

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

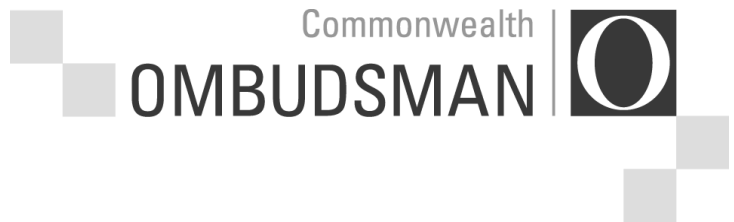
Australian Crime Commission

Australian Federal Police

2010–11

Report by the Acting Commonwealth Ombudsman
under Part IAB of the *Crimes Act 1914*

January 2012



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INTRODUCTION

Part IAB of the *Crimes Act 1914* (the Act) prescribes the process of applying for, granting, and ending an authority to conduct controlled operations. Under an authority to conduct a controlled operation, law enforcement officers and certain other persons are exempt from criminal liability arising in the course of the 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 IAB 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 for Home Affairs (the Minister) as soon as practicable after 30 June each year on the work and activities of the preceding 12 months.

Part IAB of the Act was amended in February 2010. The majority of this report relates to controlled operations that concluded under the amended legislation and only relates to a small number of controlled operations that concluded prior to the commencement of the new legislation. The references to legislative provisions in this report, unless otherwise stated, are made to sections under the amended Part IAB of the Act.

Content of this report

This report covers the Ombudsman's work and activities in monitoring controlled operations during the period 1 July 2010 to 30 June 2011 and includes:

- an overview of the methodology used to assess law enforcement agencies' compliance with Part IAB of the Act
- an assessment of the levels of compliance demonstrated by the AFP and the ACC with the requirements of Part IAB of the Act
- the recommendations made by the Ombudsman to the AFP and the ACC during the inspection period.

During 2010–11, ACLEI advised that it did not undertake any controlled operations under the Act and the ACC advised that it 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 2010–11 demonstrated compliance with Part IAB of the Act. Both agencies made progress towards addressing this office's previous recommendations, including:

- improved compliance by the AFP in relation to the recording of details for controlled operations, including correctly identifying illicit goods and civilian participants involved in an operation and clearly stating the nature of activities covered by an authority
- improved compliance by the ACC in recording whether each person whose conduct was covered by a controlled operation authority was a law enforcement officer at the time of the operation
- improved compliance by the AFP in relation to its reporting obligations to the Minister.

However, the inspections conducted during 2010–11 identified some areas where improvements were required. The most significant issues related to:

- the ACC not seeking external review by the Administrative Appeals Tribunal (AAT) for operations that extend beyond three months
- the AFP ensuring applications for authorities specify the identity of each civilian participant and the conduct in which they may engage
- the AFP ensuring its general register contains all of the information required under the Act, in order to demonstrate that controlled conduct occurred under a valid authority
- the AFP not providing Commonwealth Ombudsman inspecting officers with requested documents relevant to an inspection in a timely manner.

INSPECTIONS OF CONTROLLED OPERATIONS RECORDS

The primary purpose of our inspections is to ascertain whether agencies have complied with the requirements of Part IAB of the Act, which relates to the authorisation, conduct and reporting of controlled operations.

Under the Act, we are required to conduct at least one annual inspection of each law enforcement agency. Due to the large number of controlled operations and their respective records, it is the practice of this office to conduct two inspections each financial year. This ensures that issues are quickly identified and addressed, particularly as agencies continue to increase their use of controlled operation provisions.

Due to security reasons, we do not inspect records relating to ongoing controlled operations. Instead, we inspect:

- authorities to conduct controlled operations that expired within the inspection period
- authorities to conduct controlled operations that were revoked within the inspection period.

'Authorities' (or 'certificates' prior to the February 2010 amendments) are internally issued to AFP and ACC investigators by the agencies' respective appropriate authorising officers.

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

Table 1: Dates and periods of inspections

AGENCY	FIRST INSPECTION PERIOD Records from 1 February 2010 to 30 June 2010	SECOND INSPECTION PERIOD Records from 1 July 2010 to 31 December 2010
AFP	6 to 8 September 2010	4 to 6 May 2011
ACC	29 and 30 November 2010	24 and 25 March 2011

Of the 110 available records for inspection at the AFP and the ACC, we inspected 88 per cent, as represented in the table below.

Table 2: Number of certificates/authorities inspected

AGENCY	FIRST INSPECTION PERIOD Records from 1 February 2010 to 30 June 2010	SECOND INSPECTION PERIOD Records from 1 July 2010 to 31 December 2010
AFP	All 36 certificates/authorities were inspected: <ul style="list-style-type: none"> • 14 certificates (under pre-amended Act) • 22 authorities (under amended Act) 	41 of 54 authorities were inspected
ACC	All 13 certificates/authorities were inspected: <ul style="list-style-type: none"> • 6 certificates (under pre-amended Act) • 7 authorities (under amended Act) 	7 of 7 authorities were inspected

Inspection methodology

The inspections involved assessing that, for the AFP and ACC:

- applications for authorities to conduct controlled operations were properly made and authorities were properly granted
- applications for variations to authorities were properly made to and decided by appropriate authorising officers
- applications for variations to authorities were properly made to nominated AAT members
- powers conferred by the authorities were lawfully exercised
- cancellations of authorities were properly made
- reports were properly made and records were properly kept by the agency.

AUSTRALIAN FEDERAL POLICE

Overview

During the 2010–11 inspections, it was evident that the AFP had taken measures to address previous recommendations and findings made by this office. We were appreciative of the AFP's cooperation during these inspections, particularly its willingness to address both compliance and best-practice issues. In this regard, we met with the AFP on two occasions in order to discuss and mutually agree on the requirements of the Act.

Based on the results of the inspection conducted from 6 to 8 September 2010 (the first inspection), the AFP was assessed as generally compliant with the requirements of Part IAB of the Act. Two recommendations were made to the AFP as a result of the first inspection:

Recommendation 1: Civilian participants

The Australian Federal Police should ensure that an authority purporting to cover civilian participants complies with ss 15GK(1)(e) and (f) of the Act by specifying the identity of each civilian participant and the conduct each civilian participant may engage in.

Recommendation 2: General register

The Australian Federal Police should establish a consolidated general register and ensure that it meets all requirements under s 15HQ of the Act.

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

In addition to these findings, an issue arose when the AFP did not respond in a timely manner to a request from Commonwealth Ombudsman inspecting officers for documents relevant to the first inspection. These documents were only provided after a formal notice was issued. However, this office has since only experienced cooperation from AFP staff.

Based on the results of the inspection conducted from 4 to 6 May 2011 (the second inspection), the AFP was assessed as compliant with the requirements of Part IAB of the Act. Although no recommendations were made, we made a number of best-practice suggestions in relation to how the AFP may better comply with Part IAB of the Act. The AFP generally agreed with these suggestions.

In recognising the risk of these issues to its reputation and the success of its operations, the AFP advised that it had taken a number of measures to address the issues identified at the inspections. During its national training courses between June and August 2011, the AFP advised that it had highlighted these issues to AFP investigators and authorising officers. The AFP also advised that it had updated relevant templates and national guidelines.

Progress made by the AFP to address previous recommendations

In the Ombudsman's 2009–10 controlled operations annual report, this office identified a number of issues that required the attention of the AFP, including:

- properly identifying and accounting for illicit goods that form part of a controlled operation
- correctly identifying the civilian participants of a controlled operation
- correctly identifying the nature of activities covered by an authority
- the need to provide the Minister with reports within the timeframe required by the Act
- sending termination notices to the law enforcement officer in charge of a controlled operation
- recording the date and time an urgent authority was given and the written record was created
- notifying the Chief Executive Officer (CEO) of the Australian Customs and Border Protection Service (Customs) under s 15Q (now s 15J under the amended Act) of the Act when it is expected that illicit goods involved in the controlled operation may be dealt with by Customs
- demonstrating that controlled conduct occurred under a valid authority.

The AFP had addressed most of these issues and only the issue of the need for authorities to correctly identify civilian participants and the conduct they may engage in was again noted. However, as this issue was not identified

during the second inspection conducted in 2010-11, it appears that the AFP had implemented adequate measures to address it.

Discussion of issues

General register (first and second inspections)

According to the Revised Explanatory Memorandum to the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010, the purpose of the general register is to recognise the importance of keeping appropriate records to facilitate proper accountability and oversight of controlled operations by the Ombudsman.

The AFP advised that its general register is a combination of the effectiveness reports (which is a document already required to be completed by law enforcement participants at the end of each controlled operation) and a spreadsheet (mainly used by the relevant AFP team to keep track of controlled operations and compile six-monthly and annual reports under the Act).

While the Act does not specify the format of the general register, our view is that the AFP should keep a separate general register containing the information required under s 15HQ. However, we accepted the general register in the provided format.

At the first inspection, we noted that the effectiveness reports, and therefore the general register, did not contain all the information required under s 15HQ:

- Section 15HQ(2)(b)(iii) requires that for each authority granted by an authorising officer, the general register contains the name and rank or position of the authorising officer. The name of the authorising officer was contained in the effectiveness reports, but not the rank or position.
- Section 15HQ(2)(b)(iv) requires that the general register contains each serious Commonwealth offence or serious State offence that has a federal aspect in respect of which controlled conduct under the authority was to be engaged in. This information did not appear on the effectiveness reports.
- Section 15HQ(2)(b)(x) requires that the general register contains the outcomes of a controlled operation. This was not always recorded on the effectiveness report.

- Section 15HQ(2)(b)(x) also requires the date and time a controlled operation began, and the date it ceased, to be recorded in the general register. The date a controlled operation began was recorded on the effectiveness reports, but not the time.

We consider that the intent of s15HQ(2)(b)(x) is to record the dates on which controlled conduct, as a part of the operation, began and ceased (as opposed to the period of effect of an authority). This is because s15HQ(2)(b)(v) already requires the general register to specify the period of effect of an authority. The AFP agreed to this reading of s15HQ(2)(b)(x).

As the general register facilitates proper accountability and oversight of controlled operations, a recommendation was made:

Recommendation: *The Australian Federal Police should establish a consolidated general register and ensure that it meets all requirements under s 15HQ of the Act.*

At the second inspection, the AFP provided a consolidated general register and we noted a significant improvement in the AFP meeting this requirement. Some minor issues persisted. For a small number of records inspected, the following was not recorded:

- the rank of the appropriate authorising officers (s 15HQ(2)(b)(iii))
- who has possession of narcotic goods that have not been destroyed (s 15HQ(2A)(d))
- the recording of the date and time controlled conduct covered by an authority began and the date controlled conduct ceased (s 15HQ(2)(b)(x)).

For two authorities, as the date and time of the commencement and the date of the cessation of controlled conduct were not recorded, it could not be determined if the controlled conduct undertaken had occurred under a valid authority.

In response to these findings, the AFP advised that it had reminded investigators of their reporting requirements.

Authorities covering civilian participants

Authorities to identify civilian participants and their conduct (first inspection)

Section 15GK(1)(e) of the Act requires each formal authority to state the identity of the persons authorised to engage in controlled conduct. Section 15GK(1)(f) further requires the authority to specify, with respect to the civilian participants, the particular controlled conduct that each participant may engage in. Thus, a formal authority must specify the name of each civilian participant authorised to engage in controlled conduct.

For one authority that covered the conduct of civilian participants, the authority did not specify who the civilian participants were, only that they were 'employees' and 'Directors' of a company. The authority should have identified each civilian participant by name and specified the particular conduct each employee may have engaged in.

As this issue of not specifying civilian participants and their conduct on authorities had been previously noted, a recommendation was made.

Recommendation: *The Australian Federal Police should ensure that an authority purporting to cover civilian participants complies with ss 15GK(1)(e) and (f) of the Act by specifying the identity of each civilian participant and the conduct each civilian participant may engage in.*

An improvement was noted at the second inspection, where all inspected authorities covering civilian participants complied with ss 15GK(1)(e) and (f).

Civilian participants listed as targets (second inspection)

Under s 15HA, a civilian participant of a controlled operation is not criminally responsible for an offence if he or she engages in conduct covered by a valid authority, and if he or she acts in accordance with the instructions of a law enforcement officer.

For two authorities, the person listed as the civilian participant on the authority was the same person who was listed as a target of the operation. This created an anomaly, whereby the person targeted by the AFP was also subject to criminal immunity under s 15HA. For one of these authorities, the offence targeted by the controlled operation was the same offence the target/civilian participant of the operation had been charged with.

By listing a person as both the target and as a civilian participant of a controlled operation, the AFP may compromise its prosecution of the target; however, the AFP advised that for both authorities, the targets refused to participate as a civilian participant in the controlled operations.

In its response to this finding, the AFP advised that, based on internal legal advice, it was satisfied that there was no risk of compromising the prosecution of a target if the target was also listed as a civilian participant in a controlled operation. However, in future authorities, the AFP advised that it would not list the same person as both a civilian participant and a target of the same controlled operation.

Risk that authorities may have been granted without a valid delegation and a delay in providing the Ombudsman with relevant requested documentation (first inspection)

An authority to conduct a controlled operation may be approved by the Commissioner of the AFP, a Deputy Commissioner, or a senior executive AFP employee authorised in writing by the Commissioner (s 15GF(2)). Similar provisions existed under the previous Part IAB of the Act.

Amendments to Part IAB of the Act commenced on 19 February 2010. The Commissioner signed a written delegation instrument for the purposes of s 15GF(2)(c) on 22 April 2010. During the period 19 February to 22 April 2010, the AFP issued eleven authorities to conduct controlled operations. Of these eleven authorities, nine were issued by senior executive AFP employees pursuant to a delegation of the Commissioner under the previous Part IAB of the Act (the old delegation).

This matter was raised at the time of the inspection with AFP officers. AFP officers advised that internal legal advice had been sought and the relevant authorities were determined to have been validly issued under the existing delegation. Ombudsman staff requested a copy of this legal advice verbally and on several occasions after the inspection, but the legal advice was not provided.

Under s 15HT of the Act, if the Ombudsman has reasonable grounds to believe that a law enforcement officer is able to give information relevant to an inspection, then the Ombudsman may require the officer to provide that information.

After a formal notice was issued to the AFP to require the provision of the internal legal advice, the AFP provided a copy of the advice to Ombudsman staff. AFP officers advised that the advice had been reconsidered in light of the Ombudsman's request and that the AFP was of the view that the advice was incorrect and authorities issued between 19 February and 22 April 2010 may be invalid.

The validity of these authorities is ultimately an issue for the Commonwealth Director of Public Prosecutions and the admissibility of relevant evidence would be determined by the courts. We were further concerned that despite the clear legislative provision giving power to the Ombudsman to obtain information relevant to an inspection, it took almost three months and several requests for the AFP to provide a copy of the legal advice.

We noted the AFP's assurance that future requests will be acted upon in a timely manner and we have since experienced cooperation on the AFP's behalf in providing information requested by Ombudsman staff.

Cancellation of major controlled operation (second inspection)

Section 15GY states that an appropriate authorising officer may, by order in writing given to the primary law enforcement officer of a controlled operation, cancel the authority to conduct the controlled operation at any time and for any reason. Under s 15GF(1)(a) an appropriate authorising officer for a major controlled operation is either the Commissioner or a Deputy Commissioner.

Two major controlled operations were cancelled by an authorising officer who was not the Commissioner or a Deputy Commissioner. Therefore, these cancellations did not comply with s 15GY.

To ensure that major controlled operations are only cancelled by the Commissioner or a Deputy Commissioner, we suggested that the AFP should take measures to ensure appropriate authorising officers, other than the Commissioner or a Deputy Commissioner, understand the extent of their delegated powers. The AFP advised that it would update its national guidelines to identify the appropriate authorising officers for cancelling major controlled operations.

AUSTRALIAN CRIME COMMISSION

Overview

During the 2010–11 inspections, it was evident that the ACC had taken measures to address previous recommendations and findings made by this office.

Based on the results of the inspection conducted on 29 and 30 November 2010 (the first inspection), the ACC was assessed as compliant with the requirements of Part IAB of the Act. However, one recommendation was made as a result of the first inspection relating to the ACC's practice of raising consecutive certificates/authorities to continue controlled operations beyond three months without external review by the AAT:

Recommendation 1: AAT Review

When seeking to conduct controlled operations beyond three months, that the Australian Crime Commission uses the process outlined under s 15GU of the Crimes Act 1914 to extend the authority through the AAT. Where this is not followed, that the Australian Crime Commission provides sufficient and reliable records to demonstrate why AAT review was not legally possible.

Based on the results of the inspection conducted on 24 and 25 March 2011 (the second inspection), the ACC was assessed as compliant with the requirements of Part IAB of the Act. However, the inspection again identified the issue relating to the long duration of some controlled operations and the need for the AAT's review of these operations. Due to the delay in resolving this matter, no further recommendation was made.¹ This issue is discussed in more detail below.

Progress made by the ACC to address previous recommendations

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

¹ We are aware that the Parliamentary Joint Committee on Law Enforcement, as part of its inquiry on the ACC's 2009-10 Annual Report, has also examined this issue:

http://www.aph.gov.au/Senate/committee/le_ctte/annual/2011/report/index.htm.

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.

This recommendation was based on the results of the first inspection conducted in 2009–10, and it was evident during the second inspection in 2009–10 that the ACC had taken measures to address it. We did not note this issue during the 2010–11 inspections.

Discussion of issues

Duration of controlled operations and the need for AAT review – ongoing issue

Section 15OB(2) of the pre-amended Act stated that a certificate expired three months after it was issued unless it had been reviewed by an AAT member and that member had decided the certificate should remain in force for (a maximum of) six months. An AAT member could not allow the certificate to remain in force unless they were satisfied of the matters referred to in ss 15M(a) to (h), which set out the grounds on which a certificate could be given. An ACC authorising officer was not permitted to authorise a controlled operation beyond three months.

In our second inspection conducted in 2009–10, we 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. These certificates were the most recent in a series relating to the same operations dating back to 2007. At the time of the second 2009–10 inspection, for both operations, the latest AAT review occurred in December 2008.

Whether intentionally or not, this practice, whilst not unlawful, effectively bypassed the requirement for external review of operations conducted for longer than three months and extended the operations beyond the maximum period permitted by the pre-amended Act (six months).

The February 2010 amendments extended the maximum duration of a controlled operation from six to 24 months. Under the current Act, the requirement for external review by the AAT every three months still applies. If the authority to conduct the operation is not reviewed in the last two weeks

before the expiry date (s 15GT(4)), or if it is not cancelled under s 15GY, s 15GN(3) states that the period of effect of the authority remains as specified on the authority (a period not exceeding three months).

This issue was noted again during the 2010–11 inspections, with additional consecutive authorities issued in relation to the same two operations.

The Australian Parliament, through amending the Act, indicated that it appreciated the need for certain controlled operations to have a longer duration than previously contemplated, and provided a mechanism for this to occur, which includes appropriate scrutiny. In our view, it would be inappropriate for an agency to 'bypass' this new mechanism and seek to conduct long-term controlled operations by means of consecutive authorities.

The ACC's view

We have had a significant amount of discussion and correspondence with the ACC about this issue. The ACC's view is that when a 'significant alteration' of the nature of controlled activity is required, a variation is not permitted by s 15GO(5) and an application for a new authority is the only option available. This, in effect, prevents an application to the nominated AAT member to vary the duration of an existing authority. We agree with this view.

Further, the ACC believes that the requirement to attend before an AAT member is not mandatory and even if consecutive authorities do not differ significantly, a new authority can still be obtained internally. The ACC has advised that advice it obtained from the Australian Government Solicitor is consistent with this view.

Nevertheless, since March 2011, the ACC has undertaken to adopt the practice of seeking AAT review where legally possible – that is, when the nature of controlled activity is not significantly altered. However, the ACC considers the term 'significant alteration' under s 15GO(5) is ambiguous and is consulting with the Commonwealth Attorney-General's Department on this matter to seek to remove what it considers to be this ambiguity. The ACC acknowledges that there is a divergence of view between it and the Ombudsman about the definition of 'significant alteration'.

Due to the retrospective nature of our inspections, we will not be able to report on the outcomes of the ACC's newly adopted approach until after the 2011-12 financial year inspections.

The Ombudsman's view

We are of the view that:

- Section 15GO(4) of the Act states that a formal authority must not be extended by an appropriate authorising officer so that its period of effect exceeds three months. To continue a controlled operation beyond three months, s 15GU requires that the law enforcement agency applies to a nominated member of the AAT.
- Therefore, in instances where an agency wishes to conduct a controlled operation beyond three months, it should seek review by the AAT every three months until the operation ceases.
- However, if there has been a 'significant alteration' to the nature of the controlled operation, the authority must not be varied (s 15GO(5)), and consequently the agency needs to apply for a new authority.
- We therefore agree with the ACC that if it is not legally possible under the Act to vary an authority, an agency must obtain a new authority.
- At the very least, we consider that it is legally possible to vary an authority if the variation falls under s 15GO(2)² and is not considered a 'significant alteration to the nature of the controlled operation' (s 15GO(5)). The Revised Explanatory Memorandum to the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 implies that a significant change is one that would authorise entirely new and different operations. Accordingly, for example, a change in the law enforcement officer in charge of a controlled operation is not a 'significant alteration' to the controlled operation.
- When a variation to the controlled operation falls under s 15GO(2), the variation of the authority should occur as soon as practicable after the change had occurred. If it is intended to continue the operation beyond three months, the AAT should be approached to extend the controlled operation during the period of two weeks before the authority expires.

² This includes: extending the period of the authority (but not beyond three months); changing the participants (both law enforcement officers and civilians) in a controlled operation; and authorising additional or alternative controlled conduct for the participants in a controlled operation.

- Agencies should keep reliable records to reasonably and sufficiently demonstrate why an authority to conduct a controlled operation that continued beyond three months was not reviewed by the AAT. It is not unlawful to issue new authorities where there has been no significant change to a controlled operation.

2010–11 findings

Applying the above view to records inspected during 2010-11, the following was noted:

- At the first inspection, additional authorities were issued rather than extended where it appeared legally possible to have them extended by the AAT based on the available records (however, we noted that some authorities may not have been able to be extended due to the Act being amended during this period).
- At the second inspection, two new authorities were issued for two separate controlled operations. Based on the available records at the inspection, it appeared legally possible for the ACC to apply to the AAT to extend the two previous authorities to continue these controlled operations, rather than issuing new authorities internally.

In its response, the ACC advised that it believed that in one of the two cases, an authorising officer would have considered the changes to the parameters of the controlled operation to be significant, and therefore considered it necessary to issue a new authority. However, there were no available records that captured this decision.

For the other case, the two consecutive authorities only differed in that they had different law enforcement officers in charge of the controlled operation. The ACC explained that towards the end of the first authority, it had cause to review the need to maintain the controlled operation. When a decision was made to continue the controlled operation, the first authority had expired before it was able to make an application to vary the authority and an application to the AAT to extend the authority. The ACC also advised that this coincided with a period of high operational tempo and a changeover of a number of key operational staff. As such, a new authority was applied for and granted two days after the previous authority expired.

On this basis, we accepted the explanation provided by the ACC. However, in our view, the unique circumstances of this controlled operation should be the exception rather than the norm.

Alison Larkins
A/g Commonwealth Ombudsman