



Australian Government
Department of Home Affairs



SURVEILLANCE DEVICES ACT 2004

Annual Report 2016–17

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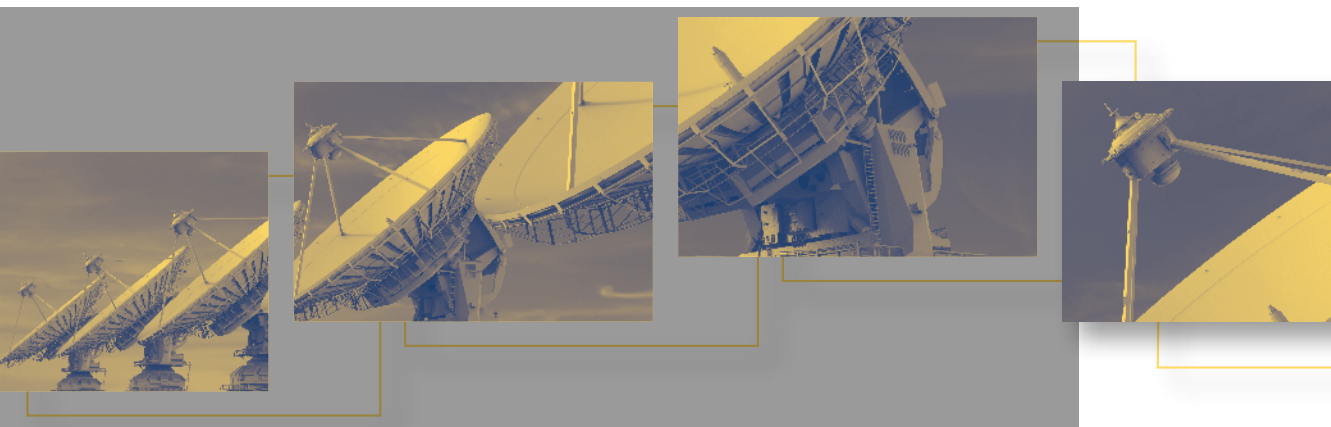
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SURVEILLANCE DEVICES ACT 2004

Annual Report 2016–17

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EXECUTIVE SUMMARY

The *Surveillance Devices Act 2004* (The Act) requires that each year the Minister¹ table in Parliament a report setting out the information required by section 50 of the Act.

The Act includes powers which support Commonwealth investigations in a limited range of offences. The Act also allows state and territory law enforcement agencies to use surveillance devices to investigate certain Commonwealth and state offences with a federal aspect. This strengthens cross-border investigations and information sharing arrangements.

In 2016-17 law enforcement agencies applied for 1,113 warrants. No applications for warrants were refused by issuing authorities. The number of tracking device authorisations decreased from 79 to 51 and the number of tracking device retrievals decreased from 4 to 0, during the reporting period.

The number of applications made to extend surveillance device warrants has risen from 211 to 225. The increase in applications to extend warrants is often due to the prolonged nature of investigations for complex and serious crime (where evidence gathering may not have been completed within the prescribed period of 90 days).

Table 1 illustrates the role information obtained under the Act has played in leading to arrests, safe recovery, prosecutions and convictions. In 2016-17, surveillance devices contributed to 185 arrests, 73 prosecutions, and 26 convictions.

Table 1: Number of arrests, safe recovery, prosecutions and convictions—s50(1)(g); s50(1)(h); s50(1)(i)

Agency	Arrests		Safe Recovery		Prosecutions		Convictions	
	15-16	16-17	15-16	16-17	15-16	16-17	15-16	16-17
ACIC	67	91	-	-	1	1	1	1
ACLEI	3	1	-	-	-	3	-	3
AFP	171	81	1	-	114	69	15	22
NSW Police	-	12	-	-	-	-	-	-
TOTAL	241	185	1	-	115	73	16	26

¹ The relevant Minister for the reporting period was the Attorney-General.



CHAPTER ONE

OVERVIEW OF THE SURVEILLANCE DEVICES ACT

Objects of the Act

The Act is intended to facilitate cross-border investigations and information sharing between Australian law enforcement agencies, and complements state and territory surveillance devices laws. It does not place constraints on the use of surveillance devices by the general public. Rather, it authorises the use of surveillance devices by law enforcement agencies. The Act:

- a) provides a single legislative regime for Commonwealth agencies to use surveillance powers
- b) authorises state and territory law enforcement agencies to use surveillance devices under the Commonwealth regime in defined circumstances.

The Act also operates to restrict the use, communication and publication of information that is obtained through the use of surveillance devices by law enforcement agencies.

Use of surveillance devices

Surveillance devices are defined in the Act as:

- a) data surveillance devices, including any device or program used to record or monitor the input into or out of a computer
- b) listening devices, including 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, including any device used to record visually or observe activity but does not include spectacles, contact lenses or similar devices
- d) tracking devices, meaning any electronic device capable of determining or monitoring the location of a person or an object or the status of an object.

Surveillance devices may be used by officers of the following law enforcement agencies:

- Australian Federal Police (AFP)
- Australian Commission for Law Enforcement Integrity (ACLEI)
- Australian Criminal Intelligence Commission (ACIC)
- all state and territory police forces
- Independent Commission Against Corruption of New South Wales (ICAC (NSW))
- New South Wales Crime Commission (NSW CC)

- New South Wales Law Enforcement Conduct Commission (LECC)
- Crime and Corruption Commission of Queensland (CCC (QLD))
- Corruption and Crime Commission of Western Australia (CCC (WA))
- Independent Commissioner Against Corruption of South Australia (ICAC (SA)).

A law enforcement agency may apply for a surveillance device 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
- defined additional offences in the:
 - *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
 - *Financial Transaction Reports Act 1988*
 - *Fisheries Management Act 1991*
 - *Torres Strait Fisheries Act 1984*
- offences against laws of the Commonwealth, states and territories arising from integrity operations which carry a maximum penalty of at least 12 months imprisonment, or
- an offence that is prescribed by the regulations.

The additional offences specified above do not carry maximum 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 often indicative of more serious criminal conduct.

The use of surveillance devices is also available to assist in the safe recovery of a child who is the subject to an order made under section 67U of the *Family Law Act 1975*, or an order for a warrant for the apprehension or detention of a child under the *Family Law (Child Abduction Convention) Regulations 1986*.

Surveillance device warrants

The Act provides that an eligible Judge or a nominated Administrative Appeals Tribunal (AAT) member may issue a surveillance device warrant. An 'eligible Judge' is a Judge who has consented in writing and been declared by the Minister to be an eligible Judge. During the reporting period eligible Judges included members of the:

- Family Court of Australia
- Federal Court of Australia
- Federal Circuit Court of Australia.

A 'nominated AAT member' refers to a Deputy President, senior member or member of the AAT who has been nominated by the Minister 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.

The total number of eligible Judges and nominated AAT members available in the reporting period is presented in Table 2.

Table 2: Availability of Federal Court Judges, Family Court Judges, Federal Circuit Court Judges and nominated AAT Members to issue warrants

Issuer	Number Eligible		
	14-15	15-16	16-17
Nominated AAT Members	29	35	31
Family Court Judges	5	5	5
Federal Circuit Court Judges	32	33	33
Federal Court Judges	13	15	13
Total	79	88	82

Please note that the figures for 2016-17 are only available as point-in-time data. The data was accessed on 1 December 2017 and therefore the figures are an approximation for the 2016-17 reporting period.

Form of warrant

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 eligible Judge or nominated AAT member.

In urgent circumstances a law enforcement officer may make an application for a warrant before making or swearing the supporting affidavit. The law enforcement officer must supply the eligible Judge or nominated AAT member with as much information as the eligible Judge or nominated AAT member considers is reasonably practical in the circumstances. The law enforcement officer must then supply the eligible Judge or nominated AAT member with an affidavit within 72 hours of the application being made, irrespective of whether the eligible Judge or nominated AAT member issues the warrant.

A warrant takes effect when it is issued and expires on a specified date, being no more than 90 days from the date the warrant is issued, unless the warrant 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 – emergency circumstances

In special circumstances, a member of an agency at Senior Executive Service level or above may issue an emergency authorisation enabling the use of surveillance devices without a warrant. An emergency authorisation may only be issued in urgent circumstances when:

- 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.

The use of a surveillance device under such an authorisation must be retrospectively approved by an eligible Judge or AAT member within 48 hours of the authorisation being issued.

Use of surveillance devices without a warrant – investigation purposes

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.

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.

A tracking device authorisation may be issued by a senior member of the agency (at least Senior Executive Service 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 purposes for which surveillance device warrants may be issued.

Use of surveillance devices outside Australia

The 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:

- the consent of an appropriate official of the foreign country must be obtained, or
- 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

The 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 purposes set out in the Act. 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
- the provision of mutual assistance to other countries.

Accountability provisions

The Act includes a reporting and inspection regime which allows the Commonwealth Ombudsman, the Minister and the Parliament to scrutinise the exercise of their powers under the Act.

All law enforcement agencies using the Act are required to maintain records relating to the use of surveillance devices and the use of information obtained through the use of surveillance devices. All law enforcement agencies must maintain a register of warrants recording details of all warrants and must provide a report on each warrant or authorisation issued under the Act to the Minister.

Inspections and reports by the Ombudsman

The Commonwealth Ombudsman is required to inspect the records of law enforcement agencies to ensure compliance with the Act. The Ombudsman must make a written report to the Minister at six monthly intervals on the results of each inspection. The Minister is required to table this report in Parliament.

The Ombudsman's inspection report for the period 1 July 2016 – 31 December 2016 was tabled in Parliament on 24 May 2017 (House of Representatives) and 13 June 2017 (Senate). The Ombudsman's inspection report for the period 1 January 2017 – 30 June 2017 was tabled on 6 December 2017.



CHAPTER TWO

INFORMATION REQUIRED UNDER THE ACT

The information required

The annual reporting requirements are set out in section 50 of the Act. The Act requires the chief officer of each law enforcement agency to submit an annual report to the Minister 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

Paragraph 50(1)(a) and paragraph 50(1)(e) of the Act provides that this report must set out the number of applications for warrants made, issued and refused (including reasons for any refusal) 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 3. In 2016-17 law enforcement agencies applied for 1,113 warrants. No applications for warrants were refused by issuing authorities

Table 2: Number of warrants issued – s50(1)(a); s50(1)(e)

Agency	Composite Multiple																Total	
	Optical				Listening				Data				Tracking					Retrieval
	14-15	15-16	16-17	14-15	15-16	16-17	14-15	15-16	16-17	14-15	15-16	16-17	14-15	15-16	16-17			
ACIC	Made	259	266	287	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Refused	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Issued	259	266	287	-	-	-	-	-	-	-	-	-	-	-	-	266	270
ACLEI	Made	2	4	26	-	-	-	-	-	-	-	-	-	-	-	-	2	4
	Refused	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Issued	2	4	26	-	-	-	-	-	-	-	-	-	-	-	-	2	4
AFP	Made	569	846	732	-	1	1	3	4	3	6	2	6	3	26	30	607	889
	Refused	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	-
	Issued	568	846	732	-	1	1	3	4	3	6	2	6	3	26	30	607	889
WA Police	Made	1	4	1	-	-	-	-	-	-	-	-	-	-	-	-	1	4
	Refused	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Issued	1	4	1	-	-	-	-	-	-	-	-	-	-	-	-	1	4
SA Police	Made	-	1	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Refused	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Issued	-	1	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-
NSW Police	Made	-	2	4	-	-	-	-	-	-	-	-	-	-	-	-	2	4
	Refused	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Issued	-	2	4	-	-	-	-	-	-	-	-	-	-	-	-	2	-
VIC Police	Made	-	-	3	-	-	-	-	-	-	-	-	-	-	-	-	-	3
	Refused	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Issued	-	-	3	-	-	-	-	-	-	-	-	-	-	-	-	-	3
TOTAL	Made	831	1123	1054	-	1	1	3	4	8	5	7	2	8	3	5	29	32
	Refused	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	1	-
	Issued	831	1123	1054	-	1	1	3	4	8	5	7	2	8	3	5	29	32

Applications for surveillance device warrants made for a mutual assistance investigation

Section 14(3A) of the Act provides that a law enforcement officer (or another person on the officer's behalf) may apply for a warrant when they are acting under the authority of a mutual assistance authorisation. The Attorney-General may issue mutual assistance authorisations under section 15(CA) of the *Mutual Assistance in Criminal Matters Act 1987* if satisfied of the following:

- a foreign country has requested that the Attorney-General arrange for the use of a surveillance device
- there is an investigation underway in the requesting foreign country into a criminal matter involving an offence against the law of that foreign country that is punishable by a maximum penalty of imprisonment for 3 years or more
- the requesting foreign country has given undertakings regarding:
 - the information obtained via the use of surveillance devices only being used for the purposes for which it is communicated to the foreign country
 - the destruction of the information obtained by the surveillance device
 - any other matter the Attorney-General considers appropriate.

Paragraph 50(1)(aa) and paragraph 50(1)(ea) of the Act provides that this report must set out the number of warrants pursuant to a mutual assistance application made, issued and refused (including the reasons for any refusal) during the reporting period.

Where a surveillance device warrant was issued as a result of mutual assistance application, paragraph 50(1)(ia) of the Act requires that the this report list the offence (if any) under a law of the Commonwealth, states or territories that is of the same or substantially similar nature as the foreign offence being investigated under that surveillance device warrant.

In 2016-17 no law enforcement agencies applied for a surveillance device warrant as a result of a mutual assistance application.

Remote applications for surveillance device warrants

Section 15 of the Act permits an application for a warrant to be made by telephone, fax, e-mail 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 Act provides that this report must set out the number of remote applications made during the reporting period.

During the reporting period, one remote application for a surveillance device warrant was made and issued by the AFP.

Extension applications for surveillance device warrants

Section 19 of the Act provides that the law enforcement officer to whom a 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 the warrant's original expiry date. This application may be made at any time before the warrant expires.

Paragraph 50(1)(f) of the Act provides that the annual report must set out the number of applications for the extension of a warrant that were made, granted and refused (including reasons why applications were granted or refused) during the reporting period. This information is presented in Table 4.

Table 4: Number of applications for extension of a warrant—s50(1)(f)

Agency		Applications		16/17
		14/15	15/16	
ACIC	Made	27	44	66
	Refused	-	-	-
	Granted	27	44	66
ACLEI	Made	1	-	25
	Refused	-	-	-
	Granted	1	-	25
AFP	Made	124	162	131
	Refused	-	-	-
	Granted	124	162	131
NSW Police	Made	-	1	1
	Refused	-	-	-
	Granted	-	1	1
SA Police	Made	-	-	2
	Refused	-	-	-
	Granted	-	-	2
WA Police	Made	-	4	-
	Refused	-	-	-
	Granted	-	4	-
Total	Made	152	211	225
	Refused	-	-	-
	Issued	152	211	225

Agencies reported that extensions to warrants were granted in order to continue the use of surveillance devices for complex investigations of significant serious and organised crime. These types of investigations involve the collection of evidence over an extended period of time. The devices are necessary to obtain relevant evidence that identifies the offender and their location.

Emergency authorisations

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.

Paragraph 50(1)(b) and paragraph 50(1)(e) provides that this report must set out the number of applications for emergency authorisations made, given and refused (including the reasons for any refusal) 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.

In 2016–17 no law enforcement agencies made an emergency authorisation.

Tracking device authorisations

In limited circumstances, the Act permits a law enforcement officer to use a tracking device without a warrant in the investigation of a relevant offence or to assist in the location and safe recovery of a child to whom a recovery order relates where the officer has the written permission of an appropriate authorising officer.

An authorisation made under this provision is subject to subsection 39(8) of the Act which states that a tracking device cannot be used, installed or retrieved if it involves entry onto premises or an interference with the interior of a vehicle without permission. The permission may come from the owner, occupier or under a surveillance device warrant. Where such use requires a greater level of intrusion (such as entry onto premises without permission), a surveillance device warrant is required.

Paragraph 50(1)(c) and paragraph 50(1)(e) provide that this report must set out the number of applications for tracking device authorisations made, given and refused (including reasons for any refusal) during the reporting period. This includes the number of tracking device retrievals, which may be authorised without a warrant in accordance with subsection 39(6) of the Act.

The required information is presented in Table 5.

Table 5: Number of applications for tracking device—s50(1)(c); s50(1)(e)

Agency		Tracking Device Authorisations			Tracking Device Retrievals		
		14–15	15–16	16–17	14–15	15–16	16–17
ACIC	Made	21	26	20	-	-	-
	Refused	-	-	-	-	-	-
	Issued	21	26	20	-	-	-
ACLEI	Made	-	-	-	-	-	-
	Refused	-	-	-	-	-	-
	Issued	-	-	-	-	-	-
AFP	Made	56	53	29	-	4	-
	Refused	-	-	-	-	-	-
	Issued	56	53	29	1	4	-
SA Police	Made	-	-	1	-	-	-
	Refused	-	-	-	-	-	-
	Issued	-	-	-	-	-	-
VIC Police	Made	-	-	-	-	-	-
	Refused	-	-	-	-	-	-
	Issued	-	-	-	-	-	-
Total	Made	77	79	51	-	4	-
	Refused	-	-	-	-	-	-
	Issued	77	79	51	-	4	-

Effectiveness of surveillance devices

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) 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 prosecutions in which a person was found guilty (convictions). 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.

Collectively, this information provides an indication of the effectiveness of the use of surveillance devices as a law enforcement investigative tool.

This information is presented in Table 6.

Table 6: Number of arrests, safe recovery, prosecutions and convictions—s50(1)(g); s50(1)(h); s50(1)(i)

Agency	Arrests		Safe Recovery		Prosecutions		Convictions	
	15–16	16–17	15–16	16–17	15–16	16–17	15–16	16–17
ACIC	67	91	-	-	1	1	1	1
ACLEI	3	1	-	-	-	3	-	3
AFP	171	81	1	-	114	69	15	22
NSW Police	-	12	-	-	-	-	-	-
TOTAL	241	185	1	-	115	73	16	26

Interpretive note

The information presented in Table 5 should be interpreted with 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 at 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.

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 removing the need for the information to be introduced into evidence.

Other information relating to the administration of the *Surveillance Devices Act 2004*

Section 50(1)(j) provides that the Minister may include information in the annual report on the administration of this Act, that he or she considers appropriate.

In November 2016, the *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* was passed by Parliament. It allows for surveillance devices to be used to monitor compliance with control orders. That Act also inserted new provisions which allow the public reporting of surveillance device warrants relating to a person subject to a control order to be deferred until a subsequent report, in limited circumstances. A chief officer of a Commonwealth agency or the chief officer of an eligible authority of a state may request that the information is not included in the report, if the information is 'control order information'.² If such information is not included in a report there is a positive obligation on the chief officer of the agency to advise the Minister to include the information in the next report if satisfied that a reasonable person could no longer draw any inferences from the information that a control order warrant is in force.

² Control order information is information that, if made public, could reasonably be expected to enable a reasonable person to conclude that a control order warrant is likely to be, or is not likely to be, in force in relation to a particular premises, object or person.



CHAPTER THREE

FURTHER INFORMATION

Further information about the *Surveillance Devices Act 2004* can be obtained by contacting the Department of Home Affairs:

National Security Policy Branch
Department of Home Affairs
PO Box 25
BELCONNEN ACT 2616
Telephone: (02) 6264 1111

Previous *Surveillance Devices Act 2004* Annual Reports can be accessed online at:
www.homeaffairs.gov.au

APPENDIX A

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APPENDIX B

ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ACIC	Australian Criminal Intelligence Commission
ACLEI	Australian Commission for Law Enforcement Integrity
Act	Surveillance Devices Act 2004
AFP	Australian Federal Police
CCC (WA)	Corruption and Crime Commission (Western Australia)
CCC (QLD)	Crime and Corruption Commission (Queensland)
ICAC (NSW)	Independent Commission Against Corruption (New South Wales)
ICAC (SA)	Independent Commissioner Against Corruption (South Australia)
LECC	Law Enforcement Conduct Commission
NSW Police	New South Wales Police Force
SA Police	South Australia Police
Act	<i>Surveillance Devices Act 2004</i>
VIC Police	Victoria Police
WA Police	Western Australia Police