



Surveillance Devices Act 2004

Report for the year ending 30 June 2011

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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 Force
SD Act	<i>Surveillance Devices Act 2004</i>
SES	Senior Executive Service
VIC Police	Victoria Police
CCC	Corruption and Crime Commission (Western Australia)

CHAPTER 1 – INTRODUCTION

1.1 This is the seventh Annual Report on the *Surveillance Devices Act 2004* (the SD Act) and relates to the period from 1 July 2010 to 30 June 2011.

1.2 In this report:

- Chapter 2 outlines the objectives and structure of the SD Act
- Chapter 3 outlines relevant developments to the legislation and cases impacting on its interpretation, and
- Chapter 4 provides information about the use of powers under the SD Act.

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
- a description of the provisions that are most relevant to the contents of this report, and
- an outline of the accountability provisions.

Objects of the Act

- 2.2 The SD Act represents model legislation and is intended to facilitate cross-border investigations and information sharing between Australian agencies.
- 2.3 The SD Act complements, rather than replaces, existing State and Territory laws. Accordingly, the SD Act does not prohibit the use of surveillance devices; rather, it authorises the use of surveillance devices where the use would otherwise be unlawful.
- 2.4 The SD Act achieves these outcomes by:
- a) providing a single legislative regime for Commonwealth agencies to utilise surveillance powers, and
 - b) authorising State and Territory law enforcement agencies to use surveillance devices under the Commonwealth regime in defined circumstances.

Use of surveillance devices

- 2.5 Surveillance devices are defined in the SD Act as:
- a) data surveillance devices which includes any device or program used to record or monitor the input into or out of a computer
 - b) listening devices which includes any device capable of being used to hear, record, monitor or listen to conversations or words spoken but does not include a hearing aid or similar device
 - c) optical surveillance devices which includes any device used to record visually or observe activity but does not include spectacles, contact lenses or similar devices, and
 - d) tracking devices which means any electronic device capable of determining or monitoring the location of a person or an object or the status of an object.

2.6 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 (NSW CC)
- Independent Commission Against Corruption of New South Wales (ICAC)
- Police Integrity Commission of New South Wales (PIC)
- Crime and Misconduct Commission of Queensland (CMC), and
- Corruption and Crime Commission of Western Australia (CCC).

2.7 An LEA may apply for a surveillance devices warrant to assist in the investigation of a 'relevant offence' which is defined as including:

- a Commonwealth offence which carries a maximum penalty of at least three years imprisonment
- State offences with a federal aspect which carry a maximum penalty of at least three years imprisonment, and
- defined additional offences in the:
 - *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
 - *Financial Transaction Reports Act 1988*
 - *Fisheries Management Act 1991, and*
 - *Torres Strait Fisheries Act 1984*

2.8 The additional offences do not carry minimum imprisonment penalties of at least three years imprisonment but either:

- a) carry pecuniary penalties that are the equivalent of imprisonment terms of at least three years, or
- b) are included in the SD Act because they are often indicative of more serious criminal conduct.

2.9 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

2.10 The SD Act provides that an eligible Judge or a nominated Administrative Appeals Tribunal (AAT) member may issue a surveillance devices warrant.

2.11 An 'eligible Judge' is a Judge who has consented in writing and 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.

2.12 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.

2.13 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 period 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		
	08/09	09/10	10/11
Nominated AAT Members	35	43	46
Family Court Judges	8	8	8
Federal Court Judges	8	7	8
Federal Magistrates	34	35	36
Total	85	93	98

¹ This figure includes declared eligible judges or nominated AAT members under subsection 12D(2) of the *Australian Federal Police Act 1979* or subsection 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.

2.15 There has been a slight increase in the number of issuing authorities during the reporting period. The change in figures reflects the normal operational changes within the respective courts and the AAT.

Form of warrant

2.16 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.

2.17 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.

2.18 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

Use of surveillance devices without a warrant – emergency circumstances

2.19 Where special circumstances of urgency exist, a member of an agency at Senior Executive Service (SES) level or above may issue an emergency authorisation enabling the use of surveillance devices without a warrant.

2.20 An emergency authorisation may only be issued when urgent circumstances exist and:

- there is a serious risk to a person or property
- it is necessary to assist in the recovery of a child who is subject to a recovery order, or
- there is a risk of loss of evidence for certain serious offences such as drug offences, terrorism, espionage, sexual servitude and aggravated people smuggling.

2.21 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.

Use of surveillance devices without a warrant – investigation purposes

2.22 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.

2.23 In limited circumstances, listening devices may be used without a warrant by a law enforcement officer who is a party to the conversation being recorded or is included in a class or group of persons whom the speaker of the words intends will, or should reasonably expect would, hear the conversation.

2.24 A tracking device authorisation may be issued by a senior member of the agency at least SES level or above where the use of that device 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.

Use of surveillance devices outside Australia

2.25 The SD Act allows for the use of surveillance devices in the investigation of Commonwealth offences occurring outside Australia. With the exception of the investigation of certain offences in Australia's contiguous and fishing zones, one of the following must apply before the surveillance device can be used:

- the consent of an appropriate official of the foreign country must be obtained, and
- if surveillance is occurring on a vessel or aircraft, consent must be obtained from the country of registration of the vessel or aircraft.

Use of the information obtained

2.26 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.

2.27 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
- disciplinary proceedings for public officers, and
- the provision of mutual assistance to other countries.

2.28 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

2.29 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.

2.30 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.

Inspections and reports by the Ombudsman

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

2.32 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

2.33 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 The SD Act was not amended during the 2010-2011 reporting period.

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 AFP reported a 29% increase in obtaining surveillance device warrants. The AFP obtained 406 warrants during the reporting period representing an increase from 311 in the 2009-2010 period. The ACC reported a 10% decrease with 179 warrants being obtained during the reporting period representing a decrease from 199 warrants obtained in the 2009-2010 period. These results are consistent with 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.

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.

Surveillance device warrants

Applications for surveillance device warrants

4.3 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.

4.4 During the reporting period, 588 warrants were issued to law enforcement agencies under the SD Act.² This represents an approximate 12% increase when compared to the 522 warrants issued during the previous reporting period. During the reporting period, warrants were issued to the ACC, the AFP, the NSW Police and the Victoria 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.

Table 2 – Number of warrants issued

AGENCY		COMPOSITE MULTIPLE			OPTICAL			LISTENING			DATA			TRACKING			RETRIEVAL			TOTAL			
		08/09	09/10	10/11	08/09	09/10	10/11	08/09	09/10	10/11	08/09	09/10	10/11	08/09	09/10	10/11	08/09	09/10	10/11	08/09	09/10	10/11	
ACC	Made	103	189	172	1	1	1	-	1	1	-	-	1	5	1	4	1	6	3	1	112	199	179
	Refused	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Issued	103	189	172	1	1	1	-	1	1	-	-	1	5	1	4	1	6	3	1	112	199	179
AFP	Made	227	263	359	5	3	1	24	15	6	3	2	-	6	8	5	18	20	37	283 ³	311	408	
	Refused	2	-	2	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2	-	2	-
	Issued	225 ⁵	263	357	5	3	1	24	15	6	3	2	-	6	8	5	18	20	37	281	311	406	
NSW Police	Made	2	5	-	-	-	-	-	-	-	1	-	4	-	-	-	-	-	-	2	9	1	-
	Refused	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Issued	2	5	-	-	-	-	-	-	-	1	-	4	-	-	-	-	-	-	2	9	1	-
VIC Police	Made	-	3	2	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	3	2	-
	Refused	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Issued	-	3	2	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	3	2	-
CCC	Made	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1 ⁴	-	-	-
	Refused	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Issued	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	-	-	-
	Made	335	460	531	7	4	1	33	16	7	3	7	5	10	12	6	24	23	38	412	522	590	-
	Refused	2	-	2	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2	-	2	-
	Issued	333	460	529	7	4	1	33	16	7	3	7	5	10	12	6	24	23	38	410	522	588	-

³ Incorrectly reported in the 2008/2009 report as 287.

⁴ The WA CCC statistics for 2009 have been corrected in this year's Surveillance Devices Report.

⁵ Incorrectly reported in the 2008 /2009 report as 229.

Remote applications for surveillance device warrants

4.5 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.

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

Extension applications for surveillance device warrants

4.7 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.

4.8 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. This information is presented in Table 3.

Table 3 – Number of applications made for extension of a warrant

AGENCY		APPLICATIONS		
		08/09	09/10	10/11
ACC	Made	14	47	69
	Refused	-	-	-
	Issued	14	47	69
AFP	Made	43	67	64
	Refused	-	-	0
	Issued	43	67	64
NSW Police	Made	-	-	1
	Refused	-	-	-
	Issued	-	-	1
VIC Police	Made	-	3	-
	Refused	-	-	-
	Issued	-	3	-
CCC	Made	2	-	-
	Refused	-	-	-
	Issued	2	-	-
Total	Made	57	117	134
	Refused	-	-	-
	Issued	57	117	134

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

4.10 Agencies reported that the reason that extensions of warrants were granted was:

- to enable continued surveillance supporting the collection of evidence
- to enable surveillance where no opportunities arose during the original warrant to install the relevant device, and
- to further assist investigations of criminals and their associates.

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

Emergency authorisations

4.12 Law enforcement officers may apply to an appropriate authorising officer for an emergency authorisation to use a surveillance device in cases of serious risk 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.

4.13 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.

4.14 This information is presented in Table 4. Agencies reported that the emergency authorisations were issued for 1 composite device and 2 tracking devices.

Table 4 – Number of emergency authorisations

AGENCY		AUTHORISATIONS		
		08/09	09/10	10/11
AFP	Made	-	-	3
	Refused	-	-	-
	Issued	-	-	3
Total	Made	-	-	3
	Refused	-	-	-
	Issued	-	-	3

Tracking device authorisations

4.15 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.

4.16 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.

4.17 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.

4.18 The required information is presented in Table 5.

Table 5 – Number of applications made for tracking device

AGENCY		TRACKING DEVICE AUTHORISATIONS			TRACKING DEVICE RETRIEVAL		
		08/09	09/10	10/11	08/09	09/10	10/11
ACC	Made	10	15	17	-	-	-
	Refused	-	-	-	-	-	-
	Issued	10	15	17	-	-	-
AFP	Made	61	51	54	3	-	-
	Refused	-	-	-	-	-	-
	Issued	61	51	54	3	-	-
VIC Police	Made	-	1	-	-	-	-
	Refused	-	-	-	-	-	-
	Issued	-	1	-	-	-	-
Total	Made	71	67	71	3	-	-
	Refused	-	-	-	-	-	-
	Issued	71	67	71	3	-	-

Effectiveness of surveillance devices

4.19 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.

4.20 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.

4.21 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.

Table 6 – Number of arrests, prosecutions and convictions⁶

AGENCY	ARRESTS			SAFE RECOVERY			PROSECUTIONS			CONVICTIONS		
	08/09	09/10	10/11	08/09	09/10	10/11	08/09	09/10	10/11	08/09	09/10	10/11
ACC	8	49	30	-	-	-	-	5	4	-	4	4
AFP	107	58	47	-	-	-	107	38	50	21	20	10
VIC Police	-	-	5	-	-	-	-	-	-	-	-	-
CCC	-	1	-	-	-	-	-	1	-	-	-	1 ⁷
Total	115	108	77	-	-	-	107	44	54	21	24	15

Interpretive note

4.22 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.

4.23 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.

⁶ The NSW Police were removed from Table 6 as they had nil data for the last 3 reporting years.

⁷ This conviction is the result of a warrant and extensions granted during 2008-09.