



Surveillance Devices Act 2004

No. 152, 2004

An Act to set out the powers of Commonwealth law enforcement agencies with respect to surveillance devices, and for related purposes

Note: An electronic version of this Act is available in SCALEplus
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)

Contents

Part 1—Preliminary

1	Short title	1
2	Commencement	2
3	Purposes	2
4	Relationship to other laws and matters	2
5	Schedule(s)	3
6	Definitions	3
7	State offence that has a federal aspect	13
8	External Territories	14
9	Binding the Crown	14

Part 2—Warrants

Division 1—Introduction

10	Types of warrant	15
11	Who may issue warrants?	15
12	Eligible Judges	15
13	Nominated AAT members	16

Division 2—Surveillance device warrants

14	Application for surveillance device warrant	18
15	Remote application	19
16	Determining the application	19
17	What must a surveillance device warrant contain?	20
18	What a surveillance device warrant authorises	22
19	Extension and variation of surveillance device warrant	24
20	Revocation of surveillance device warrant	25
21	Discontinuance of use of surveillance device under warrant	26

Division 3—Retrieval warrants

22	Application for retrieval warrant	28
23	Remote application	29
24	Determining the application	29
25	What must a retrieval warrant contain?	29
26	What a retrieval warrant authorises	30
27	Revocation of retrieval warrant	31

Part 3—Emergency authorisations

28	Emergency authorisation—serious risks to person or property	33
29	Emergency authorisation—urgent circumstances relating to recovery order	33

30	Emergency authorisation—risk of loss of evidence.....	34
31	Record of emergency authorisations to be made	35
32	Attributes of emergency authorisations	36
33	Application for approval of emergency authorisation.....	36
34	Consideration of application.....	37
35	Judge or nominated AAT member may approve giving of emergency authorisations	38
36	Admissibility of evidence	40
Part 4—Use of certain surveillance devices without warrant		41
37	Use of optical surveillance devices without warrant.....	41
38	Use of surveillance devices without warrant for listening to or recording words in limited circumstances	42
39	Use and retrieval of tracking devices without warrant in certain circumstances.....	44
40	Record of tracking device authorisations to be kept.....	46
Part 5—Extraterritorial operation of warrants		48
41	Definitions	48
42	Extraterritorial operation of warrants	48
43	Evidence obtained from extraterritorial surveillance not to be tendered in evidence unless court satisfied properly obtained	51
Part 6—Compliance and monitoring		52
Division 1—Restrictions on use, communication and publication of information		
44	What is protected information?	52
45	Prohibition on use, recording, communication or publication of protected information or its admission in evidence	53
46	Dealing with records obtained by use of surveillance devices.....	57
47	Protection of surveillance device technologies and methods.....	59
48	Protected information in the custody of a court, tribunal or Royal Commission	60
Division 2—Reporting and record-keeping		
49	Report on each warrant or authorisation.....	61
50	Annual reports	63
51	Keeping documents connected with warrants, emergency authorisations and tracking device authorisations	64
52	Other records to be kept.....	65
53	Register of warrants, emergency authorisations and tracking device authorisations	66

Division 3—Inspections	69
54 Appointment of inspecting officers	69
55 Inspection of records	69
56 Power to obtain relevant information	70
57 Ombudsman to be given information and access despite other laws	71
58 Exchange of information between Ombudsman and State inspecting authorities.....	72
59 Delegation by Ombudsman	73
60 Ombudsman not to be sued	73
61 Report on inspection.....	73
Division 4—General	75
62 Evidentiary certificates	75
Part 7—Miscellaneous	77
63 Delegation by chief officer of law enforcement agency	77
64 Compensation for loss or injury	77
65 Minor defects in connection with warrant or other authority.....	77
66 Regulations.....	78
Schedule 1—Amendment of other legislation and transitional and saving provisions	79
<i>Australian Federal Police Act 1979</i>	79
<i>Criminal Code Act 1995</i>	80
<i>Customs Act 1901</i>	80
<i>Mutual Assistance in Criminal Matters Act 1987</i>	81



Surveillance Devices Act 2004

No. 152, 2004

An Act to set out the powers of Commonwealth law enforcement agencies with respect to surveillance devices, and for related purposes

[Assented to 15 December 2004]

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act may be cited as the *Surveillance Devices Act 2004*.

Section 2

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Purposes

The main purposes of this Bill are:

- (a) to establish procedures for law enforcement officers to obtain warrants, emergency authorisations and tracking device authorisations for the installation and use of surveillance devices in relation to criminal investigations and the location and safe recovery of children to whom recovery orders relate; and
- (b) to restrict the use, communication and publication of information that is obtained through the use of surveillance devices or that is otherwise connected with surveillance device operations; and
- (c) to impose requirements for the secure storage and destruction of records, and the making of reports, in connection with surveillance device operations.

4 Relationship to other laws and matters

- (1) Except where there is express provision to the contrary, this Act is not intended to affect any other law of the Commonwealth, any law of a State, or any law of a self-governing Territory, that prohibits or regulates the use of surveillance devices.
- (2) For the avoidance of doubt, except where express provision is made to the contrary, nothing in this Act applies to any body, organisation or agency, however described, that is involved in the collection of information or intelligence.
- (3) This Act is not intended to limit a discretion that a court has:
 - (a) to admit or exclude evidence in any proceeding; or
 - (b) to stay criminal proceedings in the interests of justice.

Section 5

(4) For the avoidance of doubt, it is intended that a warrant may be issued, or an emergency authorisation or tracking device authorisation given, under this Act for the installation, use, maintenance or retrieval of a surveillance device in relation to a relevant offence or a recovery order.

5 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

6 Definitions

(1) In this Act:

AFP employee has the same meaning as in the *Australian Federal Police Act 1979*.

applicant for a warrant means the law enforcement officer who applies, or on whose behalf an application is made, for the warrant.

appropriate authorising officer, in relation to a law enforcement officer, means a person for the time being holding office or acting as:

- (a) if the law enforcement officer is a law enforcement officer belonging to or seconded to the Australian Federal Police:
 - (i) the Commissioner of Police; or
 - (ii) a Deputy Commissioner of Police; or
 - (iii) a senior executive AFP employee who is authorised in writing by the Commissioner for the purposes of this subparagraph; and
- (b) if the law enforcement officer is a law enforcement officer belonging to or seconded to the Australian Crime Commission:
 - (i) the Chief Executive Officer of the Commission; or

Section 6

- (ii) a member of the staff of the Commission who is an SES employee and who is authorised in writing by the Chief Executive Officer of the Commission for the purposes of this subparagraph; and
- (c) if the law enforcement officer is a law enforcement officer belonging to or seconded to the police force of a State or Territory:
 - (i) the Commissioner or the person holding equivalent rank; or
 - (ii) an Assistant Commissioner or a person holding equivalent rank; or
 - (iii) a Superintendent or a person holding equivalent rank; of the police force of that State or Territory; and
- (d) if the law enforcement officer is a law enforcement officer belonging to or seconded to the New South Wales Crime Commission:
 - (i) a member of the Commission; or
 - (ii) a member of the staff of the Commission (as defined by the *New South Wales Crime Commission Act 1985* of New South Wales) who occupies an office or position at an equivalent level to that of a senior executive officer within the meaning of the *Public Sector Employment and Management Act 2002* of New South Wales and who is authorised in writing by the Commissioner for the Commission for the purposes of this subparagraph; and
- (e) if the law enforcement officer is a law enforcement officer belonging to or seconded to the Independent Commission Against Corruption:
 - (i) the Commissioner for the Independent Commission Against Corruption; or
 - (ii) an Assistant Commissioner for the Independent Commission Against Corruption; or
 - (iii) an officer of the Commission (as defined by the *Independent Commission Against Corruption Act 1988* of New South Wales) who occupies an office or position at an equivalent level to that of a senior

Section 6

executive officer within the meaning of the *Public Sector Employment and Management Act 2002* of New South Wales and who is authorised in writing by the Commissioner for the Commission for the purposes of this subparagraph; and

- (f) if the law enforcement officer is a law enforcement officer belonging to or seconded to the Police Integrity Commission:
 - (i) the Commissioner for the Police Integrity Commission; or
 - (ii) an Assistant Commissioner for the Commission; or
 - (iii) a member of the staff of the Police Integrity Commission (as defined by the *Police Integrity Commission Act 1996* of New South Wales) who occupies an office or position at an equivalent level to that of a senior executive officer within the meaning of the *Public Sector Employment and Management Act 2002* of New South Wales and who is authorised in writing by the Commissioner for the Commission for the purposes of this subparagraph; and
- (g) if the law enforcement officer is a law enforcement officer belonging to or seconded to the Crime and Misconduct Commission—a commissioner of the Crime and Misconduct Commission (as defined by the *Crime and Misconduct Act 2001* of Queensland); or
- (h) if the law enforcement officer is a law enforcement officer belonging to or seconded to the Corruption and Crime Commission—the Commissioner of the Corruption and Crime Commission.

Australian Crime Commission means the Australian Crime Commission established by the *Australian Crime Commission Act 2002*.

chief officer means the person for the time being holding office or acting as:

- (a) in relation to the Australian Federal Police—the Commissioner of Police; and

Section 6

- (b) in relation to the Australian Crime Commission—the Chief Executive Officer of the Australian Crime Commission; and
- (c) in relation to the police force of a State or Territory—the Commissioner of Police in that police force or the person holding equivalent rank; and
- (d) in the case of the New South Wales Crime Commission—the Commissioner for the Commission; and
- (e) in relation to the Independent Commission Against Corruption—the Commissioner for the Commission; and
- (f) in relation to the Police Integrity Commission—the Commissioner for the Commission; and
- (g) in relation to the Crime and Misconduct Commission—the chairperson of the Commission; and
- (h) in relation to the Corruption and Crime Commission—the Commissioner of the Commission.

computer means any electronic device for storing or processing information.

Corruption and Crime Commission means the Corruption and Crime Commission established by the *Corruption and Crime Commission Act 2003* of Western Australia.

Crime and Misconduct Commission means the Crime and Misconduct Commission of Queensland.

data surveillance device means any device or program capable of being used to record or monitor the input of information into, or the output of information from, a computer, but does not include an optical surveillance device.

device includes instrument, apparatus and equipment.

disciplinary proceeding means a proceeding of a disciplinary nature under a law of the Commonwealth or of a State or Territory.

eligible Judge means an eligible Judge within the meaning of section 12.

Section 6

emergency authorisation means an emergency authorisation given under Part 3.

enhancement equipment, in relation to a surveillance device, means equipment capable of enhancing a signal, image or other information obtained by the use of the surveillance device.

federal law enforcement officer means a law enforcement officer referred to in paragraph (a) or (b) of the definition of **law enforcement officer**.

Independent Commission Against Corruption means the Independent Commission Against Corruption constituted by the *Independent Commission Against Corruption Act 1988* of New South Wales.

inspecting officer means a person appointed by the Ombudsman under section 54 to be an inspecting officer.

install includes attach.

law enforcement agency means the following agencies:

- (a) the Australian Federal Police;
- (b) the Australian Crime Commission;
- (c) the police force of each State or Territory;
- (d) the New South Wales Crime Commission;
- (e) the Independent Commission Against Corruption;
- (f) the Police Integrity Commission;
- (g) the Crime and Misconduct Commission;
- (h) the Corruption and Crime Commission.

law enforcement officer means:

- (a) in relation to the Australian Federal Police—the Commissioner of Police, a Deputy Commissioner of Police, any AFP employee, any special member or any person who is seconded to the Australian Federal Police; or
- (b) in relation to the Australian Crime Commission—the Chief Executive Officer of the Australian Crime Commission or any other person who is covered by a paragraph of the

Section 6

definition of **member of the staff of the ACC** in section 4 of the *Australian Crime Commission Act 2002*; or

- (c) an officer (however described) of the police force of a State or Territory or any person who is seconded to that police force; or
- (d) in relation to the New South Wales Crime Commission—a member of the Commission, or a member of the staff of the Commission, as defined by the *New South Wales Crime Commission Act 1985* of New South Wales; or
- (e) in relation to the Independent Commission Against Corruption—an officer of the Commission, as defined by the *Independent Commission Against Corruption Act 1988* of New South Wales; or
- (f) in relation to the Police Integrity Commission—an officer of the Commission as defined by the *Police Integrity Commission Act 1996* of New South Wales; or
- (g) in relation to the Crime and Misconduct Commission—an authorised commission officer as defined by the *Crime and Misconduct Act 2001* of Queensland; or
- (h) in relation to the Corruption and Crime Commission—an officer of the Commission as defined by the *Corruption and Crime Commission Act 2003* of Western Australia.

listening device means any device capable of being used to overhear, record, monitor or listen to a conversation or words spoken to or by any person in conversation, but does not include a hearing aid or similar device used by a person with impaired hearing to overcome the impairment and permit that person to hear only sounds ordinarily audible to the human ear.

maintain, in relation to a surveillance device, includes:

- (a) adjust, relocate, repair or service the device; and
- (b) replace a faulty device.

New South Wales Crime Commission means the New South Wales Crime Commission constituted by the *New South Wales Crime Commission Act 1985* of New South Wales.

Section 6

nominated AAT member means a person in respect of whom a nomination under section 13 is in force.

Ombudsman means the person holding office as the Commonwealth Ombudsman under the *Ombudsman Act 1976*.

optical surveillance device means any device capable of being used to record visually or observe an activity, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome that impairment.

Police Integrity Commission means the Police Integrity Commission constituted by the *Police Integrity Commission Act 1996* of New South Wales.

premises includes:

- (a) land; and
- (b) a building or vehicle; and
- (c) a part of a building or vehicle; and
- (d) any place, whether built on or not; whether within or beyond Australia.

prosecution, in relation to a criminal offence, includes all stages in the prosecution of that offence, including a committal hearing.

protected information has the meaning given in section 44.

public officer means a person employed by, or holding an office established by or under a law of, the Commonwealth, a State or a Territory or a person employed by a public authority of the Commonwealth, a State or a Territory.

record includes:

- (a) an audio, visual or audio-visual record; and
- (b) a record in digital form; and
- (c) a documentary record prepared from a record referred to in paragraph (a) or (b).

recovery order means:

- (a) an order under section 67U of the *Family Law Act 1975*; or

Section 6

(b) an order for a warrant for the apprehension or detention of a child under subregulation 15(1) or 25(4) of the *Family Law (Child Abduction Convention) Regulations 1986*.

relevant offence means:

- (a) an offence against the law of the Commonwealth that is punishable by a maximum term of imprisonment of 3 years or more or for life; or
- (b) an offence against a law of a State that has a federal aspect and that is punishable by a maximum term of imprisonment of 3 years or more or for life; or
- (c) an offence against section 15 or 18 of the *Financial Transaction Reports Act 1988*; or
- (d) an offence against section 100, 100A, 101, or 101A of the *Fisheries Management Act 1991*; or
- (e) an offence that is prescribed by the regulations.

relevant proceeding means:

- (a) the prosecution of a relevant offence; or
- (b) a proceeding for the confiscation, forfeiture or restraint of property, or for the imposition of a pecuniary penalty, in connection with a relevant offence, and any related proceeding; or
- (c) a proceeding for the protection of a child or intellectually impaired person; or
- (d) a proceeding concerning the validity of a warrant, an emergency authorisation or a tracking device authorisation; or
- (e) a disciplinary proceeding against a public officer; or
- (f) a coronial inquest or inquiry if, in the opinion of the coroner, the event that is the subject of the inquest or inquiry may have resulted from the commission of a relevant offence; or
- (g) a proceeding under subsection 13(2) of the *Mutual Assistance in Criminal Matters Act 1987* in relation to a criminal matter that concerns an offence against the laws of the foreign country that made the request resulting in the proceeding, being an offence punishable by a maximum term of

Section 6

imprisonment of 3 years or more, by imprisonment for life or by the death penalty; or

- (h) the authorisation, under section 13A of the *Mutual Assistance in Criminal Matters Act 1987*, of material to be made available to a foreign country for use in the investigation into, or proceedings in relation to, an offence against the laws of that country; or
- (i) proceedings for an order under section 67X of the *Family Law Act 1975*; or
- (j) a proceeding for the taking of evidence under section 43 of the *Extradition Act 1988*, in so far as the proceeding relates to a relevant offence; or
- (k) a proceeding under Division 1 of Part 4 of the *International War Crimes Tribunals Act 1995*; or
- (l) a proceeding of the International Criminal Court; or
- (m) a proceeding by way of a bail application that relates to a prosecution for a relevant offence; or
- (n) a proceeding for review of a decision to refuse such a bail application; or
- (o) a proceeding for review of a decision to grant such a bail application.

remote application for a warrant means an application referred to in section 15 or 23.

report of a conversation or activity includes a report of the substance, meaning or purport of the conversation or activity.

retrieval warrant means a warrant issued under Division 3 of Part 2.

State offence that has a federal aspect has the meaning given by section 7.

State or Territory law enforcement officer means a law enforcement officer referred to in paragraph (c), (d), (e), (f), (g) or (h) of the definition of **law enforcement officer**.

surveillance device means:

Section 6

- (a) a data surveillance device, a listening device, an optical surveillance device or a tracking device; or
- (b) a device that is a combination of any 2 or more of the devices referred to in paragraph (a); or
- (c) a device of a kind prescribed by the regulations.

surveillance device warrant means a warrant issued under Division 2 of Part 2 or under subsection 35(4) or (5).

sworn includes affirmed.

tracking device means any electronic device capable of being used to determine or monitor the location of a person or an object or the status of an object.

tracking device authorisation means a permission given under section 39 by an appropriate authorising officer for a law enforcement officer to use or retrieve a tracking device without a warrant.

unsworn application for a warrant means an application referred to in subsections 14(6) and (7) or 22(4) and (5).

use of a surveillance device includes use of the device to record a conversation or other activity.

vehicle includes aircraft and vessel.

warrant means surveillance device warrant or retrieval warrant.

- (2) In this Act, a reference to the law enforcement officer primarily responsible for executing a warrant, emergency authorisation or tracking device authorisation is, subject to subsection (3), a reference to:
 - (a) the person named in the warrant or authorisation as such a person; or
 - (b) if there is no such person named—the person nominated as such a person by the chief officer of the agency concerned; whether or not that person is physically present for any step in the execution of the warrant or authorisation.

Section 7

- (3) If the chief officer of a law enforcement agency becomes satisfied that a law enforcement officer of the agency who is, under subsection (2) or under a previous operation of this subsection, the law enforcement officer primarily responsible for executing a warrant, emergency authorisation or tracking device authorisation, ceases, for any reason, to have responsibility for executing the warrant or authorisation:
 - (a) the chief officer may, by instrument in writing, nominate another person as the law enforcement officer primarily responsible for executing the warrant or authorisation; and
 - (b) with effect from the execution of the instrument or such later time as is specified in the instrument, that other person becomes the law enforcement officer primarily responsible for executing the warrant or authorisation.
- (4) In this Act:
 - (a) a reference to a person who belongs or is seconded to a law enforcement agency, in the case of the Australian Crime Commission, is a reference to any person who is covered by a paragraph of the definition of *member of the staff of the ACC* in section 4 of the *Australian Crime Commission Act 2002*; and
 - (b) a reference to a person who belongs or is seconded to the Australian Crime Commission is to be similarly construed.

7 State offence that has a federal aspect

An offence against a law of a State is taken, for the purposes of this Act, to be a State offence that has a federal aspect:

- (a) in a case where the offence is being investigated by the Australian Federal Police—if it would be taken to be a State offence that has a federal aspect under section 4AA of the *Australian Federal Police Act 1979*; and
- (b) in a case where the offence is being investigated by the Australian Crime Commission—if it would be taken to be a State offence that has a federal aspect under section 4A of the *Australian Crime Commission Act 2002*; and

Section 8

- (c) in any other case—if it would be taken to be a State offence that has a federal aspect if either of the sections referred to in paragraphs (a) and (b) were to apply.

8 External Territories

This Act extends to every external Territory.

9 Binding the Crown

- (1) This Act binds the Crown in each of its capacities.
- (2) This Act does not make the Crown liable to be prosecuted for an offence.

Part 2—Warrants

Division 1—Introduction

10 Types of warrant

- (1) The following types of warrant may be issued under this Part:
 - (a) a surveillance device warrant;
 - (b) a retrieval warrant.
- (2) A warrant may be issued:
 - (a) in respect of more than one kind of surveillance device; and
 - (b) in respect of more than one surveillance device of any particular kind.

11 Who may issue warrants?

Any warrant under this Part may be issued by an eligible Judge or by a nominated AAT member.

12 Eligible Judges

- (1) In this section, unless the contrary intention appears:

eligible Judge means a person in relation to whom a consent under subsection (2) and a declaration under subsection (3) are in force.

Judge means a person who is a Judge of a court created by the Parliament.

- (2) A Judge may, by writing, consent to be declared an eligible Judge by the Minister under subsection (3).
- (3) The Minister may, by writing, declare Judges in relation to whom consents are in force under subsection (2) to be eligible Judges for the purposes of this Act.

Section 13

- (4) Any function or power conferred on the Judge under this Act is so conferred only in a personal capacity and not as a court or a member of a court.
- (5) An eligible Judge has, in relation to the performance or exercise of a function or power conferred on an eligible Judge by this Act, the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court.
- (6) An instrument declaring a Judge to be an eligible Judge is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

13 Nominated AAT members

- (1) The Minister may, by writing, nominate a person who holds one of the following appointments to the Administrative Appeals Tribunal to issue warrants under this Part:
 - (a) Deputy President;
 - (b) full-time senior member;
 - (c) part-time senior member;
 - (d) member.
- (2) Despite subsection (1), the Minister must not nominate a person who holds an appointment as a part-time senior member or a member of the Tribunal unless the person:
 - (a) is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or of the Australian Capital Territory; and
 - (b) has been so enrolled for not less than 5 years.
- (3) A nomination ceases to have effect if:
 - (a) the nominated AAT member ceases to hold an appointment described in subsection (1); or
 - (b) the Minister, by writing, withdraws the nomination.
- (4) A nominated AAT member has, in relation to the performance or exercise of a function or power conferred on a nominated AAT

Section 13

member by this Act, the same protection and immunity as a Justice of the High Court has in relation to proceedings in the High Court.

Section 14

Division 2—Surveillance device warrants

14 Application for surveillance device warrant

- (1) A law enforcement officer (or another person on his or her behalf) may apply for the issue of a surveillance device warrant if the law enforcement officer suspects on reasonable grounds that:
 - (a) one or more relevant offences have been, are being, are about to be, or are likely to be, committed; and
 - (b) an investigation into those offences is being, will be, or is likely to be, conducted; and
 - (c) the use of a surveillance device is necessary in the course of that investigation for the purpose of enabling evidence to be obtained of the commission of the relevant offences or the identity or location of the offenders.
- (2) If the application is being made by or on behalf of a State or Territory law enforcement officer, the reference in subsection (1) to a relevant offence does not include a reference to a State offence that has a federal aspect.
- (3) A law enforcement officer (or another person on his or her behalf) may apply for the issue of a surveillance device warrant if:
 - (a) a recovery order is in force; and
 - (b) the law enforcement officer suspects on reasonable grounds that the use of a surveillance device may assist in the location and safe recovery of the child to whom the recovery order relates.
- (4) The application under subsection (1) or (3) may be made to an eligible Judge or to a nominated AAT member.
- (5) An application:
 - (a) must specify:
 - (i) the name of the applicant; and

Section 15

- (ii) the nature and duration of the warrant sought, including the kind of surveillance device or devices sought to be authorised; and
- (b) subject to this section, must be supported by an affidavit setting out the grounds on which the warrant is sought.

(6) If a law enforcement officer believes that:

- (a) the immediate use of a surveillance device is necessary for a purpose referred to in paragraph (1)(c) or may assist as described in paragraph (3)(b); and
- (b) it is impracticable for an affidavit to be prepared or sworn before an application for a warrant is made; an application for a warrant may be made before an affidavit is prepared or sworn.

(7) If subsection (6) applies, the applicant must:

- (a) provide as much information as the eligible Judge or nominated AAT member considers is reasonably practicable in the circumstances; and
- (b) not later than 72 hours after the making of the application, send a duly sworn affidavit to the Judge or member, whether or not a warrant has been issued.

15 Remote application

- (1) If a law enforcement officer believes that it is impracticable for an application for a surveillance device warrant to be made in person, the application may be made under section 14 by telephone, fax, e-mail or any other means of communication.
- (2) If transmission by fax is available and an affidavit has been prepared, the person applying must transmit a copy of the affidavit, whether sworn or unsworn, to the eligible Judge or to the nominated AAT member who is to determine the application.

16 Determining the application

- (1) An eligible Judge or a nominated AAT member may issue a surveillance device warrant if satisfied:

Section 17

- (a) in the case of a warrant sought in relation to a relevant offence—that there are reasonable grounds for the suspicion founding the application for the warrant; and
- (b) in the case of a warrant sought in relation to a recovery order—that such an order is in force and that there are reasonable grounds for the suspicion founding the application for the warrant; and
- (c) in the case of an unsworn application—that it would have been impracticable for an affidavit to have been sworn or prepared before the application was made; and
- (d) in the case of a remote application—that it would have been impracticable for the application to have been made in person.

- (2) In determining whether a surveillance device warrant should be issued, the eligible Judge or nominated AAT member must have regard to:
 - (a) in the case of a warrant sought in relation to a relevant offence—the nature and gravity of the alleged offence; and
 - (b) in the case of a warrant sought to assist in the location and safe recovery of a child to whom a recovery order relates—the circumstances that gave rise to the making of the order; and
 - (c) the extent to which the privacy of any person is likely to be affected; and
 - (d) the existence of any alternative means of obtaining the evidence or information sought to be obtained; and
 - (e) the likely evidentiary or intelligence value of any evidence or information sought to be obtained; and
 - (f) any previous warrant sought or issued under this Division in connection with the same alleged offence or the same recovery order.

17 What must a surveillance device warrant contain?

- (1) A surveillance device warrant must:

Section 17

- (a) state that the eligible Judge or nominated AAT member issuing the warrant is satisfied of the matters referred to in subsection 16(1) and has had regard to the matters referred to in subsection 16(2); and
- (b) specify:
 - (i) the name of the applicant; and
 - (ii) if the warrant relates to one or more alleged relevant offences—the alleged offences in respect of which the warrant is issued; and
 - (iii) if the warrant relates to a recovery order—the date the order was made and the name of the child to whom the order relates; and
 - (iv) the date the warrant is issued; and
 - (v) the surveillance device or devices authorised to be used; and
 - (vi) if the warrant authorises the use of a surveillance device on premises—the premises on which the use of the surveillance device is authorised; and
 - (vii) if the warrant authorises the use of a surveillance device in or on an object or class of object—the object or class of object in or on which the use of the surveillance device is authorised; and
 - (viii) if the warrant authorises the use of a surveillance device in respect of the conversations, activities or location of a person—the name of the person (if known) or the fact that the person's identity is unknown; and
 - (ix) the period during which the warrant is in force, being a period not exceeding 90 days; and
 - (x) the name of the law enforcement officer primarily responsible for executing the warrant; and
 - (xi) any conditions subject to which premises may be entered, or a surveillance device may be used, under the warrant.

(2) In the case of a warrant authorising the use of a surveillance device on premises that are vehicles, the warrant need only specify the

Section 18

class of vehicle in relation to which the use of the surveillance device is authorised.

- (3) A warrant must be signed by the person issuing it and include his or her name.
- (4) As soon as practicable after completing and signing a warrant issued on a remote application, the person issuing it must:
 - (a) inform the applicant of:
 - (i) the terms of the warrant; and
 - (ii) the date on which and the time at which the warrant was issued; and
 - (b) give the warrant to the applicant while retaining a copy of the warrant for the person's own record.

18 What a surveillance device warrant authorises

- (1) A surveillance device warrant (subject to any conditions specified in it) may authorise one or more of the following:
 - (a) the use of a surveillance device on specified premises;
 - (b) the use of a surveillance device in or on a specified object or class of object;
 - (c) the use of a surveillance device in respect of the conversations, activities or location of a specified person or a person whose identity is unknown.
- (2) A surveillance device warrant authorises:
 - (a) for a warrant of a kind referred to in paragraph (1)(a):
 - (i) the installation, use and maintenance of a surveillance device of the kind specified in the warrant on the specified premises; and
 - (ii) the entry, by force if necessary, onto the premises, and onto other specified premises adjoining or providing access to the premises, for any of the purposes referred to in subparagraph (i) or subsection (3); and
 - (b) for a warrant of a kind referred to in paragraph (1)(b):

Section 18

- (i) the installation, use and maintenance of a surveillance device of the kind specified in the warrant in or on the specified object or an object of the specified class; and
- (ii) the entry, by force if necessary, onto any premises where the object, or an object of the class, is reasonably believed to be or is likely to be, and onto other premises adjoining or providing access to those premises, for any of the purposes referred to in subparagraph (i) or subsection (3); and
- (c) for a warrant of a kind referred to in paragraph (1)(c):
 - (i) the installation, use and maintenance of a surveillance device of the kind specified in the warrant, on premises where the person is reasonably believed to be or likely to be; and
 - (ii) the entry, by force if necessary, onto the premises, or other premises adjoining or providing access to those premises, for any of the purposes referred to in subparagraph (i) or subsection (3).

(3) Each surveillance device warrant also authorises:

- (a) the retrieval of the surveillance device; and
- (b) the installation, use, maintenance and retrieval of enhancement equipment in relation to the surveillance device; and
- (c) the temporary removal of an object or vehicle from premises for the installation, maintenance or retrieval of the surveillance device or enhancement equipment and the return of the object or vehicle to the premises; and
- (d) the breaking open of anything for the installation, maintenance or retrieval of the surveillance device or enhancement equipment; and
- (e) the connection of the surveillance device or enhancement equipment to any source of electricity and the use of electricity from that source to operate the device or equipment; and
- (f) the connection of the surveillance device or enhancement equipment to any object or system that may be used to transmit information in any form and the use of that object or

Section 19

system in connection with the operation of the device or equipment; and

- (g) the provision of assistance or technical expertise to the law enforcement officer primarily responsible for the execution of the warrant in the installation, use, maintenance or retrieval of the surveillance device or enhancement equipment.
- (4) A surveillance device warrant may authorise the doing of anything reasonably necessary to conceal the fact that anything has been done in relation to the installation, use, maintenance or retrieval of a surveillance device or enhancement equipment under the warrant.
- (5) A surveillance device warrant may authorise the interference with property of a person who is not the subject of the investigation in respect of which the warrant was issued but, if the interference would be on premises not specified in the warrant, only if the person issuing the warrant is satisfied that it is necessary to do so in order to give effect to the warrant.
- (6) A law enforcement officer may use a surveillance device under a warrant only in the performance of his or her duty.
- (7) Nothing in this section authorises the doing of anything for which a warrant would be required under the *Telecommunications (Interception) Act 1979*.

19 Extension and variation of surveillance device warrant

- (1) A law enforcement officer to whom a surveillance device warrant has been issued (or another person on his or her behalf) may apply, at any time before the expiry of the warrant:
 - (a) for an extension of the warrant for a period not exceeding 90 days from the day on which it would otherwise expire; or
 - (b) for a variation of any of the other terms of the warrant.
- (2) The application is to be made to an eligible Judge or to a nominated AAT member and must be accompanied by the original warrant.

Section 20

- (3) Sections 14 and 15 apply, with any necessary changes, to an application under this section as if it were an application for the warrant.
- (4) The Judge or member may grant an application if satisfied that the matters referred to in subsection 16(1) still exist, having regard to the matters in subsection 16(2).
- (5) If the Judge or member grants the application, the Judge or member must endorse the new expiry date or the other varied term on the original warrant.
- (6) An application may be made under this section more than once.

20 Revocation of surveillance device warrant

- (1) A surveillance device warrant may, by instrument in writing, be revoked by an eligible Judge or nominated AAT member on his or her own initiative at any time before the expiration of the period of validity specified in the warrant.
- (2) If the circumstances set out in paragraphs 21(2)(a) and (b) or 21(3)(a) and (b) apply in relation to a surveillance device warrant—the chief officer of the law enforcement agency to which the law enforcement officer to whom the warrant was issued belongs or is seconded must, by instrument in writing, revoke the warrant.
- (3) The instrument revoking a warrant must be signed by the eligible Judge, the nominated AAT member or the chief officer of the law enforcement agency, as the case requires.
- (4) If an eligible Judge or nominated AAT member revokes a warrant, he or she must give a copy of the instrument of revocation to the chief officer of the law enforcement agency to which the law enforcement officer to whom the warrant was issued belongs or is seconded.
- (5) If:
 - (a) an eligible Judge or nominated AAT member revokes a warrant; and

Section 21

(b) at the time of the revocation, a law enforcement officer is executing the warrant;

the law enforcement officer is not subject to any civil or criminal liability for any act done in the proper execution of that warrant before the officer is made aware of the revocation.

21 Discontinuance of use of surveillance device under warrant

(1) This section applies if a surveillance device warrant is issued to a law enforcement officer.

(2) If:

(a) the surveillance device warrant has been sought by or on behalf of a law enforcement officer in relation to a relevant offence; and

(b) the chief officer of the law enforcement agency to which the law enforcement officer belongs or is seconded is satisfied that the use of a surveillance device under the warrant sought is no longer necessary for the purpose of enabling evidence to be obtained of the commission of the relevant offence or the identity or location of the offender;

the chief officer must, in addition to revoking the warrant under section 20, take the steps necessary to ensure that use of the surveillance device authorised by the warrant is discontinued.

(3) If:

(a) a surveillance device warrant has been sought by or on behalf of a law enforcement officer in relation to a recovery order; and

(b) the chief officer of the law enforcement agency to which the law enforcement officer belongs or is seconded is satisfied that the use of a surveillance device is no longer required for the purpose of locating and safely recovering the child to whom the recovery order relates;

the chief officer must, in addition to revoking the warrant under section 20, take the steps necessary to ensure that use of the surveillance device authorised by the warrant is discontinued.

Section 21

- (4) If the chief officer of a law enforcement agency is notified that a warrant has been revoked by an eligible Judge or a nominated AAT member under section 20, he or she must take the steps necessary to ensure that use of the surveillance device authorised by the warrant is discontinued as soon as practicable.
- (5) If the law enforcement officer to whom the warrant is issued, or who is primarily responsible for executing the warrant, believes that use of a surveillance device under the warrant is no longer necessary for the purpose:
 - (a) if the warrant was issued in relation to a relevant offence—of enabling evidence to be obtained of the commission of the relevant offence or the identity or location of the offender; or
 - (b) if the warrant was issued in relation to a recovery order—of enabling the location and safe recovery of the child to whom the order relates;he or she must immediately inform the chief officer of the law enforcement agency to which he or she belongs or is seconded.

Section 22

Division 3—Retrieval warrants

22 Application for retrieval warrant

- (1) A law enforcement officer (or another person on his or her behalf) may apply for the issue of a retrieval warrant in respect of a surveillance device that was lawfully installed on premises, or in or on an object, under a surveillance device warrant and that the law enforcement officer suspects on reasonable grounds is still on those premises or in or on that object, or on other premises or in or on another object.
- (2) The application may be made to an eligible Judge or to a nominated AAT member.
- (3) Subject to this section, the application must be supported by an affidavit setting out the grounds on which the retrieval warrant is sought.
- (4) If a law enforcement officer believes that:
 - (a) the immediate retrieval of a surveillance device is necessary; and
 - (b) it is impracticable for an affidavit to be prepared or sworn before the application for a retrieval warrant is made; the application may be made before an affidavit is prepared or sworn.
- (5) If subsection (4) applies, the applicant must:
 - (a) provide as much information as the eligible Judge or nominated AAT member considers is reasonably practicable in the circumstances; and
 - (b) not later than 72 hours following the making of the application, send a duly sworn affidavit to the eligible Judge or nominated AAT member who determined the application, whether or not a warrant has been issued.

23 Remote application

- (1) If a law enforcement officer believes that it is impracticable for an application for a retrieval warrant to be made in person, the application may be made under section 22 by telephone, fax, e-mail or any other means of communication.
- (2) If transmission by fax is available and an affidavit has been prepared, the person applying must transmit a copy of the affidavit, whether sworn or unsworn, to the eligible Judge or nominated AAT member who is to determine the application.

24 Determining the application

- (1) An eligible Judge or nominated AAT member may issue a retrieval warrant if the Judge or member is satisfied:
 - (a) that there are reasonable grounds for the suspicion founding the application for the warrant; and
 - (b) in the case of an unsworn application—that it would have been impracticable for an affidavit to have been sworn or prepared before the application was made; and
 - (c) in the case of a remote application—that it would have been impracticable for the application to have been made in person.
- (2) In determining whether a retrieval warrant should be issued, the eligible Judge or nominated AAT member must have regard to:
 - (a) the extent to which the privacy of any person is likely to be affected; and
 - (b) the public interest in retrieving the device sought to be retrieved.

25 What must a retrieval warrant contain?

- (1) A retrieval warrant must:
 - (a) state that the eligible Judge or nominated AAT member is satisfied of the matters referred to in subsection 24(1) and has had regard to the matters referred to in subsection 24(2); and

Section 26

- (b) specify:
 - (i) the name of the applicant; and
 - (ii) the date the warrant is issued; and
 - (iii) the kind of surveillance device authorised to be retrieved; and
 - (iv) the premises or object from which the surveillance device is to be retrieved; and
 - (v) the period (not exceeding 90 days) during which the warrant is in force; and
 - (vi) the name of the law enforcement officer primarily responsible for executing the warrant; and
 - (vii) any conditions subject to which premises may be entered under the warrant.
- (2) A warrant must be signed by the person issuing it and include his or her name.
- (3) As soon as practicable after completing and signing a warrant issued on a remote application, the person issuing it must:
 - (a) inform the applicant of:
 - (i) the terms of the warrant; and
 - (ii) the date on which and the time at which the warrant was issued; and
 - (b) give the warrant to the applicant while retaining a copy of the warrant for the person's own record.

26 What a retrieval warrant authorises

- (1) A retrieval warrant (subject to any conditions specified in it) authorises:
 - (a) the retrieval of the surveillance device specified in the warrant and any enhancement equipment in relation to the device; and
 - (b) the entry, by force if necessary, onto the premises where the surveillance device is reasonably believed to be, and onto other premises adjoining or providing access to those

Section 27

premises, for the purpose of retrieving the device and equipment; and

- (c) the breaking open of any thing for the purpose of retrieving the device and equipment; and
- (d) if the device or equipment is installed on or in an object or vehicle—the temporary removal of the object or vehicle from any place where it is situated for the purpose of retrieving the device and equipment and returning the object or vehicle to that place; and
- (e) the provision of assistance or technical expertise to the law enforcement officer named in the warrant in the retrieval of the device or equipment.

(2) If the retrieval warrant authorises the retrieval of a tracking device, the warrant also authorises the use of the tracking device and any enhancement equipment in relation to the device solely for the purposes of the location and retrieval of the device or equipment.

(3) A retrieval warrant may authorise the doing of anything reasonably necessary to conceal the fact that anything has been done in relation to the retrieval of a surveillance device or enhancement equipment under the warrant but cannot authorise the use, for any purpose, of the surveillance device specified in the warrant.

27 Revocation of retrieval warrant

- (1) A retrieval warrant may, by instrument in writing, be revoked by an eligible Judge or a nominated AAT member on his or her own initiative at any time before the expiration of the period of validity specified in the warrant.
- (2) If the chief officer of the law enforcement agency to which the law enforcement officer to whom a retrieval warrant was issued belongs or is seconded is satisfied that the grounds for issue of the retrieval warrant no longer exist—the chief officer must, by instrument in writing, revoke the warrant.

Section 27

- (3) The instrument revoking a warrant must be signed by the eligible Judge, the nominated AAT member or the chief officer of the law enforcement agency, as the case requires.
- (4) If an eligible Judge or nominated AAT member revokes a warrant, he or she must give a copy of the instrument of revocation to the chief officer of the law enforcement agency to which the law enforcement officer to whom the warrant was issued belongs or is seconded.
- (5) If the law enforcement officer to whom a retrieval warrant has been issued, or who is primarily responsible for executing a retrieval warrant, believes that the grounds for issue of the warrant no longer exist, he or she must inform the chief officer of the law enforcement agency immediately.

Part 3—Emergency authorisations

28 Emergency authorisation—serious risks to person or property

- (1) A law enforcement officer may apply to an appropriate authorising officer for an emergency authorisation for the use of a surveillance device if, in the course of an investigation of a relevant offence, the law enforcement officer reasonably suspects that:
 - (a) an imminent risk of serious violence to a person or substantial damage to property exists; and
 - (b) the use of a surveillance device is immediately necessary for the purpose of dealing with that risk; and
 - (c) the circumstances are so serious and the matter is of such urgency that the use of a surveillance device is warranted; and
 - (d) it is not practicable in the circumstances to apply for a surveillance device warrant.
- (2) If the application is being made by or on behalf of a State or Territory law enforcement officer, the reference in that subsection to a relevant offence does not include a reference to a State offence that has a federal aspect.
- (3) The application may be made orally, in writing or by telephone, fax, e-mail or any other means of communication.
- (4) The appropriate authorising officer may give the emergency authorisation if satisfied that there are reasonable grounds for the suspicion founding the application.

29 Emergency authorisation—urgent circumstances relating to recovery order

- (1) A law enforcement officer may apply to an appropriate authorising officer for an emergency authorisation for the use of a surveillance device if:

Section 30

- (a) a recovery order is in force; and
- (b) the law enforcement officer reasonably suspects that:
 - (i) the circumstances are so urgent as to warrant the immediate use of a surveillance device; and
 - (ii) it is not practicable in the circumstances to apply for a surveillance device warrant.

- (2) The application may be made orally, in writing or by telephone, fax, e-mail or any other means of communication.
- (3) The appropriate authorising officer may give the emergency authorisation if satisfied that the recovery order is in force and that there are reasonable grounds for the suspicion founding the application.

30 Emergency authorisation—risk of loss of evidence

- (1) If:
 - (a) a law enforcement officer is conducting an investigation into:
 - (i) an offence against section 233B of the *Customs Act 1901*; or
 - (ii) an offence against section 233BAA of the *Customs Act 1901* (with respect to goods listed in Schedule 4 to the *Customs (Prohibited Imports) Regulations 1956* or in Schedule 8 or 9 to the *Customs (Prohibited Exports) Regulations 1958*); or
 - (iii) an offence against Part IIIA of the *Crimes Act 1914*; or
 - (iv) an offence under the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*; or
 - (v) an offence under Division 72 of the *Criminal Code*; or
 - (vi) an offence against section 73.2, 80.1 or 91.1 of the *Criminal Code*; or
 - (vii) an offence under Division 101, 102 or 103 of the *Criminal Code*; or
 - (viii) an offence under Division 270 of the *Criminal Code*; or more than one offence; and
 - (b) the law enforcement officer reasonably suspects that:

Section 31

- (i) the use of the surveillance device is immediately necessary to prevent the loss of any evidence relevant to that investigation; and
- (ii) the circumstances are so serious and the matter is of such urgency that the use of the surveillance device is warranted; and
- (iii) it is not practicable in the circumstances to apply for a surveillance device warrant;

the law enforcement officer may apply to an appropriate authorising officer for an emergency authorisation for the use of a surveillance device.

- (2) The application may be made orally, in writing or by telephone, fax, e-mail or any other means of communication.
- (3) The appropriate authorising officer may give the emergency authorisation if satisfied that:
 - (a) an investigation is being conducted into an offence referred to in paragraph (1)(a); and
 - (b) there are reasonable grounds for the suspicion referred to in paragraph (1)(b).

31 Record of emergency authorisations to be made

- (1) As soon as practicable after an appropriate authorising officer gives an emergency authorisation, the officer must make a written record of the giving of that authorisation, including in the record:
 - (a) the name of the applicant for the authorisation; and
 - (b) the date and time the authorisation was given; and
 - (c) the nature of the authorisation given.
- (2) A written record made under subsection (1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Section 32

32 Attributes of emergency authorisations

- (1) An emergency authorisation may authorise the law enforcement officer to whom it is given:
 - (a) to use more than one kind of surveillance device; and
 - (b) to use more than one surveillance device of any particular kind.
- (2) An emergency authorisation may authorise anything that a surveillance device warrant may authorise.
- (3) A law enforcement officer may use a surveillance device under an emergency authorisation only if he or she is acting in the performance of his or her duty.
- (4) Nothing in this Part authorises the doing of anything for which a warrant would be required under the *Telecommunications (Interception) Act 1979*.

33 Application for approval of emergency authorisation

- (1) Within 48 hours after giving an emergency authorisation to a law enforcement officer, the appropriate authorising officer who gave the authorisation (or another person on that appropriate authorising officer's behalf) must apply to an eligible Judge or to a nominated AAT member for approval of the giving of the emergency authorisation.
- (2) The application:
 - (a) must specify:
 - (i) the name of the applicant for the approval; and
 - (ii) the kind or kinds of surveillance device to which the emergency authorisation relates and, if a warrant is sought, the nature and duration of the warrant; and
 - (b) must be supported by an affidavit setting out the grounds on which the approval (and warrant, if any) is sought; and
 - (c) must be accompanied by a copy of the written record made under section 31 in relation to the emergency authorisation.

Section 34

- (3) The eligible Judge or nominated AAT member may refuse to consider the application until the applicant gives the Judge or member all the information the Judge or member requires about the application in the way the Judge or member requires.
- (4) An application for approval of the giving of an emergency authorisation and any instrument in support of such an application is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

34 Consideration of application

- (1) Before deciding an application for approval of the giving of an emergency authorisation given under section 28, the eligible Judge or nominated AAT member considering the application must, in particular, and being mindful of the intrusive nature of using a surveillance device, consider the following:
 - (a) the nature of the risk of serious violence to a person or substantial damage to property;
 - (b) the extent to which issuing a surveillance device warrant would have helped reduce or avoid the risk;
 - (c) the extent to which law enforcement officers could have used alternative methods of investigation to help reduce or avoid the risk;
 - (d) how much the use of alternative methods of investigation could have helped reduce or avoid the risk;
 - (e) how much the use of alternative methods of investigation would have prejudiced the safety of the person or property because of delay or for another reason;
 - (f) whether or not it was practicable in the circumstances to apply for a surveillance device warrant.
- (2) Before deciding an application for approval of the giving of an emergency authorisation given under section 29, the eligible Judge or nominated AAT member considering the application must, in particular, and being mindful of the intrusive nature of using a surveillance device, consider the following:
 - (a) the urgency of enforcing the recovery order;

Section 35

- (b) the extent to which use of a surveillance device would assist in the location and safe recovery of the child to whom the recovery order relates;
- (c) the extent to which law enforcement officers could have used alternative methods to assist in the location and safe recovery of the child;
- (d) how much the use of alternative methods to assist in the location and safe recovery of the child might have prejudiced the effective enforcement of the recovery order;
- (e) whether or not it was practicable in the circumstances to apply for a surveillance device warrant.

(3) Before deciding an application for approval of the giving of an emergency authorisation given under section 30, the eligible Judge or nominated AAT member must, in particular, and being mindful of the intrusive nature of using a surveillance device, consider the following:

- (a) the nature of the risk of the loss of evidence;
- (b) the extent to which issuing a surveillance device warrant would have helped reduce or avoid the risk;
- (c) the extent to which law enforcement officers could have used alternative methods of investigation to help reduce or avoid the risk;
- (d) how much the use of alternative methods of investigation could have helped reduce or avoid the risk;
- (e) whether or not it was practicable in the circumstances to apply for a surveillance device warrant.

35 Judge or nominated AAT member may approve giving of emergency authorisations

(1) After considering an application for approval of the giving of an emergency authorisation under section 28, the eligible Judge or nominated AAT member may approve the application if satisfied that there were reasonable grounds to suspect that:

- (a) there was a risk of serious violence to a person or substantial damage to property; and

Section 35

- (b) using a surveillance device may have helped reduce the risk; and
- (c) it was not practicable in the circumstances to apply for a surveillance device warrant.

(2) After considering an application for approval of the giving of an emergency authorisation under section 29 in relation to a recovery order, the eligible Judge or nominated AAT member may approve the application if satisfied that:

- (a) the recovery order was in force at the time the emergency authorisation was given; and
- (b) there were reasonable grounds to suspect that:
 - (i) the enforcement of the recovery order was urgent; and
 - (ii) using a surveillance device may have assisted in the prompt location and safe recovery of the child to whom the order relates; and
 - (iii) it was not practicable in the circumstances to apply for a surveillance device warrant.

(3) After considering an application for approval of the giving of an emergency authorisation under section 30, the eligible Judge or nominated AAT member may approve the application if satisfied that:

- (a) there were reasonable grounds to suspect that:
 - (i) there was a risk of loss of evidence; and
 - (ii) using the surveillance device may have helped reduce the risk; and
- (b) it was not practicable in the circumstances to apply for a surveillance device warrant.

(4) If, under subsection (1), (2) or (3), the eligible Judge or nominated AAT member approves the giving of an emergency authorisation, the Judge or member may:

- (a) unless paragraph (b) applies—issue a surveillance device warrant for the continued use of the surveillance device as if the application for the approval were an application for a surveillance device warrant under Division 2 of Part 2; or

Section 36

- (b) if the Judge or member is satisfied that since the application for the emergency authorisation the activity that required surveillance has ceased—order that the use of the surveillance device cease.
- (5) If, under subsection (1), (2) or (3), the eligible Judge or nominated AAT member does not approve the giving of an emergency authorisation, the Judge or member may:
 - (a) order that the use of the surveillance device cease; or
 - (b) if the Judge or member is of the view that although the situation did not warrant the emergency authorisation at the time that authorisation was given, the use of a surveillance device warrant under Division 2 of Part 2 is currently justified—issue a surveillance device warrant for the subsequent use of such a device as if the application for the approval were an application for a surveillance device warrant under Division 2 of Part 2.
- (6) In any case, the eligible Judge or nominated AAT member may order that any information obtained from or relating to the exercise of powers under the emergency authorisation, or any record of that information, be dealt with in a manner specified in the order, not being a manner that involves the destruction of that information.

36 Admissibility of evidence

If the giving of an emergency authorisation is approved under section 35, any evidence obtained because of the exercise of powers under that authorisation is not inadmissible in any proceeding only because the evidence was obtained before the approval.

Part 4—Use of certain surveillance devices without warrant

37 Use of optical surveillance devices without warrant

- (1) A federal law enforcement officer acting in the course of his or her duties may, without warrant, use an optical surveillance device for any purpose:
 - (a) if the officer belongs or is seconded to the Australian Federal Police—that is within the functions of the Australian Federal Police set out in section 8 of the *Australian Federal Police Act 1979*; or
 - (b) if the officer belongs or is seconded to the Australian Crime Commission—that is within the functions of the Commission set out in section 7A of the *Australian Crime Commission Act 1979*;

if the use of that device does not involve:

 - (c) entry onto premises without permission; or
 - (d) interference without permission with any vehicle or thing.
- (2) A State or Territory law enforcement officer acting in the course of his or her duties may, without warrant, use an optical surveillance device in the investigation of a relevant offence (other than a State offence that has a federal aspect) if the use of that device does not involve:
 - (a) entry onto premises without permission; or
 - (b) interference without permission with any vehicle or thing.
- (3) A State or Territory law enforcement officer acting in the course of his or her duties may, without warrant, use an optical surveillance device in the location and safe recovery of a child to whom a recovery order relates if the use of that device does not involve:
 - (a) a trespass on premises; or
 - (b) interference without permission with any vehicle or thing.

Section 38

38 Use of surveillance devices without warrant for listening to or recording words in limited circumstances

- (1) A federal law enforcement officer acting in the course of his or her duties may, without warrant, use a surveillance device for any purpose involving listening to, or recording, words spoken by a person:
 - (a) if the officer belongs or is seconded to the Australian Federal Police—that is within the functions of the Australian Federal Police set out in section 8 of the *Australian Federal Police Act 1979*; or
 - (b) if the officer belongs or is seconded to the Australian Crime Commission—that is within the functions of the Commission set out in section 7A of the *Australian Crime Commission Act 1979*;

if the use of that device for that listening or recording purpose is confined to circumstances where:

 - (c) the law enforcement officer is the speaker of the words or is a person, or is included in a class or group of persons, by whom the speaker of the words intends, or should reasonably expect, the words to be heard; or
 - (d) the law enforcement officer listens to or records the words with the consent, express or implied, of a person who is permitted to listen to or record the words by paragraph (c) or by subsection (4).
- (2) A State or Territory law enforcement officer acting in the course of his or her duties and in the investigation of a relevant offence (other than a State offence that has a federal aspect) may, without warrant, use a surveillance device for any purpose involving listening to, or recording, words spoken by a person if the use of that device for that listening or recording purpose is confined to circumstances where:
 - (a) the State or Territory law enforcement officer is the speaker of the words or is a person, or is included in a class or group of persons, by whom the speaker of the words intends, or should reasonably expect, the words to be heard; or

Section 38

- (b) the State or Territory law enforcement officer listens to or records the words with the consent, express or implied, of a person who is permitted to listen to or record the words:
 - (i) by paragraph (a); or
 - (ii) so far as subsection (5) applies in relation to that investigation—by that subsection.
- (3) A State or Territory law enforcement officer acting in the course of his or her duties and in relation to the location and safe recovery of a child to whom a recovery order relates may, without warrant, use a surveillance device for any purpose involving listening to, or recording, words spoken by a person if the use of that device for that listening or recording purpose is confined to circumstances where:
 - (a) the State or Territory law enforcement officer is the speaker of the words or is a person, or is included in a class or group of persons, by whom the speaker of the words intends, or should reasonably expect, the words to be heard; or
 - (b) the State or Territory law enforcement officer listens to or records the words with the consent, express or implied, of a person who is permitted to listen to or record the words:
 - (i) by paragraph (a); or
 - (ii) so far as subsection (5) applies in relation to the location and safe recovery of the child—by that subsection.
- (4) A person (other than a federal law enforcement officer) who is assisting a federal law enforcement officer acting in the course of his or her duties may, without warrant, use a surveillance device for any purpose:
 - (a) that involves listening to, or recording, words spoken by a person; and
 - (b) that is referred to in subsection (1);if the first-mentioned person is the speaker of the words or is a person, or is included in a class or group of persons, by whom the speaker of the words intends, or should reasonably expect, the words to be heard.

Section 39

(5) A person (other than a State or Territory law enforcement officer) who is assisting a State or Territory law enforcement officer who is acting in the course of his or her duties in relation to:

- (a) the investigation of a relevant offence (other than a State offence that has a federal aspect); or
- (b) the location and safe recovery of a child to whom a recovery order relates;

may, without warrant, use a surveillance device for any purpose that involves listening to, or recording, words spoken by a person if the first-mentioned person is the speaker of the words or is a person, or is included in a class or group of persons, by whom the speaker of the words intends, or should reasonably expect, the words to be heard.

39 Use and retrieval of tracking devices without warrant in certain circumstances

- (1) A law enforcement officer may, with the written permission of an appropriate authorising officer, use a tracking device without a warrant in the investigation of a relevant offence.
- (2) If the law enforcement officer referred to in subsection (1) is a State or Territory law enforcement officer, the reference in subsection (1) to a relevant offence does not include a reference to a State offence that has a federal aspect.
- (3) A law enforcement officer may, with the written permission of an appropriate authorising officer, use a tracking device without a warrant in the location and safe recovery of a child to whom a recovery order relates.
- (4) Subsections (1) and (3) have effect despite any other law of the Commonwealth or of a State or self-governing Territory (including any principle of the common law) forbidding the use of such a device without a warrant.
- (5) A tracking device authorisation given under subsection (1) or (3) may authorise the law enforcement officer to use more than one tracking device.

Section 39

- (6) If an appropriate authorising officer gives a tracking device authorisation under this section, an appropriate authorising officer may also authorise the retrieval, without a warrant, of a tracking device to which the tracking device authorisation relates.
- (7) A tracking device authorisation given under subsection (1) or (3) and an authorisation for the retrieval of a tracking device given under subsection (6) must indicate the period, not exceeding 90 days, for which the authorisation remains in force.
- (8) An appropriate authorising officer must not give permission under this section for the use, installation or retrieval of a tracking device if the installation of the device, or its retrieval, involves entry onto premises without permission or an interference with the interior of a vehicle without permission.
- (9) For the purposes of obtaining the permission of an appropriate authorising officer, the law enforcement officer wishing to use that device:
 - (a) must apply, orally or in writing, to the appropriate authorising officer; and
 - (b) must address, in that application, the matters that would be required to be addressed if the law enforcement officer were making an application for a surveillance device warrant or a retrieval warrant, as the case requires.
- (10) Subsection 18(1), subparagraphs 18(2)(a)(i), 18(2)(b)(i) and 18(2)(c)(i), paragraphs 18(3)(a), (b) and (g) and subsections 18(4), (6) and (7) apply in relation to a tracking device authorisation authorising the use of a tracking device as if:
 - (a) references in those provisions to a surveillance device warrant were references to a tracking device authorisation authorising the use of a tracking device; and
 - (b) references in those provisions to a surveillance device were references to a tracking device.
- (11) Paragraphs 26(1)(a), (c), (d) and (e) and subsections 26(2) and (3) apply in relation to a tracking device authorisation authorising the retrieval of a tracking device as if:

Section 40

- (a) references in those provisions to a retrieval warrant were references to a tracking device authorisation authorising the retrieval of a tracking device; and
- (b) references in those provisions to a surveillance device were references to a tracking device.

(12) A law enforcement officer may use a tracking device authorisation only if he or she is acting in the performance of his or her duty.

40 Record of tracking device authorisations to be kept

- (1) As soon as practicable after an appropriate authorising officer gives a tracking device authorisation, the officer must make a written record of the giving of that authorisation, including in the record:
 - (a) the name of the applicant for the authorisation; and
 - (b) the date and time the authorisation was given; and
 - (c) if the authorisation authorises the use of a tracking device in relation to the investigation of an alleged relevant offence or offences—the alleged offence or offences in respect of which the authorisation is given; and
 - (d) if the authorisation authorises the use of a tracking device in relation to a recovery order—the date the order was made and the name of the child to whom the order relates; and
 - (e) if the authorisation authorises the use of a tracking device in or on an object or class of object—the object or class of object in or on which the use of the tracking device is authorised; and
 - (f) if the authorisation authorises the use of a tracking device on a vehicle or class of vehicle—the vehicle or class of vehicle on which the use of the tracking device is authorised; and
 - (g) if the authorisation authorises the use of a tracking device in respect of the conversations, activities or geographical location of a person—the name of the person (if known); and
 - (h) if the authorisation authorises the retrieval of a tracking device—the premises or object from which the tracking device is to be retrieved; and

Section 40

- (i) the name of the law enforcement officer primarily responsible for executing the authorisation; and
- (j) any conditions subject to which a tracking device may be used, under the authorisation.

(2) A written record made under subsection (1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Section 41

Part 5—Extraterritorial operation of warrants

41 Definitions

(1) In this Part:

appropriate consenting official, in relation to a foreign country, means an official of that country having authority in that country to give consent to the use of surveillance devices in that country or on a vessel or aircraft registered under the laws of that country.

Australian fishing zone means the Australian fishing zone within the meaning of the *Fisheries Management Act 1991*.

contiguous zone, in relation to Australia, has the same meaning as in the *Seas and Submerged Lands Act 1973*.

territorial sea, in relation to Australia, has the same meaning as in the *Seas and Submerged Lands Act 1973*.

42 Extraterritorial operation of warrants

(1) If, before the issue of a warrant in relation to the investigation of a relevant offence on an application made by or on behalf of a federal law enforcement officer, it becomes apparent to the applicant that there will be a need for surveillance:

(a) in a foreign country; or

(b) on a vessel or aircraft that is registered under the law of a foreign country and is in or above waters beyond the outer limits of the territorial sea of Australia;

to assist in that investigation, the eligible Judge or nominated AAT member considering the application for the warrant must not permit the warrant to authorise that surveillance unless the Judge or member is satisfied that the surveillance has been agreed to by an appropriate consenting official of the foreign country.

(2) If:

Section 42

- (a) application is made under section 33 by an appropriate authorising officer who is a federal law enforcement officer for approval of the giving of an emergency authorisation relating to the investigation of a relevant offence; and
- (b) before the completion of consideration of that application, it becomes apparent to the applicant that there will be a need for surveillance:
 - (i) in a foreign country; or
 - (ii) on a vessel or aircraft that is registered under the law of a foreign country and is in or above waters beyond the outer limits of the territorial sea of Australia;
to assist in the investigation to which the emergency authorisation related;

the eligible Judge or nominated AAT member to whom the application was made must not permit any warrant issued on consideration of that application to authorise that surveillance unless the Judge or member is satisfied that the surveillance has been agreed to by an appropriate consenting official of the foreign country.

(3) If:

- (a) a warrant has been issued in relation to the investigation of a relevant offence on an application by or on behalf of a federal law enforcement officer; and
- (b) after the issue of the warrant it becomes apparent to the law enforcement officer primarily responsible for executing the warrant that there will be a need for surveillance:
 - (i) in a foreign country; or
 - (ii) on a vessel or aircraft that is registered under the law of a foreign country and is in or above waters beyond the outer limits of the territorial sea of Australia;
to assist in that investigation;

the warrant is taken to permit that surveillance if, and only if, the surveillance has been agreed to by an appropriate consenting official of the foreign country.

(4) Despite subsections (1), (2) and (3), if:

Section 42

- (a) a vessel that is registered under the law of a foreign country is in waters beyond the outer limits of the territorial sea of Australia but not beyond the outer limits of the contiguous zone of Australia; and
- (b) the relevant offence in respect of which it becomes apparent that surveillance on the vessel will be required is an offence relating to the customs, fiscal, immigration or sanitary laws of Australia;

there is no requirement for the agreement of an appropriate consenting official of the foreign country concerned in relation to that surveillance while the vessel is in such waters.

(5) Despite subsections (1), (2) and (3), if:

- (a) a vessel that is registered under the law of a foreign country is in waters beyond the outer limits of the territorial sea of Australia but not beyond the outer limits of the Australian fishing zone; and
- (b) the relevant offence in respect of which it becomes apparent that surveillance on the vessel will be required is an offence against section 100, 100A, 101 or 101A of the *Fisheries Management Act 1991*;

there is no requirement for the agreement of an appropriate consenting official of the foreign country concerned in relation to that surveillance while the vessel is in those waters.

(6) As soon as practicable after the commencement of surveillance under the authority of a warrant:

- (a) in a foreign country; or
- (b) in circumstances where consent to that surveillance is required—on a vessel or aircraft that is registered under the law of a foreign country;

the chief officer of the law enforcement agency to which the law enforcement officer who applied for the warrant belongs or is seconded must give the Minister evidence in writing that the surveillance has been agreed to by an appropriate consenting official of the foreign country.

Section 43

- (7) An instrument providing evidence of the kind referred to in subsection (6) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.
- (8) If a vessel or aircraft that is registered under the laws of a foreign country is in or above the territorial sea of another foreign country, subsections (1), (2) and (3) have effect as if the reference to an appropriate consenting official of the foreign country were a reference to an appropriate consenting official of each foreign country concerned.
- (9) For the avoidance of doubt, there is no requirement for the agreement of an appropriate consenting official of the foreign country to the surveillance under the authority of a warrant of a vessel or aircraft of a foreign country that is in Australia or in or above waters within the outer limits of the territorial sea of Australia.

43 Evidence obtained from extraterritorial surveillance not to be tendered in evidence unless court satisfied properly obtained

Evidence obtained from surveillance undertaken in a foreign country in accordance with subsection 42(1), (2) or (3) in relation to a relevant offence cannot be tendered in evidence to a court in any proceedings relating to the relevant offence unless the court is satisfied that the surveillance was agreed to by an appropriate consenting official of the foreign country.

Section 44

Part 6—Compliance and monitoring

Division 1—Restrictions on use, communication and publication of information

44 What is protected information?

(1) In this Act:

protected information means:

- (a) any information obtained from the use of a surveillance device under a warrant, an emergency authorisation or a tracking device authorisation; or
- (b) any information relating to:
 - (i) an application for, the issue of, the existence of, or the expiration of, a warrant, an emergency authorisation or a tracking device authorisation; or
 - (ii) an application for approval of powers exercised under an emergency authorisation; or
- (c) any information that is likely to enable the identification of a person, object or premises specified in a warrant, an emergency authorisation or a tracking device authorisation; or
- (d) any other information obtained by a law enforcement officer:
 - (i) without the authority of a warrant or a tracking device authorisation; or
 - (ii) without the authority of an emergency authorisation that was subsequently approved; or
 - (iii) in a case where the information was obtained through the use of a surveillance device in a foreign country, or on a vessel or aircraft that is registered under the law of a foreign country and that is in or above waters beyond the outer limit of Australia's territorial sea (within the meaning of section 41)—without the agreement of the appropriate consenting official of that foreign country,

and of any other foreign country, whose agreement is required under section 42;
in contravention of the requirement for such a warrant, tracking device authorisation or emergency authorisation.

- (2) For the avoidance of doubt, information obtained under an emergency authorisation falls under paragraph (a) and not paragraph (d) of the definition of **protected information** unless:
 - (a) an eligible Judge or nominated AAT member refuses to approve the giving of the emergency authorisation; or
 - (b) contrary to the requirement of section 33, no application for such an approval has been made.

45 Prohibition on use, recording, communication or publication of protected information or its admission in evidence

- (1) A person commits an offence if:
 - (a) the person uses, records, communicates or publishes any information; and
 - (b) the information is protected information; and
 - (c) the use, recording, communication or publication of the information is not permitted by this section.

Penalty: Imprisonment for 2 years.

- (2) A person commits an offence if:
 - (a) the person uses, records, communicates or publishes any information; and
 - (b) the information is protected information; and
 - (c) the use, recording, communication or publication of the information is not permitted by this section; and
 - (d) the use, recording, communication or publication of the information, endangers the health or safety of any person or prejudices the effective conduct of an investigation into a relevant offence.

Penalty: Imprisonment for 10 years.

Section 45

- (3) Subject to subsections (4) and (5), protected information may not be admitted in evidence in any proceedings.
- (4) Subsections (1), (2) and (3) do not apply to:
 - (a) the use, recording, communication or publication of any information that has been disclosed in proceedings in open court lawfully; or
 - (b) the use or communication of protected information by a person who believes on reasonable grounds that the use or communication is necessary to help prevent or reduce the risk of serious violence to a person or substantial damage to property; or
 - (c) the communication to the Director-General (within the meaning of the *Australian Security Intelligence Organisation Act 1979*) of protected information that relates or appears to relate to any matter within the functions of that organisation; or
 - (d) the communication to the agency head (within the meaning of the *Intelligence Services Act 2001*) of an agency (within the meaning of that Act) of protected information that relates or appears to relate to any matter within the functions of that agency; or
 - (e) the use, recording or communication of:
 - (i) protected information referred to in paragraph (c)—by an officer or employee of the Australian Security Intelligence Organisation; or
 - (ii) protected information referred to in paragraph (d)—by a staff member (within the meaning of the *Intelligence Services Act 2001*) of an agency (within the meaning of that Act);in the performance of his or her official functions; or
 - (f) the communication of information to a foreign country or an appropriate authority of a foreign country, or the use of information so communicated, in accordance with the *Mutual Assistance in Criminal Matters Act 1987*, if that communication or use relates to the investigation of an offence or the conduct of proceedings in respect of an offence against a law of that foreign country that is

Section 45

punishable by a maximum term of imprisonment of 3 years or more, by imprisonment for life or by the death penalty; or

(5) Protected information may be used, recorded, communicated or published, or may be admitted in evidence, if it is necessary to do so for any of the following purposes:

- (a) the investigation of a relevant offence (including a State or Territory relevant offence but not including a relevant offence referred to in paragraph (d) or (i)) or the making of a report on the outcome of such an investigation;
- (b) the making of a decision whether or not to bring a prosecution for a relevant offence (including a State or Territory relevant offence but not including a relevant offence referred to in paragraph (d) or (i));
- (c) a relevant proceeding (including State or Territory relevant proceedings but not including a relevant proceeding in respect of a relevant offence referred to in paragraph (d) or (i));
- (d) an investigation of a complaint against, or into the conduct of, a public officer within the meaning of this Act and also any subsequent investigation or prosecution of a relevant offence arising directly from the investigation of the complaint, or into the conduct;
- (e) the making of a decision in relation to the appointment, term of appointment, termination of the appointment, or retirement, of a person referred to in paragraph (d);
- (f) the keeping of records and the making of reports by a law enforcement agency under Division 2;
- (g) an inspection by the Ombudsman under section 55;
- (h) the performance of any function of the public interest monitor under either the *Crime and Misconduct Act 2001* of Queensland or the *Police Powers and Responsibilities Act 2000* of Queensland or under both of those Acts with respect to ensuring compliance with either of those Acts or with this Act;
- (i) an investigation under the *Privacy Act 1988* or any other law of the Commonwealth concerning the privacy of personal information and also any subsequent investigation or

Section 45

prosecution of a relevant offence arising directly from that first-mentioned investigation.

- (6) Paragraphs (4)(f) and (5)(a), (b) and (c) do not authorise:
 - (a) the use, recording, communication or publication of information of the kind referred to in paragraph (d) of the definition of **protected information** in section 44; or
 - (b) the giving in evidence of protected information of the kind referred to in paragraph (d) of that definition; regardless of whether that information is also information of the kind referred to in paragraph (b) or (c) of that definition.
- (7) If protected information obtained through the use of a surveillance device by a law enforcement officer of a particular law enforcement agency (the **originating agency**):
 - (a) is communicated to another law enforcement agency (by communicating it to the chief officer or another officer of that agency); or
 - (b) is communicated to any agency that is not a law enforcement agency (other than the Australian Security Intelligence Organisation and the agencies within the meaning if the *Intelligence Services Act 2001*) (by communicating it to the officer in charge of that agency or to another officer of that agency);for a particular purpose, the protected information that has been so communicated:
 - (c) may be communicated from one officer to another within that agency or organisation for that purpose only; and
 - (d) must not, except for the purpose of bringing a relevant proceeding, or a State or Territory relevant proceeding, be communicated to any person who is not a member of that agency or organisation.
- (8) A reference in subsection (5) to a relevant offence is a reference to any relevant offence, whether or not the offence in respect of which the relevant warrant or emergency authorisation was issued or given.
- (9) In this section:

State or Territory relevant offence means a relevant offence against the law of a State or self-governing Territory that is punishable by a maximum term of imprisonment of 3 years or more or for life.

State or Territory relevant proceeding means:

- (a) the prosecution of a State or Territory relevant offence; or
- (b) a proceeding for the confiscation, forfeiture or restraint of property, or for the imposition of a pecuniary penalty, in relation to a State or Territory relevant offence; or
- (c) a proceeding for the protection of a child or an intellectually impaired person; or
- (d) a disciplinary offence against a public officer; or
- (e) a coronial inquest or inquiry if, in the opinion of the coroner, the event that is the subject of the inquest or inquiry may have resulted from the commission of a State or Territory relevant offence; or
- (f) a proceeding by way of a bail application that relates to a proceeding by way of a prosecution for a State or Territory relevant offence; or
- (g) a proceeding for a review of a decision to refuse such a bail application; or
- (h) a proceeding for a review of a decision to grant such a bail application.

46 Dealing with records obtained by use of surveillance devices

- (1) The chief officer of a law enforcement agency:
 - (a) must ensure that every record or report comprising protected information is kept in a secure place that is not accessible to people who are not entitled to deal with the record or report; and
 - (b) must cause to be destroyed any record or report referred to in paragraph (a):
 - (i) as soon as practicable after the making of the record or report if the chief officer is satisfied that no civil or criminal proceeding to which the material contained in

Section 46

the record or report relates has been, or is likely to be, commenced and that the material contained in the record or report is not likely to be required in connection with an activity referred to in subsection 45(4) or a purpose referred to in subsection 45(5); and

(ii) within the period of 5 years after the making of the record or report, and within each period of 5 years thereafter, unless, before the end of that period, the chief officer is satisfied in relation to the material contained in the record or report of a matter referred to in subparagraph (i) and certifies to that effect.

(2) The officer in charge of any agency that is not a law enforcement agency but that, as described in subsection 45(4) or (5), receives records or reports obtained by use of a surveillance device:

(a) must ensure that every record or report that is so received is kept in a secure place that is not accessible to people who are not entitled to deal with the record or report; and

(b) must cause to be destroyed any record or report referred to in paragraph (a):

(i) as soon as practicable after the receipt of the record or report by the agency if the officer in charge is satisfied that no civil or criminal proceeding to which the material contained in the record or report relates has been, or is likely to be, commenced and that the material contained in the record or report is not likely to be required in connection with an activity referred to in subsection 45(4) or a purpose referred to in subsection 45(5); and

(ii) within the period of 5 years after the making of the record or report, and within each period of 5 years thereafter, unless, before the end of that period, the officer in charge is satisfied in relation to the material contained in the record or report of a matter referred to in subparagraph (i) and certifies to that effect.

(3) Subsections (1) and (2) do not apply to a record or report that is received into evidence in legal proceedings or disciplinary proceedings.

47 Protection of surveillance device technologies and methods

- (1) In a proceeding, a person may object to the disclosure of information on the ground that the information, if disclosed, could reasonably be expected to reveal details of surveillance device technology or methods of installation, use or retrieval of surveillance devices.
- (2) If the person conducting or presiding over the proceeding is satisfied that the ground of objection is made out, he or she may order that the person who has the information not be required to disclose it in the proceeding.
- (3) In determining whether or not to make an order under subsection (2), the person conducting or presiding over the proceeding must take into account whether disclosure of the information:
 - (a) is necessary for the fair trial of the defendant; or
 - (b) is in the public interest.
- (4) Subsection (2) does not affect a provision of another law under which a law enforcement officer cannot be compelled to disclose information or make statements in relation to the information.
- (5) If the person conducting or presiding over a proceeding is satisfied that publication of any information disclosed in the proceeding could reasonably be expected to reveal details of surveillance device technology or methods of installation, use or retrieval of surveillance devices, the person must make any orders prohibiting or restricting publication of the information that he or she considers necessary to ensure that those details are not revealed.
- (6) Subsection (5) does not apply to the extent that the person conducting or presiding over the proceeding considers that the interests of justice require otherwise.
- (7) In this section:
proceeding includes a proceeding before a court, tribunal or Royal Commission.

Section 48

48 Protected information in the custody of a court, tribunal or Royal Commission

A person is not entitled to search any protected information in the custody of a court, tribunal or Royal Commission unless the court, tribunal or Royal Commission otherwise orders in the interests of justice.

Division 2—Reporting and record-keeping

49 Report on each warrant or authorisation

- (1) The chief officer of each law enforcement agency to which there belongs or is seconded a law enforcement officer to whom:
 - (a) a warrant is issued; or
 - (b) an emergency authorisation is given; or
 - (c) a tracking device authorisation is given;must, as soon as practicable after the warrant or authority ceases to be in force:
 - (d) make a report to the Minister in accordance with this section; and
 - (e) give to the Minister a copy of each such warrant or authorisation, and of any instrument revoking, extending or varying such a warrant or authorisation.
- (2) In the case of a surveillance device warrant, or an authorisation referred to in paragraph (1)(b) or (c), the report must:
 - (a) state whether the warrant or authorisation was executed; and
 - (b) if so:
 - (i) state the name of the person primarily responsible for the execution of the warrant or authorisation; and
 - (ii) state the name of each person involved in the installation, maintenance or retrieval of the surveillance device; and
 - (iii) state the kind of surveillance device used; and
 - (iv) state the period during which the device was used; and
 - (v) state the name, if known, of any person whose conversations or activities were overheard, recorded, monitored, listened to or observed by the use of the device; and
 - (vi) state the name, if known, of any person whose location was determined by the use of a tracking device; and

Section 49

- (vii) give details of any premises on which the device was installed or any place at which the device was used; and
- (viii) give details of any object in or on which the device was installed and any premises where the object was located when the device was installed; and
- (ix) if the warrant is issued or the authorisation given in respect of the investigation of a relevant offence—give details of the benefit to the investigation of the use of the device and of the general use made or to be made of any evidence or information obtained by the use of the device; and
- (x) if the warrant is issued or the authorisation given in respect of the location and safe recovery of a child to whom a recovery order relates—give details of use of the device in assisting with the location and safe recovery of the child; and
- (xi) give details of the communication of evidence or information obtained by the use of the device to persons other than officers of the agency; and
- (xii) give details of the compliance with the conditions (if any) to which the warrant or authorisation was subject; and

(c) if the warrant or authorisation was extended or varied, state:

- (i) the number of extensions or variations; and
- (ii) the reasons for them.

(3) In the case of a retrieval warrant, the report must:

- (a) give details of any premises entered, anything opened and any object removed and replaced under the warrant; and
- (b) state whether the surveillance device was retrieved under the warrant; and
- (c) if the device was not retrieved, state the reason why; and
- (d) give details of the compliance with the conditions (if any) to which the warrant was subject.

50 Annual reports

- (1) The chief officer of a law enforcement agency must submit a report to the Minister that includes the following information in respect of each financial year:
 - (a) the number of applications for warrants made by or on behalf of, and the number of warrants issued to, law enforcement officers of the agency during that year; and
 - (b) the number of applications for emergency authorisations made by, and the number of emergency authorisations given to, law enforcement officers of the agency during that year; and
 - (c) the number of applications for tracking device authorisations made by, and the number of such authorisations given to, law enforcement officers of the agency during that year; and
 - (d) the number of remote applications for warrants made by or on behalf of law enforcement officers of the agency during that year; and
 - (e) the number of applications for warrants, emergency authorisations or tracking device authorisations made by or on behalf of law enforcement officers of the agency that were refused during that year, and the reasons for refusal; and
 - (f) the number of applications for extensions of warrants made by or on behalf of law enforcement officers of the agency during that year, the number of extensions granted or refused and the reasons why they were granted or refused; and
 - (g) the number of arrests made by law enforcement officers of the agency during that year on the basis (wholly or partly) of information obtained by the use of a surveillance device under a warrant, emergency authorisation or tracking device authorisation; and
 - (h) the number of instances during that year in which the location and safe recovery of children to whom recovery orders related was assisted (wholly or partly) by information obtained by the use of a surveillance device under a warrant, emergency authorisation or tracking device authorisation; and

Section 51

- (i) the number of prosecutions for relevant offences that were commenced during that year in which information obtained by the use of a surveillance device under a warrant, emergency authorisation or tracking device authorisation was given in evidence and the number of those prosecutions in which a person was found guilty; and
- (j) any other information relating to the use of surveillance devices and the administration of this Act that the Minister considers appropriate.

(2) The information referred to in paragraphs (1)(a), (b) and (c) must be presented in such a way as to identify the number of warrants issued, emergency authorisations given, and tracking device authorisations given, in respect of each different kind of surveillance device.

(3) The report must be submitted to the Minister as soon as practicable after the end of each financial year, and in any event within 3 months after the end of the financial year.

(4) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives it.

51 Keeping documents connected with warrants, emergency authorisations and tracking device authorisations

The chief officer of a law enforcement agency must cause the following to be kept:

- (a) each warrant issued to a law enforcement officer of the agency;
- (b) each instrument of revocation given to the chief officer under subsection 20(4) or 27(4);
- (c) each record made under section 31 in relation to an emergency authorisation given to a law enforcement officer of the agency;
- (d) each record made under section 40 in relation to a tracking device authorisation given to a law enforcement officer of the agency;

Section 52

- (e) each written application for an emergency authorisation made by a law enforcement officer of the agency;
- (f) each written application for a tracking device authorisation made by a law enforcement officer of the agency;
- (g) a copy of each application made by or on behalf of a law enforcement officer of the agency for:
 - (i) a warrant; or
 - (ii) extension or variation of a warrant;
- (h) a copy of each application made under section 33 by or on behalf of an appropriate authorising officer for approval of the giving of an emergency authorisation to a law enforcement officer of the agency;
- (j) a copy of each report made to the Minister under section 49;
- (k) a copy of each certificate issued by an appropriate authorising officer of the agency concerned under section 62.

52 Other records to be kept

- (1) The chief officer of a law enforcement agency must cause the following to be kept:
 - (a) a statement as to whether each application made by or on behalf of a law enforcement officer of the agency for a warrant, or for the extension or variation of a warrant, was granted, refused or withdrawn;
 - (b) a statement as to whether each application made by a law enforcement officer of the agency for an emergency authorisation was granted, refused or withdrawn;
 - (c) a statement as to whether each application made by or on behalf of an appropriate authorising officer for approval of the giving of an emergency authorisation to a law enforcement officer of the agency was granted, refused or withdrawn;
 - (d) a statement as to whether each application made by a law enforcement officer of the agency for a tracking device authorisation was granted, refused or withdrawn;
 - (e) details of each use by the agency, or by a law enforcement officer of the agency, of information obtained by the use of a

Section 53

surveillance device by a law enforcement officer of the agency;

- (f) details of each communication by a law enforcement officer of the agency to a person other than a law enforcement officer of the agency of information obtained by the use of a surveillance device by a law enforcement officer of the agency;
- (g) details of each occasion when, to the knowledge of a law enforcement officer of the agency, information obtained by the use of a surveillance device by a law enforcement officer of the agency was given in evidence in a relevant proceeding;
- (h) details of each occasion when, to the knowledge of a law enforcement officer of the agency, information obtained by the use of a surveillance device by a law enforcement officer of the agency was used in the location and safe recovery of a child to whom a recovery order related;
- (j) details of the destruction of records or reports under paragraph 46(1)(b).

(2) An instrument recording a matter for the purposes of subsection (1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

53 Register of warrants, emergency authorisations and tracking device authorisations

- (1) The chief officer of a law enforcement agency must cause a register of warrants, emergency authorisations and tracking device authorisations sought by law enforcement officers of that agency to be kept.
- (2) The register is to specify, for each warrant sought by or on behalf of a law enforcement officer of the agency:
 - (a) the date the warrant was issued or refused; and
 - (b) the name of the eligible Judge or nominated AAT member who issued or refused to issue the warrant; and
 - (c) if the warrant was issued:

Section 53

- (i) the name of the law enforcement officer named in the warrant as the person primarily responsible for executing it; and
- (ii) if the warrant was issued in relation to a relevant offence—the relevant offence in relation to which the warrant was issued; and
- (iii) if the warrant was issued in relation to a recovery order—the date of issue of the recovery order and the name of the child to whom the order related; and
- (iv) the period during which the warrant is in force; and
- (v) details of any variation or extension of the warrant.

(3) The register is to specify, for each emergency authorisation sought by a law enforcement officer of the agency:

- (a) the date the emergency authorisation was given or refused; and
- (b) the name of the appropriate authorising officer who gave or refused to give the emergency authorisation; and
- (c) if the emergency authorisation was given:
 - (i) the name of the law enforcement officer to whom the authorisation was given; and
 - (ii) if the authorisation related to a relevant offence—the relevant offence in relation to which it was given; and
 - (iii) if the authorisation related to a recovery order—the date of issue of the recovery order and the name of the child to whom the order related; and
 - (iv) the date on which the application for approval of powers exercised under the authorisation was made; and
 - (v) whether that application for approval of powers exercised under the authorisation was successful or not.

(4) The register is to specify, for each tracking device authorisation sought by a law enforcement officer of the agency:

- (a) the date the tracking device authorisation was given or refused; and
- (b) the name of the appropriate authorising officer who gave or refused to give the tracking device authorisation; and

Section 53

- (c) if the tracking device authorisation was given:
 - (i) the name of the law enforcement officer to whom the authorisation was given; and
 - (ii) if the authorisation related to a relevant offence—the relevant offence in relation to which it was given; and
 - (iii) if the authorisation related to a recovery order—the date of issue of the recovery order and the name of the child to whom the order related.
- (5) The register is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Division 3—Inspections

54 Appointment of inspecting officers

The Ombudsman may, by appointment in writing, under this Division, appoint members of the Ombudsman's staff to be inspecting officers.

55 Inspection of records

- (1) The Ombudsman must inspect the records of a law enforcement agency to determine the extent of compliance with this Act by the agency and law enforcement officers of the agency.
- (2) In the case of the Australian Crime Commission, the Ombudsman must also inspect the records of the Commission to determine the extent of compliance by the Commission with the surveillance device laws of any State or Territory in relation to any warrants or emergency authorisations sought, and surveillance devices used, by law enforcement officers of the Commission under those laws.
- (3) For the purpose of an inspection under this section, the Ombudsman:
 - (a) after notifying the chief officer of the agency, may enter at any reasonable time premises occupied by the agency; and
 - (b) is entitled to have full and free access at all reasonable times to all records of the agency that are relevant to the inspection; and
 - (c) despite any other law, is entitled to make copies of, and to take extracts from, records of the agency; and
 - (d) may require a member of staff of the agency to give the Ombudsman any information that the Ombudsman considers necessary, being information that is in the member's possession, or to which the member has access, and that is relevant to the inspection.

Section 56

- (4) The chief officer must ensure that members of staff of the agency give the Ombudsman any assistance the Ombudsman reasonably requires to enable the Ombudsman to perform functions under this section.
- (5) While an operation is being conducted under a warrant, emergency authorisation or tracking device authorisation, the Ombudsman may refrain from inspecting any records of the agency concerned that are relevant to the obtaining or execution of that warrant or authorisation.

56 Power to obtain relevant information

- (1) If the Ombudsman has reasonable grounds to believe that a law enforcement officer of a particular law enforcement agency is able to give information relevant to an inspection under this Division of the agency's records, subsections (2) and (3) have effect.
- (2) The Ombudsman may, by writing given to the law enforcement officer, require the officer to give the information to the Ombudsman:
 - (a) by writing signed by the officer; and
 - (b) at a specified place and within a specified period.
- (3) The Ombudsman may, by writing given to the law enforcement officer, require the officer to attend:
 - (a) before a specified inspecting officer; and
 - (b) at a specified place; and
 - (c) within a specified period or at a specified time on a specified day;to answer questions relevant to the inspection.
- (4) If the Ombudsman:
 - (a) has reasonable grounds to believe that a law enforcement officer of a particular law enforcement agency is able to give information relevant to an inspection under this Division of the agency's records; and
 - (b) does not know the officer's identity;

the Ombudsman may, by writing given to the chief officer of the agency, require the chief officer, or a person nominated by the chief officer, to attend:

- (c) before a specified inspecting officer; and
- (d) at a specified place; and
- (e) within a specified period or at a specified time on a specified day;

to answer questions relevant to the inspection.

(5) The place, and the period or the time and day, specified in a requirement under this section, must be reasonable having regard to the circumstances in which the requirement is made.

(6) A person must not refuse:

- (a) to attend before a person; or
- (b) to give information; or
- (c) to answer questions;

when required to do so under this section.

Penalty for an offence against this subsection: Imprisonment for 6 months.

57 Ombudsman to be given information and access despite other laws

(1) Despite any other law, a person is not excused from giving information, answering a question, or giving access to a document, as and when required under this Division, on the ground that giving the information, answering the question, or giving access to the document, as the case may be, would contravene a law, would be contrary to the public interest or might tend to incriminate the person or make the person liable to a penalty, but:

- (a) the information, the answer, or the fact that the person has given access to the document, as the case may be; and
- (b) any information or thing (including a document) obtained as a direct or indirect consequence of giving the information, answering the question or giving access to the document;

Section 58

is not admissible in evidence against the person except in a proceeding by way of a prosecution for an offence against section 45 or against Part 7.4 or 7.7 of the *Criminal Code*.

- (2) Nothing in section 45 or any other law prevents an officer of an agency from:
 - (a) giving information to an inspecting officer (whether orally or in writing and whether or not in answer to a question); or
 - (b) giving access to a record of the agency to an inspecting officer;for the purposes of an inspection under this Division of the agency's records.
- (3) Nothing in section 45 or any other law prevents an officer of an agency from making a record of information, or causing a record of information to be made, for the purposes of giving the information to a person as permitted by subsection (2).

58 Exchange of information between Ombudsman and State inspecting authorities

- (1) In this section:

State or Territory agency means a law enforcement agency of a State or Territory within the meaning of the law of that State or Territory that is of a similar nature to this Act.

State or Territory inspecting authority, in relation to a State or Territory agency, means the authority that, under the law of the State or Territory concerned, has the function of making inspections of a similar kind to those provided for in section 55 when the State or Territory agency is exercising powers under the law of that State or Territory that is of a similar nature to this Act.

- (2) The Ombudsman may give information that:
 - (a) relates to a State or Territory agency; and
 - (b) was obtained by the Ombudsman under this Act;to the State or Territory inspecting authority in relation to the agency.

- (3) The Ombudsman may only give information to an authority under subsection (2) if the Ombudsman is satisfied that the giving of the information is necessary to enable the authority to perform its functions in relation to the State or Territory agency.
- (4) The Ombudsman may receive from a State or Territory inspecting authority information relevant to the performance of the Ombudsman's functions under this Act.

59 Delegation by Ombudsman

- (1) The Ombudsman may delegate:
 - (a) to an APS employee responsible to the Ombudsman; or
 - (b) to a person having similar oversight functions to the Ombudsman under the law of a State or Territory or to an employee responsible to that person;all or any of the Ombudsman's powers under this Division other than a power to report to the Minister.
- (2) A delegate must, upon request by a person affected by the exercise of any power delegated to the delegate, produce the instrument of delegation, or a copy of the instrument, for inspection by the person.

60 Ombudsman not to be sued

The Ombudsman, an inspecting officer, or a person acting under an inspecting officer's direction or authority, is not liable to an action, suit or proceeding for or in relation to an act done, or omitted to be done, in good faith in the performance or exercise, or the purported performance or exercise, of a function or power conferred by this Division.

61 Report on inspection

- (1) The Ombudsman must make a written report to the Minister at 6 monthly intervals on the results of each inspection under section 55.

Section 61

- (2) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives it.
- (3) If the report relates, in whole or in part, to an inspection under section 55 of compliance by the Australian Crime Commission with the surveillance device laws of a State or Territory, the Minister must, as soon as practicable after the report is laid before each House of the Parliament, send a copy of the report to the Minister of that State or Territory with responsibility for the surveillance device laws of that State or Territory.

Division 4—General

62 Evidentiary certificates

- (1) An appropriate authorising officer for a law enforcement officer, or a person assisting the appropriate authorising officer, may issue a written certificate signed by the officer or person, setting out any facts he or she considers relevant with respect to:
 - (a) anything done by the law enforcement officer or by a person assisting or providing technical expertise to him or her:
 - (i) in connection with the execution of a warrant; or
 - (ii) in accordance with an emergency authorisation; or
 - (iii) in accordance with a tracking device authorisation; or
 - (b) anything done by the law enforcement officer in connection with:
 - (i) the communication by a person to another person; or
 - (ii) the making use of; or
 - (iii) the making of a record of; or
 - (iv) the custody of a record of;information obtained by the use of a surveillance device under a warrant, emergency authorisation or tracking device authorisation.
- (2) A certificate issued under subsection (1) is admissible in evidence in any proceedings as *prima facie* evidence of the matters stated in the certificate.
- (3) Subsection (2) does not apply to a certificate to the extent that the certificate sets out facts with respect to anything done in accordance with an emergency authorisation unless the giving of that authorisation has been approved under section 35.
- (4) For the purposes of this section, a document purporting to be a certificate issued under subsection (1) is, unless the contrary intention is established, to be taken to be such a certificate and to have been duly given.

Section 62

- (5) A certificate must not be admitted in evidence under subsection (2) in prosecution proceedings unless the person charged or a solicitor who has appeared for the person in those proceedings has, at least 14 days before the certificate is sought to be so admitted, been given a copy of the certificate together with reasonable evidence of the intention to produce the certificate as evidence in those proceedings.
- (6) Subject to subsection (7), if, under subsection (2), a certificate is admitted in evidence in prosecution proceedings, the person charged may require the person giving the certificate to be called as a witness for the prosecution and cross-examined as if he or she had given evidence of the matters stated in the certificate.
- (7) Subsection (6) does not entitle the person charged to require the person giving a certificate to be called as a witness for the prosecution unless the court before which the prosecution proceedings are brought, by order, allows the person charged to require the person giving the certificate to be so called.
- (8) Any evidence given in support, or in rebuttal, of a matter stated in a certificate given under subsection (2) or (3) must be considered on its merits and the credibility and probative value of such evidence must be neither increased nor diminished by reason of this section.

Part 7—Miscellaneous

63 Delegation by chief officer of law enforcement agency

The chief officer of a law enforcement agency may, by writing, delegate to a member of the staff of the agency who is an SES employee or a person of equivalent rank, all or any of the chief officer's powers or functions.

64 Compensation for loss or injury

If:

- (a) a person suffers loss or injury as a result of the use by the Australian Federal Police or the Australian Crime Commission of a surveillance device; and
- (b) the use of that device:
 - (i) is prohibited by the law of the State or Territory in which the use occurs; and
 - (ii) is not in accordance with this Act;

the Commonwealth is liable to pay to the person who has suffered the loss or injury such compensation as is agreed on between the Commonwealth and that person or, in default of such an agreement, as is determined by action against the Commonwealth in a court of competent jurisdiction.

65 Minor defects in connection with warrant or other authority

(1) If:

- (a) information or a record is purportedly obtained through the use of a surveillance device authorised by a warrant, emergency authorisation or tracking device authorisation; and
- (b) there is a defect or irregularity in relation to the warrant, emergency authorisation or tracking device authorisation; and

Section 66

(c) but for that defect or irregularity, the warrant, emergency authorisation or tracking device authorisation would be a sufficient authority for the use of that surveillance device in obtaining that information or record;

then:

(d) the use of that device is to be treated as being as valid; and

(e) the information or record obtained through that use may be dealt with, or given in evidence in any proceeding;

as if the warrant, emergency authorisation or tracking device authorisation did not have that defect or irregularity.

(2) A reference in subsection (1) to a defect or irregularity in relation to the warrant, emergency authorisation or tracking device authorisation is a reference to a defect or irregularity (other than a substantial defect or irregularity):

(a) in, or in connection with the issue of, a document purporting to be that warrant, emergency authorisation or tracking device authorisation; or

(b) in connection with the execution of that warrant, emergency authorisation or tracking device authorisation, or the purported execution of a document purporting to be that warrant, emergency authorisation or tracking device authorisation.

66 Regulations

(1) The Governor-General may make regulations prescribing matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) The regulations may impose a penalty, not exceeding 50 penalty units, for a contravention of the regulations.

Schedule 1—Amendment of other legislation and transitional and saving provisions

Australian Federal Police Act 1979

1 Division 2 of Part II

Repeal the Division.

2 Transitional and saving provision

Despite the repeal of Division 2 of Part II of the *Australian Federal Police Act 1979* by item 1 of this Schedule:

- (a) any warrant issued under that Division and in force immediately before the day of that repeal remains in force, according to its terms, after that day as if that Division had not been repealed; and
- (b) any consent by a Judge of a court created by the Parliament to be nominated by the Minister under subsection 12D(2) of the *Australian Federal Police Act 1979*, being a consent that is in force immediately before the day of that repeal, is to be treated, with effect from that day, as if it were a consent to be declared by the Minister to be an eligible Judge under subsection 12(3) of the *Surveillance Devices Act 2004*; and
- (c) any nomination by the Minister of a Judge of a court created by the Parliament as a Judge who may issue warrants under section 12G of the *Australian Federal Police Act 1979*, being a nomination that was in force immediately before the day of that repeal, is to be treated, with effect from that day, as if it were a nomination of that Judge as an eligible Judge for the purposes of section 12 of the *Surveillance Devices Act 2004*; and
- (d) any nomination by the Minister of a person holding an appointment referred to in subsection 12DA(1) of the *Australian Federal Police Act 1979*, being a nomination that was in force immediately before the day of that repeal, is taken, with effect from that day, to be a nomination of that person for the purposes of section 13 of the *Surveillance Devices Act 2004*.

3 Operation of Division 2 of Part II of the *Australian Federal Police Act 1979* preserved for limited purposes

Despite the repeal of Division 2 of Part II of the *Australian Federal Police Act 1979* by item 1 of this Schedule, that Division is to be treated as continuing to apply in relation to the use of listening devices in respect of offences against the law of the Australian Capital Territory as if:

- (a) the Division had not been repealed; and
- (b) the definitions of *class 1 general offence* and *class 2 general offence* and the definition of *general offence* were limited to offences against the law of the Australian Capital Territory; and
- (c) for the purposes of the continued operation of section 12L of the *Australian Federal Police Act 1979*:
 - (i) sections 219F to 219K of the *Customs Act 1901* had not been repealed; and
 - (ii) references in section 12L of the *Australian Federal Police Act 1979* to general offences, class 1 general offences or class 2 general offences were to be construed as if limited to offences against the law of the Australian Capital Territory.

Criminal Code Act 1995

4 Paragraph 476.2(4)(b) of the *Criminal Code*

Repeal the paragraph, substitute:

- (b) the person does so:
 - (i) under a warrant issued under the law of the Commonwealth, a State or a Territory; or
 - (ii) under an emergency authorisation given to the person under Part 3 of the *Surveillance Devices Act 2004* or under a law of a State or Territory that makes provision to similar effect; or
 - (iii) under a tracking device authorisation given to the person under section 39 of that Act;

Customs Act 1901

5 Division 1A of Part XII

Repeal the Division.

6 Transitional and saving provision

Despite the repeal of Division 1A of Part XII of the *Customs Act 1901* by item 5 of this Schedule:

- (a) any warrant issued under that Division and in force immediately before the day of that repeal remains in force, according to its terms, after that day as if that Division had not been repealed; and
- (b) any consent by a Judge of a court created by the Parliament to be nominated by the Minister under subsection 219AA(1) of the *Customs Act 1901*, being a consent that is in force immediately before the day of that repeal, is to be treated, with effect from that day, as if it were a consent to be declared by the Minister to be an eligible Judge under subsection 12(3) of the *Surveillance Devices Act 2004*; and
- (c) any nomination by the Minister of a Judge of a court created by the Parliament as a Judge who may issue warrants under that Division, being a nomination that was in force immediately before the day of that repeal, is to be treated, with effect from that day, as if it were a nomination of that Judge as an eligible Judge for the purposes of section 12 of the *Surveillance Devices Act 2004*; and
- (d) any nomination by the Minister of a person holding an appointment referred to in subsection 219AB(1) of the *Customs Act 1901*, being a nomination that was in force immediately before the day of that repeal, is taken, with effect from that day, to be a nomination of that person for the purposes of section 13 of the *Surveillance Devices Act 2004*.

Mutual Assistance in Criminal Matters Act 1987

7 At the end of Part II

Add:

13A Requests by foreign countries for provision of material lawfully obtained

- (1) If:
 - (a) a foreign country (the *requesting country*) has commenced an investigation into, or proceedings in relation to, a serious offence against the laws of that country; and
 - (b) that foreign country requests the provision of material relevant to that investigation or those proceedings; and
 - (c) the Attorney-General is satisfied that the material requested is:
 - (i) material lawfully obtained by an enforcement agency in Australia; and
 - (ii) material lawfully in the possession of that enforcement agency;

the Attorney-General may, by writing in accordance with the approved form, authorise the provision of that material to the requesting country.
- (2) Subsection (1) does not permit the Attorney-General to authorise the provision to the requesting country of material obtained through the use of a surveillance device unless the request relates to an investigation into, or proceedings in relation to, a serious offence against the laws of that country that is punishable by a maximum term of imprisonment of 3 years or more, by imprisonment for life or by the death penalty.
- (3) An authorisation by the Attorney-General under subsection (1) may include a direction to an authorised officer of the enforcement agency having possession of the material about how the material is to be provided to that foreign country.
- (4) In authorising the provision of material to a foreign country, the Attorney-General may specify the uses to which that material can be put.
- (5) An authorisation by the Attorney-General under subsection (1) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.
- (6) In this section:

authorised officer includes a law enforcement officer within the meaning of section 6 of the *Surveillance Devices Act 2004*.

enforcement agency includes a law enforcement agency within the meaning of section 6 of the *Surveillance Devices Act 2004*.

material lawfully obtained by an enforcement agency in Australia includes:

- (a) material obtained from individuals or entities by consent; and
- (b) material obtained by warrant or the exercise of a coercive power by a court in Australia for the purposes of a domestic investigation or prosecution;

but does not include material obtained under the *Telecommunications (Interception) Act 1979*.

Note: The heading to section 13 is altered by inserting “**for the taking of evidence or the production of documents**” after “**countries**”.

*[Minister’s second reading speech made in—
Senate on 17 November 2004
House of Representatives on 8 December 2004]*

