



Department of Agriculture, Fisheries and Forestry

Compliance and Investigations Activities of the Biosecurity Services Group

REPORT TWO:
AUDIT OF INVESTIGATIONS
CONDUCTED BY THE SYDNEY OFFICE
OF THE COMPLIANCE BRANCH

January 2011

Report by the Commonwealth Ombudsman,
Allan Asher, under the *Ombudsman Act 1976*

REPORT NO. **01|2011**

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ISBN 978 0 9870657 0 4

Date of publication: January 2011

Publisher: Commonwealth Ombudsman, Canberra Australia

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EXECUTIVE SUMMARY

In June 2010, the Commonwealth Ombudsman conducted an audit under his own motion powers of the Compliance Branch, Biosecurity Services Group (BSG), Department of Agriculture, Fisheries and Forestry (DAFF). It examined the way in which investigations have been conducted by the Sydney office of the Compliance Branch.

This was the second audit, as part of a series of ongoing audits on the BSG's investigations (the first was finalised in August 2009). The audits arose out of one of the recommendations contained in the Senate Standing Committee on Rural and Regional Affairs and Transport's report on the administration by DAFF of the 2004 citrus canker outbreak. The Committee recommended that the Ombudsman review investigations carried out by the BSG.

This audit focused on a sample of investigations that were finalised by the Sydney office of the Compliance Branch between 1 June 2009 and 31 May 2010.

The main issues arising out of the audit relate to:

- case management, particularly planning for an investigation
- the need to ensure defensible decision-making by keeping comprehensive records and detailing the reasons for decisions
- the need for consistency between internal guidelines on case prioritisation and that which occurs in practice on the case management database.

Arising from these issues, we made a number of recommendations to address the areas of concern, including:

- that the Biosecurity Services Group update *SOP 4 – Investigation Prioritisation Procedure* to reflect and ensure consistent practices with the use of the Jade case management system
- that the Sydney office consistently follow internal policies on case management, including considering the use of case management tools appropriate to the investigation
- that the Sydney office consistently follow internal policies on recordkeeping, including documenting the reasons for decisions made in a comprehensive, consistent and contemporaneous manner.

The Department has accepted all seven recommendations made in this report and has made progress towards implementing the recommendations.

PART 1—INTRODUCTION

Background

1.1 In June 2006, the then Senate Standing Committee on Rural and Regional Affairs and Transport published a report on the administration by the Department of Agriculture, Fisheries and Forestry (DAFF) of the 2004 citrus canker outbreak.¹ The Standing Committee recommended that the Commonwealth Ombudsman review investigations carried out by Australian Quarantine and Inspection Service (AQIS) to assess whether they have been conducted:

- by appropriately trained staff
- in a timely manner
- in accordance with relevant legislation
- in accordance with the rules adopted by AQIS' executive.

1.2 On 1 July 2009, AQIS was integrated into the Biosecurity Services Group (BSG) within DAFF. As such, the rest of this report will refer to the BSG rather than AQIS.

1.3 Under s 5(1)(b) of the *Ombudsman Act 1976* (the Act), the Ombudsman may, of his own motion, investigate any action that relates to a matter of administration undertaken by a Department or a prescribed authority. The Ombudsman agreed to address the Standing Committee's recommendation through a series of audits derived from his own motion powers under the Act.

1.4 In August 2009, the Ombudsman published the first report on the results of an audit into the policies and procedures of the Compliance Branch, Biosecurity Services Group. This was intended to provide a basis for future audits of individual investigations conducted by the Compliance Branch.

1.5 The Compliance Branch is responsible for investigating alleged breaches of DAFF administered legislation, focusing on severe non-compliance or deliberate breaches. The Branch's role and functions are discussed in more detail in the Ombudsman's August 2009 report.

1.6 From 28 June to 1 July 2010, the Ombudsman conducted a second audit of individual investigations carried out by the Sydney office of the BSG. This report discusses the findings of that audit. The audit examined a sample of investigations (15 out of 119) that were finalised or substantially finalised between 1 June 2009 and 31 May 2010.

¹ The Senate Committee's report is available at:
http://www.aph.gov.au/senate/com/rrat_ctte/completed_inquiries/2004-07/citrus_canker/index.htm

Scope and methodology

Legislative and policy requirements

1.7 In preparation for the audit, Ombudsman staff met with the National Manager Compliance to obtain an overview of the various legislative and policy obligations and an understanding of the Branch's case management system and business practices.

1.8 The Compliance Branch is subject to various Commonwealth legislation, internal and external policies and guidelines.²

1.9 Legislation includes:

- *Quarantine Act 1908*
- *Export Control Act 1982*
- *Australian Meat and Live-stock Industry Act 1997*
- *Imported Food Control Act 1992.*

1.10 Policies and guidelines include:

- *Prosecution Policy of the Commonwealth* – published by the Commonwealth Director of Public Prosecutions (CDPP)
- *Guidelines on Brief Preparation* – published by the CDPP
- Australian Government Investigation Standards (AGIS)
- Overarching principles for selecting cases for investigation and administrative, civil and criminal sanction – published by the Attorney-General's Department.

1.11 The internal procedures applicable to the conduct of investigations by the Compliance Branch include:

- Standard Operating Procedures (SOPs)
- Work Instructions (WIs).

1.12 The investigators are assisted by an electronic case management database, known as Jade which was introduced in January 2010. Compared to the previous system, Jade appears to be more sophisticated in its file management capabilities and better assists investigative practices. This office understands that business rules governing the use of Jade are yet to be finalised.

Audit criteria and methodology

1.13 The Ombudsman identified eleven specific areas that are covered by the Standing Committee's recommendation. These areas for audit are discussed below.

Investigations are conducted by appropriately trained staff

- Investigators hold an appropriate qualification – assess the qualifications of investigators in accordance with DAFF internal requirements.

² These are discussed in more detail in the Commonwealth Ombudsman's first own motion report, *Department of Agriculture, Fisheries and Forestry: Compliance and investigations activities of the Australian Quarantine and Inspection Service (AQIS)—21 August 2009*, available at: <http://www.ombudsman.gov.au/reports/investigation/2009>.

Investigations are conducted in a timely manner

- Timeliness in conducting investigations – assess the timeliness in the assessment of initial incident reports and the commencement of investigations. It has been agreed with DAFF that all incident reports should be assessed within 48 business hours of their receipt. The investigations should commence within the timeframe outlined in the relevant SOPs.

Investigations are conducted in accordance with relevant legislation

- Application for and execution of warrants – assess the use of warrants in accordance with legislation administered by DAFF, internal SOPs and WIs which reflect the requirements in the AGIS.

Investigations are conducted in accordance with the rules adopted by AQIS' executive

As outlined above, DAFF has adopted SOPs and WIs to reflect Commonwealth guidelines for conducting investigations such as the AGIS. This audit examined:

- Case management – assess investigators' case management practices in accordance with internal SOPs, WIs and the AGIS.
- Recordkeeping by investigators – assess recordkeeping practices in accordance with internal SOPs, WIs and the AGIS.
- Decisions to conduct interviews and recordkeeping – assess the preparation for and recordkeeping of formal and informal interviews in accordance with internal SOPs, WIs and the AGIS.
- Handling of exhibits – assess the handling of exhibits in accordance with internal SOPs, WIs and the AGIS.
- Preparation of briefs of evidence for the CDPP – assess the preparation of briefs of evidence in accordance with internal SOPs and WIs which reflect CDPP guidelines (the audit does not consider whether or not a decision to prepare a brief of evidence is correct or incorrect).
- Decisions to issue letters of warning (LOW) – assess the issuance of LOW in accordance with internal SOPs and WIs which reflect CDPP guidelines (the audit does not consider whether or not a decision to issue LOW is correct or incorrect).
- Decisions to issue letters of advice (LOA) – assess the issuance of LOA in accordance with internal SOPs and WIs which reflect CDPP guidelines (the audit does not consider whether or not a decision to issue LOA is correct or incorrect).
- Decisions to take no further action – assess decisions to take no further action in accordance with internal SOPs and WIs which reflect CDPP guidelines (the audit does not consider whether or not a decision to take no further action is correct or incorrect).

1.14 The sample of 15 cases involved a variety of investigation outcomes including decisions not to proceed, the issuing of LOW and LOA to alleged offenders, and matters that resulted in briefs of evidence to the CDPP.

1.15 The audit was carried out by:

- reviewing investigation files
- reviewing entries on case management databases
- interviewing investigators responsible for each investigation.

PART 2—ANALYSIS OF INVESTIGATIONS

Summary of the analysis

2.1 The Sydney office of the Compliance Branch is staffed by a team of experienced and well qualified investigators. In our view, investigations were conducted professionally and legislative requirements were observed where search or monitoring warrants were executed. In most cases, investigators were aware of the internal policies, and external policies and guidelines concerning the conduct of investigations and the referring of matters for prosecution to the CDPP.

2.2 Investigations were, for the most part, carried out in a timely manner in accordance with prioritisation procedures. However our audit highlighted the need for the Sydney office to ensure that the planning and record keeping of an investigation, along with case management practices show that decision-making is transparent, defensible and consistent.

2.3 The Ombudsman made the following findings and seven recommendations in relation to the eleven areas examined by this audit.

Timeliness in conducting investigations

2.4 This part of the audit relates to the timeliness in responding to incident reports and commencing investigations.

2.5 In relation to incident reports, we assessed the timeliness of the Sydney office's response to incident reports and specifically whether the reports were assessed within 48 business hours of receipt.

2.6 In relation to commencing investigations, we assessed the Sydney office's adherence to the Investigation Prioritisation Procedure (IPP) as outlined in *SOP 4 – Investigation Prioritisation Procedure (SOP 4)*.

2.7 We also noted inconsistencies between DAFF policy (SOP 4) and the process actually used on the Jade database.

2.8 The findings are discussed in more detail below.

Incident reports

2.9 Incident reports are completed by the BSG's various program areas that first encounter possible breaches of legislation. The Sydney office of the Compliance Branch is responsible for actioning incident reports relating to the Central East region (the majority of New South Wales).

2.10 The incident reports that relate to New South Wales are sent by program officers as an email, and are received by the Sydney office as well as administrative staff in the Canberra office. They are then entered into the Jade database by administrative staff in Canberra for action by investigators in the Sydney office.

2.11 The Regional Investigations Manager (RIM) in Sydney is responsible for the initial assessment of all incident reports. Even though the incident report may not show up immediately in Jade (as it usually takes 24 hours for Canberra administrative staff to enter the report in Jade), investigators have instant access to the report via the initial email from the program area.

2.12 In most cases examined, the incident reports were assessed within 48 business hours of receipt. Those that were not considered within 48 business hours involved matters of low risk.

Prioritisation of investigations

2.13 The IPP has been developed to assist managers to consider the acceptance, rejection, termination, finalisation and resourcing of investigation matters. This recognises the Prosecution Policy of the Commonwealth that not all criminal offences must result in criminal prosecution and that the finite resources available to an agency should be appropriately directed under a risk managed process.

2.14 The RIM is responsible for the exercise of the discretion to prioritise investigations. Under SOP 4, the RIM should consider various factors and consult with relevant staff in order to determine the extent to which resources should be expended on an incident report.

2.15 According to SOP 4, the IPP should be conducted upon initial receipt of an incident and at least once every month if the investigation is ongoing. This is designed to ensure that resourcing needs are regularly adjusted to take into account any developments in the investigation.

2.16 In one case (CIS19249), the investigation was a long running matter, but there was no evidence that monthly IPP assessments were carried out as required by SOP 4. Consequently, this office could not determine if the investigation was regularly monitored to ensure that it stayed on track and was appropriately resourced.

2.17 It is recommended that the Sydney office follow the monthly investigation prioritisation procedures for ongoing matters as prescribed in *SOP 4 – Investigation Prioritisation Procedure*.

Actioning investigations

2.18 According to SOP 4, matters are classified as either high priority or routine. High priority matters should be acted upon within seven days of receiving the incident and routine matters acted upon when resources permit. The purpose of this procedure is to ensure that the Compliance Branch immediately devotes its resources to matters of the highest risk or severe non-compliance with legislation.

2.19 In all but one case, matters considered of a high priority were commenced within seven days of receiving the incident report. In that one instance (CIS 19397), the matter was classified as high priority on 26 June 2009, but the next action on file appeared to take place on 14 August 2009, long past the seven day period for high priority matters. There was no explanation on file or the CIS database of this delay. There were also no records to verify whether or not the urgency of the case was later reassessed and downgraded.

2.20 Matters classified as routine or low risk were commenced in a timely manner and most were dealt with within 30 days of receiving the incident report.

2.21 For cases assessed as high priority, it is recommended that the Sydney office consistently follow the requirements in *SOP 4 - Investigation Prioritisation Procedure* and commence investigation within seven days of receiving the incidence report. Alternatively, if the case is later assessed as being of a routine nature, the Sydney office should ensure that records are updated to reflect this change.

Inconsistency between policy and practice

2.22 The risk assessment process of an incident report is pre-programmed in Jade so that investigators can select from drop-down lists and arrive at a risk rating for an incident report. This process does not necessarily align with the IPP described in SOP 4.

2.23 Jade has fields or attributes where the RIM is able to input their risk assessment of an incident report. By selecting from the relevant drop-down lists, the RIM makes assessments regarding the likelihood and consequence of a risk materialising. The assessments of likelihood and consequence result in an overall risk rating for the incident report, which is recorded in Jade as low, medium or high. A decision to investigate is based on this risk rating. If an investigation ensues, it is then assigned a priority rating of low, medium or high. The priority rating determines the timeframe in which the investigation should be conducted.

2.24 SOP 4 takes a high-level approach and does not provide specific guidance on how risk assessments and priority ratings should be conducted in Jade. It provides a list of considerations the RIM needs to take into account when actioning incident reports.

2.25 The considerations include risk factors such as Australia's pest and disease status, its export reputation and whether the incident would impact on human health. Considerations also encompass the use of resources. However, SOP 4 does not refer to any risk ratings for incident reports, nor does it provide guidance on how risk ratings should be assigned in Jade.

2.26 Further, if an incident is to be investigated, SOP 4 provides guidance on how an investigation is to be prioritised but this does not align with how the Jade system operates. In SOP 4, an investigation is prioritised as either high or routine – whereas Jade's ratings are low, medium and high.

2.27 It is recommended that the incident prioritisation procedure prescribed by *SOP 4 – Investigation Prioritisation Procedure* be updated to ensure consistency with the Jade case management system.

Investigators hold an appropriate qualification

2.28 We enquired as to the qualifications held by investigators at the Sydney office of the Compliance Branch. In accordance with DAFF internal requirements,³ this office expected to see that:

- all Investigators hold, as a minimum, a Certificate IV in Government (Investigations)
- all Principal Investigators and Managers hold, as a minimum, a Diploma in Government (Investigations).

2.29 The Sydney office of the Compliance Branch has seven permanent staff. A training register is maintained by the Canberra office for each investigator in the Compliance Branch. From the register, it appears that one Investigator does not currently hold a Certificate IV in Government (Investigations) but is currently undertaking the relevant course to achieve the qualification.

³ Compliance and Investigations Operations Policy 2008—09.

2.30 All but one Principal Investigator hold the Diploma equivalent. This Principal Investigator was recently promoted and currently holds the Certificate IV qualification. We were advised that the requirement to obtain the higher qualification had been recognised in the officer's current performance agreement and the officer is working towards gaining the Diploma.

Table 1: Qualifications held by Sydney office staff

Staff	Qualification (either Certificate IV or Diploma in Government Investigations)
Manager (RIM)	Diploma
Principal Investigator	Diploma
Principal Investigator	Diploma
Principal Investigator	Diploma
Principal Investigator	Diploma
Principal Investigator	Certificate IV (working towards Diploma)
Investigator	Working towards Certificate IV

Case management

2.31 Case management is an integral part of any investigation, the primary purpose of which is to gather admissible evidence for any subsequent action, whether civil, criminal or administrative.

2.32 We examined the case management practices of all 15 investigations in the sample for adherence with BSG policies. In particular, this office expected to see that:

- investigations are planned to ensure that they are carried out methodically, resources are used to the best effect and sources of evidence are not overlooked
- assisted by appropriate investigative methods, obvious lines of inquiry are followed up, witnesses and subjects are identified and interviewed at the first practicable opportunity.

2.33 More specifically for the planning of investigations, this office looked for evidence of planning that had:⁴

- identified allegations and potential offences
- identified relevant facts
- identified avenues of inquiry
- identified tasks to be undertaken
- determined the strategic and operational methods that will be used to achieve the aim of the investigation
- prioritised the identified tasks and determined the methodology for collecting evidence
- set the structure of the investigation team allocated specific tasks
- determined timings for tasks to be commenced and completed.

⁴ Compliance and Investigations SOP 5 – Investigation Management.

2.34 The internal policy, *SOP 5 – Investigation Management* (SOP 5), provides guidelines for managing investigations undertaken by the Compliance Branch and is based on the AGIS. SOP 5 outlines techniques of investigation management such as setting an overall plan, milestones and deadlines for individual tasks. These techniques ensure the investigation remains on track, within budget and on time.

2.35 Depending on the size and complexity of the investigation, SOP 5 also outlines the tools that are available to investigators such as an evidence matrix and investigation plan. Both are used to plan an investigation, so that the investigator may focus on outcomes, and make objectively based and informed decisions.

2.36 The evidence matrix outlines the allegation, the offence, proofs of the offence and possible avenues of inquiry to satisfy each proof of the offence. The investigation plan is similar to a project management plan and contains details such as the objectives of the investigation, a risk assessment, the main investigative phases, resource requirements and a cost assessment.

2.37 From the sample of 15 investigations, simple matters that resulted in no further action by the Compliance Branch were generally reviewed by the RIM at the beginning of the process. This review sets the direction of the matter and allocates the case to an investigator. For these matters, this seems to satisfy the requirements of SOP 5.

2.38 For complex matters, Ombudsman staff saw inconsistencies in the degree of planning and case management. The planning was done particularly well in one of the cases that we examined that resulted in a brief of evidence (CIS 19309). In preparing for the investigation, the investigator used an investigation plan which included objectives of the investigation, the main phases to be carried out and resourcing matters. The investigation plan was based on the standard format attached to SOP 5. There was also an evidence matrix on file for the alleged offence.

2.39 In contrast, another case (CIS 19249), which also resulted in a brief of evidence to the CDPP, lacked the same comprehensive planning and case management. The investigators did not use an investigation plan or an evidence matrix, or any other similar methodology. Although the use of these case management and investigative tools is not mandatory, they build a solid foundation for the investigation by setting its direction and focus. These tools also assist in conducting internal reviews of investigations to ensure that they are still on track and that the investigators have not missed any critical issues.

2.40 It is recommended that the Compliance Branch follow internal policies on case management consistently, and use case management and investigative tools that are commensurate with the complexity of the investigation.

Record keeping by investigators

2.41 We examined the record keeping practices of the Sydney office to determine whether there was complete, consistent and defensible record keeping throughout the investigation with respect to:

- critical decisions⁵
- details or events occurring throughout the investigation
- contemporaneous notes of conversations conducted internally, with witnesses, with suspects and with external agencies.

2.42 According to internal policy, *SOP 3 – Intelligence and Information Management*, records are created to provide evidence of business activities and support effective decision-making as well as to satisfy regulatory requirements. The importance of good record keeping is also recognised in *Work Instruction 5d – Note Taking and Record Keeping*.

2.43 In the context of investigations, comprehensive and contemporaneous record keeping is essential for evidentiary purposes, demonstrates the consistency of decision-making over time and is the basis for defensible decision-making should the decision ever be reviewed or tested in courts.

2.44 From the sample of investigations, it appeared that notes of conversations were made contemporaneously in the investigators' notebooks.

2.45 Most critical decisions were adequately documented. However, for two cases (CIS 19249 and Jade 77) the reasons for the decisions were not well documented and there was little in the way of justification for the recommended course of action.

Case example – Case A

Some decisions were documented such as the options or different investigative paths at the beginning of the investigation. However, other decisions made during the investigation to undertake certain actions did not appear to have been documented. For example, a decision was made to execute a warrant on multiple occasions at the same premises. The file contained operational orders⁶ detailing when the warrant was executed, but the reasons for making each decision to execute the warrant were not documented. The ongoing risk assessment of the informant was also not documented,⁷ although it was clear that the investigators considered the informant reliable and acted on the information provided. However, there was no record of documented risk assessments of the informant or the reliability of the information provided.

Case example – Case B

The decision to issue a LOW was noted, but the reasons for doing so were poorly documented. A briefing note on file from the investigator to the RIM noted that a

⁵ A critical decision is a decision made during the course of an investigation that led to a significant change in direction or approach (AGIS).

⁶ Operational orders prepare investigators before the execution of warrants, and include information such as location of the premises, warrant teams, timing and objectives.

⁷ This is a requirement in Work Instruction 5f – Management of Informants.

Recommendation 5

That the Sydney office of the Compliance Branch consistently follow internal policies and guidelines on recordkeeping, including documenting the reasons for decisions made and activities and events that occurred throughout an investigation in a comprehensive, consistent and contemporaneous manner.

DAFF response:

The Compliance Branch has reinforced the requirement to comply with internal policies and guidelines on record keeping. The Sydney office has implemented processes to increase consistency in record keeping associated with investigations.

Recommendation 6

That, as part of its review of exhibit management practices, the Biosecurity Services Group engage an external or independent auditor with the appropriate security clearance to conduct an audit of all exhibit holdings in each of its regional offices once every six months.

DAFF response:

The Compliance Branch implemented revised audit arrangements in July 2010 which will now see through staged implementation, exhibit holdings in each of its regional offices audited once every six months by an independent auditor with appropriate security clearance.

Recommendation 7

That the Biosecurity Services Group review its templates for a Letter of Warning and a Letter of Advice so that the recipient is afforded with an opportunity to comment or reply to the letters.

DAFF response:

The Compliance Branch implemented revised Letter of Advice and Letter of Warning templates in July 2010 which now strengthens the opportunity for recipients to comment on and reply to these letters.

