



Surveillance Devices Act 2004

Report for the year ending 30 June 2008



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ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ACLEI	Australian Commission for Law Enforcement Integrity
ACC	Australian Crime Commission
AFP	Australian Federal Police
LEA	law enforcement agency
NSW Police	New South Wales Police
SD Act	<i>Surveillance Devices Act 2004</i>
SES	Senior Executive Service

CHAPTER 1 – INTRODUCTION

- 1.1 This is the fourth Annual Report on the *Surveillance Devices Act 2004* (the SD Act) and relates to the period from 1 July 2007 to 30 June 2008.
- 1.2 Chapter 2 outlines the objectives and structure of the SD Act.
- 1.3 Chapter 3 records significant 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 SD Act. That section requires the Attorney-General, as the Minister responsible for administering the SD 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 DEVICES ACT

2.1 This chapter provides an overview of the SD 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 SD Act, describing the means by which law enforcement agencies (LEAs) are accountable for their actions under the legislation.

Objects of the Act

2.2 The SD Act was developed to strengthen the legislative regime which previously consisted of a combination of State and Commonwealth legislation and common law principles. The purpose of the SD Act is to provide a single legislative regime for Commonwealth agencies to utilise surveillance powers while still regulating the use of information obtained through the use of these investigative tools.

2.3 The SD Act complements, rather than replaces, existing State and Territory laws governing the use of surveillance powers and represents model legislation in this regard. It is intended to facilitate cross-border investigations and information sharing between Australian agencies. In this regard, the SD Act does not prohibit the use of surveillance devices; rather, the SD Act enables their use by LEAs when such use would otherwise be unlawful.

Use of surveillance devices

2.4 Surveillance devices are defined in the SD Act as data surveillance devices, listening devices, optical surveillance devices and tracking devices. Surveillance devices may be used by officers of the following LEAs:

- Australian Federal Police (AFP)
- Australian Commission for Law Enforcement Integrity (ACLEI)
- Australian Crime Commission (ACC)
- all State and Territory police forces
- New South Wales Crime Commission
- Independent Commission Against Corruption of New South Wales
- Police Integrity Commission of New South Wales
- Crime and Misconduct Commission of Queensland
- Corruption and Crime Commission of Western Australia.

2.5 Surveillance devices may be used for the investigation of Commonwealth offences which carry a maximum penalty of at least three years imprisonment. Commonwealth agencies may also use surveillance devices to further the investigation

of State offences with a federal aspect which carry a maximum penalty of at least three years imprisonment.

2.6 Surveillance devices may also be used for the investigation of certain offences against the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984*, which do not carry imprisonment penalties but carry pecuniary penalties that are the equivalent of imprisonment terms of at least three years. In addition, surveillance devices may be used for the investigation of certain offences against the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and the *Financial Transaction Reports Act 1988*, which only carry a two-year term of imprisonment. These offences are included in the SD Act because they are often indicative of more serious criminal conduct.

2.7 The use of surveillance devices is also available 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. An example is where a child has been unlawfully removed from Australia to another country.

Surveillance device warrants

2.8 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.

2.9 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. During the reporting period eligible Judges included members of the Federal Magistrates Court, the Federal Court and the Family Court of Australia.

2.10 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.

2.11 The total number of eligible Judges and nominated AAT members available in the reporting period is presented in Table 1.¹

¹ This figure includes 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 SD Act to preserve the operation of declarations under those Acts, which prior to the commencement of the SD Act contained powers relating to the use of surveillance devices.

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

ISSUER	NUMBER ELIGIBLE		
	2005 - 06	2006 - 07	2007 - 08
NOMINATED AAT MEMBERS	12	37	37
FAMILY COURT JUDGES	0	11	12
FEDERAL COURT JUDGES	0	11	14
FEDERAL MAGISTRATES	24	28	30
TOTAL	36	87	93

2.12 There has been a slight increase in the number of issuing authorities during the reporting period, which assists to ensure the availability of an issuing authority.

2.13 Generally, an application for a warrant must be in writing and be accompanied by an affidavit setting out the grounds on which the warrant is sought. However, in urgent circumstances, applications may be made 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 of the warrant being issued. Where this legislative requirement is not complied with, specific provision is made for the revocation of the warrant.

2.14 A warrant takes effect when it is issued and expires on the date specified in it, being no more than 90 days from the date it is issued, unless it is revoked earlier or extended. A warrant may be extended or varied by an eligible Judge or nominated AAT member if he or she is satisfied that the grounds on which the warrant was issued still exist.

Use of surveillance devices without warrant

2.15 Where special circumstances of urgency exist, a member of an agency at Senior Executive Service (SES) level or above may issue an emergency authorisation. These special circumstances must involve a serious risk to a person or property, the recovery of a child or a risk of loss of evidence for certain serious offences such as drug offences, terrorism, espionage, sexual servitude and aggravated people smuggling. 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 authorisation being issued.

2.16 Optical surveillance devices may be used without a warrant where the device can be installed and retrieved without either entering premises or interfering with the interior of a vehicle or thing without permission.

2.17 Listening devices may be used without a warrant by a law enforcement officer who is a party to the conversation being recorded.

2.18 A tracking device authorisation, being an authorisation issued by a member of the agency at least SES level or above, may authorise the use of a tracking device that does not involve either entering premises or interfering with the interior of a vehicle or

thing without permission. A tracking device authorisation may only be issued in relation to the same offences for which surveillance device warrants may be issued.

2.19 The SD Act 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 Australia's 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 the surveillance device may be used in these circumstances.

Use of the information obtained

2.20 The SD Act establishes a strict regime to regulate the use, communication and disclosure of information obtained from the use of surveillance devices. As a general rule, all information obtained under a surveillance device and all information relating to the existence of a surveillance device warrant is 'protected information' and may only be used for the express purposes set out in the SD Act.

2.21 These purposes include the investigation and prosecution of relevant offences, including but not limited to the offence for which the surveillance device was originally used, information sharing with national security agencies and the provision of mutual assistance to other countries. These strict purposes strike the appropriate balance between protecting the privacy of the information obtained and providing appropriate mechanisms for sharing information within Australia's law enforcement community.

Accountability provisions

2.22 The SD Act establishes a rigorous reporting and inspection regime which allows the Ombudsman, the Attorney-General and the Parliament to scrutinise the exercise of powers under the SD Act.

2.23 All LEAs using the SD Act are required to maintain records relating to the use of surveillance devices and the use of surveillance product. All LEAs must maintain a register of warrants recording details of all warrants and must provide a report on each warrant or authorisation issued under the SD Act to the Attorney-General, as the Minister responsible for administering the SD Act.

Inspections and reports by the Ombudsman

2.24 The Commonwealth Ombudsman is required to inspect the records of LEAs to ensure compliance with the SD Act.

2.25 The Ombudsman must make a written report to the Attorney-General at six monthly intervals on the results of each inspection. The Attorney-General must table this report in Parliament.

Annual Report tabled by the Attorney-General

2.26 The SD 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 SD Act.

CHAPTER 3 – DEVELOPMENTS IN THE REPORTING PERIOD

3.1 This chapter sets out the principal legislative developments and judicial decisions relating to the SD Act which occurred during the reporting period.

Recent legislative and policy developments

3.2 During the reporting period, the *Fisheries Management Act 1991* was amended. This resulted in more offences under the *Fisheries Management Act* and the *Torres Strait Fisheries Act 1984* being added to the definition of a ‘relevant offence’ under section 6 of the SD Act. Therefore, there are additional offences for which a surveillance device warrant can now be obtained.

Judicial decisions

3.3 No significant judicial decisions relevant to the SD Act were handed down during the reporting period.

Effectiveness of surveillance

3.4 The ACC reported a 32.89% increase in the use of surveillance devices from the previous reporting period, while the AFP reported a 20.77% increase in such use. The NSW Police reported an 89.47% decrease in use. The increases are a result of operational activities and indicate that surveillance devices continue to be valuable investigative tools.

3.5 State and Territory law enforcement agencies generally rely on their own legislative regimes for their use of surveillance devices but are able to make use of the SD Act when investigating a Commonwealth matter or during a joint operation. The New South Wales Police (the NSW Police) reported using the provisions of the SD Act during the reporting period, although their use declined due to the use of their own regime.

CHAPTER 4 – INFORMATION REQUIRED UNDER THE ACT

The information required

4.1 The annual reporting requirements of the SD Act are set out in section 50 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)) and reasons for refusal
- (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 prosecutions which resulted in convictions (paragraph 50(1)(i)), and
- (j) any other information relating to the use of surveillance devices and the administration of the SD Act that the Minister considers appropriate (paragraph 50(1)(j)).

4.2 The SD Act requires the chief officer of each LEA to submit an annual report 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. These reports are compiled into this single report.

Which agencies may seek surveillance device warrants?

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

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

Surveillance device warrants

Applications for surveillance device warrants

4.4 Paragraph 50(1)(a) of the SD Act provides that this report must set out the number of applications for warrants made and the number of warrants issued during the reporting period. Subsection 50(2) further requires that the report set out 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 period, 355 warrants were issued to law enforcement agencies under the SD Act.² This represents a 10.59% increase when compared to the 321 warrants issued during the previous reporting period. During the reporting period, warrants were issued to the ACC, the AFP and the NSW Police.

² Section 10 provides that surveillance device warrants can be issued for more than one surveillance device or more than one kind of surveillance device. For example, a warrant may authorise the use of separate listening and tracking devices for a vehicle. A warrant can also be issued for composite devices, being devices that have more than one function. For example, a composite device may combine both listening and tracking device functions.

4.6 During the reporting period, six warrant applications made by the AFP were refused. The reasons for refusal were that the issuing authority involved in the application:

- was reluctant to issue a warrant for the premises
- deemed a lack of connectivity to the vehicle by the suspects
- deemed a lack of evidence linking the suspect to the offence
- could not reasonably be satisfied that the contents of the affidavit allowed the issue of the warrant
- was reluctant to issue a warrant for a listening device to be utilised on the premises.

Table 2 – Number of warrants issued to law enforcement agencies in the 2007-08 reporting period

AGENCY		COMPOSITE MULTIPLE ³			OPTICAL			LISTENING			DATA			TRACKING			RETRIEVAL			TOTAL		
		06	07	08	06	07	08	06	07	08	06	07	08	06	07	08	06	07	08	06	07	08
ACC																						
	Made	30	45	95	0	3	0	2	4	0	0	0	0	14	18	0	0	6	6	46	76	101
	Refused	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
AFP	Issued	30	45	95	0	3	0	2	4	0	0	0	0	14	18	0	0	6	6	46	76	101
	Made	172	148	209	19	12	6	83	26	10	4	2	4	46	13	16	14	7	11	338	208	256
	Refused	0	0	4	0	0	0	0	1	1	0	0	1	0	0	0	0	0	0	0	1	6
NSW Police	Issued	172	148	205	19	12	6	83	25	9	4	2	3	46	13	16	14	7	11	338	207	250
	Made	0	3	3	0	0	0	7	35	1	0	0	0	0	0	0	0	0	0	7	38	4
	Refused	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
SA Police	Issued	0	3	3	0	0	0	7	35	1	0	0	0	0	0	0	0	0	0	7	38	4
	Made	3	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	5	0	0
	Refused	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total	Issued	3	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	5	0	0
	Made	205	196	307	19	15	6	94	65	11	4	2	4	60	31	16	14	13	17	396	322	361
	Refused	0	0	4	0	0	0	0	1	1	0	0	1	0	0	0	0	0	0	0	1	6
	Issued	205	196	303	19	15	6	94	64	10	4	2	3	60	31	16	14	13	17	396	321	355

³ Warrants that authorise the use of more than one type of surveillance device or surveillance devices with more than one function are contained under the heading 'Composite/Multiple'.

Remote applications for surveillance device warrants

4.7 Section 15 of the SD 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 SD Act provides that this report must set out the number of remote applications made during the reporting period.

4.8 In the reporting period, no remote applications for a warrant under the SD Act were made.

Extension applications for surveillance device warrants

4.9 Section 19 of the SD 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 SD Act provides that this report must set out the number of applications for the extension of a warrant that were made, the number of extensions granted and the number of extensions refused during the reporting period.

4.11 There were 50 applications to extend warrants under section 19 of the SD Act during the reporting period. This represents a 13.64% increase when compared to the 44 extensions of warrants issued during the previous reporting period. This information is presented in Table 3.

Table 3 – Number of applications made for extension of a warrant by law enforcement agencies in the 2007-08 reporting period

AGENCY		APPLICATIONS		
		2005-06	2006-07	2007-08
Australian Federal Police	Made	49	36	35
	Refused	0	0	0
	Issued	49	36	35
Australian Crime Commission	Made	1	7	15
	Refused	0	0	0
	Issued	1	7	15
New South Wales Police Force	Made	1	1	0
	Refused	0	0	0
	Issued	1	1	0
Total	Made	51	44	50
	Refused	0	0	0
	Issued	51	44	50

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

4.13 Agencies reported that the reason that extensions of warrants were granted was to assist with ongoing investigations over the initial 90-day period of the original

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

Emergency authorisations

4.14 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) or where there is a 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.

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

4.16 There was one emergency authorisation made under section 35 during the reporting period. The device used by the AFP was a composite device. This is the first year in which an emergency authorisation has been made. This information is presented in Table 4.

Table 4 – Number of emergency authorisations made by law enforcement agencies in the 2007-08 reporting period

AGENCY		AUTHORISATIONS		
		2005-06	2006-07	2007-08
Australian Federal Police	Made	0	0	1 ⁴
	Refused	0	0	0
	Issued	0	0	1
Total	Made	0	0	1
	Refused	0	0	0
	Issued	0	0	1

Tracking device authorisations

4.17 In limited circumstances, the SD 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.

4.18 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.

4.19 Paragraph 50(1)(c) provides that this report must set out the number of applications for tracking device authorisations made and the number of tracking device authorisations given.

⁴ This emergency authorisation was issued for multiple devices.

4.20 During the reporting period, 49 tracking device authorisations were issued by appropriate authorising officers to law enforcement agencies under section 39 of the SD Act. These authorisations were issued within the ACC and the AFP. These figures show a 27.94% decrease in the number of authorisations granted from the previous reporting period. The required information is presented in Table 5.

Table 5 – Number of applications made for tracking device authorisations in the 2007-08 reporting period

AGENCY		TRACKING DEVICE AUTHORISATIONS			TRACKING DEVICE RETRIEVAL		
		05/06	06/07	07/08	05/06	06/07	07/08
Australian Federal Police	Made	48	59	43	3	0	0
	Refused	0	0	0	0	0	0
	Issued	48	59	43	3	0	0
Australian Crime Commission	Made	17	9	6	0	0	0
	Refused	0	0	0	0	0	0
	Issued	17	9	6	0	0	0
South Australia Police Force	Made	1	0	0	0	0	0
	Refused	0	0	0	0	0	0
	Issued	1	0	0	0	0	0
Total	Made	66	68	49	3	0	0
	Refused	0	0	0	0	0	0
	Issued	66	68	49	3	0	0

Effectiveness of surveillance devices

4.21 Section 50 of the SD Act provides that this report must set out 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 the use of surveillance devices as a law enforcement investigative tool.

4.22 Paragraph 50(1)(g) provides that this report must 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) provides 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.

4.23 Paragraph 50(1)(h) provides that this report must 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 presented in Table 6.

4.24 During the reporting period, there was a 24.76% increase in the number of arrests, a 14.85% decrease in the number of prosecutions commenced and a 44.44% decrease in the number of convictions in which surveillance device product was given in evidence when compared to the previous year. On a per warrant basis there were 24

prosecutions and 3 convictions for every 100 warrants issued. Further interpretative guidance is provided at paragraph 4.27. This information is presented in Table 6.

4.25 During the reporting period, the SD Act was not utilised for the safe recovery any children.

Table 6 – Number of arrests, prosecutions and convictions made and conducted in the 2007-08 reporting period

AGENCY	ARRESTS			SAFE RECOVERY			PROSECUTIONS			CONVICTIONS		
	05/06	06/07	07/08	05/06	06/07	07/08	05/06	06/07	07/08	05/06	06/07	07/08
Australian Federal Police	59	38	98	2	0	0	43	58	85	5	18	9
Australian Crime Commission	15	64	33	0	0	0	0	43	1	0	0	1
New South Wales Police Force	0	3	0	0	0	0	0	0	0	0	0	0
Total	74	105	131	2	0	0	43	101	86	5	18	10

Interpretive note

4.26 The statistics presented in Table 6 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 period. An arrest recorded in one reporting period may not result in a prosecution/committal (if at all) until a later reporting period 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 prosecuted at a later time) as an arrested person may be prosecuted and convicted for a number of offences.

4.27 Further, the table 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.