controlled operation involving ... AFP [law enforcement officers] in accordance with the provisions of Part 1AB of the *Crimes Act 1914*'. We believe that this broad statement is not a clear description of the activities authorised under the certificate. In our view, the statement does not satisfy the requirements of s 15N(2)(ca) of the Act.

Another certificate authorising the conduct of the controlled operation simply described a civilian's role as 'onsite manager'. This is not a sufficient description of the nature of activities for which the civilian participant is covered under the certificate and does not satisfy the requirements of s 15N(2)(cc) of the Act.

*Provision of quarterly reports to the Minister*

Section 15R(1) requires the AFP Commissioner to give the Minister a report in relation to each certificate granted within two weeks after the end of each quarter. Section 15S(2) requires the report to contain certain information about the operation if the operation ceased to be in force during the relevant quarter. These mechanisms ensure transparency and accountability for each agency's conduct of controlled operations.

The AFP did not provide the Minister with a quarterly report for one operation within the timeframe required by s 15R(1) of the Act. As the operation terminated on 17 April 2009, the report should have been submitted in the quarter ending on 30 April 2009 and include information required by s 15S(2) of the Act for completed operations. However, for the quarter ending on 30 April 2009, the AFP reported the operation as ongoing. The AFP failed to remedy this in the quarter ending on 31 July 2009, and at the time of the inspection in September 2009, no final report had been made to the Minister in relation to this operation.

This office recommended that the AFP should ensure that an appropriate quarterly report was provided to the Minister within two weeks of the end of

each quarter, pursuant to s 15R(1) of the Act. The AFP later provided the Minister with a quarterly report for the quarter ending on 31 October 2009.

A similar issue was noted in a previous inspection (for records relating to the period 1 February 2008 to 31 July 2008). I note the amended Part 1AB has replaced the quarterly reports with six-monthly reports to the Ombudsman. However, the information required to be reported remains largely the same.

*Sending termination notices to the law enforcement officer in charge of a controlled operation*

Under s 15OA(1), an AFP authorising officer may terminate a certificate authorising a controlled operation. Section 15OA(4) requires the AFP authorising officer to send a written notice of the termination to the Australian law enforcement officer in charge of the controlled operation.

In all records inspected where the certificates were terminated, it was not clear whether or not the law enforcement officer receiving the written notice of termination was the law enforcement officer in charge of the operation.

The intent of this section may be to ensure that all participants in a controlled operation are informed of the termination. To ensure that this is the case, this office recommended that the AFP keep records of who has been provided with the written notice of termination.

*Certificates issued as a result of urgent applications*

Section 15N(3) states that a certificate issued in relation to an urgent application must specify the day on which, and the time when, the applicant was informed of the decision of the authorising officer to give the certificate. Section 15N(2)(e) states that the certificate must specify the day on which, and the time when, the certificate was given.

The distinction is important in order to establish the time at which the participants have been authorised to initiate a controlled operation and the protection of the certificate began, which is necessarily prior to the certificate being drawn up.

In all urgent applications examined, it was clear from the case notes on file when the urgent applications were granted. However, it was not clear from the certificates when (date and time) the applicant was informed of the decision of the authorising officer to grant the urgent application.

This issue has been the subject of recommendations in the Ombudsman's two previous reports to the AFP. The AFP advised that it has modified its templates to improve compliance with ss 15N(3) and 15N(2)(e) of the Act.

*Notice to the CEO of Australian Customs and Border Protection Service*

If the applicant for a controlled operation certificate believes that illicit goods involved in the conduct of an operation may be dealt with by Customs, s 15Q(2) of the Act requires the applicant to, as soon as practicable after the certificate is issued, notify the CEO of Customs (or a person nominated by the CEO for the purposes of s 15Q(2) in writing of certain matters.

Five of the eligible records inspected did not include a notification in writing as required by s 15Q(2), despite it being reasonable to believe that the illicit goods involved in the conduct of the operation would be dealt with by Customs.

Whilst AFP records indicated that investigators had informed Customs of the possible arrival of illicit goods in most cases, the Act is unqualified and a formal notification that satisfies s 15Q(2) is required. This office acknowledged that the AFP was in the process of centralising the notification process and that we expected to see improvements in future inspections as the requirement to notify Customs has been retained in the amended Part 1AB.

*Demonstrating that controlled conduct occurred under a valid certificate*

As part of examining the comprehensiveness and adequacy of the AFP's quarterly reports and their 2008-09 controlled operations annual report, this office assessed whether the controlled conduct was carried out under a valid certificate. To achieve this, we looked at the timeframe within which any conduct occurred, the activities carried out, the participants, accountability for any illicit goods and compliance with any conditions attached to certificates.

The documents that assist in this exercise usually consist of the controlled operations certificate, the application, the quarterly and annual reports, and the AFP's 'effectiveness report' completed at the conclusion of an operation by the relevant case officer.

For three of the controlled operations subject to inspection, there were no records available which contained the dates on which any controlled conduct occurred. As such, inspection officers were not able to verify that the operation took place within the period of the certificates.

## **AUSTRALIAN CRIME COMMISSION**

Based on the results of the inspection conducted on 17 and 18 November 2009, the ACC was assessed as compliant with the requirements of Part 1AB of the Act.

Based on the results of the inspection conducted from 3 to 5 May 2010, the ACC was assessed as compliant with the requirements of Part 1AB of the Act. However, the inspection identified an issue relating to the long duration of some controlled operations and the need for the AAT's review of these operations. This is discussed in more detail below.

One recommendation was made to the ACC as a result of the two inspections. The ACC agreed with the recommendation and undertook to review the relevant policies and procedures, as well as training programs to improve compliance.

### **Progress made by the ACC to address previous recommendations**

During 2009–10, the ACC made a number of improvements to address previous recommendations made by this office.

In our 2008–09 annual report, we referred to ongoing discussions with the ACC to ascertain appropriate source documents that would allow this office to verify the accuracy of information contained in the ACC's quarterly reports, and in particular, information relating to the handling and possession of illicit goods. It is important to clarify that this is not a case of the ACC withholding information – quite the contrary. It is a matter of working with the ACC to determine the best source of information to allow this office to be satisfied that certain requirements are met, and the ACC has been very helpful in that regard.

At the inspections during 2009–10, the ACC provided documents that sufficiently allowed my staff to verify the accuracy of information contained in its quarterly reports. However, one issue remains to be addressed – my staff were unable to ascertain whether all controlled conduct was carried out within the period of validity of a certificate, as not all of this information was available from the documents provided. The ACC advised that it will be able to include this information in future documentation for our inspection.

At an inspection during 2008–09, one certificate we inspected was issued subject to six conditions, some related to the conduct of the operation, and

others related to internal business practice. It appeared that the conditions were not fully met. This office suggested, and the ACC acknowledged, that it would be preferable for conditions in a certificate to be limited to those of an operational nature, as failure to abide by a condition can limit the protection provided by the certificate (ss 15I and 15IA of the Act). The ACC later advised that it has instituted a practice where conditions relating only to business practices are issued and monitored separately to operational conditions in the certificate. My office will continue to monitor this issue in the future.

One issue from previous inspections which was still noted during 2009–10 is the need to notify the Chief Executive Officer (CEO) of the Australian Customs and Border Protection Service (Customs) under s 15Q of the Act, when it is expected that illicit goods involved in the controlled operation may be dealt with by Customs.

## **Recommendation to the ACC**

One recommendation was made to the ACC as a result of our inspections during 2009–10.

### ***Recommendation 1: Stating whether each person covered by the certificate was a law enforcement officer***

The ACC should ensure that it complies with s 15S(2)(b) of the Act by stating, in quarterly reports, whether each person whose conduct was covered by a controlled operations certificate was a law enforcement officer at the time of the operation.

## **Discussion of issues**

### *Duration of controlled operations and the need for AAT review*

Section 15OB(2) of the Act states that a certificate expires three months after it is issued unless it has been reviewed by an AAT member and that member has decided the certificate should remain in force for six months. An AAT member may not allow the certificate to remain in force unless they are satisfied of the matters referred to in ss 15M(a) to (h) which set out the grounds on which a certificate may be given. An ACC authorising officer is not permitted to authorise a controlled operation beyond three months.

In the second inspection of 2009–10, this office noted that the particulars of a number of certificates were identical, and it appeared that a series of certificates authorised what was effectively two ongoing operations.

Examination of records showed that the certificates were the most recent in a series relating to the same operations dating back to 2007. For both operations, the latest AAT review occurred in December 2008.

The ACC believes that the 'regular processes of [internal] re-application has been a valuable part of high levels of governance and oversight over ACC investigations and their supporting controlled operation activities'. We accept that advice.

However, our concern is that an ACC authorising officer, who issues a three-month certificate in relation to an operation which has been subject to a previous certificate, is effectively circumventing the requirement for external review. Further, an agency that obtains a series of certificates in relation to the same operation also effectively extends the duration of an operation beyond the maximum duration permitted by the Act.

The requirement for external review of a certificate beyond three months is retained in the February 2010 amendments to Part 1AB of the Act. However the amendments extend the maximum duration of a controlled operation from six to 24 months. This change recognised that ceasing a controlled operation at six months may cause disruption to investigation and may put participants at risk. The new legislation still requires a controlled operation to cease after three months unless an extension has been authorised by a nominated AAT member and for an AAT member to authorise any extension at three months intervals up to the maximum duration for a controlled operation permitted by the Act – 24 months.

As these certificates were issued under Part 1AB of the Act prior to its amendment in February 2010, no recommendation was made to the ACC. However, in our view, Parliament has very recently turned its attention to the need for certain controlled operations to have a longer duration than previously contemplated and has provided a mechanism for this to occur, with appropriate scrutiny. While we note the ACC believes that the various internal controls it has instigated ensure a robust and justifiable approach to its use of controlled operations, in our view, it would be inappropriate for an agency to 'by pass' the new mechanism and seek to conduct controlled operations by the means of consecutive certificates.

*Stating whether each person covered by the certificate was a law enforcement officer*

If a controlled operation was carried out, s 15S(2)(b) of the Act requires each quarterly report to identify each person whose conduct was covered by a

controlled operations certificate, and state whether the person was a law enforcement officer at the time of the operation.

In its quarterly reports, the ACC identified each person whose conduct was covered by the certificate, but did not always state whether the person was a law enforcement officer at the time of the operation.

The ACC advised that it would address this issue in the revisions to the reporting template and in training. Subsequently, we noted that the ACC had complied with the requirements of s 15S(2)(b) of the Act and stated whether a participant listed in a quarterly report was a law enforcement officer at the time of the operation.

*Notice to the CEO of Australian Customs and Border Protection Service*

If the applicant for a controlled operation certificate believes that illicit goods involved in the conduct of an operation may be dealt with by Customs, s 15Q(2) of the Act requires the applicant to, as soon as practicable after the certificate is issued, notify the CEO of Customs (or a person nominated by the CEO) in writing of certain matters.

One record inspected did not include a notification in writing as required by s 15Q(2), despite it being reasonable to believe that the illicit goods involved in the conduct of the operation would be dealt with by Customs.

Whilst ACC records indicated that investigators had contacted Customs informally, the Act is unqualified and a formal notification in compliance with s 15Q(2) is required. The ACC informed this office that further training will be provided to staff to reinforce this aspect.

Allan Asher  
Commonwealth Ombudsman