



Surveillance Devices Act 2004

Report for the year ending 30 June 2006

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ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ACC	Australian Crime Commission
AFP	Australian Federal Police
FTR Act	<i>Financial Transactions Reports Act 1988</i>
SES	Senior Executive Service
Surveillance Act	<i>Surveillance Devices Act 2004</i>
NSW Police	New South Wales Police
SA Police	South Australia Police

CHAPTER 1 – INTRODUCTION

1.1 This is the second Annual Report on the *Surveillance Devices Act 2004* (the Surveillance Act), and relates to the period from 1 July 2005 to 30 June 2006. The Surveillance Act commenced operation on 15 December 2004.

1.2 Chapter 2 outlines the objectives and the structure of the Surveillance Act.

1.3 Chapter 3 records relevant developments that have occurred during the period under review.

1.4 Chapter 4 presents the information collected in accordance with the statutory requirements of section 50 of the Surveillance Act. That section requires the Attorney-General, as Minister administering the Surveillance Act, to have prepared each year a report giving details of the use of surveillance devices for law enforcement purposes.

CHAPTER 2 – OVERVIEW OF THE SURVEILLANCE ACT

2.1 This chapter provides an overview of the Surveillance Act, including an outline of its objects and a description of the provisions that are most relevant to the contents of this report. In addition, this chapter includes a section relating to the accountability provisions of the Surveillance Act, describing the means by which the various agencies are accountable for their actions under the legislation.

Overview of the legislation

2.2 The Surveillance Act strengthens the legislative regime which previously consisted of a combination of State and Commonwealth legislation and common law principles. Legislation governing the use of surveillance devices at a federal level, namely the *Customs Act 1901* and the *Australian Federal Police Act 1979*, became outdated and inadequate in the face of progressively complex and covert criminal activity.

2.3 The Surveillance Act is broadly based on the model surveillance device laws developed by the Joint Working Group on National Investigation Powers. The Joint Working Group on Cross Border Investigative Powers for Law Enforcement was an initiative of the Leaders Summit on Terrorism and Multijurisdictional Crime in November 2003. In its report the Working Group proposed the adoption of model laws both at the state and federal levels to regulate the use of surveillance devices by law enforcement. The Surveillance Act formed part of the model regime and commenced operation on 15 December 2004.

Use of surveillance devices

2.4 Surveillance devices are defined in the Surveillance Act as data surveillance devices, listening devices, optical surveillance devices and tracking devices. Surveillance devices may be used by officers from the AFP, the ACC, State and Territory police forces and non-police agencies, such as State anti-corruption agencies, for the investigation of Commonwealth offences or State offences with a federal aspect which carry a maximum penalty of at least three years imprisonment. These devices may also be used to assist in the safe recovery of a child who is the subject of a recovery order or an order for a warrant of apprehension or detention of a child, for example when a child has been unlawfully removed from Australia to another country.

2.5 Surveillance devices may also be used for the investigation of certain offences against the *Fisheries Management Act 1991*, such as the illegal fishing of Patagonian tooth fish, although these offences do not carry terms of imprisonment. Surveillance devices may also be used for the investigation of offences under sections 15 and 18 of the *Financial Transaction Reports Act 1988* (FTR Act), which relate to the failure to declare the import or export of money in excess of A\$10,000 and operating an account with a cash dealer in a false name. The FTR Act offences carry a two year term of imprisonment but are included in the Surveillance Act as they are often indicative of more serious criminal conduct.

2.6 Generally, surveillance devices may only be used under the authority of a warrant issued by an eligible judge or a nominated Administrative Appeals Tribunal (AAT) member unless special circumstances of urgency exist involving a serious risk to a person or property, the recovery of a child, or where there is a risk of loss of evidence for certain listed offences such as drug offences, terrorism, espionage, sexual servitude and aggravated people smuggling offences. In such cases, a member of the agency of at least Senior Executive Service (SES) level may issue an emergency authorisation. The use of a surveillance device under such an authorisation must be retrospectively approved by a judge or AAT member within 48 hours of the issue of the authorisation.

2.7 Optical surveillance devices, listening devices and tracking devices may also be used without warrant where the device can be installed and retrieved without entering premises, or interfering with a vehicle or thing without permission. Listening devices may also be used without warrant by a law enforcement officer who is a party to the conversation being monitored or recorded. In such cases a member of the law enforcement agency can use a device without a warrant under sections 37 and 38 of the Surveillance Act, or in the case of tracking devices an authorisation can be sought from a member of the agency of at least SES level for the use of a tracking device under section 39 of the Surveillance Act.

2.8 The Surveillance Act also allows the use of surveillance devices for the investigation of Commonwealth offences occurring outside Australia. With the exception of the investigation of certain offences in the contiguous and fishing zones, the consent of an appropriate official of the foreign country or the country of registration of the vessel or aircraft is required before use of the surveillance device can be lawful.

2.9 The Surveillance Act establishes a strict regime, similar to that in the *Telecommunications (Interception and Access) Act 1979*, to regulate the use, communication, publication, storage, and destruction of surveillance product. The Surveillance Act establishes a rigorous reporting and inspection regime which allows for scrutiny of the exercise of powers under the Surveillance Act by the Ombudsman, the Attorney-General and the Parliament.

Applications for warrants

2.10 In the normal course of events, the Surveillance Act requires that an application for a warrant be in writing. However, in urgent circumstances applications may be made remotely by telephone. In either case, the warrant takes effect only when completed and signed by the Judge or nominated AAT member. The information required for a written application must also be provided to a Judge or nominated AAT member at the time of a telephone application and the applicant must supply the relevant supporting affidavits to the Judge or nominated AAT member within one day after the warrant is issued. Specific provision is made for the revocation of a warrant where this legislative requirement is not complied with.

Issue of warrants by eligible judges and nominated AAT members

2.11 Division 1 of Part 2 of the Surveillance Act provides that an eligible judge or nominated AAT member may issue a warrant authorising the use of a surveillance device on application by an agency.

2.12 An ‘eligible Judge’ refers to a Judge of a court created by the Parliament who has consented in writing to being nominated by the Attorney-General, and who has been declared by the Attorney-General to be an eligible Judge. In the reporting year eligible Judges included members of the Federal Magistrates Court of Australia.

2.13 A ‘nominated AAT member’ refers to a Deputy President, senior member or member of the AAT who has been nominated by the Attorney-General to issue surveillance device warrants. In the case of part-time senior members and members of the AAT, the member must have been enrolled as a legal practitioner of the High Court, Federal Court, or Supreme Court of a State or Territory for no less than five years to be eligible for nomination to issue surveillance device warrants.

2.14 The total number of eligible judges and nominated AAT members available in the reporting year is presented in Table 1.¹

Table 1 – Availability of Federal Court Judges, Family Court Judges, nominated AAT Members and Federal Magistrates to issue warrants

ISSUER	NUMBER ELIGIBLE	
	04/05	05/06
NOMINATED AAT MEMBERS	8	12
FAMILY COURT JUDGES	10	0
FEDERAL COURT JUDGES	0	0
FEDERAL MAGISTRATES	25	24
TOTAL	43	36

Accountability provisions

2.15 The Surveillance Act contains a number of provisions designed to enhance the accountability of the agencies using surveillance devices under a warrant. The most significant of these provisions are outlined below.

Legislative safeguards and controls

2.16 The Surveillance Act contains a number of safeguards and controls. All law enforcement agencies using the Surveillance Act are required to maintain records relating to the use of surveillance devices and the use of surveillance product. The Surveillance Act requires that the Ombudsman conduct regular inspections of those records. In addition, all law enforcement agencies must maintain a register of warrants recording details of all warrants in force during the preceding three months. The Surveillance Act also ensures that the Attorney-General, as the Minister administering

¹ This figure includes judges and AAT members who have been declared eligible judges or nominated AAT members under subsection 12D(2) of the *Australian Federal Police Act 1979* or 219RA(2) of the *Customs Act 1901*. A transitional provision was included in the *Surveillance Devices Act 2004* to preserve the operation of declarations under those Acts.

the Surveillance Act, is kept informed of the agencies' activities by means of reports from the agencies and the Ombudsman.

Inspections and reports by the Ombudsman

2.17 Under Division 3 of Part 6 of the Surveillance Act, the Commonwealth Ombudsman is required to inspect the records of law enforcement agencies to determine the extent of compliance with the Act.

2.18 The Ombudsman must make a written report to the Attorney-General at six monthly intervals on the results of each inspection.

Annual Report tabled by the Attorney-General

2.19 The Surveillance Act requires that the Attorney-General table in Parliament a report setting out the information required by section 50 each year. Chapter 4 of this report contains the information required to be presented under the Surveillance Act.

CHAPTER 3 – DEVELOPMENTS IN THE REPORTING YEAR

3.1 This chapter sets out the principal legislative developments and judicial decisions relating to the Surveillance Act occurring during the reporting year.

Recent Legislative and policy developments

3.2 There were no major legislative or policy developments regarding the Surveillance Act during the reporting year.

Judicial decisions

3.3 No significant judicial decisions relevant to the Surveillance Act were handed down during the reporting year.

Effectiveness of surveillance

3.4 The Australian Federal Police and the Australian Crime Commission reported an increase in the use of surveillance devices from the previous reporting period. This indicates that such devices are a valuable investigative tool.

3.5 The State and Territory law enforcement agencies often rely on their own legislative regimes, but are able to make use of the Surveillance Act where investigating a Commonwealth matter or undertaking a joint operation. The New South Wales Police and the South Australia Police reported using the provisions of the Surveillance Act during the reporting period, consistent with the objectives of the Surveillance Act.

Correction to Surveillance Devices Act – Report for the Year Ending 30 June 2005

3.6 In the Annual Report for the year ending 30 June 2005, the NSW Police was recorded as having not made any applications for warrants under the Surveillance Act.

3.7 The NSW Police has since advised that it applied for and was issued with three listening device warrants during the reporting period 15 December 2004 to 30 June 2005. These warrants did not require extensions, were not applied for remotely nor in emergency circumstances. Further the warrants did not result in any arrests, prosecutions or convictions during the reporting period.

CHAPTER 4 – INFORMATION REQUIRED UNDER THE SURVEILLANCE ACT

The information required

4.1 The annual reporting requirements of the Surveillance Act are contained in Division 2 of part 6 of the Act, which provides that this report must include information on:

- (a) the number of applications for warrants made and the number of warrants issued (paragraph 50(1)(a)) in respect of each different kind of surveillance device (subsection 50(2)),
- (b) the number of applications for emergency authorisations made and the number of emergency authorisations given (paragraph 50(1)(b)) in respect of each different kind of surveillance device (subsection 50(2)),
- (c) the number of applications for tracking device authorisations made and the number of tracking device authorisations given (paragraph 50(1)(c)),
- (d) the number of remote applications for warrants made (paragraph 50(1)(d)),
- (e) the number of warrants, emergency authorisations or tracking authorisations refused (paragraph 50(1)(e)),
- (f) the number of applications for extensions of warrants made, the number of extensions granted and the number of extensions refused, as well as the reasons why they were granted or refused (paragraph 50(1)(f)),
- (g) the number of arrests made wholly or partly on the basis of information obtained under a warrant, emergency authorisation or tracking device authorisation (paragraph 50(1)(g)),
- (h) the number of instances in which the location and safe recovery of a child, to whom a recovery order related, was assisted wholly or partly on the basis of information obtained under a warrant, emergency authorisation or tracking device authorisation (paragraph 50(1)(h)),
- (i) the number of prosecutions commenced in which information obtained under a warrant, emergency authorisation or tracking device authorisation was given in evidence and the number of convictions (paragraph 50(1)(i)), and
- (j) any other information relating to the use of surveillance devices and the administration of the Surveillance Act that the Minister considers appropriate (paragraph 50(1)(j)).

4.2 The Surveillance Act requires that the chief officer of the law enforcement agencies submit annual reports to the Attorney-General as soon as possible after the end of each financial year and in any event within three months after the end of the financial year. This report must also be laid before the House of Parliament within 15 sitting days after the Attorney-General receives it.

Which agencies may seek surveillance device warrants?

4.3 During the reporting period, the following law enforcement agencies were entitled to apply for surveillance device warrants or authorisations for law enforcement or other defined purposes:

- (a) Australian Federal Police,
- (b) Australian Crime Commission,
- (c) New South Wales Police,
- (d) New South Wales Crime Commission,
- (e) Independent Commission Against Corruption,
- (f) Police Integrity Commission,
- (g) Queensland Crime and Misconduct Commission,
- (h) Queensland Police,
- (i) South Australia Police,
- (j) Victoria Police,
- (k) Western Australia Police,
- (l) Corruption and Crime Commission of Western Australia,
- (m) Tasmanian Police, and
- (n) Northern Territory Police.

Part 2 Warrants

Applications for Part 2 warrants

4.4 Paragraph 50(1)(a) requires that this report sets out the number of applications for warrants made and the number of warrants issued under Part 2 of the Surveillance Act during the reporting year. Subsection 50(2) further requires that the report provide a breakdown of these numbers in respect of each different kind of surveillance device. This information is presented in Table 2.

4.5 During the reporting year, 396 warrants were issued to law enforcement agencies under Part 2 of the Surveillance Act². This represents a 24% increase over the 257 warrants issued in the previous reporting year. The increase is commensurate with the increasing use by agencies of the new regime. Warrants were issued to the AFP, the ACC, the NSW Police and the SA Police, which is one additional agency using the Surveillance Act than the previous reporting year.

² Section 10 makes it clear that surveillance device warrants can be issued for more than one kind of surveillance device. For example, a warrant may authorise the use of separate listening and tracking devices for a vehicle. It can also be issued for composite devices, that is, a device that has more than one function; for example a combined listening and tracking device. A warrant can also be issued to permit the use of more than one of the same kind of surveillance device.

4.6 One warrant was found to be invalid as it was issued for a period of 91 days, which is in excess of the 90 day maximum period prescribed by the Surveillance Act. The error was identified before any evidence was obtained and no surveillance device was installed.

Table 2 – Number of warrants issued to law enforcement agencies in the 2005-06 reporting year

AGENCY		COMPOSITE MULTIPLE ³		OPTICAL		LISTENING		DATA		TRACKING		RETRIEVAL	
		05	06	05	06	05	06	05	06	05	06	05	06
AFP	Made	86	172	17	19	85	83	2	4	45	46	0	14
	Refused	0	0	0	0	0	0	0	0	0	0	0	0
	Issued	86	172	17	19	85	83	2	4	45	46	0	14
ACC	Made	16	30	2	0	1	2	0	0	2	14	1	0
	Refused	0	0	0	0	0	0	0	0	0	0	0	0
	Issued	16	30	2	0	1	2	0	0	2	14	1	0
NSW Police	Made	0	0	0	0	3	7	0	0	0	0	0	0
	Refused	0	0	0	0	0	0	0	0	0	0	0	0
	Issued	0	0	0	0	3 ⁴	7	0	0	0	0	0	0
SA Police	Made	0	3	0	0	0	2	0	0	0	0	0	0
	Refused	0	0	0	0	0	0	0	0	0	0	0	0
	Issued	0	3	0	0	0	2	0	0	0	0	0	0
Total	Made	102	205	19	19	89	94	2	4	47	60	1	14
	Refused	0	0	0	0	0	0	0	0	0	0	0	0
	Issued	102	205	19	19	89	94	2	4	47	60	1	14

Remote applications for Part 2 warrants

4.7 Section 15 of the Surveillance Act permits an application for a warrant to be made by telephone, fax, email or other means of communication if the law enforcement officer believes that it is impracticable to make the application in person. Paragraph 50(1)(d) of the Surveillance Act requires that this report set out the number of remote applications made during the reporting year.

4.8 In the reporting year, the AFP made 1 remote application for a warrant under the Surveillance Act. No other applications were reported.

³ Section 10 provides that surveillance device warrants can be issued for more than one kind of surveillance device. For example, a warrant may authorise the use of separate listening and tracking devices for a vehicle. It can also be issued for composite devices, that is, a device that has more than one function; for example a combined listening and tracking device. A warrant can also be issued to permit the use of more than one of the same kind of surveillance device.

⁴ These figures incorporate the 3 listening device warrants issued to NSW Police during the previous reporting year but not included in the previous annual report – refer paragraph 3.7

Extension applications for Part 2 warrants

4.9 Section 19 of the Surveillance Act provides that the law enforcement officer to whom the warrant was issued (or another person on the officer's behalf) may apply for an extension of the warrant for a period not exceeding 90 days after its original expiry date. This application may be made at any time before the expiry of the warrant.

4.10 Paragraph 50(1)(f) of the Surveillance Act requires that this report set out the number of applications for extension of a warrant made, the number of extensions issued and the number of extensions refused.

4.11 There were 51 applications to extend warrants under section 19 of the Surveillance Act. This information is presented in Table 3.

Table 3 – Number of applications made for extension of a warrant by law enforcement agencies in the 2005-06 reporting year

AGENCY		APPLICATIONS	
		2004-05	2005-06
Australian Federal Police	Made	39	49
	Refused	2	0
	Issued	37	49
Australian Crime Commission	Made	0	1
	Refused	0	0
	Issued	0	1
New South Wales Police Force	Made	0	1
	Refused	0	0
	Issued	0	1
South Australia Police Force	Made	0	0
	Refused	0	0
	Issued	0	0
Total	Made	39	51
	Refused	2	0
	Issued	37	51

4.12 Paragraph 50(1)(f) of the Surveillance Act also requires that this report set out the reasons why extensions were granted or refused.

4.13 Reasons for extensions of warrants include:

- to assist with ongoing investigations,
- to enable the person of interest to be identified,
- to assist in the identification of the extent of criminal activity, and
- to allow sufficient time to obtain further evidence in relation to all persons involved.

4.14 No applications for the extension of a warrant were refused during the reporting year.

Part 3 Emergency Authorisations

4.15 Law enforcement officers may apply to an appropriate authorising officer for an emergency authorisation to use a surveillance device in cases of serious risks to person or property (section 28), urgent circumstances relating to a child recovery order (section 29) and cases of risk of loss of evidence (section 30). Within 48 hours of giving an emergency authorisation, the authorising officer (or another person on the officer's behalf) must apply for approval of the giving of the emergency authorisation from an eligible Judge or nominated AAT member.

4.16 Paragraph 50(1)(b) requires that this report set out the number of applications for emergency authorisations made and the number of emergency authorisations given. Subsection 50(2) further requires that the report provide a breakdown of these numbers in respect of each different kind of surveillance device.

4.17 During the reporting year, no law enforcement agency used the emergency authorisation provisions of the Surveillance Act.

Section 39 Tracking Device Authorisations

4.18 In limited circumstances, the Surveillance Act permits a law enforcement officer to use a tracking device without a warrant in the investigation of a relevant offence where the officer has the written permission of an appropriate authorising officer.

4.19 Subsections 39(1) and (3) permit a law enforcement officer to use a tracking device with authorisation in the investigation of a relevant offence and in the location and safe recovery of a child to whom a recovery order relates.

4.20 Paragraph 50(1)(c) requires that this report set out the number of applications for tracking device authorisations made and the number of tracking device authorisations given. The required information is presented in Table 4.

4.21 During the reporting year, 66 tracking device authorisations were issued by senior officers to law enforcement agencies under section 39 of the Surveillance Act. These authorisations were issued within the AFP, the ACC and the SA Police. These figures show an increase in the number of authorisations granted and in the number of law enforcement agencies utilising section 39 of the Surveillance Act.

Table 4 – Number of applications made for tracking device authorisations in the 2005-06 reporting year

AGENCY		TRACKING DEVICE AUTHORISATIONS		TRACKING DEVICE RETRIEVAL AUTHORISATIONS	
		04/05	05/06	04/05	05/06
Australian Federal Police	Made	24	48	0	3
	Refused	0	0	0	0
	Issued	24	48	0	3
Australian Crime Commission	Made	9	17	0	0
	Refused	0	0	0	0
	Issued	9	17	0	0
South Australia Police Force	Made	0	1	0	0
	Refused	0	0	0	0
	Issued	0	1	0	0
Total	Made	33	66	0	3
	Refused	0	0	0	0
	Issued	33	66	0	3

Effectiveness of surveillance devices

4.22 Section 50 requires that this report set the number of arrests, prosecutions and convictions, together with the number of locations and safe recoveries of children, on the basis of information obtained using surveillance devices. Collectively, this information provides an indication of the effectiveness of surveillance devices as a law enforcement investigative tool.

Arrests, location and safe recovery of children, prosecutions and convictions

4.23 Paragraph 50(1)(g) requires that this report set out the number of arrests made wholly or partly on the basis of information obtained under a warrant, emergency authorisation or tracking device authorisation. Paragraph 50(1)(i) requires that this report set out the number of prosecutions commenced in which information obtained under a warrant, emergency authorisation or tracking device authorisation was given in evidence and the number of convictions. This information is presented in Table 5.

4.24 Paragraph 50(1)(h) requires that this report set out the number of instances in which the location and safe recovery of a child, to whom a recovery order related, was assisted wholly or partly on the basis of information obtained under a warrant, emergency authorisation or tracking device authorisation. This information is also presented in Table 5.

4.25 During the reporting year, 74 arrests were made as a result of the use of surveillance devices under the Surveillance Act, as compared to 72 during the previous reporting period. Of the arrests made, 43 were prosecuted resulting in 5 convictions to date, as compared to 71 prosecutions resulting in 5 convictions for the previous reporting period. Further interpretative guidance is provided at paragraph 4.27.

4.26 During the reporting period, the use of surveillance devices resulted in the safe recovery of two children, which is the first time that this has occurred since the Surveillance Act commenced. This illustrates the vital role that the use of surveillance devices can play in the protection of children.

Table 5 – Number of Arrests, prosecutions and convictions made and conducted in the 2005-06 reporting year

AGENCY	ARRESTS		SAFE RECOVERY		PROSECUTIONS		CONVICTIONS	
	04/05	05/06	04/05	05/06	04/05	05/06	04/05	05/06
Australian Federal Police	72	59	0	2	71	43	5	5
Australian Crime Commission	1	15	0	0	0	0	0	0
Total	72	74	0	2	71	43	5	5

Interpretive note

4.27 The statistics presented in Table 5 should be interpreted with some caution, particularly in presuming a relationship between the number of arrests, prosecutions (which include committal proceedings) and convictions in a reporting year. An arrest recorded in one reporting year may not result in a prosecution/committal (if at all) until a later reporting year and any resulting conviction may be recorded in that or an even later reporting period. Moreover, the number of arrests may not equate to the number of charges laid (some or all of which may be later prosecuted) as an arrested person may be prosecuted and convicted for a number of offences.

4.28 Further, the tables may understate the effectiveness of the use of surveillance devices as in some cases, prosecutions may be initiated and convictions recorded, without the need to give information obtained through the use of a surveillance device in evidence. In particular, agencies report that the use of surveillance devices effectively enables investigators to identify persons involved in and the infrastructure of organised criminal activities. In many cases, the weight of evidence obtained through the use of a surveillance device results in defendants entering guilty pleas, thereby obviating the need for the information to be introduced into evidence.