

**Report to the Attorney-General
on agencies' compliance with
Part 15 of the
*Telecommunications Act 1997***

FOR THE PERIOD 9 DECEMBER 2018 TO 30 JUNE 2020

Report by the Commonwealth Ombudsman, Iain Anderson,
under s 317ZRB(3) of the Telecommunications Act 1997

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EXECUTIVE SUMMARY

This report presents the results of inspections conducted by the Office of the Commonwealth Ombudsman (the Office) under Part 15 of the *Telecommunications Act 1997* (the Act) from March to August 2021 (the inspection period) in relation to records covering the period 9 December 2018 to 30 June 2020 (the reporting period). This was the first round of inspections conducted by the Office under Part 15 of the Act since the legislation came into effect in December 2018.

The industry assistance framework under Part 15 allows interception and intelligence agencies to request or compel a designated communications provider (DCP) to provide certain types of technical assistance for a specified purpose under the Act. The definition of DCP (s 317) covers an expanded range of communications industry providers beyond traditional carriers and carriage service providers.

Agencies can seek industry assistance through 3 mechanisms: Technical Assistance Requests (TAR; voluntary), Technical Assistance Notices (TAN; compulsory), and Technical Capability Notices (TCN; compulsory). These mechanisms do not replace existing warrants and authorisations. For example, to intercept communications agencies still need to seek a telecommunications interception warrant under the *Telecommunications (Interception and Access) Act 1979* (TIA Act). However, industry assistance mechanisms can be used to seek technical assistance to help give effect to a separate warrant or authorisation.

Part 15 includes a range of procedural requirements and safeguards to ensure any request or notice given to a DCP is reasonable and proportionate, and that compliance with the request or notice is practical and technically feasible. Agency use of industry assistance powers under the Act is also subject to independent oversight by our Office (for interception agencies) and the Office of the Inspector-General of Intelligence and Security (OIGIS) (for intelligence agencies).

Our oversight role

The role of our Office under the Act is to provide independent oversight of interception agencies' use of industry assistance powers. Under the Act, 'interception agency' means the Australian Federal Police, the Australian Criminal Intelligence Commission, and the police force of a state or the Northern Territory – 9 agencies in total. We provide oversight by inspecting agencies' records, policies and procedures to determine the extent of the agency's compliance with the Act. We enhance transparency and public accountability on the use of industry assistance powers by reporting our findings to the Minister responsible for the

TIA Act who is required to table a copy of this report in Parliament. Under the Administrative Arrangements Order that commenced on 1 July 2022, the Attorney-General is the Minister responsible for the TIA Act.

Conducting industry assistance inspections

As this was our first round of industry assistance inspections, we conducted a health check of agencies' governance frameworks. The health checks were aimed at assessing agencies' readiness to commence using industry assistance powers and to help agencies identify potential risks and areas for improvement. Where an agency had used industry assistance powers during the reporting period, we combined the health check with a compliance assessment of the agency's industry assistance records to determine whether their use of the powers complied with Part 15 of the Act.

Tasmania Police advised it was not in a position to undertake a health check of its industry assistance framework during the inspection period. The Office elected to cancel our inspection of Tasmania Police after it was confirmed that Tasmania Police would not use industry assistance powers before it establishes a compliance framework.

We held 2 inspections in August 2021 (outside the 2020–21 financial year) due to the impacts of COVID-19 lockdowns (NSW Police) and a request for deferral by SA Police to allow them more time to prepare governance frameworks. We included the results of these 2 inspections in this report as they form part of the first round of inspections originally scheduled for 2020–21.

Due to border restrictions and COVID-19 requirements, the Office conducted 4 of the 8 industry assistance inspections remotely. These agencies made a special effort to ensure our inspection teams still received access to the systems and information required to conduct the inspections efficiently and effectively. We express our appreciation to these agencies for their flexibility. The Office would not have been able to respond quickly to changing COVID-19 restrictions without this support.

Agencies' use of powers

Only 3 of the 9 interception agencies used Part 15 industry assistance powers during the reporting period. In total, 18 TARs were given, including one purported TAR which was invalidly authorised. There were no TANs given by interception agencies and no TCNs given by joint approval of the Attorney-General and Minister for Communications.

Under Part 15 of the Act, industry assistance powers must be used for the purpose of:

- enforcing the criminal law as it relates to serious Australian offences (punishable by a maximum penalty of 3 years' imprisonment or more)
- assisting the enforcement of criminal laws in a foreign country, as it relates to serious foreign offences
- safeguarding national security.

The TARs given during the reporting period sought industry assistance to aid criminal investigations or intelligence-gathering activities relating to organised crime, cybercrime, drug offences, telecommunications offences, armed robbery, theft and conspiracy to murder.

Inspection outcomes

For the most part, agencies engaged openly and frankly with the Office when discussing their processes, policies and procedures. Generally, agencies were receptive to the recommendations and suggestions made by our Office as a result of our inspections findings.

We found the agencies that used industry assistance powers during the reporting period had started using the powers before establishing comprehensive governance frameworks. For example, agencies used industry assistance powers prior to having a completed policy document, formalised training procedures, a full suite of templates or guidance material and fully realised procedures for using the powers. This led to instances of statutory non-compliance or, at best, a failure by agencies to demonstrate compliance with key safeguards and requirements under Part 15 of the Act.

As a result of our inspections, across all agencies we made a total of **2** recommendations, **29** suggestions and **58** better practice suggestions. All our inspection findings, recommendations, suggestions or better practice suggestions were accepted by the agencies.

Key issues identified during our inspections were:

- an absence of processes and procedures to encourage decision-makers to demonstrate consideration of the key legislative criteria when approving use of industry assistance powers under Part 15 of the Act
- an absence of formalised training on the use of industry assistance for relevant staff, including delegates
- an absence of an established definition of when an industry assistance mechanism is 'given' by an agency, with flow-on ambiguity about the

period of effect for the mechanism and the reporting obligations to the responsible Minister

- incomplete or incorrectly drafted instruments of delegation.

The details of these issues and other significant or recurring inspection findings are discussed further in Part 3 of this report.

Ongoing engagement

In undertaking our inspections we identified ambiguities and apparent inconsistencies in the legislation. We raised these issues with the Department of Home Affairs (the department), which in practice exercised policy responsibility for the legislation during the reporting period. The department developed the administrative guidance for agency engagement with designated communications providers, which is available on the department's website. In addition, the department developed factsheets to help businesses understand the industry assistance framework and how it may apply to them.

We will continue to engage with the responsible department (as of 1 July 2022, the Attorney-General's Department), interception agencies and other stakeholders to support the clarity and effectiveness of the industry assistance framework.

PART 1: INTRODUCTION

1.1 Legislative background

In December 2018, Schedule 1 of the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* amended the *Telecommunications Act 1997* (the Act) to create Part 15 of the Act. The legislation created a comprehensive framework for interception and intelligence agencies to obtain assistance from industry to support their functions. Under the Act, an ‘interception agency’ means the Australian Federal Police, the Australian Criminal Intelligence Commission, and the police force of a state or the Northern Territory.

The industry assistance framework under Part 15 allows interception and intelligence agencies to request or compel a designated communications provider (DCP) to give certain types of assistance, in connection with any or all of the eligible activities of the DCP, for a specified purpose under the Act. Section 317C of the Act defines what constitutes a DCP. This covers an expanded range of communications industry providers beyond traditional carriers and carriage service providers.

The industry assistance mechanisms through which agencies can obtain assistance are:

- Technical Assistance Requests (TARs; voluntary)
- Technical Assistance Notices (TANs; compulsory), and
- Technical Capability Notices (TCNs; compulsory).

The glossary of terms in **Annex 1** provides additional detail about what each of these industry assistance mechanisms entail.

Industry assistance mechanisms do not replace the warrant and authorisation regimes under the *Telecommunications (Interception and Access) Act 1979* (the TIA Act), the *Surveillance Devices Act 2004* (the SD Act), or other state or territory laws, and must not provide a new basis for interception. Instead, Part 15 of the Act allows agencies to seek reasonable and proportionate assistance directly from DCPs in conjunction with existing warrant and authorisation-based powers for specified purposes.

Agency use of industry assistance powers is also subject to independent oversight by our Office (for interception agencies) and the Office of the Inspector-General of Intelligence and Security (OIGIS) (for intelligence agencies).

1.2 Our oversight role

Under section 317ZRB(1) of the Act, an Ombudsman official may inspect the records of an interception agency to determine the extent of its compliance with Part 15 of the Act. Interception agencies are also required to notify the Ombudsman within 7 days of issuing, extending, varying or revoking an industry assistance mechanism.

Industry assistance mechanisms can be used to compel DCPs to assist with investigations. The assistance provided may contribute to significant intrusions on the privacy of members of the public. The covert nature of these powers means members of the public will rarely know of their use (other than in high level, de-identified reporting). The Ombudsman's oversight role provides assurance to Parliament and the public that agencies' use of these powers complies with the legislation.

How we inspect and report

The Office commenced inspections under Part 15 of the Act in March 2021. Each inspection involved a health check aimed at assessing the readiness or 'health' of an agency's compliance framework. Where an agency used the industry assistance powers between 9 December 2018 to 30 June 2020 (the reporting period), the Office conducted an additional compliance assessment of the agencies' records.

Following each inspection, we provided agencies with an inspection report detailing our findings. An Ombudsman inspection may identify a range of issues, from minor administrative errors through to serious non-compliance and systemic issues. If an issue is sufficiently serious, the Ombudsman may make formal recommendations for remedial action. On other issues, we may make suggestions for improvement to encourage agencies to take responsibility for identifying and implementing practical solutions. We may also make better practice suggestions where we consider an agency's existing practice may expose it to a risk of non-compliance.

Agencies we oversee

Part 15 of the Act confers industry assistance powers on 9 interception agencies (see **Table 1** below). The Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, and the Australian Signals Directorate also have access to industry assistance powers under Part 15 of the Act, however the OIGIS oversees those agencies' use of the powers. The Commonwealth Ombudsman's oversight function does not extend to compliance by DCPs.

PART 2: INSPECTIONS OVERVIEW

In 2020–21, we inspected 8 of the 9 law enforcement interception agencies under Part 15 of the Act. Tasmania Police did not have its frameworks or policy documents in place for our Office to review during the inspection period. We cancelled the scheduled inspection of Tasmania Police after it undertook not to use the powers until it had established an appropriate governance framework.

Of the 8 inspections conducted, 5 involved health checks only, 3 involved both a health check and a compliance assessment, and 4 were conducted remotely (see **Table 1** below).

Table 1: Summary of inspections conducted

Agency	Health check conducted	Compliance assessment conducted	Conducted remotely
Australian Criminal Intelligence Commission	✓	✓	✗
Australian Federal Police	✓	✓	✗
New South Wales Police Force	✓	✓	✓
Northern Territory Police Force	✓	✗	✗
Queensland Police Service	✓	✗	✓
South Australia Police	✓	✗	✓
Tasmania Police	✗	✗	✗
Victoria Police	✓	✗	✓
Western Australia Police Force	✓	✗	✗

2.1 Approach for the initial inspection round

Health check methodology

Our health checks were aimed at determining agencies' readiness to use the industry assistance powers. Our primary focus was to determine whether the frameworks, policies and procedures an agency had developed, or was in the process of developing, were suitable for supporting legislative compliance under the Act. During this process, we checked agencies' governance frameworks against

criteria derived from the *Australian Standard on Compliance Management Systems – Guidelines (AS ISO 19600:2015)*, as well as the requirements of the Act.

As a part of the health checks, we reviewed agencies' policy documents, procedures, templates, training materials and record-keeping processes. We also interviewed key staff to assess their understanding of their roles and responsibilities.

The *Industry Assistance Health Check Inspection Criteria* document at **Annex 2** provides further information about our health check methodology.

Compliance assessment methodology

During the compliance assessment portion of the industry assistance inspections, we reviewed agencies' records to assess the extent of their compliance with Part 15 of the Act. We assessed whether:

- agencies sought and exercised industry assistance in accordance with the requirements in Part 15 of the Act
- agencies managed information obtained through use of industry assistance in accordance with legislative requirements
- agencies met notification and reporting obligations
- agencies demonstrated a culture of compliance during their use of industry assistance powers.

Where industry assistance gave effect to a warrant or authorisation, we also reviewed records to determine the extent of the agency's compliance with the legislation governing the use of these affiliated warrants or authorisations and with the industry assistance mechanism. However, we could not do this where the warrant or authorisation was issued under a legislative framework which the Office does not oversee. This only arose in the context of the New South Wales Police Force using state-based powers in affiliation with industry assistance.

The *Industry Assistance Inspection Criteria* document at **Annex 3** provides further information about our compliance assessment methodology.

2.2 Response to COVID-19 outbreaks

Due to border restrictions, city-wide lockdowns and social distancing requirements imposed in response to COVID-19 outbreaks, the Office conducted 4 inspections remotely using video-conferencing and other technologies.

Our Office was only able to proceed because the relevant agencies were prepared to adopt new or modified practices to support our remote inspections. We acknowledge and appreciate the additional work these agencies undertook to facilitate these remote inspections.

PART 3: INSPECTION FINDINGS

3.1 Inspections findings summary

The 2020–21 industry assistance inspections resulted in **2** recommendations, **29** suggestions and **58** better practice suggestions. The allocation of these findings across agencies are identified below in **Table 2** (Health checks) and **Table 3** (Compliance assessments).

Table 2: findings, recommendations, suggestions and better practice suggestions

Health checks				
Agency	Findings	Recommendations	Suggestions	Better practice suggestions
Australian Criminal Intelligence Commission	6	2	0	3
Australian Federal Police	7	0	2	6
New South Wales Police Force	2	0	2	3
Northern Territory Police Force	6	0	0	8
Queensland Police Service	4	0	0	5
South Australia Police	5	0	0	5
Tasmania Police	N/A	N/A	N/A	N/A
Victoria Police	5	0	1	7
Western Australia Police Force	5	0	0	6
Total	40	2	5	43

Table 3: findings, recommendations, suggestions and better practice suggestions

Compliance assessments				
Agency	Findings	Recommendations	Suggestions	Better practice suggestions
Australian Criminal Intelligence Commission	13	0	12	5
Australian Federal Police	11	0	10	9
New South Wales Police Force	5	0	2	1
Total	29	0	24	15

3.2 Health check findings

We found agencies’ readiness to use the industry assistance powers varied significantly. Of the 5 agencies we inspected that had not used their powers during the reporting period, only one (Queensland Police Service) had a largely complete governance framework in place at the time of our inspection. The remaining 4 agencies were in varying stages of developing their policies and procedures. We suggested these agencies implement specific improvements to their policies, procedures, training and record-keeping arrangements prior to accessing industry assistance under Part 15 of the Act.

Of the 3 agencies that accessed industry assistance during the reporting period, 2 (NSW Police Force and Australian Federal Police) had comprehensive governance frameworks in place at the time of the health checks. In both instances, the frameworks reviewed during the health checks had been considerably refined and improved from those that were in effect at the time the powers were first used by the agencies (as discussed further in section 3.3 below). The remaining agency (Australian Criminal Intelligence Commission) had an incomplete governance framework in place at the time of our health check. In our view, this contributed significantly to the instances of statutory non-compliance we identified in the agency’s records.

One of the agencies (Victoria Police) had not used the powers within the reporting period but had used them by the time we conducted the health check. We observed that Victoria Police did not have a complete and accurate governance framework in place at the time it used the powers. For example, it did not have a completed policy document to support compliant use of the industry assistance

powers. We will conduct a full compliance assessment of Victoria Police's use of industry assistance powers in the 2021–22 inspection period.

Spotlight issues

During the health checks, we identified multiple issues which occurred across the agencies. Our inspection reports made recommendations, suggestions and better practice suggestions to support agencies in addressing these concerns.

Delegations

Of the 8 agencies inspected, only 3 agencies (NSW Police Force, Queensland Police Service and Australian Federal Police) had comprehensive, appropriately framed instruments of delegation in place at the time of the health checks. Of the remaining 5 agencies, 2 had not commenced drafting their delegation instruments and 3 had delegation instruments that were either incomplete or did not comply with key requirements under s 317ZR of the Act. In some instances, this arose because the drafting of s 317ZR is not clear as to what ranks are delegable under Part 15 of the Act, particularly for state and territory agencies.

Under section 317ZR of the Act, certain functions and powers of the chief officer are delegable to certain levels of officer within an agency. For state and territory agencies, this is defined as an Assistant Commissioner or a person holding the rank of Superintendent or an equivalent rank. During the inspections, we noted that state and territory agencies commonly have the position of Deputy Commissioner. This rank is senior to the Assistant Commissioner rank and not equivalent to it. Similarly, state and territory agencies commonly have one or 2 ranks between Assistant Commissioner and Superintendent (i.e., Commander and/or Chief Superintendent). This created some confusion for state and territory agencies when drafting their instruments of delegation.

Definition of 'given'

The Act does not contain a definition of 'given'; as such it is not clear whether an industry assistance mechanism is 'given' at the time of signature by the chief officer or delegate, or when served on the DCP. The time at which a TAR or TAN is given is important because it may dictate the in-force period for the mechanism. This, in turn, determines when civil and criminal immunities apply to actions undertaken by a DCP under an industry assistance mechanism. It is also important for ensuring information reported to the Minister under s 317ZRB of the Act, and to the Ombudsman under the notification provisions, is accurate and consistent.

In the absence of a definition under statute or centralised policy guidance, it is important agencies clearly define the term 'given' in their internal policies. Only

one agency we inspected (NSW Police Force) had an established definition of when an industry assistance mechanism was taken to be 'given' in this regard.

In September 2021, we raised the absence of a clear definition under the Act with the Department of Home Affairs, which in practice exercised policy responsibility for Part 15 of the Act at that time. Until a centralised definition is established, we will continue to advise agencies to determine their own internal definition of 'given' under Part 15 of the Act.

Records management procedures

The Act does not require interception agencies to maintain records of their industry assistance activities (other than requirements relating to urgent oral TARs and TANs). However, the Office relies on the ability to inspect an agency's records to determine the extent of its compliance with Part 15 of the Act. If an agency does not make and retain contemporaneous records, we may be unable to provide assurance to the responsible Minister, Parliament and the public that the relevant agency has used the powers appropriately.

During the health checks, agencies typically demonstrated some awareness that the effectiveness of Ombudsman inspections and oversight functions was contingent on the agencies' capacity to establish and maintain good record-keeping practices. However, agencies generally did not have documented procedures for record-keeping to ensure consistency and completeness of relevant records and to demonstrate compliance with the Act. We made better practice suggestions directed at improving agencies' record management practices for 7 of the 8 agencies we inspected.

Absence of established training procedures

During our health checks, only Western Australia Police Force had formalised training arrangements for delegates and other officers involved in using industry assistance powers. The remaining 7 interception agencies instead relied on a combination of existing expertise and ad hoc training.

Given the industry assistance framework requires consideration of complex technical and legal requirements, targeted training is an important dimension of agencies' governance and compliance frameworks. A regular training program can reinforce staff understanding of their respective roles and responsibilities to ensure compliant use of industry assistance powers, whilst also communicating important updates to procedures or legislation.

We recommended agencies adopt a structured approach to training, including the establishment of induction training for officers temporarily acting in roles with delegated powers under s 317ZR of the Act.

3.3 Compliance assessment findings

Three agencies used industry assistance powers during the reporting period. This resulted in a total of 18 TARs issued by the Australian Criminal Intelligence Commission (1 TAR), Australian Federal Police (8 TARs) and NSW Police Force (9 TARs). None of the agencies our Office oversees gave a TAN, and the Attorney-General did not notify our Office of any occasions where a TCN was given.

Industry assistance powers under Part 15 must be used for the purpose of enforcing the criminal law as it relates to serious Australian offences (punishable by a maximum penalty of 3 years' imprisonment or more); assisting the enforcement of criminal laws in force in a foreign country as it relates to serious foreign offences; or safeguarding national security. The TARs given during the reporting period sought industry assistance to aid criminal investigations or intelligence gathering activities relating to organised crime, cybercrime, drug offences, telecommunications offences, armed robbery, theft and conspiracy to murder.

All 3 agencies used industry assistance powers before they established comprehensive governance and compliance frameworks. In our view, this created a risk (in some instances realised) of statutory non-compliance during these agencies' early use of the industry assistance powers.

Significant or recurring issues we noted during the compliance assessment part of our inspections are outlined below.

Spotlight issues

Demonstrating consideration of key criteria and safeguards

All 3 agencies that used industry assistance powers had poor record-keeping practices in place during early use of the powers. We found that agencies failed to demonstrate the chief officer or delegate had fully considered the key decision-making criteria when giving industry assistance mechanisms. For example, for all TARs given, agencies failed to produce records demonstrating:

- the decision-maker had considered whether a request was reasonable and proportionate having regard to each of the matters specified in s 317JC of the Act, and

- the decision-maker was satisfied, before giving the TAR, that compliance with the request by the DCP was practicable and technically feasible, as required under s 317JAA of the Act.

Consequently, we were unable to determine that all legislative requirements were adhered to in the giving of these TARs.

In some instances, TARs were given that requested the DCP to do acts or things that had the potential to affect the privacy of numerous individuals who were not the target, or who were not of interest to the requesting interception agency. Despite this potential privacy intrusion, agencies were unable to produce evidence the decision-maker had turned their mind to whether the request, when compared to other forms of industry assistance available, was the least intrusive form of assistance; in so far as persons whose activities were not of interest to the agency (s 317JC(f) of the Act). Further, agency records did not include formal processes for identifying and quarantining personal information of persons not of interest to the agency which was obtained in accordance with the TAR and affiliated warrants or authorisations.

We also found agencies were unable to produce documents demonstrating the decision-maker's consideration of whether the specified assistance requested in a TAR would create a systemic weakness or systemic vulnerability, as required under s 317ZG of the Act. In some instances, agencies included templated phrasing on the TAR requiring the DCP not to proceed with implementing the request where it identified that doing so would breach the requirement under s 317ZG of the Act. This is a useful safeguarding measure. However, we consider the decision-maker must turn their own minds to whether the assistance could give rise to, or prevent rectification of, a systemic vulnerability or weakness and, prior to giving a TAR or TAN, satisfy themselves that it will not.

Aside from certain legacy issues, implementing the recommendations, suggestions and better practice suggestions made by our Office should help agencies prevent these issues from reoccurring in future reporting periods.

Compliance of warrants and authorisations for access to telecommunications data in connection with TARs

Where industry assistance is in connection with, related to, helps or gives effect to a warrant or authorisation, our inspections also assess compliance of these warrants or authorisations against the requirements of the relevant legislation.

Part 15 of the Act relies on the safeguards and protections within the separate legislative schemes for warrants and authorisations that govern how agencies

request and receive personal information from DCPs. It is important the warrants and authorisations used in association with industry assistance mechanisms are properly applied for and authorised, without agencies seeking to rely only on considerations made for the industry assistance mechanisms.

In several instances across 2 of the 3 agencies, we were not satisfied from the records available during the inspection that telecommunications data authorisations under Chapter 4 of the TIA Act had been properly made. We suggested the agencies seek legal advice on whether these authorisations were properly made. To the extent that any authorisations were determined to have not been properly made, we advised agencies should quarantine affected data, determine any use and disclosure implications, and where applicable inform partner agencies accordingly.

Delegations

As discussed in the health check section of this report, we identified multiple instances where instruments of delegation issued under s 317ZR of the Act were either incomplete or did not comply with certain statutory criteria. This issue largely arose for agencies that had not yet used their powers, and therefore did not lead to statutory non-compliance.

However, in one agency, an officer of the agency purported to give a TAR where there was no delegation instrument in place. The agency disclosed this to our Office 2 weeks before the inspection. During the inspection, we identified that the officer who purported to give the TAR could not have been delegated by the chief officer's powers under s 317ZR of the Act given their classification (even if a delegation had been in place). This demonstrates the importance of agencies maintaining clear guidance for their officers on the required processes for applying for and approving industry assistance mechanisms.

In another agency, the delegate signed a TAR using a new position title following an internal restructure. However, the delegation instrument had not been updated to reflect the new position title. In this instance, and on the basis of additional records inspected, we were satisfied that the individual was holding an appropriately delegated position at the time the TAR was given. Nonetheless, there was a lack of clarity regarding the capacity in which the delegate authorised the TAR. This had potential implications for the use of information sought from the industry assistance request and provided by the DCP in accordance with the TAR. We suggested the agency seek legal advice in relation to this issue.

3.4 Ongoing inspections

The Office continue to conduct compliance-focused inspections during the 2021–22 financial year for agencies that accessed industry assistance between 1 July 2020 and 30 June 2021. As a part of these inspections, we reviewed the remedial action taken by agencies in response to our findings during the 2020–21 inspection period. We will discuss this in our 2021–22 report on agencies’ use of industry assistance powers.

3.5 Ongoing engagement

Through our oversight function, we identified some ambiguities and apparent inconsistencies within the relevant legislation. In October 2021, the Office met with the Department of Home Affairs to discuss these issues. We will continue to engage with the responsible department (now the Attorney-General’s Department), as well as with interception agencies and other stakeholders, to support the clarity and effectiveness of the industry assistance framework.

ANNEXES

Annex 1 | Industry assistance glossary of terms

Term/Acronym	Meaning
IA	Industry Assistance.
DCP	Designated communications provider. This refers to the entity that is requested/required to give assistance. Section 317C of the Act defines what constitutes a DCP.
Health check	An assessment of the readiness, or ‘health’, of an agency’s compliance framework to identify any potential issues or risks, and areas for improvement.
Intelligence agencies	The Australian Secret Intelligence Service, Australian Security Intelligence Organisation and the Australian Signals Directorate. These are agencies, other than interception agencies, that are empowered to issue TARs and TANs under Part 15 of the Act. ‘Intelligence agencies’ is a term of convenience used by Ombudsman staff; it is not used in the legislation.
Interception agency	The Australian Federal Police, Australian Criminal Intelligence Commission, and a police force of a state or the Northern Territory (per s 317B of the Act).
TAR	Technical Assistance Request: A request issued by an intelligence agency or an interception agency under s 317G of the Act. This is a request for the DCP to provide voluntary assistance.
TAN	Technical Assistance Notice: A notice issued by a designated intelligence agency or interception agency under s 317L of the Act. A TAN compels a DCP to provide assistance to interception or intelligence agencies. A TAN cannot require a DCP to create a new capability.
TCN	Technical Capability Notice: A notice given by the Attorney-General under s 317T of the Act requiring that a DCP take steps to ensure it is capable of providing assistance, or otherwise provide assistance to an interception or intelligence agency for a specified purpose.

Industry assistance mechanisms	The substantive mechanisms that exist under Part 15 of the Act (i.e., TAR, TAN, TCN).
Inspection period	The period during which an inspection occurs for a specific agency. In relation to the annual reports, this is the financial year during which the inspections being reported were held.
Reporting period	The period for which records are being reviewed – generally, the financial year ending prior to commencement of inspections.

Annex 2 | Industry assistance health check inspection criteria

Objective: To understand the ‘health’ of the agency in establishing its compliance framework and to determine any current or future compliance risks with Part 15 of the *Telecommunications Act 1997* (the Act)

Under s 317ZRB(1) of the Act, an Ombudsman official may inspect the records of an interception agency to determine the extent of its compliance with Part 15 of the Act.

This ‘health check’ will assess the readiness, or ‘health’ of each agency’s compliance framework against the criteria below, which have been derived from the Australian Standard on Compliance Management Systems – Guidelines (AS ISO 19600:2015)

1. Context of the agency

1.1 Organisational context

- Has the agency identified any external and internal issues, especially those related to compliance risks, that affect its ability to establish processes for, and implement, its industry assistance powers?
- Has the agency used processes under s 313 of the Act rather than the industry assistance powers and processes under Part 15 of the Act? If so, why?
- Does the agency’s compliance management reflect the agency’s values, objectives, strategy and compliance risks?

1.2 Compliance culture

- Does the agency demonstrate active, visible, consistent and sustained commitment by senior management and management towards a common, published standard of behaviour that is required throughout every area of the agency?
- Does the agency exhibit values, ethics and beliefs that exist throughout the agency and interact with the agency’s structures and control systems to produce behavioural norms conducive to compliance outcomes? (See Guidelines 7.3.2.3 for list of factors that will support the development of a compliance culture.)

2. Leadership

2.1 Senior leadership commitment

- Do senior leaders demonstrate their leadership and commitment with respect to the agency meeting its compliance obligations?

- What are the messages conveyed to staff about compliance and expectations, generally and specifically in regard to industry assistance?
- What leadership actions are taken to support effective compliance?

2.2 Compliance policy

- Does the agency have a documented compliance policy or equivalent(s)?
- How is this communicated within the organisation and specifically to those with responsibilities under Part 15 of the Act?
- When was the compliance policy last updated?

2.3 Organisational roles, responsibilities and authorities

Delegations:

- Is there a delegation instrument (or multiple instruments) in place for the purposes of Part 15 of the Act?
- Do the delegations reflect the current organisational structure?
- Are only officers at an appropriate level delegated?
- How are officers aware of the delegation instrument?
- If a delegation instrument is position based, do procedures include mitigations for the potential risks associated with organisation change?

Authorising officers:

- Are the chief officer and delegates made sufficiently aware of their obligations regarding industry assistance?

3. Planning

3.1 Actions to address compliance risks

- Does the agency have a risk register and/or risk management plan in regard to compliance with Part 15 of the Act?
- Does the agency have an approach to managing industry assistance touch-points with other powers and ensuring all compliance obligations are met?
- Does the agency have measures in place to manage privacy concerns with respect to industry assistance?
- Does the agency have measures in place to manage commercially sensitive information with respect to industry assistance?
- Has the agency sought legal or other advice, as appropriate, in establishing processes and systems for industry assistance?
- Has the agency contacted Home Affairs, the Attorney-General's Department, other agencies, or the Office of the Commonwealth Ombudsman in establishing processes and systems for industry assistance?

3.2 Compliance objectives and planning to achieve them

- Does the agency have established plans to achieve its industry assistance compliance objectives?
- At what stage is the agency in implementing its plans?

- What are the outstanding actions, if any, and anticipated timeframes for implementation?

4. Support

4.1 Resources

- Has the agency determined a need for and established the necessary resources to implement industry assistance?
- If not established, what are the outstanding actions and anticipated timeframes for implementation?

4.2 Competence and training

- Does the agency, or does the agency intend to:
 - hold compliance training for officers involved in using industry assistance powers?
 - hold training for the chief officer/delegated officers giving the TARs/TANs and requesting TCNs?
 - require chief officer/delegated officers to complete mandatory training and refresher training?
 - engage with investigators and the chief officer/delegated officer to advise on relevant issues/compliance concerns?
 - plan to hold any further training or release further guidance?
- If not established, what are the outstanding actions and anticipated timeframes for implementation?

4.3 Awareness and communication

- Are those with responsibilities under Part 15 of the Act made aware of:
 - the compliance policy
 - their role and contribution to the effectiveness of the agency's compliance management system, including the benefits of improved compliance performance
 - the implications of not conforming with the compliance management system requirements
 - their specific responsibilities under Part 15 of the Act and the systems, tools and practices required to support compliance?
- Has the agency communicated with potential designated communications providers and/or other external stakeholders about using industry assistance powers in practice?

4.4 Documented information

- What documentation has been, or will be, established by the agency to support its compliance with Part 15 of the Act?

5. Operation

5.1 Operational planning

- Does the agency have processes in place and guidance for staff about giving, extending (TANs only), varying and revoking TARs/TANs? Is the guidance practical and sufficient? (Please provide copies of relevant documentation.)
- Does the agency have processes in place and guidance for staff about requesting TCNs? (Please provide copies of relevant documentation.)
- Does the agency’s procedural and guidance documentation include:
 - the limitations applicable to industry assistance and how these should be considered in applying for and decision-making in relation to TARs, TANs and TCNs?
 - ensuring relevant advice is given to designated communications providers?
 - managing authorised disclosure of industry assistance information?
 - record-keeping and notification obligations?
- Are the relevant standard operating procedures available to everyone who needs access to these?

5.2 Establishing controls and procedures

- Does the agency have appropriate quality assurance and control measures established in relation to Part 15 of the Act? For example, consider:
 - automated processes and prompts
 - secondary checks
 - vetting procedures/guidelines
 - segregation of duties
 - internal reviews/audits
 - systematised reminders
 - quarantine procedures
 - records management/destruction registers.

5.3 Outsourced processes

- Are any agency processes related to Part 15 of the Act outsourced?
 - If so, what controls and monitoring systems are in place to assure compliance obligations are met?

6. Performance evaluation

6.1 Monitoring, measurements, analysis and evaluation

- Does the agency have systems in place for capturing and responding to feedback on compliance performance, including:
 - staff feedback
 - provider feedback
 - other stakeholder feedback?

- How will the agency identify and manage emerging issues?

6.2 Audit and management review

- Does the agency conduct, or intend to conduct, any form of internal audit or routine management review of its compliance with Part 15 of the Act?

7. Improvement

7.1 Non-compliance identification and corrective action

- Does the agency have systems and processes in place to identify and respond should non-conformity and/or non-compliance occur?

7.2 Continual improvement

- Does the agency have systems and processes in place to enable the agency to facilitate continual improvement in the suitability, adequacy and effectiveness of its compliance with Part 15 of the Act?

Annex 3 | Industry assistance compliance assessment inspection criteria

Objective: To determine the extent of compliance with Part 15 of the *Telecommunications Act 1997* (the Act) by the agency and its officers (s 317ZRB[1])

1. Did the agency access industry assistance in accordance with the Act?

1.1 Were TARs given, varied and revoked in accordance with the Act?

Process checks:

- Does the agency have effective procedures in place to ensure that TARs are properly given and varied?
- Does the agency have effective procedures in place to revoke TARs when required?

Records checks in the following areas:

- Whether TARs were given by a person with the authority to do so (ss 317G, 317ZM and 317ZR)
- Whether TARs were given to a ‘designated communications provider’ (ss 317G and 317C)
- Whether form and content requirements were met (s 317H)
- Whether TARs were given for appropriate purposes (ss 317G, 317C and 317E)
- Whether key decision-making considerations were demonstrated (ss 317JAA and 317JC)
- Whether TARs were properly varied (s 317JA)
- Whether TARs were revoked when required (s 317JB)

1.2 Were TANs given, extended, varied and revoked in accordance with the Act?

Process checks:

- Does the agency have effective procedures in place to ensure that TANs are properly given, extended and varied?
- Does the agency have effective procedures in place to revoke TANs when required?

Records checks in the following areas:

- Whether TANs were given by a person with the authority to do so (ss 317L, 317LA, 317ZM and 317ZR)
- Whether TANs were given to a ‘designated communications provider’ (ss 317L and 317C)
- Whether the provider was consulted before the TAN was given (s 317PA)
- Whether form and content requirements were met (s 317M)
- Whether TANs were given for appropriate purposes (ss 317L, 317C and 317E)

- Whether State/Territory interception agencies obtained approval from the AFP Commissioner (s 317LA)
- Whether key decision-making considerations were demonstrated (ss 317P and 317RA)
- Whether TANs were properly extended (s 317MA) and/or varied (s 317Q)
- Whether TANs were revoked when required (s 317R)

1.3 Were TCN-related requests in accordance with the Act?

Process checks:

- Does the agency have processes in place to ensure TCN-related requests are made in accordance with the Act?

Records checks in the following areas:

- Whether requests to the Attorney-General complied with any procedures and arrangements to be followed as determined by the Attorney-General (s 317S)
- Whether requests to the Attorney-General for a TCN outlined all relevant information (ss 317T, 317U, 317V and 317ZAA)
- Whether requests to the Attorney-General for variation of a TCN outlined all relevant information (ss 317X, 317XA and 317ZAA)

1.4 Were limitations adhered to?

Process checks:

- Does the agency have processes in place to manage the key limitations to TARs, TANs and TCNs?

Records checks in the following areas:

- Whether restrictions around systemic weaknesses or vulnerabilities were adhered to (s 317ZG)
- Whether TCN limitations were considered in applications to the Attorney-General (s 317ZGA)
- Whether relevant warrants or authorisations were in place for the assistance sought (s 317ZH)