



NSW Ombudsman

Review of the Police
Powers (*Drug Detection in
Border Areas Trial*) Act 2003

January 2005



Review of the *Police
Powers (Drug Detection
in Border Areas Trial) Act 2003*

January 2005

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NSW Ombudsman

10 January 2005

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The Hon. Bob Debus
Attorney General, and
Minister for the Environment
Level 36
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Attorney General

Under section 22 of the *Police Powers (Drug Detection in Border Areas Trial) Act 2003* ('the Act'), I have been required to keep under scrutiny the exercise of the functions conferred on police with respect to the Act and report to you, the Minister for Police and the Commissioner of Police on the work and activities undertaken for that purpose.

I am pleased to provide you with the final report of our review. In addition to reporting on the activities undertaken to monitor the operation of the Act, I have made a number of recommendations. I note that key agencies involved in the implementation of the Act, including NSW Police and the Roads and Traffic Authority, were provided with a draft of the report, and their comments have been considered in finalising my findings and recommendations.

I draw your attention to section 22(5) of the Act which requires you to lay a copy of this report before both Houses of Parliament as soon as practicable after receipt.

Yours sincerely

Bruce Barbour
Ombudsman



NSW Ombudsman

10 January 2005

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The Hon. John Watkins
Minister for Police
Level 34
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Under section 22 of the *Police Powers (Drug Detection in Border Areas Trial) Act 2003* ('the Act'), I have been required to keep under scrutiny the exercise of the functions conferred on police with respect to the Act and report to you, the Attorney General and the Commissioner for Police on the work and activities undertaken for that purpose.

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Bruce Barbour
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Commissioner Ken E Moroney APM
Commissioner of Police
Level 13
201 Elizabeth Street
Sydney NSW 2000

Dear Commissioner

Under section 22 of the *Police Powers (Drug Detection in Border Areas Trial) Act 2003* ('the Act'), I have been required to keep under scrutiny the exercise of the functions conferred on police with respect to the Act and report to you, the Attorney General and the Minister for Police on the work and activities undertaken for that purpose.

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Bruce Barbour
Ombudsman



contents

Foreword	i
Acknowledgements	ii
Executive Summary	iii
Part One	
Chapter 1: Introduction	3
Chapter 2: Background	5
Chapter 3: Methodology	15
Chapter 4: legislative survey.....	19
Part Two	
Chapter 5: Conducting an Operation and Results.....	41
Chapter 6: Case Study (Deniliquin)	48
Chapter 7: Case Study 2 (Wagga Wagga)	59
Chapter 8: Case Study Three (Barrier, Deniliquin and Wagga Wagga)	71
Chapter 9: Case Study Four (Griffith)	93
Chapter 10: Case Study Five (Albury)	97
Chapter 11: Comparative Case Studies	103
Part Three	
Chapter 12: Implementation of Legislation	112
Chapter 13: Factors that affected police practice.....	147
Chapter 14: Cost Effectiveness	161
Part Four	
Chapter 15: Conclusion	181

Appendicies

Appendix A. Selected descriptions of searches observed	189
Appendix B. Further information about methodology	195
Appendix C. Letter to NSW Police outlining our information requirements.....	197
Appendix D. Memorandum of Understanding	200
Appendix E. Observational research checklist	208
Appendix F. Recording drug dog incidents	209
Appendix G. Information sheet issued during fruit fly inspection operations	211
Appendix H. Other relevant legislation.....	212
Appendix J. Advertisement placed in local and industry newspapers	213
Appendix K. List of submissions	214
Appendix L. Acronyms and abbreviations	215

foreword

In January 2004 NSW Police began an 18-month trial of new laws permitting police officers to randomly stop and screen vehicles for prohibited drugs. The new Act, the *Police Powers (Drug Detection in Border Areas Trial) Act 2003* ('the Act'), applies in specific sites along the southern borders of NSW. To exercise the powers in the Act, police must first obtain a Supreme Court warrant. This warrant authorises police to set up roadside checkpoints and use drug detection dogs to screen vehicles for prohibited drugs for a period of up to 72 hours.

NSW Parliament determined that my office monitor the implementation of the Act for nine months and prepare a report detailing our findings.

Our review has involved a significant amount of direct observational research of police exercising their new powers. We have structured the report to reflect this emphasis on observational research. Following a brief discussion of the background to the legislation, a description of our research methods and a summary of relevant legislation, there are five descriptive 'case studies' which provide a practical 'on-site' perspective of how the Act is used by police.

The report then proceeds to discuss a number of issues arising from our observations of police checkpoints and review of other information.

The effective policing of drug laws is a complex task and involves striking the right balance between law enforcement, individual rights, health and fiscal concerns.

I trust this report provides a valuable contribution in assessing the question of how interstate trafficking of drugs is policed.



Bruce Barbour
Ombudsman

acknowledgements

This report was researched and written by Emma Koorey, Michelle Chung and Les Szaraz with assistance from the following people of the NSW Ombudsman's Office:

- Marie-Louise Bank
- Ruth Barlow
- Simon Cohen
- Shelagh Doyle
- Seranie Gamble
- Kate Merryweather
- Stephen Murray
- Gabrielle McNamara
- Kate Owens
- Katrina Sanders
- David Snell.

We would like to thank NSW Police, the Roads and Traffic Authority, and the Attorney General's Department for providing information and assistance in this review.

We also acknowledge the many organisations and individuals who made contributing submissions to our review. See Appendix K for a full list of submissions.

executive summary

Background to this report

The *Police Powers (Drug Detection in Border Areas Trial) Act 2003* ('the Act') commenced on 15 January 2004.

The Act establishes an 18-month trial which enables police to apply for a warrant to set up roadside checkpoints in defined 'border areas' which police reasonably suspect are being used in connection with the supply of prohibited drugs. After obtaining a warrant from a judge of the Supreme Court of New South Wales, police are authorised to randomly stop and screen vehicles utilising drug detection dogs in the search area specified in the warrant.

The Act is specifically aimed at detecting the trafficking of indictable quantities of prohibited drugs across the southern borders of NSW.

Section 22 of the Act required the NSW Ombudsman to monitor the implementation of the Act for nine months, from January to September 2004.

We have used a combination of direct observation, interviews, examination of data provided by NSW Police and other agencies, and review of complaints, submissions and court transcripts in our scrutiny of the implementation of the Act. The most significant of these was our direct observation of police checkpoints established under the Act. We observed six of the nine operations conducted in 2004, including observations of 122 searches of vehicles and the screening by drug detection dogs of 1091 vehicles.

The structure of this report reflects the centrality of these observations to our review of the Act. Each police operation observed has been reported as a 'Case study' in Part Two of the report. In addition we have reported on one operation not independently observed, relying instead on documentation of the operation by NSW Police.

The legislation in practice

While there were differences in approach at each operation conducted under the Act, operations also shared many common features. A brief description of a typical police operation is provided below.

Before an operation can begin, intelligence is gathered by local police to support an application for a warrant. Authorisation to apply for a warrant to permit an operation at a particular time and place is determined by a Deputy Commissioner of Police. A Supreme Court judge then considers and may approve a warrant application for the operation. From the moment this warrant is signed, police have 72 hours during which they may use the powers to stop and screen vehicles at specific locations.

A roadside checkpoint already approved by the Roads and Traffic Authority (RTA) is then set up for a police operation. Signage is erected and where necessary lighting and other equipment is put in place. Drug dog handlers and dogs arrive from Sydney and a police briefing is held.

The operation commences and Highway Patrol officers direct vehicles into the checkpoint. Vehicles form a queue, with each vehicle waiting a short time while a police officer reads a script to each driver about the process of screening for drugs. A drug detection dog is then led around the vehicle. A notice is provided to the driver with details of the police officer and the time and date of the vehicle stop. If the drug detection dog has made no indication, the vehicle is directed to exit the checkpoint.

If the drug detection dog indicates that it has detected the scent of prohibited drugs, the vehicle is directed into the adjoining 'hot zone'. This is a separate area set aside for the searching of vehicles and persons. In the hot zone the driver is officially cautioned, read additional scripts and provided with additional notices. The vehicle, and usually also the driver and passengers, are searched. The drug detection dog may assist with this process. Radio checks may be conducted in relation to the vehicle, driver or passengers.

Police will take action if any offences are detected. If no offences are detected the vehicle is then permitted to leave the checkpoint.

Some additional police powers in the Act are available to permit effective screening and searching of heavy vehicles and coaches.

Significant findings

Operational issues

Overall, we found that the police involved in operations performed their functions in a professional manner and that drug detection dogs and handlers were not overly intrusive in their screening. Delays and inconvenience experienced by the majority of motorists stopped by police appeared to be minor. We found no evidence of inappropriate targeting of vehicles by police.

We also found that NSW Police were in some respects hampered by the requirements of the legislation, especially in regard to the preparation time for operations and the level of resources needed to properly implement the Act. There were also areas in which NSW Police practices and procedures could be improved.

Many of our 33 recommendations are aimed at enhancing the way in which police conduct operations and some suggest legislative amendment to better facilitate police use of the powers. For example, we found that police could provide more privacy to persons being searched at checkpoints; that greater efforts could be made to communicate with persons whose first language was not English; and that arrangements should be in place to supervise and support young children whose parent(s) are being detained by police. We also note that police should properly apply the protections afforded by Part 10A of the *Crimes Act 1900*, unless and until legislative amendments allow police suitable flexibility to detain arrested persons in the field. In this context we emphasise the importance of quality videotaping of searches.

Results

Although we found that police acted in a professional and diligent manner, it was clear that the objectives of the Act had not been met. That is, police operations had not effectively targeted the trafficking of indictable quantities of prohibited drugs.

Over the nine operations in 2004, police stopped a total of 3,809 vehicles, and searched 291 (just under 8%) of those. A total of 411 people were searched. Police seized about 4.7 kilograms of cannabis and just over 1 kilogram of amphetamine. Only two indictable quantities of drugs were located – one of cannabis and one of amphetamine. Neither of these detections resulted in convictions for the supply of prohibited drugs. While less serious drug possession offences were detected (99 offences), more than half (51) resulting in the issue of a cannabis caution, the detection of offences of minor possession was not the purpose of the legislation. We note that in one operation involving 21 officers, no drugs were found. In another three-day operation involving 33 officers, only 6.8 grams of cannabis was located.

Summary of results over nine operations

Result	Total
Total weight of cannabis found (grams)	4799.81
Total weight of amphetamine found (grams)	1025.41
Number of indictable quantities of any drug found	2
Charges for drug trafficking or supply resulting in conviction	Nil
Rate of finding drugs	
Vehicle searches resulting in drugs and/or drug implements	89
Percentage of vehicle searches where something was found	31%

Source: Table 18 at paragraph 14.2 'Results'.

The lack of drug trafficking or supply convictions may relate to the rapid dissemination of information about operations which we believe occurred shortly after they commenced. In addition, difficulties associated with proving possession meant that the two indictable quantities of drugs that were found were not successfully prosecuted.

Costs

A total of 234 police officers have been involved in the nine operations conducted in 2004.

Summary of police expenditure over nine operations

Resource	Quantity
Base wages	\$181,008
Operational preparations	\$10,421
Post operational reporting	\$3,494
Travelling allowance	\$15,882
Overtime	\$1,795
Shift allowances	\$12,110
Meals	\$680
Vehicle related expenses	\$12,398
Equipment hire	\$1,400
Total	\$239,188
Total excluding base wages	\$58,180

Source: Table 16 at paragraph 14.1 'Financial costs'.

In addition to the above, the RTA spent a total of \$430,000 to facilitate the conduct of these operations. Of this amount, the total infrastructure investment was \$410,000.

Including all information available to us about costs incurred by NSW Police and the RTA, the total cost of running nine operations has been \$669,188. However, if base wages are excluded from NSW Police costs, the total cost to NSW Police has been \$58,180. If RTA investments which can be used for other purposes (such as heavy vehicle and fruit fly inspections) are excluded from RTA costs, the total cost to the RTA has been \$121,000.

Calculated on this basis, the total cost to the NSW Government of implementing the Act has been \$179,180.¹ This is an average cost of just under \$20,000 per operation.

We note this cost assessment does not consider any opportunity cost – that is, the benefit lost from deploying police at checkpoints instead of in frontline policing in the community or conducting other police operations.

Conclusions

The results of operations, when viewed in the context of a combined expenditure by NSW Police and the RTA of at least \$179,180, have led us to question whether the continued allocation of public resources to this project is in the public interest. Our research indicates that there may be alternative strategies which more effectively target vehicles carrying significant quantities of drugs.

On this basis we recommend that Parliament consider allowing the Act to expire according to section 23 of the Act.

However, if the Parliament chooses to extend the trial of the Act, our view is that a number of changes should be made to both the legislation and NSW Police practice.

Consolidated list of recommendations

	Recommendation	Report
1	<p>Section 6(2) of the Act be amended to include the requirement that drug detection warrant applications include:</p> <ul style="list-style-type: none"> • A statement as to whether or not a previous application for a warrant at the same site has been made in the previous 12-month period, and if so, whether or not the warrant was granted. • If the application was granted, a statement outlining the results of the operation. 	12.1.1
2	The Act be amended to permit the execution of a 72-hour drug detection warrant at anytime within a period of 14 days from when the warrant is granted.	12.2.3
3	Parliament consider amending the time that an authorisation from the Commissioner or Deputy Commissioner has effect in section 5(5) of the Act from 72 hours to seven days.	12.2.3
4	NSW Police amend the SOPs to provide additional guidance about search area descriptions to police making warrant applications under the Act.	12.3.3
5	NSW Police incorporate into their policy and procedures documents that police officers be regularly reminded at briefings that each person stopped under the Act has a right to view the warrant.	12.4.1
6	<p>The Act and/or SOPs be amended taking into account the following:</p> <ul style="list-style-type: none"> • A single information pamphlet be developed in plain English which sets out the aim of the legislation and the various stages of screening and searching that may occur at a checkpoint. • The pamphlet be provided to all drivers stopped at checkpoints and to any passengers in searched vehicles (excluding public passenger vehicles) or anyone who has their luggage searched. • The pamphlet include a section on which a police officer involved in a particular vehicle stop, must put their details and the time and date of the stop. • The pamphlet be translated into languages likely to be encountered in border operations. • Pamphlets should also be provided to any person who requests further information about the checkpoint. 	12.5.3
7	NSW Police develop a new script which provides information in a manner that effectively communicates the purpose of the stop and the exercise of police powers.	12.5.3
8	NSW Police incorporate into their policy and procedures documents that police officers be regularly reminded at briefings to explain the reason for the vehicle stop to drivers <i>before</i> screening the vehicle with the drug detection dog.	12.6.1
9	The SOPs be amended to emphasise that searches of coach passengers be conducted away from the coach and not within easy view of other coach passengers.	12.7.6
10	All future police operations under the Act make use of privacy screens or other appropriate facilities to afford reasonable privacy to persons searched at checkpoints.	12.7.6

	Recommendation	Report
11	If police continue using sites close to hotels, tourist attractions or other venues frequented by members of the public, measures be taken to ensure that persons and vehicles searched are afforded reasonable privacy.	12.7.6
12	In its efforts to provide reasonable privacy to persons searched, NSW Police continue to meet its obligation to minimise safety risks for police officers carrying out their duties.	12.7.6
13	When searching cabins of heavy vehicles, police officers, and particularly dog handlers, give due consideration to the fact that some drivers of heavy vehicles live and work in their cabins.	12.7.6
14	The Act be amended to allow police to ask drivers of commercial vehicles to step out of their vehicles, provided the Parliament determines that heavy vehicle drivers should be subject to a higher level of scrutiny than other motorists.	12.8.6
15	NSW police incorporate into their policy and procedures documents that if the practices of forming two lanes of vehicles in the cold zone and/or directing vehicles to turn right into check points across major highways, are to continue at future operations, NSW Police should consult with the RTA and/or WorkCover about any safety risks involved.	12.9.3
16	If police are to deviate in any significant way from the traffic control plan agreed with the RTA, then NSW Police should consult with the RTA and/or WorkCover about any safety risks involved.	12.9.3
17	The SOPs be amended to make clear to police officers conducting operations under the Act the extent and limits of their power to: <ul style="list-style-type: none"> • stop vehicles outside the search area • direct vehicles outside the search area into the checkpoint. 	12.10.1
18	NSW Police consider developing guidelines or SOPs for video taping investigations in the field, taking into consideration our discussion of video taping in this report, particularly at paragraphs 12.11.6 and 12.12.2.	12.11.7
19	The existing NSW Police Video/Audio Recording of Search Warrants and Planned Operations Education Package be updated to reflect any new guidelines or SOPs for video taping searches.	12.11.7
20	The existing SOPs for border operations be amended to give better guidance about video taping procedures, taking into consideration our discussion of video taping in this report, particularly at paragraph 12.11.6 and 12.12.2.	12.11.7
21	Parliament consider appropriate amendments to the <i>Listening Devices Act 1984</i> to explicitly permit video and audio recording of police actions conducted pursuant to drug detection warrants under the Act.	12.12.3
22	Police comply with the requirements of Part 10A of the <i>Crimes Act 1900</i> unless and until an appropriate legislative amendment is made.	12.12.3

	Recommendation	Report
23	<p>Parliament consider an appropriate amendment to Part 10A of the <i>Crimes Act 1900</i> to facilitate processing away from a police station of persons suspected of committing offences. These considerations should include:</p> <ul style="list-style-type: none"> • Preference to deal with less serious offences – those which can be managed on-the-spot (such as criminal infringement notices, cannabis cautions, and in some circumstances, Field Court Attendance Notices) – without the requirement to attend a police station. • Where appropriate – including drug operations conducted under the <i>Police Powers (Drug Detection in Border Areas Trial) Act 2003</i> – the audio-visual recording of interactions between the police and the suspect. • Where – because of the nature of the offence or other reason – it is not appropriate to process a suspect in the field, the provisions and protections of Part 10A apply. 	12.12.3
24	NSW Police incorporate into their policy and procedures documents that a brief and debrief should be conducted for each day of the operation.	13.1.1
25	NSW Police incorporate into their policy and procedures documents an instruction that the needs of children and young people be considered during operations, and in particular where children will wait and who will take care of young children while their parents are being detained.	13.2.1
26	If a pamphlet is devised to replace the section 12 notice, that it be translated into a variety of languages for distribution to people whose first language is not English. Alternatively, interpreters be made available on mobile phone to translate information provided by police at operations.	13.3.1
27	NSW Police incorporate into their policy and procedures documents that when searching vehicles, police officers provide some measure of protection for a persons' possessions from dirt and dust on the ground.	13.4.1
28	The Dog Unit SOPs, or a similar document, be amended to include a policy regulating situations in which 'pseudo' may be used as a training aid for drug detection dogs.	13.5.4
29	NSW Police provide reflective vests or use other appropriate methods to ensure drug detection dogs are visible during operations conducted under the Act.	13.5.4
30	The SOPs be amended to include guidelines to assist police in making decisions about whether or not to extensively search a vehicle.	13.6.1
31	NSW Police ensure that reasonable rest, toilet and meal facilities are available for police officers performing functions at operations conducted under the Act.	13.8.1
32	If NSW Police utilise FED dogs during an operation, consideration be given to an appropriate form of disclosure to drivers.	13.10.2
33	<p>In light of the findings of this report, Parliament give consideration to allowing the <i>Police Powers (Drug Detection Border Areas Trial) Act 2003</i> to expire according to section 23 of the Act.</p> <p>Should the Parliament consider that an extension of the trial is warranted, recommendations 1 to 32 be implemented.</p> <p>NSW Police consider the advantages and disadvantages of alternative means of targeting the vehicular supply of drugs across state borders.</p>	15.6.1

Endnotes

¹ It is noted that the above cost assessment does not consider any opportunity cost – that is, the benefit lost from not using the same resources for other purposes.

part 1: contents

Chapter 1: Introduction	3
Chapter 2: Background	5
2.1. Structure of NSW Police.....	5
2.2. Role of the NSW Ombudsman	5
2.3. Across border drug trafficking	6
2.4. Policing of borders before the Act	6
2.5. Origins of the new police power	7
2.6. Legislative response	10
Chapter 3: Methodology.....	15
3.1. Participation on the Project Steering Committee.....	15
3.2. Direct observation.....	15
3.3. Interviews with operational police and other interested parties	15
3.4. Information supplied by NSW Police	16
3.5. COPS information	16
3.6. Court proceedings	17
3.7. Consultations and submissions.....	17
3.8. Research limitations.....	18
Chapter 4: Legislative survey.....	19
4.1. Provisions of the Act	19
4.2. Drug offences – comparison of drug laws	23
4.3. Powers to stop vehicles for search and/or detection of drugs.....	28
4.4. Drug detection dogs	30
4.5. Other vehicle stop powers in NSW	32
4.6. Summary of powers to stop, search and/or detain vehicles in NSW, Vic and SA.....	32
4.7. Sentencing	34

chapter 1 : introduction

The *Police Powers (Drug Detection in Border Areas Trial) Act 2003* ('the Act') commenced on 15 January 2004.

The Act establishes an 18-month trial which enables police to apply for a warrant to set up roadside checkpoints in defined 'border areas' which police reasonably suspect are being used in connection with the supply of indictable quantities of prohibited drugs.

After obtaining a warrant from an eligible judge of the Supreme Court of New South Wales, police are authorised to randomly stop and screen vehicles utilising drug detection dogs in the search area specified in the warrant.

The Act does not give police any new search powers, but it does create a new power of entry in respect of commercial vehicles. That is, police are empowered to screen cargo areas of heavy vehicles and luggage holds of passenger coaches using a drug detection dog.

Section 22 of the Act required the NSW Ombudsman to monitor the implementation of the Act for nine months² and report to the Attorney General, Minister for Police and the Commissioner for Police three months after the expiration of the monitoring period.

This report represents an evaluation of the first nine months³ of the trial and examines the issues and challenges that have emerged during this period. Where appropriate, recommendations are provided following the relevant discussion of each chapter. A consolidated summary of recommendations is also provided at the beginning of the report.

The report is divided into four parts. Part 1 contains background information on the trial, a description of the research activities undertaken as part of the review, and an overview of similar legislative provisions utilised in other jurisdictions.

Part 2 details the conduct of operations and contains a summary of the results of operations conducted during the review period. Information on specific operations is presented by way of case studies. Three comparative case studies are also included to illustrate how operations involving the stopping of vehicles are carried out in different contexts.

Part 3 contains a discussion of the issues that have arisen during the trial. Issues related to the implementation of the legislation, the manner in which operational police have put the legislation into practice, and the cost effectiveness of operations under the Act are considered.

Part 4 contains our concluding comments.

chapter 2: background

This chapter outlines the background to the introduction of the Act and notes some of the issues relevant to the review of the Act.

2.1. Structure of NSW Police

NSW Police consists of five regions made up of 80 Local Area Commands. Local Area Commands are the primary management units of NSW Police and are responsible for strategic and business planning at a local level. Since 1 July 2002, each command has been situated within the geographical boundaries of one of the following regions:

- Inner Metropolitan Region
- Greater Metropolitan Region
- Northern Region
- Southern Region
- Western Region.

A total of five Local Area Commands have conducted operations under the Act. Deniliquin, Wagga Wagga, Griffith and Albury from Southern Region; and Barrier from Western Region.

The Assistant Commissioner, Region Commander of Southern Region is the corporate sponsor of the 18-month trial. The corporate sponsor acts as the NSW Police spokesperson for the trial, and is also responsible for the implementation and management of the trial.

NSW Police also has specialist units that have been involved in operations under the Act:

- **Drug Squad** - situated within the State Crime Command of NSW Police. The Drug Squad focuses on individuals and groups who organise, direct and finance drug related activities. The Drug Squad provides intelligence information to Local Area Commands and assists in the tactical and strategic planning of operations. The Drug Squad also provides intelligence based policy advice on issues related to prohibited drugs.
- **Dog Unit** - situated within the State Protection Group of NSW Police. The unit provides specialist dog services which include: general purpose, critical incident, drug detection, firearms and explosive detection, urban search and rescue, and cadaver dogs.
- **Target Action Groups (TAGs)** - teams of police that concentrate on specific crime issues within a Local Area Command.
- **Highway Patrol** - primarily responsible for reducing road trauma associated with speed, fatigue, failure to wear approved occupant restraints, and alcohol/drug impaired driving.

2.2. Role of the NSW Ombudsman

The Ombudsman is responsible for handling complaints about public authorities in New South Wales. Each year the Ombudsman receives a large number of telephone enquiries and written complaints regarding NSW Police.

Most complaints involving police received by the Ombudsman are referred to NSW Police for investigation. The Ombudsman's role is to independently oversee and review the manner in which NSW Police handles these complaints.

In addition to oversight of complaint handling, the New South Wales Parliament requires the Ombudsman from time to time to review the implementation and operation of new legislative powers conferred on police.

The Act requires the Ombudsman to monitor the first nine months of the operation of the legislation.⁴

To facilitate this monitoring role, the Ombudsman may require the Commissioner of Police to provide information about the exercise of functions under the Act.⁵

Three months after the nine-month monitoring period, the Ombudsman is required to furnish a report to the Attorney General, the Minister for Police and the Commissioner of Police.⁶

The Attorney General is responsible for causing the report to be laid before both Houses of Parliament as soon as practicable after receipt.⁷

The Government will have six months to consider the contents of the report before the 18-month trial comes to an end.

2.3. Across border drug trafficking

NSW Police have intelligence information suggesting that prohibited drugs are regularly trafficked in vehicles across borders between New South Wales, Victoria and South Australia.⁸

The *2001-2002 Australian Illicit Drug Report* noted the following specific interstate movements of prohibited drugs:⁹

- methamphetamine paste, ice, heroin, cocaine, and ecstasy from New South Wales into South Australia
- methamphetamine powder and cannabis from South Australia into New South Wales
- heroin, cocaine, ecstasy and ice from New South Wales into Victoria
- ecstasy from Victoria into New South Wales.

NSW Police intelligence identifies South Australia as the primary source of cannabis in New South Wales.¹⁰ This has led to the view that more lenient or 'relaxed' cultivation of cannabis laws¹¹ in South Australia have resulted in criminal groups syndicating cannabis cultivation¹², which in turn drives across border trafficking of cannabis between South Australia and New South Wales.¹³ It has also been suggested that backyard growers in South Australia have joined together to grow marketable quantities of cannabis, which attract higher prices in the New South Wales cannabis market.¹⁴

2.4. Policing of borders before the Act

In July 1997 NSW Police in Southern Region initiated Operation Hereford, which was aimed at reducing road trauma and the detection of trafficking of prohibited drugs along the highways connecting New South Wales with Victoria and/or South Australia.¹⁵

Operations directed towards reducing road trauma included random breath testing, speed monitoring, fatigue management and general patrols by Highway Patrol officers. No operations were carried out with the sole purpose of detecting the trafficking of prohibited drugs as police lacked a specific authority to randomly stop vehicles for that purpose.

During operations directed at reducing road trauma, for example the random breath testing of drivers, police may have suspected that drug offences had been committed based upon their observations of the vehicle and/or the behaviour of the occupants. These suspicions may have been strengthened by information relayed to police during routine licence and vehicle registration checks. Occasionally police utilised drug detection dogs to screen the exterior of vehicles stopped which may have also raised suspicions that the vehicle contained prohibited drugs.

If police formed a reasonable suspicion in relation to a drug offence, then they could exercise one of the statutory powers to stop and search the vehicle and its occupants.¹⁶ Alternatively, police may have first sought the consent of the driver to search the vehicle, arguably obviating the need for reasonable suspicion.

In the course of searches conducted during Operation Hereford, police seized prohibited drugs including heroin, amphetamines and large quantities of cannabis. Police also located large amounts of cash and firearms, which led police to the conclusion that significant drug trafficking activities were taking place along the highways in Southern Region.

2.5. Origins of the new police power

As a result of Operation Hereford and other policing activities, NSW Police have gathered considerable generic intelligence regarding the transportation of prohibited drugs across southern state borders. Namely, they are aware of common methods that drug couriers employ, the routes they take, the vehicles they utilise, and the times they prefer.

However, as will be noted in what follows, generic intelligence alone is unlikely to satisfy the legal requirement of reasonable suspicion, which is required before police can lawfully exercise one of the statutory powers to stop and search a vehicle and its occupants.¹⁷

2.5.1. Trafficking charges at Hay Local Court

On 6 May 2001 a magistrate at Hay Local Court decided that police had unlawfully obtained evidence in four similar cases involving charges of supplying indictable quantities of cannabis.¹⁸

The four cases involved motor vehicles travelling along the Sturt Highway that were initially stopped for the purposes of random breath testing or fatigue management operations. The motor vehicles were subsequently searched by police who located indictable quantities of cannabis.

2.5.1.1. *The issue of consent*

In three of these cases¹⁹ police obtained the consent of the driver to conduct a search of the motor vehicle after they noted that the vehicle fitted the profile of those utilised by drug couriers. In the fourth case²⁰ police searched the vehicle after purportedly forming a reasonable suspicion that it was involved in a drug related offence.

In the three cases involving the consent of the driver, the Local Court (Dowd LCM) accepted the proposition that 'if an individual freely consents to a search, no reasonable suspicion or warrant is required.'²¹ However, the magistrate held that consent must be *informed* consent. In the magistrate's view, informed consent required that the person giving the consent be aware of the right to refuse consent. The magistrate discussed this issue as follows:

... knowledge of the right to refuse may not be the only or all controlling factor. It may for example, have much less weight or no weight at all if the person requested to consent is legally trained, or himself a police officer or other person known to be familiar with drugs laws. However, the average person without this knowledge in the present situation is clearly at a disadvantage. The DPP (in Leonard & Holmes) submitted that the consent was informed consent because the defendants were told the purpose was to search for drugs. Whilst the reason for and the limits of search are relevant as information, they do not refer to the very core of the individual's rights, that is, that he or she is entitled to refuse consent.²²

...

Unless there are other relevant features to consider, I do not consider the statement 'This is a well known drug route. Are you prepared to consent to a search of your vehicle for illicit drugs' or similar, without more, enables the occupant to make any properly informed decision. His consent not being informed consent, it follows that without reasonable suspicion the expressed consent cannot legalise an otherwise illegal search.²³

In the absence of consent, the next question was whether police were entitled to search the vehicles on the basis of reasonable suspicion.

2.5.1.2. *The issue of reasonable suspicion*

The Local Court looked at the circumstances in each case and decided that the formation of reasonable suspicion was primarily based on the police officer's knowledge of generic intelligence. The magistrate stated:

I cannot accept that a general knowledge that the Sturt Highway is a well known drug route and that drugs are frequently transported in hire cars (even if such facts could be established) can, without more, form the basis of a reasonable suspicion.²⁴

The Court therefore decided that reasonable suspicion was lacking in all three cases because it was not based on the factual circumstances that existed at the time when police stopped the vehicle. Rather, it was formed with regard to generic intelligence, which, without more, was insufficient to lead to the formation of reasonable suspicion at law.

In the fourth case, consent was neither sought by police nor voluntarily given by the driver. The evidence was that the police officer decided to search the vehicle based on the responses to questions he put to the driver after administering the random breath test that returned a negative result. Having regard to the enquiry that took place between the police officer and the driver, the Court held that there was insufficient basis for the formation of a reasonable suspicion.

In all four cases, the magistrate decided that the lack of reasonable suspicion rendered the searches by police unlawful. The magistrate did not exercise his judicial discretion²⁵ to admit the unlawfully obtained evidence, and without this evidence the cases could not be proven.

The consequence of the magistrate's decision was that many of the drug trafficking charges that were to be heard at Hay Local Court were placed on hold due to the legal uncertainty created by the decision.

2.5.2. Magistrate suggests police powers may need reconsideration

The magistrate's decision highlighted the limitations of policing using generic intelligence alone to stop and search persons potentially involved in across border trafficking of prohibited drugs. The concluding comments of the magistrate identify the competing tensions between the privacy of individuals on the one hand, and the need for effective police powers in relation to the across border trafficking of prohibited drugs on the other:

It is the experience of this court and courts in neighbouring areas over recent years that the transporting of illicit substances, particularly cannabis, and the proceeds of trafficking in those substances (considerable quantities of cash) is both prevalent and increasing. If this court's determination as to the legal issues involved [is] correct, it is clear law enforcement officers will have increasing [difficulties] in locating and apprehending offenders and the drugs themselves.

The rights of private citizens to their privacy and in relation to their homes and vehicles has been justifiably jealously guarded both by the legislature and the courts. There have, however, been exceptions where statutory powers have been given to various authorities impinging on these rights. Random Breath Testing, fruit inspection by the Department of Agriculture, and searches of vehicles (and boats) by Fisheries Inspectors spring readily to mind. There are a number of others. Perhaps the time may have come to give consideration to some widening of the powers of search, or the basis for the search, under the Drug Misuse and Trafficking Act in the interests of giving clear direction to police generally and for more efficient law enforcement.²⁶

2.5.3. Judicial developments after the decision at Hay Local Court

The finding of the magistrate that informed consent required that the person consenting be aware of the right to refuse consent was subsequently overturned on appeal to the Supreme Court of New South Wales.²⁷ In that case, Greg James J held that 'a person may consent to an investigative procedure taking place without being aware that he has the right to withhold his consent to the procedure taking place'.²⁸ Whilst the Court acknowledged that an awareness of the right to refuse may be a factor to be considered in the weighing up exercise to determine whether consent was given in the circumstances, James J held that the magistrate had erroneously elevated that factor to critical or controlling status.²⁹

The finding of the magistrate that, in the absence of consent to a search, there was a need for a reasonable suspicion was not challenged in the appeal.

It might also be noted that in December 2001, the New South Wales Court of Criminal Appeal reiterated in *R v Rondo*³⁰ the general proposition that police must form reasonable suspicion before lawfully stopping and searching a vehicle. However, Smart AJ³¹ stated that 'it does not follow that because police have unlawfully stopped a vehicle they are precluded from investigating whether any offences have been committed.'³² He affirmed the general discretion to admit unlawfully obtained evidence:

Where a vehicle has been unlawfully stopped it becomes a matter for the Court's consideration whether evidence obtained as a consequence revealing a criminal offence should be admitted: see s 138 of the Evidence Act 1995. Much will depend on the offence alleged and its relative seriousness as well as all the other circumstances.³³

2.5.4. Government seeks advice from NSW Police after the Hay Local Court decision

After the decision at Hay Local Court, the NSW Government sought advice from NSW Police regarding the adequacy of police powers to search vehicles for drugs.³⁴

NSW Police expressed the view that the statutory stop and search powers contained in the *Crimes Act 1900*, the *Drug Misuse and Trafficking Act 1985*, and the *Police Powers (Vehicles) Act 1998*, were often inadequate to deal with situations where police suspected that vehicles may be involved in the trafficking of prohibited drugs based upon generic intelligence.³⁵

2.5.5. Media reports on police powers to search vehicles for drugs

On 6 May 2002 the *Daily Telegraph* published a 'special investigation' suggesting that NSW Police were struggling to stem the flow of drugs from interstate.³⁶ It was reported that in one week alone, 21 people were convicted at Hay Local Court for trafficking cannabis across the border between New South Wales and South Australia.³⁷

One of the articles described as a 'glaring contradiction' the fact that officers from the Department of Agriculture had the power to randomly stop and search a vehicle for the purposes of stopping fruit fly entering the state, whilst police were effectively denied the same power. Instead police were forced to conduct random breath testing and seek the consent of the driver in order to search the vehicle for drugs.³⁸

The Mayor of Hay, Mr Rutledge, was quoted as saying that the town and local police had had a 'gutful' of drug trafficking through the area and that residents wanted police to be given the power to conduct random drug searches similar to the power given to fruit fly inspectors.³⁹ He argued that police already conducted random stops for the purposes of random breath testing. The call for random searches by police was echoed by the President of the Police Association who was quoted as saying that 'the Government would have to introduce random vehicle searches if courts did not reflect community standards on when police should be able to search vehicles for drugs.'⁴⁰

2.5.6. NSW Police request a widening of powers to address across border drug trafficking

After media reports suggesting that police lacked adequate powers to address the issue of trafficking of prohibited drugs along the Sturt Highway, the NSW Government again sought advice and recommendations from NSW Police on the adequacy of police powers to search vehicles for drugs.⁴¹

NSW Police expressed similar views to those given after the decision at Hay Local Court.⁴² However, this time NSW Police requested a widening of vehicle stop and search powers.

The call for a widening of vehicle stop and search powers was led by police in Southern Region who felt frustrated by the legal stumbling block of reasonable suspicion. Despite significant seizures of prohibited drugs, there was concern that police were unable to secure convictions because of the legal restrictions on police to stop, search and detain vehicles.⁴³

NSW Police summarised their view as follows:⁴⁴

- The current power to stop search and detain vehicles for prohibited drugs is found in section 37(4) of the *Drug Misuse and Trafficking Act 1985*.
- The power can only be exercised when police have a reasonable suspicion that the vehicle contains prohibited drugs.
- The requirement of reasonable suspicion is the stumbling block to the widespread exercise of this power.
- Drug detection dogs can be used to assist in the search of a vehicle, but only after the vehicle has been lawfully stopped under section 37(4) of the *Drug Misuse and Trafficking Act 1985*.

- It would be an abuse of power to stop vehicles in the purported exercise of the random breath test power, but with the real purpose of conducting a search for drugs.
- Police from Southern Region believe wider powers are needed for them to effectively counter the transportation of drugs.
- Other than their frequency, there is no reason to think that the legal problems encountered in Southern Region are different to those in other parts of the State.
- Police would be best served by having a random power to stop cars to search for drugs.

NSW Police acknowledged that having a random power to stop vehicles would be controversial and unlikely to be supported by the NSW Government. In lieu of this, police suggested that:

- A random power to externally screen vehicles that was limited to locations known for the transportation of prohibited drugs would be a useful alternative.
- The power would require legislative recognition of the right to use a drug detection dog to conduct an external screen of a vehicle.

2.6. Legislative response

2.6.1. Parliamentary debate

In June 2003 the NSW Government introduced the Police Powers (Drug Detection in Border Areas Trial) Bill 2003 into Parliament establishing an 18-month trial of a new police power to stop and screen vehicles for prohibited drugs using drug detection dogs.

During the Second Reading of the bill, the Hon. John Hatzistergos, Minister for Justice, expressed his concurrence with the NSW Police view that the current statutory powers to stop and search vehicles required reasonable suspicion to attach to a *particular* vehicle before it could be lawfully stopped. He stated that:

*This is an appropriate safeguard in our society that recognises that there must be a check on the use of powers by police. Police should not be able to stop and search vehicles completely at random.*⁴⁵

However, the Minister recognised that:

*... the requirement for reasonable suspicion to attach to the vehicle being searched can prevent police from using generic intelligence about patterns of criminal activity.*⁴⁶

The Minister stated that the bill balanced the need to retain a check on police powers while giving police an opportunity to demonstrate the value of their generic intelligence. The balance being achieved by the requirements of the bill in that it:

*... maintains the requirement for reasonable suspicion. This provides for the essential process of judicial review of police intelligence material. It prevents there being a random power to stop and search. However, the bill requires that the reasonable suspicion must attach not to a particular vehicle but to the geographical area. This means that when the police can make a case to the Supreme Court judge that drug dealers are trafficking large quantities of drugs regularly in a given area, a warrant may be issued to permit police to stop any vehicle in that area. If police cannot make a case, the Supreme Court will refuse to issue a warrant.*⁴⁷

The NSW Opposition supported the bill but noted some concerns as to whether the legislation would enable police to do their jobs effectively. In particular, concerns were raised about the advance warning that the legislation would give drug traffickers.⁴⁸ Mr Debnam MP said that the bill was akin to a big advertising sign advising not to carry drugs through the areas defined in the bill. Later in the debate he stated that:

*[i]n effect, it [the bill] says 'For the next 18 months please do not use this road.'*⁴⁹

The Member for Albury, Mr Aplin MP also raised concerns about the provisions of the bill despite his view that the bill was worthwhile because it was aimed at the detection of prohibited drugs. He stated that it was odd that the bill required signs to be erected at checkpoints suggesting that:

*This is advertising! If we have literate drug traffickers, we can warn them, 'You are approaching a detection area. Please turn around now to avoid being detected.'*⁵⁰

Mr Aplin also noted the 'peculiar' discrepancy between the power to randomly stop vehicles for the purpose of random breath testing and the provisions contained in the bill.⁵¹ This theme was also taken up by Mr O'Farrell MP who stated that:

*The legislation does not allow effectively for random searches, and I do not understand that. ... we can stop people randomly and require them to undertake breath tests ...*⁵²

The bill was not supported by all parties in the Parliament. The Greens opposed the bill on the grounds that using drug detection dogs was 'an affront to civil liberties' and 'a huge waste of police resources in rural New South Wales.'⁵³

The Australian Democrats did not support the bill either, believing too that it would result in a waste of resources. The Hon. Dr Arthur Chesterfield-Evans stated that:

*With a police presence of this size, do police really think that drug dealers will not have contacts to inform them of what is happening? This bill will result in a monumental waste of money, with very little chance of drug use being detected in New South Wales.*⁵⁴

2.6.2. Why trial the new power?

The NSW Government decided to trial the new police power in response to calls from both NSW Police and local mayors in southern New South Wales.⁵⁵

It is apparent from the parliamentary debates that the Government chose to trial the new power in recognition of the significance that such a power may have for police and members of the public. The Government's view was that a trial would lead to an objective, evidence-based assessment of the new power. As Mr West MP stated:

*The 18-month time frame gives the police plenty of opportunity to get results. The Government wishes to get a clear idea of how police powers are working or, indeed, what could be done better. That is why the Ombudsman will review the first 9 months of the trial.*⁵⁶

2.6.3. Why limit the trial to particular border areas?

During the parliamentary debate of the bill, Mr West MP stated that the trial was limited to certain border areas based upon the evidence of drug trafficking in the area of the trial. Mr West also stated that characteristics of the trial border areas, namely, relatively remote locations with simple road infrastructure, were suitable to conduct a trial.⁵⁷

Figure 1. Graphical illustration of locations where the Police Powers (Drug Detection in Border Areas Trial) Act 2003 applies.



Source: NSW Police, Standard Operating Procedures for Police Powers (Drug Detection in Border Areas Trial) Act 2003, Version 1.6, Date Revised 20 August 2004, p.2.

2.7. The provisions of the Act

The Police Powers (Drug Detection in Border Areas Trial) Bill 2003 received assent on 8 July 2003 and was commenced by proclamation on 15 January 2004.

The Act establishes an 18-month trial that enables police to apply for a drug detection warrant to set up roadside checkpoints in defined border areas which police reasonably suspect are being used in connection with the supply of indictable quantities of prohibited drugs.

Before applying for a drug detection warrant, a police officer must first seek authorisation from the Commissioner or Deputy Commissioner of Police. Upon obtaining authorisation, a police officer may then apply to a judge of the Supreme Court of New South Wales for a drug detection warrant.

The judge must be satisfied that there are reasonable grounds for suspecting that any part or all of the area proposed for the warrant is being, or is to be, used on a regular basis for or in connection with the supply of indictable quantities of prohibited drugs. The judge may issue a drug detection warrant which must expire no later than 72 hours after being issued.

After the issue of a drug detection warrant, police may establish a checkpoint, stop vehicles at the checkpoint and use a drug detection dog to screen the vehicles stopped at the checkpoint. If police form a reasonable suspicion based on an indication by the drug detection dog and/or their observations, they may exercise their ordinary stop and search powers.

It is important to note that this Act does not create any new search powers. The Act does, however, create a new power of entry in relation to commercial vehicles. Under the Act, police are authorised to use a drug detection dog to screen the luggage holds of buses and coaches and the cargo areas of heavy vehicles without the need for consent or reasonable suspicion.

For more detail about the provisions of the Act see Chapter 4 'Legislative Survey'.

2.8. Implementation of the Act

Shortly after the Act was assented to, NSW Police established an implementation project to prepare for the trial's commencement. The Commander of Southern Region was appointed Project Manager. The project was responsible for coordinating planning, education, training and implementation of the trial.

Endnotes

- ² Section 22(4) of the Act provides that the Ombudsman's report may contain information about the exercise of functions conferred on police officers under the Act that relate to the period after the 9 month review period.
- ³ We have also included some information about operations and events which occurred after the 9 month period.
- ⁴ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.22(1).
- ⁵ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.22(2).
- ⁶ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.22(3).
- ⁷ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.22(5), (6) & (7).
- ⁸ NSW Police State Crime Command Drug Squad, 'Drug Detection in Border Areas Briefing Paper', 6 January 2004.
- ⁹ Cited in NSW Police State Crime Command Drug Squad, 'Drug Detection in Border Areas Briefing Paper', 6 January 2004.
- ¹⁰ NSW Police State Crime Command Drug Squad, 'Drug Detection in Border Areas Briefing Paper', 6 January 2004.
- ¹¹ For a discussion of the differences in cannabis laws between NSW and SA see Chapter 4 'Legislative Survey'.
- ¹² Lenton S, 'Pot, politics and the press – reflection on cannabis law reform in Western Australia', *Drug and Alcohol Review*, (June 2004), 23, 223-233 at p.225.
- ¹³ Commander Survey C.
- ¹⁴ 'Revealed: Toothless police and our drugs highway' and 'Smugglers use many tricks to defeat police', *Daily Telegraph*, 6 May 2002, p.5.
- ¹⁵ NSW Police, Operational Orders: Operation Carting, Executive Summary at 1.1.
- ¹⁶ See paragraph 4.3.1 for a description of statutory stop and search powers in relation to drug offences in New South Wales.
- ¹⁷ See paragraph 4.3.1 for a description of statutory stop and search powers in relation to drug offences in New South Wales.
- ¹⁸ *Police v Lazenby; Police v Mlaco; Police v Holmes & Leonard; Police v Egan & Egan* (Written judgment of voir dire inquiries of Magistrate Dowd, Unreported, Hay Local Court, 6 March 2001).
- ¹⁹ *Police v Lazenby; Police v Holmes & Leonard; and Police v Egan & Egan*.
- ²⁰ *Police v Mlaco*.
- ²¹ *Police v Lazenby; Police v Mlaco; Police v Holmes & Leonard; Police v Egan & Egan* at p.7.
- ²² *Ibid* at p.10.
- ²³ *Ibid* at p.10.
- ²⁴ *Ibid* at p.5.
- ²⁵ *Evidence Act 1995*, s.138(1).
- ²⁶ *Police v Lazenby; Police v Mlaco; Police v Holmes & Leonard; Police v Egan & Egan* at pp.32-33.
- ²⁷ *DPP v Leonard* (2001) 53 NSWLR 227; (2001) 127 A Crim R 381; [2001] NSWSC 797.
- ²⁸ *Ibid* at para [64].
- ²⁹ *Ibid* at para [51].
- ³⁰ (2001) 126 A Crim R 562; [2001] NSWCCA 540.
- ³¹ With whom Spigelman CJ and Simpson J agreed.
- ³² *R v Rondo* at para [55] per Smart AJ.
- ³³ *Ibid* at para [56] per Smart AJ.
- ³⁴ NSW Police Internal Memo.
- ³⁵ *Ibid*.
- ³⁶ 'Revealed: Toothless police and our drugs highway' and 'Smugglers use many tricks to defeat police', *Daily Telegraph*, 6 May 2002, pp.4-5.
- ³⁷ *Ibid*, pp.4-5. It should be noted that the large number of cases heard that week at Hay Local Court was due in large part to police proceeding with cases that were put on hold after the decision of the Magistrate at Hay Local Court on 6 May 2001.
- ³⁸ *Ibid*.
- ³⁹ *Ibid*.
- ⁴⁰ *Ibid*.
- ⁴¹ NSW Police Internal Memo.
- ⁴² See 2.5.4 above.
- ⁴³ Interview with NSW Police Corporate Sponsor.
- ⁴⁴ NSW Police Internal Memo.
- ⁴⁵ New South Wales Parliamentary Debates (NSWPD), Legislative Council, 25 June 2003, p.2043.
- ⁴⁶ *Ibid*.
- ⁴⁷ *Ibid*.
- ⁴⁸ The Hon. David Clarke, NSWPD, Legislative Council, 25 July 2003 at p.2420.
- ⁴⁹ NSWPD, Legislative Assembly, 2 July 2003, p.2699.
- ⁵⁰ *Ibid*, p.2702.
- ⁵¹ *Ibid*, p.2701.
- ⁵² *Ibid*, p.2704.
- ⁵³ Ms Lee Rhiannon, NSWPD, Legislative Council, 1 July 2003, p.2421.
- ⁵⁴ NSWPD, Legislative Council, 1 July 2003, p.2423.
- ⁵⁵ See the Hon. David Clarke, NSWPD, Legislative Council, 1 July 2003, p.2419; and Mr Aplin MP, NSWPD, Legislative Assembly, 2 July 2003, p.2700.
- ⁵⁶ NSWPD, Legislative Assembly, 2 July 2003, p.2705.
- ⁵⁷ *Ibid*.

chapter 3: methodology

This chapter briefly discusses the research activities that we undertook during our review. Further information on our research methods is included in Appendix B.

3.1. Participation on the Project Steering Committee

NSW Police established a formal Steering Committee as part of the implementation project. The Steering Committee comprised both internal and external stakeholders. The internal NSW Police stakeholders included representatives from the Police Ministry, Legal Services, Finance, Business and Technology Section, Drug Squad, Dog Unit, External Agencies Response Unit, and operational police from Local Area Commands in the defined border areas. The external stakeholders included representatives from the Attorney General's Department, NSW Ombudsman (in an observational capacity) and the New South Wales Roads and Traffic Authority (RTA).

To better understand the reasoning behind operational and other decisions in relation to the exercise of the powers in the Act, we attended all meetings of the Project Steering Committee. Our presence at the Steering Committee was invaluable insofar as it provided an avenue for discussing the information and observational research requirements of the review, as well as providing a forum for feedback on our observations of operations.

We found participation on the Steering Committee to be a crucial component in undertaking a thorough review of the Act.

3.2. Direct observation

Direct observation of policing activity is one way to obtain an independent, first hand understanding of the use of new police powers in the field. From the outset it was decided that attending operations and observing operational police would constitute the core research for this review. The NSW Ombudsman and NSW Police agreed to a Memorandum of Understanding (MOU) to govern some key aspects of the conduct of direct observation of police activities under the Act. The MOU is appended at Appendix D.

In total our observers attended six of nine operations. We observed 122 searches of vehicles and took details in relation to the stopping of 1091 vehicles. In addition, we briefly attended one operation to observe police implement new practices designed to better protect privacy during searches.

Our observers completed checklists to record information about vehicles and passengers stopped at checkpoints and to record whether police were complying with certain aspects of the legislation. Observers also took detailed notes of searches and other incidents of interest. Where possible observers also attended police briefings and de-briefings run in conjunction with operations.

We were also able to observe one 'in chambers' drug detection warrant application.

3.3. Interviews with operational police and other interested parties

An important aspect of the review involved interviewing police about their experiences using the legislation and any suggestions they had as to how the legislation might be improved or the legislative objectives could be better met. We spoke with police at a range of levels including relatively junior officers, operation commanders, specialist officers (such as dog handlers and independent officers) and senior police with specialist knowledge.

Our interviews were semi-structured and in some cases were focussed on the particular operations at which police had been deployed. In addition, we conducted a phone survey of local area and region commanders in areas where the legislation was implemented.

We also spoke with police from Northern NSW and Queensland about operations conducted along the Northern border of NSW.

In addition to our discussions with police we also interviewed other relevant personnel including a senior officer from the RTA, an officer from the Department of Primary Industries in relation to fruit fly inspections, two Australian Taxation Office (ATO) excise duty investigators, and the editor (ex heavy vehicle driver) of a nationally distributed trucking industry magazine.

Where possible we also interviewed local businesses potentially affected by the use of the legislation.

We have generally kept confidential, information about the identity of persons we have interviewed for the review. In cases where this may not have been possible, we have sought the agreement of the interviewee to use their identity.

In total we conducted interviews with 51 police officers and 7 other interested parties.

3.4. Information supplied by NSW Police

Section 22 of the Act allows the NSW Ombudsman to require and obtain information from NSW Police about the use of the Act. The relevant sub-sections provide:

- (1) For the period of 9 months from the date of commencement of this section, the Ombudsman is to keep under scrutiny the exercise of the functions conferred on police officers under this Act.*
- (2) For that purpose, the Ombudsman may require the Commissioner of Police to provide information about the exercise of those functions.*

Prior to the conduct of any operations under the Act, we wrote to NSW Police setting out the information we required under section 22(2) of the Act. This correspondence is referred to as the NSW Ombudsman's 'Information requirements' and is appended at Appendix C.

As per our information requirements, NSW Police were required to send us specific information about each operation within 21 days of the conclusion of each operation. NSW Police scanned this information into a computer so that it could be made into an electronic file, and then sent this material on CD to our office. In total we received seven information packages from NSW Police and these are referred to as Information Package 1, 2 etc throughout the report.

We used this information to better understand the operational strategies adopted by local police. The information also enabled us to determine the frequency and size of drug seizures, the number of persons and vehicles stopped and/or searched, any offences that were detected and the corresponding legal process initiated by police, and to assess whether various legal requirements had been met.

At our request police also searched their records for any relevant complaints or local management issues that were recorded during the review period. Police advised us that there had been one letter from a member of the public in relation to the Act. We determined that this matter was a complaint.⁵⁸ Another member of the public wrote directly to our office to complain about an operation under the Act.⁵⁹ In addition, we became aware of a serious internal police complaint alleging that a police officer informed known criminals and local heavy vehicle drivers of impending operations under the Act.⁶⁰

We also reviewed 39 video recordings of search incidents conducted during operations. We chose to review the videos from operations which we did not directly observe.

Overall, the provision by NSW Police of information for the review has been timely and comprehensive.

3.5. COPS information

In addition to the information provided by NSW Police, we also made inquiries of the police database COPS (Computerised Operational Policing System). All information about charges and cautions was stored in COPS under the heading of Operation Carting, except for charges in relation to one serious assault.⁶¹

The COPS database provides a structure for police to record event details such as date, location, offence, local area command, offender details and other factors. COPS also contains a 'narrative' field which allows officers to describe an event in their own words and to record important features of the incident which may not fit under other category headings.

We used COPS to obtain details of incidents such as court hearing dates and results, fact sheets about offences, penalties imposed on-the-spot (eg cannabis cautions) and 'event narratives' composed by operational police who dealt with particular incidents. Searching COPS also allowed us to ascertain the extent to which police were recording information about persons and/or vehicles searched where no offence was detected.

Extracts from narratives recorded on COPS are quoted in this report. These extracts, as with all quotes, have been transcribed literally and have not been corrected for spelling, grammatical or other similar errors. In considering the entries it should be appreciated that COPS narratives are made from notebook entries and the recording officer's recollection, and are often entered in relatively unfavourable circumstances such as the end of a shift following hours on patrol.

3.6. Court proceedings

Court transcripts can be a useful source of information about the legality of police actions, the clarity and practicality of legislative provisions and the perspectives of persons charged with offences.

We attempted to review transcripts of all court proceedings for drug offences detected as a result of operations conducted according to the Act. We reviewed 11 transcripts and 14 audio recording of matters. At the time of writing a further five matters had yet to be heard in court. The results of all charges contained in the report are accurate as at 25 November 2004.

In addition, we reviewed three background cases which were significant in terms of the introduction of the legislation.

3.7. Consultations and submissions

We sought contributions from organisations and individuals with an interest in the implementation of the legislation. We placed advertisements and/or articles in local newspapers and an industry magazine to encourage contributions to the review. A number of people came forward as a result of this promotion, including four truck drivers and a member of the public expressing support for operations under the Act.

In addition, we wrote to:

- NSW Police
- Attorney General's Department
- Roads and Traffic Authority
- Police Association of NSW
- local councils (where operations had been in their local government area)
- driver organisations (which included unions representing drivers)
- bus and coach organisations
- truck and fleet owner organisations
- various community legal centres.

In response we received twelve submissions. The submitting organisations are listed in Appendix K.

3.8. Research limitations

All research methods have strengths and weaknesses. We have attempted to minimise the limitations of any one research method by using a range of strategies to examine the issues which arose during this review. Nonetheless, it is important to note some of the potential limitations of the methods used in this review. These are outlined below.

3.8.1. Direct Observation

One consequence of observing police while they work is that police may alter their behaviour as a result of the observer's presence. Thus it may be expected that what was observed during operations may not have conformed in every respect to policing activity which occurs without observers present.

Other limitations of this method flow from environmental difficulties, such as difficulties in hearing what has been said because of traffic noise, and the subjectivity of some of the observer assessments, for example the age of persons stopped in vehicles.

3.8.2. Interviews with police

While most interviewees could be granted anonymity, their frankness may have been affected by the formal complaint oversight role which the NSW Ombudsman performs in relation to police. To some extent these barriers may have been broken down by the contact and cooperation between Ombudsman observers (who doubled as interviewers) and police during operations.

3.8.3. Input from persons subject to the powers in the Act

A key limitation of the review has been the limited avenues for contact with persons subject to the powers in the Act. We approached the Project Steering Committee with some options which involved handing out surveys to persons stopped at checkpoints, however, the Steering Committee was of the view that this would interfere unduly with the conduct of the operation.

While we encouraged people to come forward to contribute to the review through advertisements in newspapers and by making direct contact with organisations whose members might be affected by the new powers, the direct input from members of the public was minimal. We did observe persons stopped and/or searched by police at checkpoints and recorded their comments and reactions where possible. However, the views expressed and behaviour witnessed may have been affected by the presence of police. We do not know what views may have been expressed if such persons had the opportunity to make more independent comment.

It is open to people with any concerns about their treatment by police to come forward to make a complaint or inquiry with our office or directly with police. However, as previously noted, only two members of the public made a complaint in relation to the operation of the Act.

3.8.4. Limitations of the COPS database

In this review we have not relied on the COPS database to collect statistics. COPS has assisted us in providing some descriptive information about events. This information is a useful adjunct to observations and other police records. However, it should be remembered that the information in COPS is inputted by a broad range of police officers and is often the last task performed at the end of a tiring day or night at a roadside checkpoint. COPS narratives represent the informed, but necessarily subjective, views of police involved in an incident and may not be 100% reliable or accurate.⁶²

Endnotes

⁵⁸ Complaint 1.

⁵⁹ Complaint 2.

⁶⁰ Complaint 3.

⁶¹ Charge reference 33.

⁶² For a more detailed discussion of the limitations of COPS see NSW Ombudsman, *Policing Public Safety, Report under s.6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998*, November 1999, p.90-93.

chapter 4: legislative survey

This chapter outlines the provisions of the Act and also examines legislative provisions bearing upon or analogous to the powers conferred on police by the Act. In particular it considers:

- drug related offences and penalties in those states contiguous with the zones created by the Act, being South Australia and Victoria
- other police powers to stop vehicles in New South Wales and those states for the purpose of searching and/or drug detection, and
- legislative provisions governing the use of detection dogs in New South Wales.

In addition to the above, this chapter details the sentencing options available to courts in New South Wales, relevant to the later discussion of sentencing and penalties for drug related offences.

4.1. Provisions of the Act

The Act commenced on 15 January 2004. Its main purpose is:

An Act to confer power on police officers to stop vehicles, and use dogs, for drug detection in border areas; and for other purposes.

As suggested by the long title, the Act creates a scheme within which police can randomly stop vehicles in certain areas, and use a drug detection dog to screen vehicles for prohibited drugs.

4.1.1. Border areas

A border area is defined in section 3 of the Act as any area within 100 kilometres of the border between NSW and Victoria or NSW and South Australia. Section 3 also specifies three areas outside this 100 kilometre range, being a 20 kilometre radius from a particular intersection in the town of Hay, a 20 kilometre radius from a particular intersection in the town of Narrandera, and a 20 kilometre radius from a place known as the 'Birdcage'. This is illustrated in Figure 1 at paragraph 2.6.3.

4.1.2. Drug detection warrants

Warrants issued under this Act are called 'drug detection warrants'. Section 4 states that only eligible judges may issue drug detection warrants. The Standard Operating Procedures for operations under the Act⁶³ include a list of judicial officers of the Supreme Court of NSW who gave written consent to being declared eligible judges.⁶⁴

Before a police officer can apply for a warrant, he or she must consult with the RTA.⁶⁵ The police officer must then get authorisation from either the Commissioner or Deputy Commissioner of Police to apply for the warrant.⁶⁶ Neither officer can delegate this responsibility.⁶⁷

Section 5(2) of the Act sets out the details which must be included in the application for authorisation from the Commissioner or Deputy Commissioner:

- a statement identifying the search area for the proposed warrant,*
- the grounds on which the warrant is to be sought,*
- a plan of the operation proposed to be carried out, including the number of officers and dogs proposed to be used,*
- a statement setting out the consultation that has taken place with the Roads and Traffic Authority,*
- a statement as to whether the proposed search area has been the subject of earlier applications for an authorisation or warrant and, if so, whether the applications were granted,*
- any other particulars prescribed by the regulations.*

The proposed area, or search area, must be in a border area described above, and cannot be more than one square kilometre in area.⁶⁸

The application for authorisation must contain information which proves on reasonable grounds that any part, or all, of the search area is being used on a regular basis, or will be used on a regular basis, for the supply of indictable quantities of prohibited drugs or prohibited plants.⁶⁹ The Commissioner or Deputy Commissioner can only authorise the application if they suspect that the area is being used for that purpose. Once authorisation is given, it can be cancelled at any time by the Commissioner or Deputy Commissioner of Police.⁷⁰

The authorisation applies for a maximum of 72 hours.⁷¹ In other words, once authorisation is given, a police officer has up to three days to apply to a Supreme Court judge for the warrant.

Section 6(2) of the Act sets out what is required to be in the warrant application:

- (a) *a statement identifying the search area for the proposed warrant,*
- (b) *the grounds on which the warrant is sought,*
- (c) *a plan of the operation proposed to be carried out, including the number of officers and dogs proposed to be used,*
- (d) *the authorisation to apply for the warrant,*
- (e) *the proposed expiry date of the warrant,*
- (f) *any other particulars prescribed by the regulations.*

According to section 14(2), the warrant can apply for no longer than 72 hours, and cannot be extended.

A judge may issue a warrant if he or she is satisfied that there are reasonable grounds that any part, or all, of the search area is being used on a regular basis, or will be used on a regular basis, for the supply of indictable quantities of prohibited drugs or prohibited plants.⁷² A judge can put conditions on the warrant if they choose.

4.1.3. Applicability of the Search Warrants Act 1985

Drug detection warrants issued under the Act are subject to certain provisions of the *Search Warrants Act 1985*, specified in section 15 of that Act. These include a requirement that the warrant be applied for in writing, and by the applicant in person (as opposed to a representative of the applicant). The information given by the applicant must be verified by oath, affirmation or affidavit.⁷³

The judge considering the warrant must consider the reliability of the information. If the judge requires further information about the grounds upon which the warrant is sought, the applicant must provide it, either orally or in writing.⁷⁴

A person cannot provide false or misleading information about a 'material particular' in connection with a warrant application. The penalty for this is a maximum of \$11,000 and/or two years imprisonment.⁷⁵

If an application is refused, the applicant or any other person who is aware of the application, may not make a further application for the same warrant, unless further information is provided which justifies applying for the warrant again.⁷⁶

Section 16 of the *Search Warrants Act* imposes a duty to show the warrant to the occupier of a premises that the warrant applies to. It would appear that a drug detection warrant must be shown to anybody to whom the warrant applies to, that is, any occupant of a vehicle stopped under the Act. This is the approach taken by NSW Police in the SOPs:

Duty to show warrant - *The officer in charge of each search area will show the warrant to any person in the search area who requests to see it.*⁷⁷

There are also provisions of the *Search Warrants Act* which apply in relation to reporting requirements. These are outlined below.

4.1.4. Functions under a drug detection warrant

Once a warrant has been granted, police are permitted to exercise certain functions,⁷⁸ including:⁷⁹

- (a) *establish a check point,*
- (b) *stop vehicles at a check point,*
- (c) *if a vehicle is stopped at a check point or stopped in the search area, use a dog to carry out general drug detection in relation to a person in or on, or seeking to enter or leave, the vehicle or in relation to the vehicle,*
- (d) *seize and detain any prohibited drug or prohibited plant in the possession or under the control of a person in contravention of the Drug Misuse and Trafficking Act 1985 found as a result of general drug detection using a dog or any search of a person that the police officer is entitled to carry out,*
- (e) *seize and detain any thing found in the course of general drug detection using a dog or any such search that the police officer suspects on reasonable grounds may provide evidence of the commission of an indictable offence,*
- (f) *give reasonable directions to facilitate the exercise of any powers under this section to any person in the search area.*

Section 11 of the Act provides further guidance about how a drug detection dog can be used:

- (2) *A police officer using a dog to carry out general drug detection under a drug detection warrant must comply with the following:*
 - (a) *the police officer is to take all reasonable precautions to prevent the dog touching a person,*
 - (b) *the police officer is required to keep the dog under control,*
 - (c) *the police officer must not allow the dog to enter any driver or passenger area of a vehicle, except as provided by paragraph (d),*
 - (d) *the police officer may allow the dog to enter any driver or passenger area of a vehicle only if the police officer is entitled to search it and all persons have left the area to be searched,*
 - (e) *the police officer must not direct a person to open the door of a vehicle unless the police officer is entitled to search the person or vehicle or is otherwise entitled to give such a direction,*
 - (f) *the police officer must not direct a person to open an area of a vehicle that is not a driver or passenger area of the vehicle, unless the vehicle is used for commercial purposes (including the transport of goods) or is a public passenger vehicle.*
- (3) *A police officer using a dog to carry out general drug detection under a drug detection warrant may:*
 - (a) *if a vehicle is used for commercial purposes (including the transport of goods), or is a public passenger vehicle, allow the dog to enter an area of the vehicle that is not a driver or passenger area of the vehicle (for example, the boot, back of a goods vehicle or luggage hold of a coach), and*
 - (b) *use the dog for general drug detection outside any vehicle.*

The Act does not create a power of entry or any additional powers to search people. Section 18 states:

-
- (3) *Nothing in this Act confers on a police officer:*
- (a) *except as provided by section 11(3) (a), a power to enter a vehicle, or*
 - (b) *a power to search a person.*

4.1.5. Notices and other requirements

If any person is the subject of a function exercised under the warrant, section 12 of the Act requires a notice to be issued to that affected person. The notice, known as a section 12 notice, must include the name of the police officer exercising the function, his or her place of duty and the date, time and place at which the function was exercised. A section 12 notice has to be given before, or as soon as possible after a function has been exercised.

Section 13 requires a police officer exercising a function:

...must ask for the person's co-operation and carry out the function:

- (a) *in a way that provides reasonable privacy for the person subject to the exercise of the function, and*
- (b) *as quickly as is reasonably practicable.*

There is an additional requirement for the specific function of using a drug detection dog. Before a drug detection dog is used, police must provide certain information to the occupants of the vehicle, including:⁸⁰

- (a) *evidence that the police officer is a police officer (unless the police officer is in uniform),*
- (b) *the name of the police officer and his or her place of duty,*
- (c) *the reason for the exercise of the power and the nature of the procedures to be carried out,*
- (d) *a warning that failure or refusal to comply with a request of the police officer, in the exercise of the function, may be an offence.*

Police must also ensure that signs are erected to indicate the presence of the check point.⁸¹

4.1.6. Restrictions

Ordinarily, police must not direct a person to open the door, or any other area of a vehicle unless they are already entitled to search the person, or otherwise entitled to ask the person to open the door.⁸² However, police may direct a person to open other areas of a vehicle, such as the cargo area, if the vehicle is used for commercial purposes, such as a truck, or a public passenger vehicle, such as a bus. The Act specifically gives police the authority to use a drug detection dog in an area that is not a driver or passenger area (for example, the boot, back of a goods vehicle or luggage hold of a coach).⁸³

The Act does not affect or apply to a search of a person that a police officer is otherwise entitled to conduct, or a search of a person that a police officer reasonably suspects is committing a drug offence.⁸⁴

4.1.7. Offences created

Three offences are created under the Act, which each carry a maximum penalty of \$1,100.⁸⁵ Offences under the Act are summary offences, to be dealt with at Local Court.⁸⁶

Section 16 provides:

- (1) *A person must not, without reasonable excuse, obstruct or hinder a person executing or assisting in the execution of a drug detection warrant.*
- (2) *A person must not, without reasonable excuse:*
 - (a) *fail or refuse to stop a vehicle the person is driving when directed to do so by a police officer under this Part, or*
 - (b) *fail or refuse to comply with any other direction given by a police officer under this Part.*

Section 20 of the Act places an onus on the defendant to prove 'reasonable excuse'. The effect of this provision is that provided that the elements of the offence can be proved beyond reasonable doubt by the prosecution, the person accused carries the onus to prove (on the balance of probabilities) that there was a reasonable excuse for their conduct.

4.1.8. Reporting requirements

The applicant must report to the judge who issued the warrant about the execution of the warrant within 10 days of the execution of the warrant. This report must contain brief results of the execution of the warrant.⁸⁷ If the warrant wasn't executed a report should be provided within 10 days of its expiry date and must set out the reasons why the warrant was not executed.

The Commissioner of Police is also required to keep a record of the number of warrants obtained and the number of operations conducted under the Act.⁸⁸ A summary of this information is required to be included in the NSW Police annual report.⁸⁹

4.1.9. Monitoring provisions

The Act requires the NSW Ombudsman to keep under scrutiny the exercise of functions conferred on police for nine months after the commencement of the Act.⁹⁰ In order to scrutinise these functions, the NSW Ombudsman may require the Commissioner of Police to provide information about the exercise of those functions.⁹¹

The NSW Ombudsman is required to report to the Attorney General, the Minister for Police and the Commissioner of Police, no later than three months after the nine month period of scrutiny has expired.⁹² In other words, the Act requires the NSW Ombudsman to report 12 months after the Act commenced.

The Act commenced on 15 January 2004. In accordance with the provisions of the *Interpretation Act 1987*,⁹³ the Ombudsman's report must be provided to the Attorney General, the Minister for Police and the Commissioner of Police by 17 January 2005.

It is the responsibility of the Attorney General to table the report with NSW Parliament as soon as practicable after the report is received.⁹⁴

4.1.10. Sunset clause

The Act expires 18 months after commencement,⁹⁵ that is, on 15 July 2005.

4.2. Drug offences – comparison of drug laws

Police have commented that disparate state drug laws may be one of the factors influencing across border drug transportation between New South Wales, Victoria and South Australia. An outline of drug laws in those states is discussed below.

4.2.1. New South Wales

The principal NSW legislation regulating drug offences is the *Drug Misuse and Trafficking Act 1985* ('the DMTA').⁹⁶ The DMTA is directed at prohibited drugs and prohibited plants. A prohibited drug is defined as any substance, other than a prohibited plant, specified in Schedule 1 of the DMTA. A prohibited plant is defined as cannabis plant.⁹⁷

Division 1 of the DMTA prescribes summary (less serious) offences and Division 2 of the DMTA prescribes indictable (more serious) offences.

4.2.1.1. Summary offences

Summary offences under Division 1 of the DMTA are prosecuted summarily in the Local Court by a Magistrate sitting alone.⁹⁸

Summary offences include possession of prohibited drugs,⁹⁹ possession of equipment (although not a hypodermic syringe or needle)¹⁰⁰ for the administration of prohibited drugs,¹⁰¹ and various other offences related to the sale, supply and display of waterpipes (commonly known as 'bongs'),¹⁰² administration of prohibited drugs,¹⁰³ and illegal prescriptions.¹⁰⁴

4.2.1.2. *Penalties for possession*

Possession of any amount of a prohibited drug is a summary offence under Division 1 of the DMTA. The offender is liable for a fine of up to \$2200 and/or two years imprisonment.¹⁰⁵

If the offence is possession of no more than 15 grams of dried cannabis for personal use police have the option of issuing a caution.¹⁰⁶

4.2.1.3. *Indictable offences*

Indictable offences under Division 2 of the DMTA are usually prosecuted on indictment in higher courts such as the District or Supreme Court of New South Wales.¹⁰⁷

Indictable offences under the DMTA include cultivation of prohibited plants,¹⁰⁸ supply prohibited plant,¹⁰⁹ possess prohibited plant,¹¹⁰ manufacture/production of prohibited drugs,¹¹¹ possession of precursors for the manufacture/production of prohibited drugs,¹¹² and supply of prohibited drugs.¹¹³

The penalties that apply to indictable offences vary depending upon the type and quantity of the prohibited drug or plant. Schedule 1 classifies amounts of prohibited drugs and plants in the following ascending order: 'small', 'traffickable', 'indictable', 'commercial' and 'large commercial'. Schedule 1 also prescribes the amount which constitutes that quantity for each prohibited drug and plant.¹¹⁴

The quantity of drug in each of these classifications varies depending on the prohibited drug. For example, the indictable quantity of cannabis leaf is 1000.0 grams whereas the indictable quantity of amphetamine is 5.0 grams.

It is important to distinguish the nomenclature of 'traffickable' quantity used in Schedule 1 from the expression 'trafficking of indictable quantities of prohibited drugs' that is used throughout the report. When this report refers to the trafficking of indictable quantities it is referring to quantities equal to and greater than the indictable quantity, which includes commercial and large commercial quantities.

4.2.1.4. *Penalties for cultivation, manufacture/production and supply*

The DMTA prescribes separate offences for cultivation, manufacture/production and supply of prohibited drugs and plants. The penalties for these offences depend on the type and quantity of prohibited drug or plant involved.

For indictable offences involving less than commercial quantities, the offender is liable to a fine of up to \$220,000 and/or 15 years imprisonment (10 years where the offence relates to cannabis plant or cannabis leaf).¹¹⁵

For indictable offences involving commercial quantities, the offender is liable to a fine of up to \$385,000 and/or 20 years imprisonment (15 years where the offence relates to cannabis plant or cannabis leaf).¹¹⁶

For indictable offences involving large commercial quantities, the offender is liable to a fine of up to \$550,000 and/or life imprisonment (20 years where the offence relates to cannabis plant or cannabis leaf).¹¹⁷

It is worth noting that the DMTA deems the possession of a 'traffickable' quantity of prohibited drug to be possession for the purposes of the indictable offence of supply prohibited drug, unless the person in possession of the prohibited drug can establish (on the balance of probabilities) that the possession was otherwise than for supply.¹¹⁸

4.2.2. **Victoria**

The principal Victorian legislation regulating drug offences is the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ('the Victorian Act').

The Victorian Act establishes offences in a similar fashion to NSW, depending on the quantity of drugs involved. The offences are based on whether the amount involved is to be considered a small, commercial or large commercial quantity. Again, amounts vary depending on the particular drug involved.

4.2.2.1. *Laws in relation to possession*

Possession of any defined 'drug of dependence' without permission is an offence under the Victorian Act. Any amount of a prohibited drug constitutes possession. However, the law does distinguish between possession of cannabis and other drugs.

Possession of a small quantity of cannabis (an amount up to 50 grams) leaves the offender liable to a fine of up to five penalty units (\$511.25).¹¹⁹ Police can issue a caution in relation to a small quantity of cannabis in certain circumstances.¹²⁰

4.2.2.2. *Laws in relation to supply*

Any attempt to traffic drugs (either by sale or supply), regardless of the amount involved, is an indictable offence.¹²¹

4.2.3. **South Australia**

The principal South Australian legislation regulating drug offences is the *Controlled Substances Act 1984* (SA) ('the SA Act').¹²²

In South Australia the amount required to constitute an offence of manufacturing, sale, supply and administration of a prohibited drug is prescribed for each drug nominated in the applicable regulation.¹²³

4.2.3.1. *Laws in relation to possession*

Unlike the NSW and Victorian Acts, there are no prescribed amounts of prohibited drugs under the SA Act. Any amount of prohibited drugs constitutes possession. However, offences involving possession of small amounts of cannabis (less than 100 grams) are expiable (or remedied) by payment of legislatively nominated amount.¹²⁴

The SA Act makes other distinctions between an offence relating to cannabis and offences related to other drugs. For instance, possession of cannabis can result in a fine of up to \$500 whereas possession of another drug can result in a fine of up to \$2000 and/or two years imprisonment.

4.2.3.2. *Laws in relation to sale/supply/manufacture*

South Australia does not distinguish between sale, supply and manufacturing.

Sale, supply and manufacture are all covered by section 32 of the SA Act. Possession of more than the prescribed amount of a drug is deemed to be possession for the purpose of sale.¹²⁵ The penalty varies depending on whether the drug in question is cannabis or some other drug. The penalty is less severe if the offence is related to cannabis.

4.2.4. Comparison of cannabis laws between NSW, Vic and SA

Table 1. Cannabis – Penalties by specified quantities

	NSW	Victoria	SA
Amount for which caution and/or expiation notice may be issued (Nature of caution)	15g (Formal caution and referral to health service)	50g (Formal caution and referral to health service)	Up to 100 g Expiation by way of payment of up to \$150
Small quantity (Maximum) (Maximum penalty)	30g or 5 plants 2 yrs +/\$2,200	50g \$511.25	
Indictable quantity (Minimum) (Maximum penalty)	1kg or 50 plants 10yrs +/\$220,000	N/A	If amount greater than 1/5 commercial quantity then max. penalty is 10yrs +/\$50,000
Commercial quantity (Minimum) (Maximum penalty)	25kg or 250 plants 15yrs +/\$385,000	25kg or 100 plants 25yrs	10kg 25yrs +/\$500,000
Large commercial quantity (Minimum) (Maximum penalty)	100kg or 1000 plants 20yrs +/\$550,000	250kg or 1000 plants Life imprisonment +/\$511,125	N/A
Deemed to be supply quantity (Minimum) (Maximum penalty)	Greater than 300g 10yrs +/\$220,000	Greater than 250g or 10 plants 15yrs	Greater than 100g but less than 2kg 2yrs +/\$2,000

Source: Australian Institute of Criminology at <http://www.aic.gov.au/research/drugs/context/penalties.html>, *Drug Misuse and Trafficking Act* (NSW), *Drugs, Poisons and Controlled Substances Act* (Vic), *Controlled Substances Act* (SA), *Controlled Substances (Prohibited Substances) Regulation 2000* (SA).

4.2.5. Minor cannabis offences

NSW, South Australia and Victoria each have arrangements that offer additional options to deal with minor cannabis offences. NSW and Victoria have each recently established a scheme of police cautioning for minor cannabis offences, while South Australia has a long standing legislative scheme that allows a minor cannabis offence to be expiated by payment of a fine.

The various cautioning and expiation schemes are not intended to legalise cannabis either *de jure* or *de facto*. These are simply meant to be an alternative option for police dealing with offenders who are in possession of a small amount of cannabis.¹²⁶ All of the schemes require that the offender receive information concerning drug treatment and health issues.

4.2.5.1. New South Wales

The NSW Cannabis Cautioning Scheme (CCS) commenced in April 2000. The scheme is not legislatively based. The CCS provides police with the option of issuing a caution when a person is found in possession of dried cannabis and/

or equipment for the use of administering cannabis. It should be noted that not all persons are eligible for a caution: For example:

- the person must be found with an amount of cannabis of no more than 15 grams and/or equipment for the use of cannabis
- the person must be an adult over 18 years of age (although note that a juvenile caution may be issued to a young person)¹²⁷
- there must be no other offence detected at the same time the cannabis is detected
- an offender must consent to the caution and sign the cannabis caution notice
- the drug must be dried cannabis (not resin, oil or living plants)
- drugs must be for personal use only
- the offender must admit to the offence
- the caution must be appropriate
- the offender cannot demand the caution – the caution is at the discretion of the police officer
- the identity of the offender must be confirmed
- the person must not have convictions for drug related offences, or offences involving violence and/or sexual assault
- the person must have no more than one previous caution.

In the absence of a caution, possession of a prohibited drug, including cannabis, may leave the offender liable to a fine of up to \$2200 and/or two years imprisonment.

4.2.5.2. *Victoria*

Victoria has the Cannabis Cautioning Program, which like NSW, is not established by statute. Under this program a police officer may issue a caution notice when dealing with minor cannabis offences. The amount of drugs involved must be no more than 50 grams of cannabis leaf.

The caution notice is accompanied by information about drug use and where to get help. The issuing of a caution as an alternative to arrest and charge is at the police officer's discretion. A person can only be issued with a caution on two occasions.

In the absence of a caution, possession of up to 50 grams of cannabis may leave the offender liable to a fine of up to \$511.25.

4.2.5.3. *South Australia*

Since 1987, South Australia has had an expiation scheme for offenders found in possession of small amounts of cannabis for personal use. The offender is not liable for prosecution if the expiation fee is paid within the prescribed time limit. The maximum amount by which an offence may be expiated is \$150.

The legislation does not provide a limit for how many expiation notices one person can receive.

In recent years, there has been controversy over the number of cannabis plants that should attract an expiation notice. In the past the scheme has provided that an expiation notice could be issued for up to ten plants. However, concerns were raised that this number was open to abuse. For example, an organised dealer or trafficker might arrange for a number of people to grow plants in groups of ten or less thereby only attracting an expiation notice if any one grower were apprehended while growing the cannabis plants. This concern was heightened with emerging evidence of the increased potency of cannabis, particularly hydroponically grown cannabis.¹²⁸

Following amendments to the South Australian regulation in 2002, an expiation notice may now only be issued if the offender is in possession of one plant.¹²⁹

The offences relevant to this report and the amount that will expiate each offence are set out in the following table.

Table 2. Certain minor cannabis offences in South Australia and related expiation amounts

Offence	Amount to expiate offence
Possession of cannabis where the amount is less than 25 grams	\$50
Possession of cannabis where the amount is 25 grams or more but less than 100 grams	\$150
Possession of cannabis resin where the amount is less than 5 grams	\$50
Possession of cannabis resin where the amount is 5 grams or more but less than 20 grams	\$150
Cultivation of one cannabis plant	\$150

Source: cl. 6, Controlled Substances (Expiation of Simple Cannabis Offences) Regulation 2002 (SA).

4.3. Powers to stop vehicles for search and/or detection of drugs

4.3.1. New South Wales

Police presently have a range of general and specific powers that enable them to stop and search vehicles for drugs. Under section 357E of the *Crimes Act 1900*, police may stop, search and detain:

- (a) any person whom he or she reasonably suspects of having or conveying any thing stolen or otherwise unlawfully obtained or any thing used or intended to be used in the commission of an indictable offence, or
- (b) any vehicle in which he or she reasonably suspects there is any thing stolen or otherwise unlawfully obtained or any thing used or intended to be used in the commission of an indictable offence.

Under section 37(4) of the *Drug Misuse & Trafficking Act 1985* police may stop, search and detain:

- (a) any person in whose possession or under whose control the member reasonably suspects there is, in contravention of this Act, any prohibited plant or prohibited drug, or
- (b) any vehicle in which the member reasonably suspects there is any prohibited plant or prohibited drug which is, in contravention of this Act, in the possession or under the control of any person.

Section 10 of the *Police Powers (Vehicles) Act 1998* permits a search of a vehicle to be conducted when there is a reasonable suspicion that the vehicle or a class of vehicles to which the vehicle belongs is reasonably suspected of having been used in connection with the commission of an indictable offence.

These statutory provisions each require police to have *reasonable suspicion* before a *particular* person, vehicle or class of vehicle is to be stopped and searched.

In *R v Rondo*¹³⁰ the New South Wales Court of Criminal Appeal explained the meaning of 'reasonable suspicion' as follows:¹³¹

A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s.357E. A reason to suspect that a fact exists is more than a reason to look into the possibility of its existence.

Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.

What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole surrounding circumstances.

Police also have the option of obtaining a search warrant under the *Search Warrants Act 1985* if they have 'reasonable grounds for believing that there is or, within 72 hours, will be in or on any premises ... a thing connected with a particular narcotics offence'.¹³² The *Search Warrants Act* defines 'premises' to include a vehicle.¹³³

4.3.2. Victoria

Section 82 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) authorises warrantless searches of persons and vehicles in the following manner:

Where a member of the police force has reasonable grounds for suspecting that—

- (a) on or in a vehicle in or upon a public place;*
- (b) on an animal in a public place;*
- (c) in the possession of a person in a public place;*
- (d) on or in a boat or vessel, underway or not; or*
- (e) on or in an aircraft—*

there is a drug of dependence in respect of which an offence has been committed or is reasonably suspected to have been committed under a provision of Part V¹³⁴, the member may with such assistance as he thinks necessary—

- (f) search the vehicle, animal, person, boat, vessel or aircraft;*
- (g) seize and carry away any instrument device or substance which he reasonably believes to be used or capable of being used for or in the manufacture, sale, preparation for manufacture, preparation for sale, or use of any drug of dependence;*
- (h) seize and carry away the drug of dependence—*

and deal with it according to law.

In December 2003, the Victorian Parliament passed the *Road Safety (Drug Driving) Act 2003* (Vic) which amended the *Road Safety Act 1986* (Vic) to create new offences relating to driving 'while prescribed illicit drugs are present in the person's oral fluid or blood'.¹³⁵

These amendments to the *Road Safety Act* (Vic) also authorise Victorian police to randomly stop vehicles for the purpose of conducting a roadside saliva test to ascertain whether the driver has recently consumed THC (the active component in cannabis) and/or methamphetamine (speed). Random roadside saliva testing is due to commence in late 2004 and will be reviewed in mid 2005, with the legislation containing a sunset clause that takes effect on 1 July 2005.

A positive test will result in the driver being charged with 'driving whilst exceeding the prescribed concentration of a prescribed illicit drug', and the Act precludes the test being admitted in respect of any non-road safety offence.¹³⁶ A positive result, of itself, may not be sufficient to warrant a search of the vehicle for the presence of illicit drugs:

*Police will carry out further investigations for drug offences, which may include searches, only when there is sufficient information to suggest that a serious drug offence is being committed.*¹³⁷

4.3.3. South Australia

The *Controlled Substances Act 1984* (SA) confers on police broad powers in relation to 'premises' which by definition includes vehicles. Section 52(1) gives police the power to:

- (a) *enter at any time any premises for the purposes of ascertaining whether the provisions of this Act, ... are being complied with or have been contravened; and*
- (b) *where reasonably necessary for that purpose, break into or open any part of the premises, or anything in or on the premises; and*
- (c) *for the purposes of paragraph (a) or (b), require the driver of any vehicle, ... to stop that vehicle, ...*

A warrant is required before police are able to exercise these powers. Section 52(4) of the *Controlled Substances Act* provides:

A [police officer] must not exercise the powers conferred by subsection (1)(a) and (b) except upon the authority of a warrant issued by an officer of police, a special magistrate or a justice,

Section 52(5) requires:

An officer of police, special magistrate or justice must not issue a warrant under subsection (4) unless satisfied, on information given upon oath--

- (a) *that there are reasonable grounds for suspecting that an offence against this Act has been, is being, or is about to be, committed; and*
- (b) *that a warrant is reasonably required in the circumstances.*

Police also have the power to stop and search a vehicle without first obtaining a warrant. Section 52(9) provides:

Where ... a member of the police force suspects on reasonable grounds that a substance that would afford evidence of an offence against this Act is in any vehicle, ... , the officer may--

- (a) *require the driver of the vehicle ... to stop the vehicle ...; and*
- (b) *detain and search the vehicle, ...; and*
- (c) *seize and remove from the vehicle, ... anything that the officer has reasonable cause to suspect affords evidence of an offence against this Act.*

General police powers to search and enter are separately established by the *Summary Offences Act 1953* and these remain unaffected by the *Controlled Substances Act*. Generally, however, a person must be arrested before she or he can be searched using the *Summary Offences Act*.

However, police may search people *without* arresting them if the police have a reasonable belief that they are in possession of any substance or equipment in contravention of the *Controlled Substances Act*. A person can insist on being taken before a magistrate to have the search authorised but as there is no obligation on a police officer to inform the person of this right it is rarely exercised. As a consequence, street searches for cannabis are common.

4.4. Drug detection dogs¹³⁸

Section 11 of the Act permits police officers to use dogs to carry out general drug detection duties in addition to any other authority conferred by the Act or any other law.

The use of drug detection dogs in New South Wales is established and regulated by statute after a Local Court decision in November 2001 which held that a search conducted on the basis of an indication from a drug detection dog was an illegal search. While the decision was reversed in the Supreme Court, legislation was introduced and passed to remove any doubt about the power of police to conduct a search after an indication from a drug detection dog.

The *Police Powers (Drug Detection Dogs) Act 2001* (the 'Drug Dogs Act') confers powers on police to use drug detection dogs for 'general drug detection'. In particular, the Drug Dogs Act allows police to use drug detection dogs without a warrant to detect drug offences in relation to persons in places such as licensed premises, particular public transport routes and some other entertainment venues.

The Drug Dogs Act confers powers on police to use drug detection dogs to detect prohibited drugs and plants. It authorises a police officer to use a drug detection dog if the police officer is already authorised to search a person for the purpose of detecting a drug offence.¹³⁹

For example, if a police officer has a reasonable suspicion that a person is committing a drug offence, the officer may use a drug detection dog to assist with the search of the person.

The Drug Dogs Act also specifies that if police are entitled to enter premises (for instance, to execute a search warrant) they may be accompanied by a drug detection dog for the purpose of detecting a drug offence.¹⁴⁰

The Drug Dogs Act also sets out provisions for police to use drug detection dogs for 'general drug detection'. General drug detection is defined as:

*. . . the detection of prohibited drugs or plants in the possession or control of a person, except during a search of a person that is carried out after a police officer reasonably suspects that the person is committing a drug offence.*¹⁴¹

The Drug Dogs Act confers powers on police to carry out general drug detection without a warrant in relation to specified persons, including:

- persons at, or seeking to enter or leave, any part of premises¹⁴² being used for the consumption of liquor that is sold at the premises (other than any part of premises being used primarily as a restaurant or other dining place)
- persons at, or seeking to enter or leave, a public place at which a sporting event, concert or other artistic performance, dance party, parade or other entertainment is being held
- persons on, or seeking to enter or leave, a public passenger vehicle¹⁴³ that is travelling on a route prescribed by the regulations, or a station, platform or stopping place on any such route.¹⁴⁴

The routes prescribed under the Drug Dogs Regulation enable drug detection dogs to be used for general drug detection on most of the CityRail Network and on specified bus routes between Albury and Sydney, and Sydney and Grafton.

The Drug Dogs Act also empowers police to conduct general drug detection in any public place if they obtain a warrant. Police may apply for such a warrant if they have reasonable grounds to believe that 'the persons at any public place may include persons committing drug offences'.¹⁴⁵ The Drug Dogs Regulation sets out the procedures in relation to warrants obtained according to the Drug Dogs Act.¹⁴⁶

'Public place' is defined in the Drug Dogs Act.¹⁴⁷ In summary, it includes a place that is open to or used by the public, whether or not on payment of money and whether or not it is only open to a limited class of persons. A public place may be a road but not a school.

The Drug Dogs Act requires police carrying out general drug detection to take reasonable precautions to prevent the dog from touching a person and to keep the dog under control.¹⁴⁸

The Drug Dogs Act also makes clear that it does not confer on police powers to enter any premises that a police officer is not otherwise authorised to enter, or to detain a person that the officer is not otherwise authorised to detain.¹⁴⁹

The Drug Dogs Act does not provide police with a specific power to search a person. The drug detection dogs are used by police as a tool to form a 'reasonable suspicion' that a person is carrying a prohibited substance. Once police have formed a reasonable suspicion they may then search the person in accordance with section 37(4)(a) of the *Drug Misuse and Trafficking Act*.

While Victoria and South Australian police each use drug detection dogs there is no specific legislative authority for their use in either of those jurisdictions.

4.5. Other vehicle stop powers in NSW

There are a number of other powers established by legislation for stopping vehicles for the purpose of conducting searches and/or inquiries in respect of the driver and vehicle analogous to the powers conferred by the Act. Some examples of these include:

- random breath testing
- fruit fly inspections
- general power to stop vehicles for traffic offences/infringements
- enforcing weight limits on heavy vehicles
- inspecting monitoring devices on heavy vehicles
- fatigue management of heavy vehicle drivers.

4.6. Summary of powers to stop, search and/or detain vehicles in NSW, Vic and SA

Jurisdiction	Legislation	Power	Conferred on	Grounds for exercise
New South Wales	<i>Crimes Act</i> (s.357E)	Stop, search and detain	Police officers	A reasonable suspicion that there is any thing stolen or otherwise unlawfully obtained or any thing used or intended to be used in the commission of an indictable offence.
New South Wales	<i>Drug Misuse & Trafficking Act</i> (s.37(4))	Stop, search and detain	Police officers	A reasonable suspicion that there is any prohibited plant or prohibited drug which is, in contravention of the Act, in the possession or under the control of any person.
New South Wales	<i>Police Powers (Vehicles) Act</i> (s.10)	Stop, search and detain	Police officers	A reasonable suspicion that the vehicle or a class of vehicles to which the vehicle belongs is reasonably suspected of having been used in connection with the commission of an indictable offence.
New South Wales	<i>Search Warrants Act</i> (s.5)	Search premises (includes vehicle)	Police officers	Have reasonable grounds for believing that there is or, within 72 hours, will be in or on any premises a thing connected with a particular narcotics offence.

Jurisdiction	Legislation	Power	Conferred on	Grounds for exercise
Victoria	<i>Drugs, Poisons and Controlled Substances Act</i> (s.82)	Stop, search, detain and seize	Police officers	Have reasonable grounds for suspecting that— <ul style="list-style-type: none"> on or in a vehicle in or upon a public place on an animal in a public place in the possession of a person in a public place on or in a boat or vessel, underway or not, or on or in an aircraft— there is a drug of dependence in respect of which an offence has been committed or is reasonably suspected to have been committed.
South Australia	<i>Controlled Substances Act</i> (s.52)	Warrant to stop, search, detain and seize	Police officers	Have reasonable grounds for suspecting that an offence against the Act has been, is being, or is about to be, committed and a warrant is reasonably required in the circumstances. If a warrant is sought to search a vehicle, there must be reasonable grounds in respect of that particular vehicle.
New South Wales	<i>Road Transport (Safety and Traffic Management) Act</i> (s.13)	Stop vehicles for the purpose of conducting breath test on driver or supervisor	Police officers	Have reasonable cause to believe that the person is driving a vehicle, attempting to drive a vehicle or supervising a learner driver. For the purpose of conducting the breath test a police officer may request or signal to the driver of the motor vehicle to stop the vehicle, and the driver must comply with any request or signal made.
New South Wales	<i>Roads Act</i> (s.230)	Stop to inspect, measure or weigh vehicle or check safety of load	Police officers and other authorised officers	Any heavy vehicle using or seen using a road or road related area.
New South Wales	<i>Roads Act</i> (s.232)	Detain and drive a vehicle that has been stopped	Police officers and other authorised officers	Failure to comply with direction from authorised officer.

Jurisdiction	Legislation	Power	Conferred on	Grounds for exercise
New South Wales	<i>Road Transport (Safety and Traffic Management) Act</i> (s.64)	Stop heavy vehicle to inspect monitoring device	Police officers and other prescribed officers	An applicable motor vehicle (particularly heavy vehicles) for the purpose of ascertaining that a monitoring device has been installed and is operating correctly.
New South Wales	<i>Road Transport (Safety and Traffic Management) (Driver Fatigue) Regulation</i> (cl.130)	Stop vehicle to make inquiries to ensure compliance with regulations concerning fatigue management	Police officers and other authorised officers	The vehicle appears to be a heavy vehicle or commercial bus.
New South Wales	<i>Plant Diseases Act</i> (s.13)	Stop and search vehicles to ascertain compliance with prohibitions or regulations in a defined quarantine zone	Inspectors issued with a certificate of authority from Director-General of NSW Department of Primary Industries.	Vehicle approaching land that is the subject of a proclamation, notification, order or undertaking pursuant to the Act and regulations.

4.7. Sentencing options¹⁵⁰

The following information is included to complement our discussion of court outcomes of persons prosecuted as a result of police operations under the Act.

A court can sentence an offender to any of the following types of sentences.

4.7.1.1. *Rising of the court*

The court orders the defendant to 'remain in court until the next adjournment'. This is a symbolic way of saying that an offender is convicted but no formal sentence is imposed. Such an order is reserved for the least serious of offences.

4.7.1.2. *Dismissal and conditional discharge*

The court finds the offender guilty but dismisses the charge without recording a conviction. The court can also impose a condition that the offender is to be of good behaviour (which is made as a good behaviour bond) for up to 2 years.

In determining whether or not to make such an order, the court must take into account:

- the offender's character, previous criminal history, age, health and mental condition
- the nature of the offence, reserving this option for relatively trivial or very minor offences
- the extenuating (mitigating) circumstances in which the offence was committed
- any other matter that the court thinks should be considered.

An offender who breaches the condition to be of good behaviour can be convicted and sentenced for the original offence.

4.7.1.3. *Probation attached to a bond*

When a court decides to attach a condition of probation to a bond, the offender is subject to the supervision and control of the Probation and Parole Service for a specific period of time.

4.7.1.4. *Bond*

The court can also record a conviction and impose a good behaviour bond. A good behaviour bond always contains the condition that the person under the bond must be of good behaviour during the time of the bond. An offender under a bond must appear before the court if called on to do so at any time during the term of the bond for any alleged breach of the bond. An offender who has breached a good behaviour bond may be re-sentenced by the court for the original offence. A good behaviour bond cannot exceed 5 years.

4.7.1.5. *Non-association and place-restriction orders*

For an offence that has a penalty of six months imprisonment or more, a court may, in addition to any other sentence, make a non-association order, a place-restriction order or both in respect of the offender if it is satisfied that it is reasonably necessary to do so to ensure that the offender does not commit any further offences. A non-association order can prohibit the offender from associating with a specified person for a specified term. A place restriction order can prohibit the offender from frequenting or visiting a specified place or district for a specified term. The order can be for a period of up to 12 months.

4.7.1.6. *Deferred sentence*

The court will postpone passing sentence for a period of up to 12 months from the date of conviction to allow the offender to be assessed for rehabilitation, or to demonstrate that rehabilitation has taken place, or for any other purpose.

4.7.1.7. *Fines*

A fine is a monetary penalty and is the most frequently used sentencing option in Australian jurisdictions.

4.7.1.8. *Community service order*

A court can impose a community service order of up to 500 hours.

4.7.1.9. *Periodic detention*

Where a court has decided to sentence an offender for a total sentence of imprisonment of less than 3 years, the court may order that the offender serves the sentence by way of periodic detention. This means that the offender will spend a certain period of time each week or month in prison (such as a weekend), but generally not serve the entirety or majority of the sentence as a block.

4.7.1.10. *Home detention*

Where a total sentence (that is non-parole period and additional term) of 18 months or less is imposed, the offender may apply to serve the sentence by way of home detention. Sentences for murder, attempted murder, manslaughter, sexual assault, armed robbery, firearms offences, assault occasioning actual bodily harm or stalking cannot be served this way.

A sentence of home detention cannot be imposed if the offender has a record for any of the last mentioned offences, or has been convicted of a domestic violence offence or had an AVO made against them in the past 5 years where the victim lives at the intended address.

4.7.1.11. *Suspended sentence*

A judicial officer that imposes a sentence of 2 years or less may make an order suspending the sentence and direct that the offender be released from prison on the condition that he or she enters into a good behaviour bond.

4.7.1.12. *Imprisonment*

A sentence of imprisonment is used as a last resort and is to be imposed only when there is no other sentence appropriate.

4.7.1.13. *Proceeds of crime*

Money or property that offenders have obtained through criminal activities can be recovered from offenders in many cases under proceeds of crime legislation. This confiscation action may occur in addition to other consequences such as a fine or imprisonment.

Endnotes

⁶³ The Standard Operating Procedures for operations under the Act, or 'SOPs' are discussed in more detail at paragraph 5.1 'What are Standard Operating Procedures?'

⁶⁴ NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, Annexure H.

⁶⁵ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.5(2)(d).

⁶⁶ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.5.

⁶⁷ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.5(8).

⁶⁸ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.7(b).

⁶⁹ In this context indictable quantities includes amounts equal to or greater than the defined indictable quantity amount in the *Drug Misuse and Trafficking Act 1985*.

⁷⁰ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.5(6)-(7).

⁷¹ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.5(5).

⁷² *Police Powers (Drug Detection in Border Areas Trial) Act*, s.8.

⁷³ *Search Warrants Act*, ss.11(2) and s.11(3).

⁷⁴ *Search Warrants Act*, ss.12A(2)(a) and 12A(3).

⁷⁵ *Search Warrants Act*, s.12B.

⁷⁶ *Search Warrants Act*, s.12C.

⁷⁷ NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, p.36.

⁷⁸ Exercising a function is defined by section 3 of the Act as including performing a power, authority or duty.

⁷⁹ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.9(1).

⁸⁰ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.9(3).

⁸¹ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.10.

⁸² *Police Powers (Drug Detection in Border Areas Trial) Act*, s.11(2)(e) and (f).

⁸³ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.11(3)(a).

⁸⁴ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.18(2).

⁸⁵ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.16.

⁸⁶ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.21.

⁸⁷ *Search Warrants Act*, s.21.

⁸⁸ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.17(1).

⁸⁹ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.17(2).

⁹⁰ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.22(1). Note that according to s.22(4) the report can include information that relates to the period after the nine month period.

⁹¹ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.22(2).

⁹² *Police Powers (Drug Detection in Border Areas Trial) Act*, s.22(3).

⁹³ Section 36(1) of the *Interpretation Act 1987* provides that time shall be 'reckoned exclusive' of the day that is given in an Act. Therefore, in this case the calculation of the time starts from 16 January 2004. Section 21 of the *Interpretation Act 1987* defines a month to mean a calendar month. Therefore, the first month would be between 16 January to 15 February and the 12th month would end on 15 January 2005, which is a Saturday. Section 36(2) of the *Interpretation Act 1987* provides that when a prescribed day falls on a weekend the thing may be done on the first following business day.

⁹⁴ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.22(5).

⁹⁵ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.23.

⁹⁶ The *Drug Misuse and Trafficking Act* is supplemented by the *Drug Misuse and Trafficking Regulation 2000*.

⁹⁷ Also included in the definition of prohibited plant is any growing plant of the genus *Erythroxylon* or of the species *Papaver Somniferum* or *Papaver orientale*, also known as *Papaver bracteatum*.

⁹⁸ *Drug Misuse and Trafficking Act*, s.9.

⁹⁹ *Drug Misuse and Trafficking Act*, s.10.

- ¹⁰⁰ *Drug Misuse and Trafficking Act*, s.11(1A).
- ¹⁰¹ *Drug Misuse and Trafficking Act*, s.11.
- ¹⁰² *Drug Misuse and Trafficking Act*, s.11A.
- ¹⁰³ *Drug Misuse and Trafficking Act*, ss.12-14.
- ¹⁰⁴ *Drug Misuse and Trafficking Act*, ss. 15&16.
- ¹⁰⁵ *Drug Misuse and Trafficking Act*, s.21.
- ¹⁰⁶ See 'Minor cannabis offences' at paragraph 4.2.5.
- ¹⁰⁷ *Drug Misuse and Trafficking Act*, s.22. However, in certain prescribed circumstances indictable offences may be prosecuted summarily (in the Local Court), unless the prosecution or the accused elects to have the matter prosecuted on indictment (ss. 31 & 32). The advantage of having the matter prosecuted summarily is that the penalties that may be imposed are less severe than those available when the offence is prosecuted on indictment. For example, the largest term of imprisonment available for a summary offence prosecuted in the Local Court is 2 years.
- ¹⁰⁸ *Drug Misuse and Trafficking Act*, s.23(1)(a).
- ¹⁰⁹ *Drug Misuse and Trafficking Act*, s.23(1)(b).
- ¹¹⁰ *Drug Misuse and Trafficking Act*, s.23(1)(c).
- ¹¹¹ *Drug Misuse and Trafficking Act*, s.24.
- ¹¹² *Drug Misuse and Trafficking Act*, s.24A.
- ¹¹³ *Drug Misuse and Trafficking Act*, s.25.
- ¹¹⁴ A 'small' quantity is any amount less than or equal to the prescribed 'small' amount, a 'traffickable' quantity is any amount less than or equal to the prescribed 'traffickable' but greater than a small quantity and so on, with each quantity only amenable to one classification. Some prohibited drugs in Schedule 1 also have the classification Discrete Dosage Unit (DDU), which is defined as being the amount of a prohibited drug that is prepared or apparently prepared for the purpose of being administered as a single dose.
- ¹¹⁵ *Drug Misuse and Trafficking Act*, s.32.
- ¹¹⁶ *Drug Misuse and Trafficking Act*, s.33.
- ¹¹⁷ *Drug Misuse and Trafficking Act*, s.32.
- ¹¹⁸ *Drug Misuse and Trafficking Act*, s.29.
- ¹¹⁹ *Drugs, Poisons and Controlled Substances Act*, s.73(1). As at 1 July 2004, 1 penalty unit = \$102.25.
- ¹²⁰ See 'Minor cannabis offences' at paragraph 4.2.5.
- ¹²¹ *Drugs, Poisons and Controlled Substances Act 1981* (Vic), s.71AC.
- ¹²² The SA Act is supplemented by *Controlled Substances Act (Exemptions) Regulation 1989*; *Controlled Substances (Prohibited Substances) Regulation 2000*; and *Controlled Substances (Expiation of Simple Cannabis Offences) Regulation 2002*.
- ¹²³ *Controlled Substances Act 1984* (SA), s.32(3); & *Controlled Substances (Prohibited Substances) Regulation 2000* (SA), Schedule 2.
- ¹²⁴ See 'Minor Cannabis Offences' at paragraph 4.2.5.
- ¹²⁵ *Controlled Substances Act* (SA), s.32(3).
- ¹²⁶ A 'small amount of cannabis' in NSW is up to 15 grams, in Victoria is up to 50 grams and in South Australia is up to 100 grams.
- ¹²⁷ A juvenile caution may be issued to a young person: see *Young Offenders Act 1997*, ss.(8) and (16); and *Young Offenders Regulation 2004*, cl. 16.
- ¹²⁸ See, for instance, debate on Controlled Substances (Cannabis) Amendment Bill in House of Assembly (SA) on 28 November 2002, Hansard, pp. 2069-80.
- ¹²⁹ *Controlled Substances (Expiation of Simple Cannabis Offences) Regulation 2002* (SA), cl. 6.
- ¹³⁰ (2001) 126 A Crim R 562; [2001] NSWCCA 540.
- ¹³¹ *Ibid* at para [53].
- ¹³² *Search Warrants Act*, s.5. A 'narcotics offence' includes an offence under the *Drug Misuse and Trafficking Act 1985*.
- ¹³³ *Search Warrants Act*, s.3.
- ¹³⁴ Part V deals with offences related to 'drugs of dependence', including possession, cultivation, manufacture, supply and trafficking.
- ¹³⁵ The Hon. P. Batchelor, Minister for Transport, Second Reading Speech, Road Safety (Drug Driving) Bill, Legislative Assembly (Vic), Hansard, 30 October 2003, p.1418.
- ¹³⁶ Advice obtained from Victoria's Road Safety Strategy website: http://www.arrivealive.vic.gov.au/c_drugs_test.html.
- ¹³⁷ *Ibid*
- ¹³⁸ This discussion draws directly from material contained in our discussion paper on the use of drug detection dogs: NSW Ombudsman, *Discussion Paper: Review of the Police Powers (Drug Detection Dogs) Act*, Sydney, June 2004.
- ¹³⁹ *Police Powers (Drug Detection Dogs) Act*, s.4(1).
- ¹⁴⁰ *Police Powers (Drug Detection Dogs) Act*, s.4(2).
- ¹⁴¹ *Police Powers (Drug Detection Dogs) Act*, s.5. The same definition is contained in s.3(1) of the *Police Powers (Drug Detection in Border Areas Trial) Act 2003*.
- ¹⁴² Premises is defined in s.3 of the *Police Powers (Drug Detection Dogs) Act* and includes 'any building, structure, vehicle, vessel or aircraft and any public place whether built on or not'.
- ¹⁴³ Section 7(2) of the *Police Powers (Drug Detection Dogs) Act* defines 'Public passenger vehicle' as a train, light rail vehicle or bus that is used to provide a public passenger service.
- ¹⁴⁴ *Police Powers (Drug Detection Dogs) Act*, s.7.
- ¹⁴⁵ *Police Powers (Drug Detection Dogs) Act*, s.8(2).
- ¹⁴⁶ Part 3 of the *Police Powers (Drug Detection Dogs) Regulation 2002*.
- ¹⁴⁷ *Police Powers (Drug Detection Dogs) Act*, s.3.
- ¹⁴⁸ *Police Powers (Drug Detection Dogs) Act*, s.9.
- ¹⁴⁹ *Police Powers (Drug Detection Dogs) Act*, s.10.
- ¹⁵⁰ This section is drawn from material contained in the 'Sentencing Information Package', jointly produced by Victims of Crime Bureau and Criminal Law Review Division. Accessed at http://www.agd.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_sentencing_info.

part 2: contents

Chapter 5: Conducting an Operation and Results	41
5.1. What are Standard Operating Procedures?	41
5.2. What are operational orders?	41
5.3. Training	42
5.4. Obtaining a warrant.....	42
5.5. How did the operation work in practice?	45
Chapter 6: Case Study (Deniliquin)	48
6.1. Township of Hay.....	51
6.2. Supporting information	51
6.3. Physical description of the location	52
6.4. General description of the operation	52
6.5. Costs	53
6.6. Results	54
6.7. Ombudsman's observations	56
Chapter 7: Case Study 2 (Wagga Wagga)	59
7.1. Township of Tarcutta	59
7.2. Supporting information	59
7.3. Physical description of the location	61
7.4. General description of the operation	62
7.5. Costs	64
7.6. Results	64
7.7. Ombudsman's observations	67
Chapter 8: Case Study Three (Barrier, Deniliquin and Wagga Wagga)	71
8.1. Barrier LAC.....	71
8.2. Deniliquin LAC	75
8.3. Wagga Wagga LAC	78
8.4. Costs	85
8.5. Results	85
Chapter 9: Case Study Four (Griffith)	93
9.1. City of Griffith.....	93
9.2. Supporting Information	93
9.3. Physical description of the locations	94
9.4. General description of the operation	95
9.5. Costs	95
9.6. Results	99
Chapter 10: Case Study Five (Albury)	97
10.1. Township of Holbrook	97
10.2. Supporting information	97
10.3. Physical description of the location	98
10.4. General description of the operation	98
10.5. Costs	99
10.6. Results	100
10.7. Ombudsman's observations	100

Chapter 11: Comparative Case Studies	103
11.1. NSW/Qld border operation	103
11.2. Random Breath Testing operations	105
11.3. Fruit Fly inspection operations	106

chapter 5: conducting an operation and results

This chapter describes how operations under the Act were generally conducted. All operations came under a broad name for all operations: Operation Carting

As outlined in Chapter 4 'Legislative survey', the Act requires a number of steps to be taken before an operation can proceed. For this task, and for most tasks related to conducting an operation, police are considerably guided by the Standard Operating Procedures for the Act.

5.1. What are Standard Operating Procedures?

As the name implies, Standard Operating Procedures, or SOPs, are guidelines as to how police conduct certain operations. SOPs are not a legal requirement, nor are they legally binding. As such they are not developed for all operations that police undertake. However, SOPs have been developed for a range of policing issues, including Bushfire Investigations, Domestic Violence, Accident and Emergencies, Legal Services and Victim Support.

SOPs are 'living documents', and may be changed as the need arises. SOPs are highly confidential, and may not be available to all police officers.

The SOPs for the conduct of operations under the Act were developed by the Steering Committee and Working Group members, together with representatives from NSW Police Legal Services, the Drug Squad and police from the Southern Region. The SOPs are maintained by the NSW Police Project Management Unit.

The SOPs for the Act were released on 16 December 2003, and as at the date of writing, have been revised six times.¹⁵¹ These SOPs are highly detailed and comprehensive.

The SOPs advise NSW Police involved in operations under the Act that:

*Your ultimate aim in using the legislation is to reduce the movement by vehicles of indictable quantities of prohibited drugs across our State's borders with South Australia and Victoria through high visibility police intervention.*¹⁵² [original emphasis]

5.2. What are operational orders?

As required by the SOPs, operational orders are drafted for each operation. Operational orders document how each particular operation will be conducted. Therefore, their structure and content may vary from operation to operation, however they do have some common traits.

Typically, operational orders include information from a section in the SOPs entitled 'Conducting an operation'. This section of the SOPs provides highly specific information about how to execute the warrant, including the following mission statement:

*Detection of vehicles/persons involved in the road transportation of indictable quantities of prohibited drugs and prohibited plants through the designated 'search area'.*¹⁵³

The SOPs also specify two objectives:

To detect the road transportation across the NSW/Victorian and NSW/South Australian State borders of indictable quantities of prohibited drugs and prohibited plants; [and to]

*Provide highly visible presence on roadways within the designated 'border area'.*¹⁵⁴

In addition to the information contained in the SOPs about how the operation will be conducted, operational orders include information about when and where the operation is going to take place; and information about known drug activity in border areas, including the modus operandi of some drug traffickers, such as the types of vehicles commonly used to transport drugs and where drugs are commonly concealed.

Operational orders also include a list of police officers who are taking part in the operation, and the role each officer will be fulfilling. Any relevant traffic management plans are usually included.

5.3. Training

For training purposes, NSW Police developed a comprehensive PowerPoint presentation to be delivered to officers participating in a border operation. This package was developed by several Education Development Officers (EDOs) from LACs in the Southern Region, together with a crime manager from a LAC in the Southern Region.¹⁵⁵ The bulk of the material was contained in the SOPs.

The stated objectives of the presentation were to:

- educate police in the procedures involved in Operation Carting
- educate police about the legislation, and how it effects the roles and responsibilities of police
- increase awareness of offences under the Act.

The SOPs require this package to be delivered by the local EDO to police prior to each operation. This package was delivered to most, if not all, officers who participated in an operation under the Act. NP We had the opportunity to observe a training session in January 2004, prior to any of the operations taking place.

We also had the opportunity to observe a training session in April 2004. The PowerPoint presentation is comprehensive and when followed it is adequate for preparing officers for an operation under the Act.

5.4. Obtaining a warrant

As discussed in the legislative survey chapter, the Act outlines several steps which must be taken before a warrant can be granted. The SOPs assist police in fulfilling these requirements by providing detailed instructions on preparing a warrant.

5.4.1. Authorisation to apply for a warrant

As detailed at paragraph 4.1.2 'Drug detection warrants', the Act requires the applicant to first get authority from the Commissioner or Deputy Commissioner of NSW Police to apply to the Supreme Court for a warrant. The Act details what type of information should be in this internal application. The SOPs provide a pro forma and detailed instructions to assist applicants to comply with the legislation in this regard.¹⁵⁶

5.4.1.1. Search area

In preparation for the authorisation, police must cite an area in which to conduct the operation.

5.4.1.2. Establishing grounds for the warrant

Police must then establish the grounds upon which they will be relying to apply for a warrant to the Supreme Court. This usually consists of a short description of the information relied upon, with the source documentation attached to the warrant in full.

The SOPs provide some advice as to what kind of information will help a warrant application to be successful. For example, the SOPs advise that:

A 'one-off' use of the area for [drug supply] will not normally suffice to ground a successful application... You are NOT able to include evidence of minor drug seizures of drugs possessed for personal use in support of an application for a warrant.¹⁵⁷

The SOPs advise that the following type of information can be used to support a warrant:

- generic intelligence about patterns of drug supply activity
- information from recorded conversations or phone taps
- incidents resulting in drug seizures, where it can be shown that drugs were taken through the area by a vehicle
- information from interstate police about large amounts of cash being taken through the area for the purposes of purchasing drugs
- previous arrests
- information from witnesses and informers.

Attached to the SOPs is a spreadsheet containing a number of incidents that occurred between 1997 and 2001 that could be used in support of a warrant.¹⁵⁸ The spreadsheet contains information such as the event reference number, the date on which the incident occurred, where it occurred, which LAC brought the charges, the type and amount of drugs found, the street value of drugs found and the type of vehicle that the drugs were found in.

It appears that police relied heavily on this spreadsheet, as a number of incidents used to support warrant applications were also on the spreadsheet. When we reviewed warrant applications under the Act it was apparent that police did rely heavily on this spreadsheet.

5.4.1.3. Operation plan

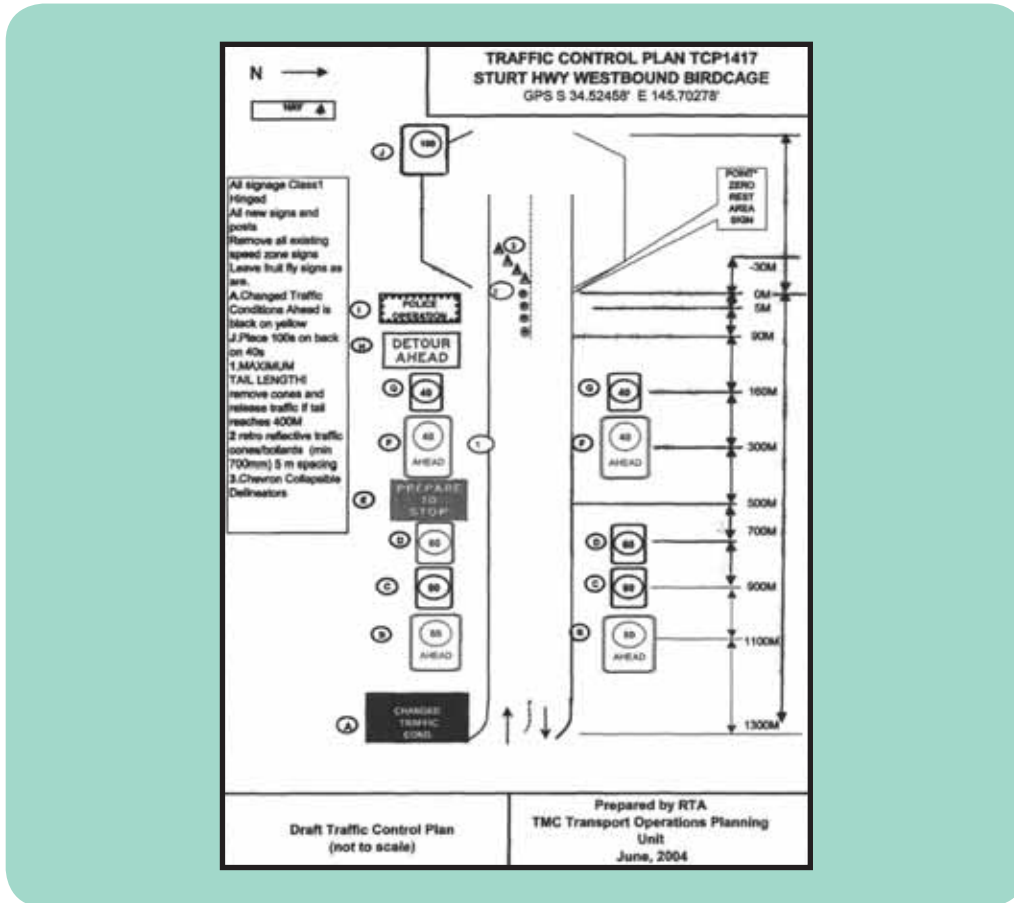
The Act requires that an operational plan is attached to the application for a warrant. We found the operational orders were always attached to the warrant for this purpose.

5.4.1.4. RTA consultation

Guided by the SOPs, we found the applicant always attached a formal police statement which described how the RTA came to approve the site as suitable for conducting an operation.

This usually involved consultation between the Crime Manager or site controller with senior representatives from the RTA. It was found that the RTA also always submitted to NSW Police a traffic control plan which provided traffic calming advice. These plans advised police where to post signs letting people know that a police operation was taking place, and also where to post signs which staged a gradual decrease in speed. They also provided advice about where to place bollards or witches hats to guide traffic into the site. These steps were taken to increase the safety of the operation for police and members of the public. These traffic plans were always found to be attached to the warrant.

Figure 2. Example of traffic plan submitted by the RTA



Source: NSW Police Information Package 4.

5.4.2. Warrant

As described at paragraph 4.1.2 'Drug detection warrants', the Act requires certain details to be in the warrant application, including a statement identifying the search area for the proposed warrant, the grounds on which the warrant is sought and a plan of the operation.¹⁵⁹ In these respects, the warrant application was usually similar, if not identical, to the application made to the Commissioner or Deputy Commissioner.

As required, it was found that the warrant application also always included the authorisation from the Commissioner or Deputy Commissioner, the proposed expiry date of the warrant, and any information about whether an operation had previously been conducted... under the Act.

Usually, the applicant would draft an affidavit including all of the above information. The SOPs provide applicants with comprehensive advice about how to draft this affidavit, such as:

The affidavit is effectively a detailed fact sheet. In other words, it must contain the facts that you rely on to obtain the warrant.

...

You are not writing a best-seller. The affidavit is a factual document. Where possible, avoid flowery language and stick to the facts.

...

The affidavit in support of an application for a drug detection warrant should show a picture of how Drug Traffickers [sic] operate...¹⁶⁰

Once the applicant had affirmed or sworn the affidavit, it was forwarded to legal services, who would make the application to an eligible judge on the applicant's behalf. A list of eligible judges was attached to the SOPs.

5.5. How did the operation work in practice?

At the same time that the warrant was being prepared, senior police involved in the operation were making preparations for the execution of the warrant – such as organising rosters and arranging equipment.

Again, the SOPs provided considerable guidance in this regard. The SOPs advised when certain tasks should be completed. The SOPs also established the way that the operation would work in practice.

Although there was some variety as to how each operation was conducted, a general description of the process is described below. For more detail on each operation conducted, please refer to the case studies in chapters 6-10.

5.5.1. Assigning roles

The roles of operation commander and site controller are established fairly early in the process, as they are required to participate in the preparation of the warrant. The operation commander has overall responsibility for the operation, and, according to the SOPs, is a role best filled by the Crime Manager of the LAC. The site controller is the field commander, and has operational responsibility for control of the site. This role was usually filled by the leader of the Target Action Group.

The SOPs provided for a range of other roles which needed to be assigned in order for the operation to run smoothly. The SOPs advised that officers participating in the operation should be chosen from Target Action Groups and Highway Patrol, or be investigative officers.

- *Independent Officer.* According to the SOPs, the independent officer must be of the rank of Inspector or above. The SOPs state that the role is 'vital in ensuring impartiality and scrutiny', and is to take no part in the operation 'other than to ensure the propriety and legality of the search'.¹⁶¹
- *Penciller/scribe.* These officers are responsible for keeping records of vehicles stopped, and for issuing section 12 notices.¹⁶²
- *Traffic controllers.* These officers are responsible for controlling traffic coming in and out of the site. According to the SOPs these officers are to be in constant contact with the site controller.
- *Searchers.* These officers are advised to wear protective gloves and to keep records of searches conducted. A form for this purpose is attached to the SOPs.
- *Exhibit officer.* This officer is responsible for recording and keeping safe any exhibits seized during the operation.
- *Video operator.* This officer records each search on video.
- *Investigators.* These officers oversight searches conducted, and are also the case officer should any exhibits be seized.

5.5.2. Setting up a check point

The site, or sites, that the operation took place at were chosen early, as police were required to consult with the RTA about each site before applying to the Supreme Court for a warrant.

Once the RTA approved a site, it always submitted a traffic plan to NSW Police. While the traffic calming strategies in these plans were usually adhered to by NSW Police, these plans were not always followed to the letter. For example, for one operation, the RTA's traffic plan assumed that every vehicle coming through the site would be stopped, however, when the operation was conducted this proved impractical due to the high volume of traffic coming through the site. Stopping every vehicle would have held up traffic significantly, so the traffic plan was modified to reflect that not every vehicle would be stopped. The change did not adversely impact upon the safety of the operation.

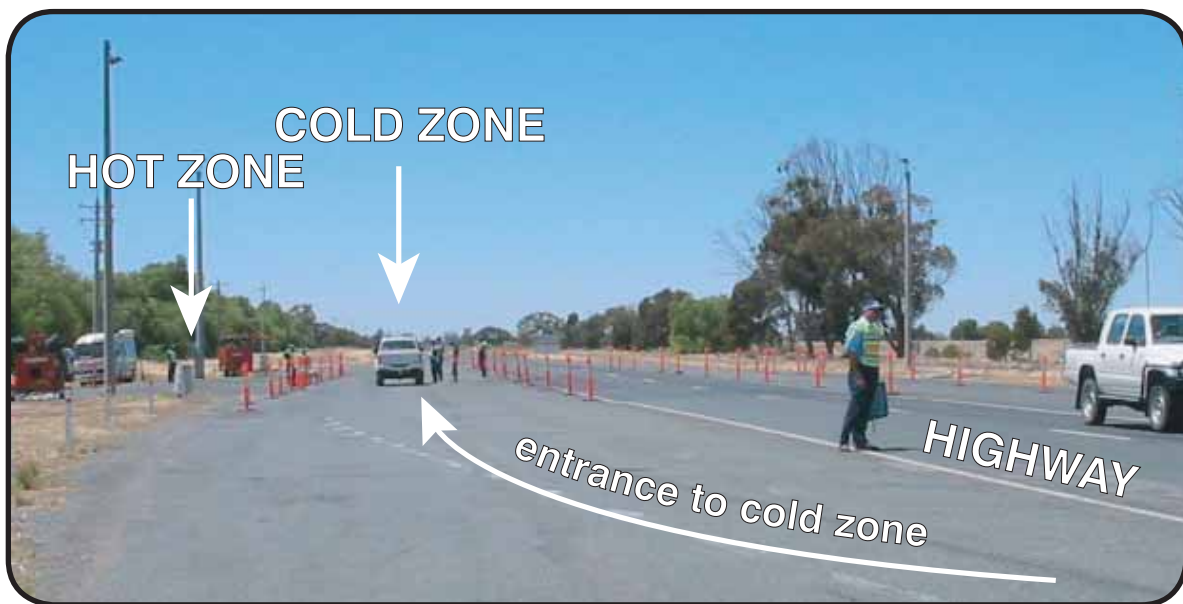
Figure 3. Example of signage



Source: Photograph taken by Ombudsman observers

Something that was not covered by the traffic plan was how to deal with traffic once a vehicle had been pulled over into the site. Each site was divided into 'cold' and 'hot' zones. The cold zone was where a vehicle was first stopped and the police dog lead around the vehicle. The hot zone was where a vehicle was directed if the dog had made an indication that drugs may be in the vehicle, and where the vehicle was searched. Below is a photograph of one example of the cold and hot zones set up. As each site was different in width and length, the set up varied from site to site.

Figure 4. Example of cold and hot zones



Source: Photograph taken by Ombudsman observers

In one of the recent revisions of the SOPs, an instruction was inserted for police to put up a hessian screen or something similar to separate the hot and cold zone, in order to protect the privacy of the persons whose vehicles were being searched.¹⁶³

5.5.3. Briefing

Before the operation, the SOPs advised that a briefing should be held by the site controller with all officers participating in the operation.

The SOPs also detailed the kind of information that should be included in the briefing, such as an outline of police powers, designated roles, requirements under the Act, communication systems and exhibit handling.

5.5.4. Stopping a vehicle in the cold zone

Usually, at least two scribes were assigned to work in the cold zone. Once a driver was directed into the site by an officer standing at the entrance to the cold zone, a scribe would indicate where the car had to stop. A scribe would then approach the driver, greet them, and ask for the engine to be switched off. If the driver was in a vehicle which had a cabin elevated significantly off the ground (such as a heavy vehicle) they would usually be asked to step down from the cabin.

The scribe would then read a script. The latest version of the SOPs as at the time of writing include the following script for police to read:

Good Afternoon/Evening Sir/Madam. Could you please switch off your vehicle?

*My name is Sergeant/Constable *** attached to [police station].*

You have been stopped as a result of the execution of a drug detection warrant issued under the Police Powers (Drug Detection in Border Area Trial) Act 2003. A Drug Detection Dog will be used to assist in the detection of prohibited drugs or prohibited plants that may be located within your vehicle. The dog will be walked around your vehicle when carrying out this function.

I must warn you that failure or refusal to comply with this request, may be an offence and I seek your co-operation in carrying out this function. A written notice containing particulars will be provided to you as a result of carrying out these functions.¹⁶⁴

Most scribes would then paraphrase the above speech into plain English. Many scribes stood for hours repeating this script every few minutes to drivers stopped at the checkpoint.

5.5.5. Dog screening

The scribe would then indicate to the dog handler that it was time to go around the car with the drug detection dog. Generally, the handler would then lead the drug detection dog by a leash around the car, saying 'seek, seek' and occasionally dragging their free hand along the places on the car that the handler wanted the dog to smell, such as the door frames or tyres.

Police regard the task that a drug detection dog does as screening, as opposed to searching. The dog 'screens' the area that they are directed to screen, and indicates whether or not the scent of a drug is present in the air. Police will conduct a search of the person, place or object when the dog indicates the scent of a prohibited drug.

5.5.6. Section 12 notice

As outlined in Chapter 4 'Legislative survey', section 12 of the Act requires police to issue a notice to persons affected by the Act. The SOPs include a notice that can be used for this purpose.

At some point, usually after the dog had circled the car, the scribe would issue the driver with a section 12 notice, as shown in the figure below, with the relevant details filled out. The remaining scribe would also record the number plate and the time the car was stopped.

Figure 5. Example of section 12 notice

NSW POLICE
Police Powers (Drug Detection in Border Areas Trial) Act 2003

**NOTICE TO PERSON SUBJECT TO THE EXERCISE OF A FUNCTION
UNDER A DRUG DETECTION WARRANT**

You have been / will be subject to the exercise of a function under a drug detection warrant. Pursuant to section 12 of the *Police Powers (Drug Detection in Border Areas Trial) Act 2003*, you are hereby given notice of the following particulars:

NAME OF OFFICER EXECISING FUNCTION:.....

PLACE OF DUTY:.....

TIME/DATE WHEN FUNCTION EXERCISED:.....

PLACE WHERE FUNCTION EXERCISED:.....

Source: NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, Annexure 1.

5.5.7. Searching a vehicle

If the dog indicated that the scent of a drug was present, the dog handler would inform the scribe by either gesturing to them or telling the scribe where the indication was made. The scribe would then inform the Site Commander that an indication had been made. The Site Commander would read the following script to the driver:

Good Afternoon/Evening Sir/Madam

The Drug Detection Dog has indicated that there may be present in your vehicle a prohibited drug or prohibited plant.

I will shortly direct you to move your vehicle to the search area (state and describe location) where a more thorough search will be conducted in accordance with Section 37 (4) of the Drug Misuse and Trafficking Act.

I want you to understand that failure or refusal to comply with this request, may be an offence and I seek your co-operation in carrying out this function.

*A written notice containing particulars will be provided to you as a result of carrying out these functions.*¹⁶⁵

The Site Commander would usually then paraphrase the above speech into plain English, and direct the person to the hot zone. At some stage, the Site Commander would also issue them with another notice, identical in form to the one they received from the scribe, with the relevant details filled out.

In the hot zone, the driver would be approached by an investigator, who would, while the driver was either in or out of the car, read the driver another script, as follows:

Good Afternoon/Evening Sir/Madam

As you have been informed, police will now conduct a search of your vehicle.

I must warn you that failure or refusal to comply with this request, in the exercise of this function may be an offence and I seek your co-operation in carrying out this function.

*Prior to commencing this search I intend to ask you a number of questions. I want you to understand that you do not have to say or do anything as anything you do say or do may be used as evidence. Do you understand this?*¹⁶⁶

When the investigator began reading the script, the video recording officer would begin taping the situation. Often, the investigator would also ask the driver for permission to video tape. The issue of video taping searches is discussed in more detail at paragraph 12.11 'Video taping practices'.

The investigator would usually then ask whether the driver had anything to declare, or if they knew of any reason why the dog had indicated the car (or something to that effect). If there were passengers in the car, they would usually be separated from the driver and spoken to by another investigator.

The nature of the conversation between the investigator and driver, and/or passengers, would usually inform the way the search was conducted. That is, the investigator might deduce from the person's words and behaviour that drugs were secreted in a particular place in the vehicle, which would lead police to focus on one area of the vehicle.

In any event, at an appropriate time, the investigator would direct the search team to search the car, and might give them some idea of where to begin looking, often guided by the location of the drug dog indication.

The driver and/or passengers would usually be invited to observe the search. During the search, the investigators would usually chat with the driver and/or passengers.

Depending on the circumstances, the driver and/or passengers were searched as well. The issue of the privacy of such searches is discussed in more detail at paragraph 12.7 'Privacy'. Generally, people were not searched in a private area, except when they were searched behind a vehicle, however, police began taking steps to remedy this toward the end of the review period.

In the case of heavy vehicle drivers, because they were asked to step down from their cabins in the cold area they were sometimes indicated by the drug detection dog. In situations such as these, the driver was always searched. The issue of asking drivers to step down from their cabins is discussed in more detail at paragraph 12.8.

5.5.8. Debrief

The SOPs also provide that police must conduct a debrief at the end of the operation. The SOPs give a format for the debrief to follow and suggest a number of issues that a debrief could cover. The SOPs advise that the debrief 'must not become a back slapping exercise nor should it become a 'witch hunt''.¹⁶⁷

Endnotes

¹⁵¹ As at 25 November 2004

¹⁵² NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, p.13.

¹⁵³ Ibid, p.35.

¹⁵⁴ Ibid, p.35.

¹⁵⁵ NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - PowerPoint Training Package, slide 30.

¹⁵⁶ NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, Annexure C.

¹⁵⁷ Ibid, p.16.

¹⁵⁸ Ibid, Annexure A.

¹⁵⁹ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.6.

¹⁶⁰ NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, pp.31-32.

¹⁶¹ Ibid, p.36.

¹⁶² Notices are required to be issued under s.12 of the Act. This requirement is discussed in more detail at paragraphs 5.5.6 and 12.5.2.

¹⁶³ NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, p.37.

¹⁶⁴ Ibid, Annexure P.

¹⁶⁵ Ibid, Annexure P.

¹⁶⁶ Ibid, Annexure P.

¹⁶⁷ Ibid, p.52.

chapter 6: case study one (Deniliquin)

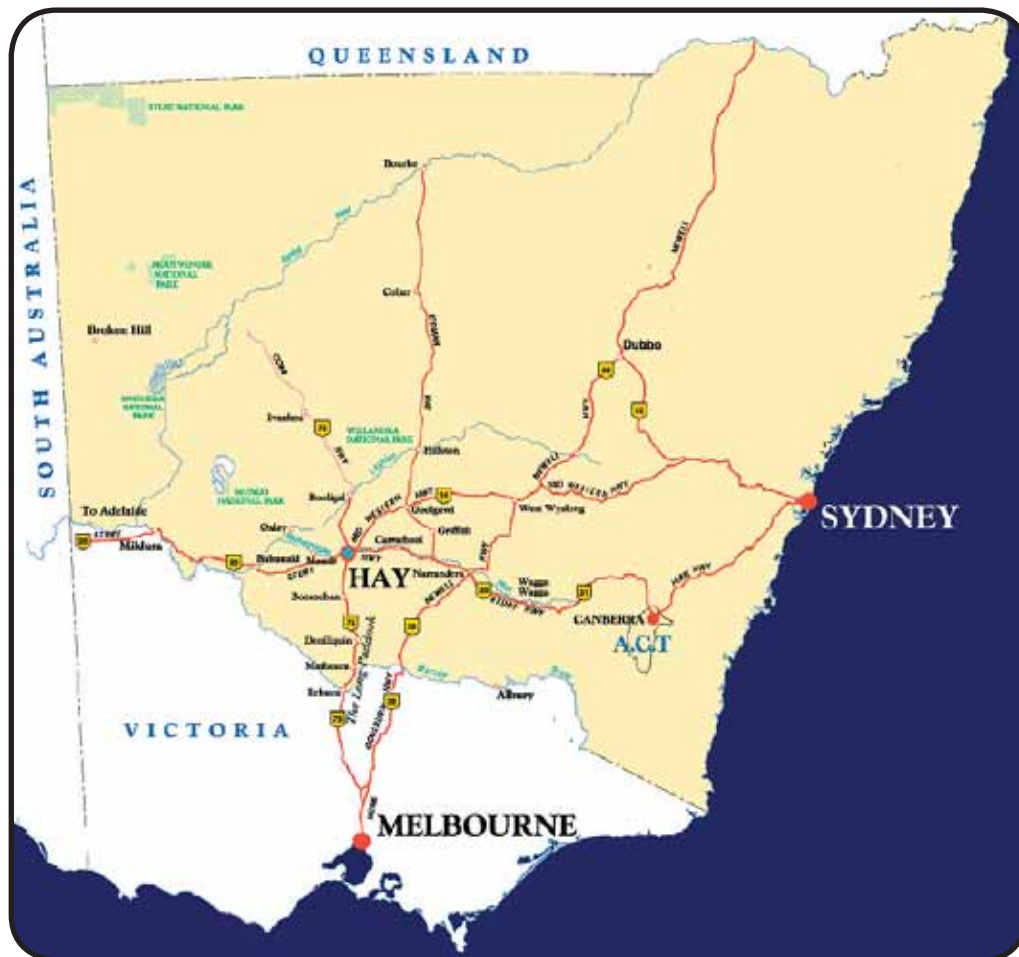
Deniliquin was the first operation under the Act, and was conducted between 1-3 February 2004. As a consequence, reporters were given permission to attend the site. The operation received coverage in a number of local newspapers¹⁶⁸ and by some main stream media outlets.

The operation occurred in Hay, which is in the Deniliquin Local Area Command (LAC). The officers involved were from Deniliquin LAC and two neighbouring LACs, Wagga Wagga and Griffith LAC.

6.1. Township of Hay

Hay is about mid-way between Sydney, Adelaide and Melbourne. To be exact, it is 735 kilometres or eight hours from Sydney and 685 kilometres or six and a half hours from Adelaide; and it is about 400 kilometres, or five hours, from Melbourne.¹⁶⁹ The Sturt, Mid-Western and Cobb Highways intersect at Hay, therefore a lot of traffic between Adelaide and Sydney travels through Hay.

Figure 6. Map showing position of Hay in relation to Sydney and Melbourne



Source: From Hay Tourism & Development website (<http://www.visithay.com.au/regionalmap.htm>)

6.2. Supporting information

The information relied upon to support the drug detection warrant application included 36 occasions where a substantial quantity of drugs had been found by police in vehicles searched in or around Hay.¹⁷⁰

The 36 instances occurred between 1997 and 2001, with the majority occurring between 2000-2001. None of the cases cited occurred in the latter part of 2001, which was when legal uncertainty around vehicle searches arose.

Cannabis was the drug that was found most often. Cannabis was located in over 80% (31 of 36) of vehicle searches. The average amount of cannabis seized was 4.8 kilograms, and the median¹⁷¹ amount was 4.1 kilograms. An amount between 1 kilogram and 25 kilograms is an indictable quantity under the *Drug Misuse and Trafficking Act*.

Amphetamine was the second most common drug found by police. Amphetamine was located in 28% (10 of 36) of vehicle searches. The average amount of amphetamine seized was 27 grams, and the median was 14 grams. An amount between 5 grams and 250 grams is an indictable quantity under the *Drug Misuse and Trafficking Act*.

The drugs found in these instances were secreted in a variety of places in the vehicle. Of the 36 instances, only one involved a heavy vehicle.

6.3. Physical description of the location

6.3.1. Location of operation

The operation took place on the Sturt Highway, about 3 kilometres or 5 minutes drive from the centre of Hay. This location was chosen because it was designed to be a Heavy Vehicle Inspection Bay for the RTA¹⁷² and was therefore already large enough to hold a number of vehicles without disrupting the flow of traffic on the Sturt Highway. It was also regarded as being a safe space for officers to work in. It was approximately 150 metres from entry to exit, and about 30 metres in width.¹⁷³

6.3.2. Weather conditions

The weather conditions were harsh, with the maximum temperature for each day about 28 degrees.¹⁷⁴ The hot weather was exacerbated by clear skies, heat from the asphalt and a persistent warm wind.

6.3.3. Amenities

There was no on-site toilet and there were no coffee and tea facilities. However, there was a rest stop about five minutes drive from the site which provided these facilities. There was also a small bus on site, which doubled as an office area for paper work. Water was provided to police from this bus.

While the bus could seat four or five officers, there was no designated rest area large enough to accommodate all officers at the site. During 'down time' police would sit in their cars or on the open boots of their cars. This lack of shade or shelter aggravated already harsh weather conditions.

6.4. General description of the operation

6.4.1. Times and numbers of police

The operation took place over three days. Police would usually begin setting up at about 2pm. The operation stopped at about 10pm on the first day, about midnight on the second day, and about 6pm on the last day. As stated above, according to the operational orders, a total of 40 police and four drug detection dogs would work each shift of the operation, with 20 officers and two drug detection dogs on each side of the road.

6.4.2. Police briefing

On the first day there was a road-side briefing before the operation began. Several people addressed the briefing, including the operational commander, a local police prosecutor, the Assistant Commissioner, the LAC Commander, and a site controller. The briefing included information about the parameters of the legislation; search powers; charge and arrest procedures; the different responsibilities of officers; and advice about how to keep motivation levels up.

As well as this general briefing, the officers for each site were briefed by their site controller. The site briefing was more detailed, and covered specific procedures, such as how to conduct video taping. The drug detection dog handler also addressed this smaller briefing and generally described the dog's capabilities. For the next two days, these site briefings occurred as needed, for example, after meal breaks, or at the beginning of a new shift.

On the second day, there was another general briefing for all officers involved, which was addressed by the operational commander, the independent officer, the same local police prosecutor who addressed the previous general briefing, and the Assistant Commissioner. This briefing addressed issues arising from the previous day, such as ways to deal with the weather conditions and how to resolve operational 'kinks'.

There was no general briefing on the third day.

6.4.3. A typical scenario

The scribe would typically make pleasant conversation with the driver while the dog screened the car. If there was no indication from the dog that the scent of a drug was present, the handler would give the scribe the 'all clear' and the scribe would tell the driver they were free to go.

6.4.4. A typical search

As this was the first operation under the Act, the method and manner of searching was not systematic. In fact, the manner of searching varied between each site, and from day to day. An example of a search is described at paragraph 6.7.1 below.

6.4.5. Debrief

There was no formal debriefing for the officers at this operation. There was a 'hot debrief' at the site, which was essentially an opportunity for feedback. During this 'hot debrief' the Assistant Commissioner identified some potential areas for improvement. He also praised the professionalism of police. A 'cold debrief' was held later with team leaders to obtain feedback from managing police officers.¹⁷⁵

6.5. Costs

NSW Police provided the following information about the costs of this operation:¹⁷⁶

Cost type	Deniliquin
Base wages	\$32,038
Operational preparations	\$3,620
Post operational reporting	\$0
Travelling allowance	\$4,082
Overtime	\$0
Shift allowances	\$2,337
Meals	\$0
Vehicle related expenses	\$2,007
Equipment hire	\$0
Total	\$44,084
Total excluding base wages	\$12,046

6.6. Results

6.6.1. Summary of results

No indictable quantities of drugs were seized during this operation. However a number of people were charged or given cannabis cautions for smaller amounts of prohibited drugs. The following information about the results from this case study were obtained from police records.

Table 3. Results summary

Total number of vehicles stopped	646
Vehicles searched	65
Percentage of vehicles stopped that were searched	10.06%
People searched	46
Total weight of cannabis found (grams)	86.1
Total weight of amphetamine found (grams)	7
Number of indictable quantities of any drug found	0
Cannabis cautions issued	5
Number of persons charged	7

Source: NSW Police Information Package 1

6.6.2. Charges

The details and results of each charge are outlined below. Most charges were proved, and most people received a fine. Two of the charges were withdrawn or dismissed.

Table 4. Charges resulting from case study one

Charge ref	Offender profile	Brief facts	Charges	Proved/ Not proved	Sentence/ Result
1	Female, 26, prior charges	A bong and two metal cones were found in the car, and the driver admitted to owning them, and that she intended to use them in the future.	Possession of equipment for administering prohibited drug	Proved	\$500 fine + \$61 court costs
2	Male, 25, no prior charges	A plastic bong, glass bowl, scissors and some cannabis (not noted how much) were found in the car. The driver admitted to owning and using it.	Possess prohibited drug	Proved	\$400 fine + \$61 court costs
			Possession of equipment for administering prohibited drug	Proved	\$250 fine
3	Male, 51, prior charges	50 grams of cannabis found concealed in a bar under the car. Two lots of amphetamine found in the driver's wallet (unspecified weight). One wooden baseball bat found in the car. It is not clear how it was established that the car was stolen, nor why the charge was not proved.	Have custody of an offensive implement in a public place	Proved	\$100 fine
			Possess prohibited drug x 3	Proved	Two year bond
			Goods in personal custody suspected being stolen (motor vehicle)	Not proved	Dismissed

Event ref	Offender profile	Date of offence	Brief facts	Proved/ Not proved	Sentence/ Result
4	Male, 36, no prior charges	A tin of cannabis was found in the floor of the front passenger side (5 grams). The driver said it was for personal use. A brass pipe was also found in the vehicle, which the driver said he used to smoke cannabis.	Possess prohibited drug	Proved	\$500 fine + \$61 court costs
			Possession of equipment for administering prohibited drug	Proved	\$500 fine + \$61 court costs
5	Male, 36, no prior charges	In the hot zone, the driver admitted he had speed in his possession, which when weighed was 4.6 grams (deemed supply). Police also found a metal spoon in the vehicle which the driver said he used to administer speed. Not clear why the supply charge was withdrawn.	Possess prohibited drug	Proved	Three year bond
			Possession of equipment for administering prohibited drug	Proved	\$100 fine
			Supply prohibited drug	Not proved	Withdrawn
6	Male, 49, prior charges	No drugs found but a pole with a rope attached was found. The driver said he kept it in case he was attacked.	Have custody of an offensive implement in a public place	Proved	\$50 fine + \$61 court costs
7	Male, 39, no prior charges	Driver admitted to having a pipe and cannabis (not noted how much) in his bag, and his intention to use them in the future.	Possess prohibited drug	Proved	\$500 fine + \$61 court costs
			Possession of equipment for administering prohibited drug	Proved	\$500 fine + \$61 court costs

6.6.3. Cannabis cautions

As discussed at paragraph 4.2.5.1, the Cannabis Cautioning Scheme allows police to issue a caution notice instead of a charge when a person is found with a small amount of cannabis. Typically, after a small amount of cannabis was found, police conducted a check of the person's criminal history to determine whether or not the person was eligible to receive a caution.

Below is a short description of all cannabis cautions issued during the operation.

Table 5. Cannabis cautions resulting from case study one

Event ref	Female, 32 Years	Date of offence	Brief facts
1	Female, 32 years	1-Feb-04	Police located approximately 5 grams of cannabis in two metal tobacco tins. The POI admitted owning the cannabis.
2	Male, 27 years	1-Feb-04	Police found a 'small amount of cannabis'.
3	Male, 26 years	2-Feb-04	Police located a small quantity of cannabis (approx 6 grams). The driver admitted to purchasing the cannabis for personal use.
4	Male, 33 years	2-Feb-04	Police found a 'small amount of cannabis'.
5	Male, 50 years	3-Feb-04	After the dog indicated the presence of a drug scent, the driver admitted to having a small quantity of cannabis in his possession. Police records state that the gross amount of drugs was 3 grams.

Source: Information downloaded from COPS, unless otherwise stated

6.7. Ombudsman's observations

In total, our observers viewed approximately 45% of cars that came through the site (291 of 646). We observed 65% of the cars searched (42 of 65).

According to our observer's notes, on average, the time taken to complete this typical scenario, was about two minutes.¹⁷⁷ According to our observer's notes, the average amount of time that a vehicle was held up by a search was 22 minutes.¹⁷⁸ However this varied, with search times ranging from 7 minutes to 76 minutes.

The majority of vehicles were sedans (24%) or heavy vehicles (22%).¹⁷⁹ The majority of drivers were male (76%).¹⁸⁰ We estimated the age of drivers and found that drivers between 20-30, 30-40, 40-50 and 50-60 occurred in equal proportions (about 20% each).¹⁸¹

It was observed that generally police officers acted professionally and displayed good communication skills. Most searches occurred without incident. One of the searches is described in more detail below.

6.7.1. Case C34

Driver: Male, forties

Passenger/s: Male, thirties

Vehicle: Utility

Found: Cannabis, amphetamine ('goey')

Approximate search time: 38 minutes.

A positive indication was made and the vehicle was directed to the hot zone where detectives spoke to both men. Police checked the driver's licence. The search was explained and a caution issued. The driver accepted ownership of the vehicle but denied ownership of certain items within the vehicle. The passenger accepted ownership of some of these items. The driver described himself as a self-employed plasterer and said that he had been in trouble previously for possession of an unlicensed firearm. He said he had no history of violence offences or drug matters. The driver was invited to observe the search conducted by the dog handler. The driver commented favourably on the drug dog and indicated he understood the handler was just doing their job.

The drug dog made positive indications on most of the items located in the vehicle which were laid out on the roadside, and positive indications at the rear of the vehicle. A second drug dog also indicated strongly at the rear of the vehicle. Two large metal bars at the back of the vehicle were searched and a tin, pipe and plastic bags were found secreted within. The driver repeatedly denied any knowledge of these items. Police told the driver he was now under arrest for the possession of cannabis, that he would be taken back to the station and further search of the vehicle and contents conducted there.

The driver was then pat searched and his wallet inspected. At this point police located foil in the driver's wallet which contained a white powder. The driver accepted ownership of this and described the white powder as 'goey'. He said he had forgotten about it and did not know how long it had been there. Police told the driver he was under arrest for the possession of speed and he would be spoken to further about this at the station. Procedures were explained to him and a property seizure form was signed, before the driver was handcuffed.

Endnotes

¹⁶⁸ Including *The Daily Advertiser* (3 February 2004, p.4), *The Area News* (2 February 2004, p.1), *The Deniliquin Times* (3 February 2004, p.1), *The Riverina Grazier* (4 February 2004, p.1).

¹⁶⁹ Information from the Hay Tourism & Development website: <http://www.visithay.com.au/findingHay.html>.

¹⁷⁰ NSW Police Information Package 1, copy of warrant application.

¹⁷¹ The median is the number in the middle of a set of numbers; that is, half the numbers have values that are greater than the median, and half have values that are less.

¹⁷² NSW Police Information Package 1, OH&S risk assessment at paragraph 5.

¹⁷³ Ibid at paragraph 9.

¹⁷⁴ Information from the Australian Bureau of Meteorology's website: <http://www.bom.gov.au/climate/dwo/200402/pdf/IDCJDW2058.200402.pdf>.

¹⁷⁵ Ombudsman observers did not attend the 'cold debrief'.

¹⁷⁶ NSW Police Costing Information.

¹⁷⁷ This average was calculated excluding 34 records where the length of time was not recorded.

¹⁷⁸ This average was calculated excluding six records where the length of time was not recorded.

¹⁷⁹ This was calculated excluding 28 records where no record of the type of vehicle stopped was recorded.

¹⁸⁰ This was calculated excluding 29 records where no record of the sex of the driver was recorded.

¹⁸¹ This was calculated excluding 58 records where no estimate of the age of the driver was made.

chapter 7: case study two (Wagga Wagga)

Wagga Wagga was the second operation under the Act and was conducted between 19-21 February 2004. The operation occurred in Tarcutta, which is in Wagga Wagga LAC. There were officers from a number of LACs participating in this operation.

7.1. Township of Tarcutta

Tarcutta is small town approximately halfway between Sydney and Melbourne, and about 20 minutes drive from Wagga Wagga. A service station and a hotel on one side of the Hume Highway form the main part of the town.

Tarcutta is also a major trucking stop between Sydney and Melbourne. As well as being a rest area for truck drivers, Tarcutta is used as a place for many drivers to swap trucks. One officer described it as follows:

...most truck drivers will drive from Sydney to Tarcutta and Melbourne to Tarcutta, swap trucks and turn around and go back home. So the closer you get, the later at night, you have a greater concentration of trucks all leaving at Tarcutta, all changing over, because they take the same prime mover back but they drop the trailer, unhitch.¹⁸²

To cater for the large number of heavy vehicles that stop in Tarcutta, there is a large trucking bay, or 'truck interchange' opposite the service station on the Hume Highway.

Figure 7. Truck interchange at Tarcutta



Source: Photo taken by Ombudsman observers.

Tarcutta is also home to the Truck Drivers Memorial – a monument to 'the memory of truck drivers who have been accidentally killed while performing their duties in the transport industry'.¹⁸³

7.2. Supporting information

The information relied upon to support the warrant application included 46 incidents where large amounts of prohibited drugs were found on the Hume Highway between Goulburn and Albury, and in other border areas.

In addition, the search warrant application included a briefing from the State Crime Command Drug Squad; information about the results of a particular strikeforce; and five recent intelligence reports relating to drug supply in the area.

7.2.1. Incidents of large prohibited drug seizures

Of the 46 drug seizures described, the majority occurred in Albury LAC (44%) or Goulburn LAC (30%). Nine (or 20%) seizures occurred in the Wagga Wagga LAC (see description of the structure of NSW Police at paragraph 2.1). The 46 incidents occurred between 1997 and 2004, with about 6-7 incidents per year included. The only exception was the year 2000, when 11 seizures were described.

Amphetamine was seized in 23 or 50% of incidents. The average quantity of amphetamine found was about 62 grams.¹⁸⁴ An amount between 5 grams and 250 grams is an indictable quantity under the *Drug Misuse and Trafficking Act*. The largest seizure described was about 1 kilogram. For one of these incidents, a large quantity of a precursor to the manufacture of amphetamine was found.¹⁸⁵

Cannabis was seized on 13 or 28% of incidents. The average amount seized was 6 kilograms, with most of the larger seizures (between 15-28 kilograms) occurring before 2001. An amount between 1 kilogram and 25 kilograms is an indictable quantity under the *Drug Misuse and Trafficking Act*.

There were eight seizures of ecstasy between 1998 and 2003, with the average amount seized being 215 grams. The largest seizure occurred in 2002, when approximately 1 kilogram of ecstasy was seized. An amount between 1.25 grams and 125 grams is an indictable quantity under the *Drug Misuse and Trafficking Act*. Large amounts of heroin were seized on 5 occasions between 1999-2000. The average amount seized was 512 grams. An indictable amount is 5-250 grams under the *Drug Misuse and Trafficking Act*.

Most incidents involved sedans, but there were 15 which involved heavy vehicles, and three involving coaches. One incident involved a motorcycle. Nine incidents involved hire cars. Seventeen involved cars which had registration plates from other states.

7.2.2. State Crime Command Drug Squad briefing

The information used to support the warrant also included a brief prepared by an intelligence analyst at the State Crime Command Drug Squad. This brief described available information about the transportation of cannabis, amphetamine, ecstasy, cocaine and heroin across State borders. It was primarily based on a survey of LACs in 2002 and 2003, and several investigations that had been conducted by the State Crime Command into drug supply.

According to this brief, during 2003, police in 18 LACs identified South Australia or Victoria as being the primary source of cannabis found in their LAC. In 2002, 15 LACs identified South Australia as the primary source of cannabis.

As well as this general information, some investigations were described. In one of these investigations, telephone interceptions and surveillance of people suspected of being involved in supply revealed that their modus operandi was to conceal up to 34 kilograms of cannabis in secondary fuel tanks of 4WD vehicles. In another, telephone interceptions and surveillance led to the arrest of a man carrying 18,852 cold and flu tablets on a coach. In an operation recently run by the State Crime Command, numerous¹⁸⁶ persons were arrested transporting illicit drugs on coaches, across Victorian and South Australian borders.

This brief also quotes the *2001-2002 Australian Illicit Drug Report*. This report is produced by the Australian Crime Commission and, with the support of all Australian police services, provides a picture of the Australian drug market.¹⁸⁷ In the report, police from South Australia reported that amphetamine, heroin, cocaine and ecstasy were being transported into South Australia from NSW, while cannabis and methamphetamine were being transported out of South Australia to NSW. Police from Victoria stated that heroin, cocaine, ecstasy and ice were being transported from NSW to Victoria, while ecstasy was being transported from Victoria to NSW.

7.2.3. Strikeforce Reina

Strikeforce Reina had some success in 2002, and arrested several people believed to be involved in the regular supply of prohibited drugs between NSW and Victoria. Typically, the drug couriers involved travelled in coaches. They also kept an overnight bag with them, rather than in the luggage compartment. They paid cash for the coach ticket at the last minute, and used a particular coach service.

7.2.4. Intelligence reports

There were five recent intelligence reports included in the warrant application. Each report was made after March 2003. Two of these were reports that general information had been received about the regular supply of prohibited drugs between Sydney and Melbourne, and Melbourne and Wagga. Two reports were in relation to people who were stopped by police on the way to Melbourne or Sydney and who were suspected of being involved in the supply of prohibited drugs. The remaining report was in relation to an anonymous tip-off that somebody would be transporting heroin from Sydney to Melbourne via coach.

There is no information in the warrant application about the extent to which these reports were followed up, and if they were, what the result was.

7.3. Physical description of the location

7.3.1. Location of operation

The operation was held on both sides of the Hume Highway in Tarcutta, just in front of the hotel and service station. The site had previously been used for major traffic operations. The site was narrower than the site at Hay, as it was not designed specifically to cater for vehicle stops. As commented by some of the officers we interviewed:

*...we didn't have the luxury of...physical space that we had last time.*¹⁸⁸

*...I think the site was just smaller which made you just a bit more wary of traffic flow when you were crossing the road. And the size that you had for hot zones, the hot zoning in Hay was dramatically larger than it was in Tarcutta. And basically you're falling over each other [at the Tarcutta site]...*¹⁸⁹

Figure 8. Location of operation



Source: Photo taken by Ombudsman observers.

7.3.2. Weather conditions

The weather for the duration of the operation was extreme, with temperatures ranging between 13-39 degrees Celsius over the course of the operation. One officer commented to us that '...it was unusually hot, you saw in the paper on Saturday that it's the hottest February in Wagga ever.'¹⁹⁰ Police were provided with sunscreen and insect repellent to deal with the weather conditions.

7.3.3. Amenities

As the operation took place near a service station and local hotel, toilet and meal facilities were better than at the location for the first operation. However, there was still no stand down area for police during times when the site was not busy.

On one side of the road, the hotel was just behind the location of the cold zone. Officers on that side of the road had the benefit of the shade from the building during daylight hours. Officers on the other side of the road did not have the benefit of shade but set up a tent to provide shade for handlers and their dogs.

7.4 General description of the operation

7.4.1. Times and numbers of police

The operation started between 3-6 pm and finished between 10pm-1am each day. There were about 46 officers present for each day of the operation, which was slightly more officers than were present at Hay.

7.4.2. Police briefing

A major briefing was held on the first day of the operation. The Operation Commander outlined some of the background to the legislation, the powers under the Act and the major roles in the operation. The Commander emphasised a series of issues, such as the importance of correctly filling out forms, ensuring privacy when conducting searches, dealing with the local media, the scope of searching powers, and the need to be professional when not engaged in a search.

The site controller described each role in detail, and demonstrated how the site would be set up. He identified some specific and general intelligence about drug couriers, and how they operate.

After this large briefing, police officers broke up into smaller groups according to their role, and were briefed again. For example, all investigators were given specific advice about how to conduct searches. At these briefings, officers were given their 'kits' which contained the relevant forms and equipment they would need for the operation.

For the next two days, before the day's operation began, police officers held a debrief/brief about the previous days' work. At these brief/debriefs, the operation commander would clarify any issues identified, and then go through each role and ask for feedback. For example, on day two of the operation, video operators were instructed to communicate more between the investigators and the searchers to determine what they should be video taping.

7.4.3. A typical scenario

The scenario where no indication was made was fairly similar to the process observed at Hay. Compared with the first operation in Hay, significantly more traffic came through this site. As a result, queues formed quickly in the cold zone, and the time drivers spent waiting to be approached by a scribe was slightly longer than it was in Hay.

To deal with the anticipated delay from the heavy traffic, an extra scribe was assigned to each side of the road, as well as an extra independent. As cars queued up in the cold zone, the two scribes would approach one car each, then the dog would circle both cars in close succession, while the two scribes moved onto the next two cars.

7.4.4. A typical search

Our observers noted that the searching process was particularly systematic during this operation. This may have been a result of the clear instructions given to investigators about searching at the first briefing, where investigators were specifically advised to:

- confirm with each driver, or person being the subject of the video, that the video records audio as well as visual images
- do a radio check on each person they came across
- have a drug detection dog screen the car being searched again if nothing was found.¹⁹¹

There were a few occasions where there were three or four cars waiting in the hot zone to be searched. When this happened, the site was closed, and all available officers were diverted to searching the cars in the hot zone.

After taking this step, there were fewer resources to deal with each car being searched. For example, investigators sometimes found themselves in a situation where they were waiting for a video camera to become available. This meant that they could not engage the driver or passengers in any meaningful dialogue or conduct a search, in case it was critical to the investigation and needed to be recorded. On occasion, investigators decided to conduct the procedure without a video camera.

One or two strip searches were conducted during this operation. The local police station, which was within walking distance, was available for these searches. For 'pat down' searches conducted at the site, there was no specific facility available. As at Hay, people were searched where they stood, or behind a vehicle if possible.

7.4.5. Australian Tax Office representatives

Initially, the ATO envisioned that its role would be to better educate the police involved in the operation about the transportation of tobacco for the black market. However, it was ultimately decided that two representatives would attend and observe the operation, and be available to assist if the need arose. Both officers attended the first formal briefing, however, neither remained on site for the whole operation. Instead, they remained on call until the operation was over.

The ATO is responsible for investigating breaches of the tobacco excise duty. That is, they are responsible for investigating the black market for tobacco. One of the major tobacco fields is in Victoria, and it is just over the border from NSW.

An ATO representative heard about the first operation on the news and noted that there might be scope for the ATO and NSW Police to work collaboratively to tackle the tobacco black market through such border operations. He subsequently approached NSW Police.¹⁹²

ATO officers visited the site on at least two occasions.

7.4.6. Debrief

A formal debrief was held at the end of the operation, including issues such as officer safety and privacy of searches. Police were also asked to fill in an anonymous voluntary feedback form. The form asked questions such as:

- *During the operation was there a clear delineation between the operations of [the Police Powers (Drug Detection in Border Areas Trial) Act] and your powers of stop, search and detain under the Drug Misuse and Trafficking Act?*
- *Were the resources provided adequate?*
- *Are there any ways in which you feel the provisions of the Act or the conduct of the operation could be improved?*

Where appropriate, the answers to these questions have been included in our discussion of the major issues.

7.5. Costs

NSW Police provided the following information about the costs of this operation:¹⁹³

Cost type	Wagga Wagga
Base wages	\$43,805
Operational preparations	\$1,426
Post operational reporting	\$214
Travelling allowance	\$5,336
Overtime	\$0
Shift allowances	\$4,704
Meals	\$0
Vehicle related expenses	\$484
Equipment hire	\$800
Total	\$56,769
Total excluding base wages	\$12,964

7.6. Results

7.6.1. Summary of results

No indictable quantities of drugs were found during this operation. Police did find \$52,000 cash located in one car, which also had three large empty suitcases in the boot. The ATO advised that the driver and passenger were known to be involved in the tobacco black market. Ultimately, police did not take any action against the driver or passenger. This incident was observed by one of our researchers, and is described below at paragraph 7.7.3.

Below is a table of the results from this operation.

Table 6. Results Summary

Total number of vehicles stopped	988
Vehicles searched	93
Percentage of vehicles stopped that were searched	9.41%
People searched	159
Total weight of cannabis found (grams)	247
Total weight of amphetamine found (grams)	1
Number of indictable quantities of any drug found	0
Cannabis cautions issued	25
Number of persons charged	5

Source: NSW Police Information Package 2.

7.6.2. Charges

Below is a table of charges made during the operation. All charges were proved at court, and all received a fine.

Table 7. Charges resulting from case study two

Charge ref	Offender profile	Brief facts	Charges	Proved/ Not proved	Sentence/ Result
8	Male, 22 years, no prior convictions	After the dog made an indication, the driver was asked whether he had anything in his possession, and he took a 'small plastic money (coin) resealable bag' from his pocket. The driver said it was cannabis. The driver also indicated that there was more in a blue bag in the vehicle, where another bag of cannabis was found. Police also found another small plastic money bag in another bag in the vehicle. In total 44 grams of cannabis was located.	Possess prohibited drug	Proved	\$150 fine + \$60 court costs
9	Male, 42 years, no prior convictions	After the dog indication, the driver said that there were drugs under the bonnet of the car. Police found 7 grams of cannabis behind the headlights. A police radio check revealed that the driver had a previous conviction for assault, which meant he was ineligible for a caution. He was then charged. Four days later, police discovered that he did not have a previous conviction for assault, and advised Wagga Wagga Local Court of this.	Possess prohibited drug	Proved	\$150 fine + \$61 court costs
10	Female, 19 years, no prior convictions	When questioned in the hot zone, the driver produced a small quantity of cannabis, which weighed 1 gram. Police found two more lots of cannabis, one weighing 55 grams, and one weighing 16 grams.	Possess prohibited drug	Proved	\$250 fine + \$61 court costs
11	Female, 28 years, no prior convictions	In the hot zone, after police began removing luggage from the car, the driver admitted that there were illegal drugs in her hand bag. The hand bag was searched and in it was a plastic bag of pink powder weighing 1 gram, which the driver admitted was amphetamine. The person was arrested and placed into custody.	Possess prohibited drug	Proved	\$250 fine
12	Male, 38 years, prior convictions	After being indicated by the dog, the driver gave police less than 1 gram of cannabis wrapped in plastic. The driver said that he found it earlier that day in the gutter of an unknown street in Sydney.	Possess prohibited drug	Proved	\$150 fine + \$61 court costs

Source: Information downloaded from COPS

7.6.3. Cannabis cautions

There were several cannabis cautions issued during this operation. They are listed below.

Table 8. Cannabis cautions resulting from case study two

Event Ref	Offender profile	Date of offence	Brief facts
6	Male, 20 years	19/02/2004	After the dog indication, and being spoken to by police, the driver said there was cannabis in the centre console of the vehicle. Police found 8 grams of cannabis in a resealable bag.
7	Male, 21 years	19/02/2004	Police found 'about 10 grams' of cannabis in the vehicle.
8	Male, 36 years	19/02/2004	Police found 5 grams of cannabis in the vehicle.
9	Male, 51 years	19/02/2004	In the hot zone, the driver said that he had cannabis in the centre console of the vehicle. He then got out of the car. Police found a black film canister with cannabis in it. It weighed 2.2 grams.
10	Male, 28 years	20/02/2004	Police located a 'small amount of cannabis' found on the driver's person.
11	Male, 40 years	20/02/2004	After the dog indication and being spoken to by police, the driver said there were drugs in the glove box. Police found a resealable bag of 14 grams of cannabis in the glove box.
12	Male, 20 years	20/02/2004	After the dog indication and being spoken to by police, driver removed his wallet and showed police a small resealable bag containing less than 1 gram of cannabis.
13	Male, 31 years	20/02/2004	7 grams and two 'cannabis pipes' were found in the driver's possession. He did not make any admissions in relation to the pipes, so he was given a caution in relation to the cannabis only. No action was taken in relation to the pipes.
14	Male, 26 years	20/02/2004	Police found 0.6 grams of cannabis in the vehicle.
15	Male, 28 years	20/02/2004	After dog indication and being spoken to by police, the driver said he had some marijuana in his glove box. A resealable bag of cannabis weighing 15 grams was located in the car.
16	Male, 36 years	20/02/2004	Police found 1gram of cannabis in the vehicle.
17	Male, 26 years	20/02/2004	Police found 3 grams of cannabis leaf and a bong.
18	Male, 43 years	20/02/2004	2 grams of cannabis found
19	Male, date of birth not recorded	21/02/2004	After dog indication and caution from police officer, the driver said he had cannabis in his vehicle. 12 grams of cannabis were found in one of the car's consoles.
20	Male, 24 years	21/02/2004	When the driver was being spoken to by police, the passenger said there were drugs in his bag on the back seat. Police found a small plastic bag with cannabis weighing 3 grams.

Event Ref	Offender profile	Date of offence	Brief facts
21	Male, 31 years	21/02/2004	The driver admitted to having smoked cannabis in the vehicle. Police also located 1 gram of cannabis in a tin.
22	Male, 21 years	21/02/2004	The driver told police he had cannabis in the tray of his ute. Police found 1 gram of cannabis in a bag.
23	Male, 20 years	21/02/2004	Police found 1 gram of cannabis in the vehicle.
24	Female, 29 years	21/02/2004	10 grams of cannabis was found in luggage. Police also found 2.09 grams of ephedrine. The ephedrine was seized, but no action was taken.
25	Male, 27 years	21/02/2004	After the dog indication and being spoken to by police, the driver said he had drugs in the car. Police located 7.7 grams of cannabis in a plastic container.
26	Male, 23 years	21/02/2004	Police found 1 gram of cannabis in the vehicle.
27	Male, 21 years	21/02/2004	The driver indicated that there were drugs in his wallet. He removed a small amount of cannabis wrapped in plastic.
28	Male, 32 years	21/02/2004	In the hot area, the driver indicated that there were drugs under the sun visor on the passenger side. He removed a bag of cannabis from the car and handed it to police. It weighed 6 grams.
29	Female, 31 years	21/02/2004	In the hot zone, the driver said there may be drugs in the car. She said that when she saw police she threw it into the back of the vehicle. Police searched the car and found a resealable bag containing cannabis behind the front passenger seat. The bag of cannabis weighed 12 grams.
30	Male, 24 years	21/02/2004	After the dog indication, police searched the car, then the driver gave police a small resealable bag containing less than 1 gram of cannabis from the glove box.

Source: Information downloaded from COPS

7.7. Ombudsman's observations

In total, our observers viewed approximately 22% of cars that came through the site (217 of 988). We observed 19% of the cars searched (18 of 93).

According to our observer's notes, on average, the time taken to complete a typical scenario, that is, where a car was stopped but no indication was made by the dog, was about 4 minutes. The average time a vehicle and its driver and passengers were delayed in the hot zone was 34 minutes, with search times ranging from 5 minutes to 1 hour and 40 minutes.

The majority of vehicles we observed were sedans (37%) or heavy vehicles (26%).¹⁹⁴ The majority of drivers were male (83%) and we estimated the majority of drivers to be aged between 30 and 40 (31%).¹⁹⁵ We estimated that approximately 25% of drivers were aged between 20-30, and 25% of drivers were aged between 40-50.

Police at this operation displayed excellent communication and organisational skills. This may have been a result of the thorough briefings and debriefings which occurred each day.

Police officers also seemed comfortable exercising discretion. For example, we observed several instances where police did not take any formal action against people found with drug implements. This may have been a result of officers being conscious to act in keeping with the objective of the operation, which was to target drug suppliers rather than drug users. As noted by the operation commander:

*Now, I must say the police did a fabulous job in exercising discretion. In those situations where it was... obvious, or the indications were that these people were not involved in drug dealing,... [those people] were subject to much less scrutiny.*¹⁹⁶

Below is a description of some of the issues particular to this operation, as well as a description of a search that we observed.

7.7.1. Narrow site

As mentioned above, the site was narrow in comparison to the site at Hay. During the operation, some Highway Patrol officers created a 'corridor of safety' between the cold zone and the highway to better protect scribes talking to drivers in the cold zone. This was done by placing bollards in a way which created a space between the highway and the cold zone which was wide enough for an officer to stand in while talking to drivers.

7.7.2. Local businesses

As mentioned above, the operation occurred in front of a local hotel, and a service station. This meant that people who were intending to go into either premises were sometimes pulled into the site before they could reach their destination. For example, as noted by one of our observers:

*The driver said that he was going to get a coffee before he got pulled in, and asked if he could turn around and drop into the service station.*¹⁹⁷

This also meant that patrons of the hotel were close to cars being searched in the hot zone on that side of the road. This impacted on the privacy of people being searched in the hot zone in front of the hotel, as they were scrutinised by patrons of the hotel throughout their interactions with police. In some cases, the driver and/or passengers of the car being searched were standing or sitting right next to hotel patrons.

Some patrons of the hotel sat on the balcony of the second floor which overlooked the site, and provided a lively commentary on events. As observed by two police officers interviewed by our office:

A2: I've got to say that the crowd at the pub were very supportive. Up there on the balcony.

A1: Nice having your own cheer squad.

*A2: Every time someone got wheeled into the 'red' they would be whooping and carrying on.*¹⁹⁸

We interviewed the managers of both the hotel and the service station. Both were generally supportive of the operation. While one business reported a marked decrease in trade during the operation, the other noted a slight increase.

7.7.3. Case J35

Driver: Male, forties

Passenger/s: Male, forties

Vehicle: Sedan

Found: \$52,000 in cash

Approximate search time: 1 hour 40 minutes

The driver and passenger were spoken to by police at the checkpoint. The men were behaving strangely and gave unusual answers to questions put to them. They were driving in the opposite direction to their nominated destination and could not say why they were travelling there. Although the drug dog did not positively indicate the vehicle or the men, police directed the vehicle into the hot zone.

After speaking to the driver the operation controller indicated to other police that the driver had consented to the search. The men were cautioned, the search explained and the warrant read to them. Police appeared to be unclear about which powers they were relying on to conduct the search.

The search was to be video recorded and this was also explained to the men. The driver indicated he did not 'like' to be video recorded. Police continued to video record the search. The passenger indicated to police he did not speak English and requested an Arabic interpreter. Police advised he would be taken to the station and provided with an interpreter. A bag full of cash was located in the vehicle and the passenger told police it contained the sum of \$52,000. Video recording was made of the cash being counted and sealed in a drug bag. The passenger was taken to the station where police advised him there would be an interpreter and he would be questioned in relation to the money.

A further search of the vehicle was undertaken by police in the presence of the driver. Police told the Ombudsman observer that computer records linked both males with intelligence relating to the large-scale smuggling of tobacco. The driver was pat searched and the contents of his wallet inspected. Police indicated their intention to charge the male passenger with goods in custody and told the driver he would be free to go when the search was complete.

Endnotes

¹⁸² Interview EE.

¹⁸³ From the Fairfax Walk About Australian Travel Guide website: <http://www.walkabout.com.au/locations/NSWTarcutta.shtml>.

¹⁸⁴ This average was calculated excluding one seizure of amphetamine which was found in liquid form.

¹⁸⁵ Although this was a seizure of a precursor, this event was incorrectly described in the warrant application as a seizure of 'amphetamine'.

¹⁸⁶ Number of people arrested not specified in the brief.

¹⁸⁷ Australian Crime Commission, *2001-2002 Australian Illicit Drug Report*, pp.2-3.

¹⁸⁸ Interview FF.

¹⁸⁹ Interview GG.

¹⁹⁰ Interview HH.

¹⁹¹ Ombudsman observer notes A.

¹⁹² Meeting with ATO officers.

¹⁹³ NSW Police Costing Information.

¹⁹⁴ This was calculated excluding one record where no note of the type of vehicle stopped was taken.

¹⁹⁵ This was calculated excluding two records where no note of the driver's estimated age was taken.

¹⁹⁶ Interview JJ.

¹⁹⁷ Ombudsman observer notes B.

¹⁹⁸ Interview EE.

chapter 8: case study three

(Barrier, Deniliquin and Wagga Wagga)

This operation consisted of three LACs, Barrier, Deniliquin and Wagga Wagga, each conducting operations at roughly the same time. The operations conducted by Barrier and Deniliquin were between 29 April to 1 May 2004. The operation conducted by Wagga Wagga was between 28-30 April 2004.

Operations were conducted at different points on the Hume and Sturt Highways. While there was some co-ordination between the three operation commanders as to the timing of each operation to prevent vehicles from being repeatedly stopped again at sites further down the highway, each LAC otherwise ran their operation independently. Each LAC prepared a separate search warrant application. However, many of the incidents used to support each application were used by all three LACs.

This operation resulted in the only two seizures of indictable quantities of drugs during the review period. Wagga Wagga LAC seized a large amount of amphetamine, and Barrier LAC seized a large amount of cannabis.

8.1. Barrier LAC

8.1.1. Location

The operation conducted by Barrier LAC occurred at a large truck stop on the Sturt Highway, about 9 kilometres from Gol Gol. The site was separated from the highway by a grass median strip.

Figure 9. Approximate site of the operation conducted by Barrier LAC



Source: From Sensis Whereis website: <http://www.whereis.com.au/whereis/mapping/maplink.do?maplinkId=119717>
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8.1.2. Supporting information

The warrant application from Barrier LAC included four incidents where police seized an indictable quantity of drugs on the Sturt Highway in Buronga.¹⁹⁹ This is near the site where the operation was conducted. The four incidents occurred between 2000–2002. Three of the incidents involved seizures of cannabis, and one involved the seizure of ecstasy tablets and ecstasy powder.

The warrant application also referred to 38 incidents where the amount seized was less than an indictable quantity or where the drugs were not seized on the Sturt Highway, but where police believed that the driver had travelled on the

Sturt Highway. In their respective warrant applications, many of these incidents were also relied upon by Deniliquin LAC and a few were used by Wagga Wagga LAC.

Of the 38 instances, the majority occurred in 2000-2001. Most incidents involved cannabis. The average weight of cannabis found was about 4.5 kilograms, with the biggest amount found being nearly 18 kilograms and the smallest amount being 10 grams (found in conjunction with a larger amount of another drug).

Nine incidents involved amphetamine (average 29 grams), one involved ecstasy (25 grams) and one involved cocaine (1.5 grams).

A number of cars had interstate registration plates and/or were hire cars.

8.1.3. Physical description of location

8.1.3.1. Site

The original traffic plan allowed for police to use both sides of the road, however, while the west-bound traffic side of the road easily accommodated a major traffic operation, the east-bound side of the road was only slightly larger than a normal road shoulder. For safety reasons, on the first day of the operation police decided to only use the larger site. While most of the traffic directed into the site was west-bound, occasionally police also directed east-bound vehicles into the site from the other side of the highway.

Figure 10. Gol Gol Site



Source: Photograph taken by Ombudsman observers

8.1.3.2. Weather conditions

The weather was cool, with temperatures ranging from 10-19 degrees.

8.1.3.3. Amenities

A caravan was made available on site. The caravan provided tea, coffee and water, and also functioned as a temporary office. There was no official stand down area. However there were two shade shelters and a toilet at the site.

8.1.4. General description of the operation

Usually, police receive training for the operation in the weeks prior to the operation. However officers from Barrier LAC received training the day before the operation. The training package is described in more detail at paragraph 5.3.

8.1.4.1. Times and numbers of police

Police set up the site between 2-3pm for the first two days, and closed the site between 5-9pm. On the third day, the site opened at about 7am and closed at about midday. There were approximately 20 police on site for each day of the operation.

8.1.4.2. Police briefing

Police conducted a major briefing on the day before the first day of the operation, just after the training package had been delivered.

The site controller stressed that as far as he was concerned, the operation was a 'glorified RBT station'. He covered some key operational issues such as fatigue, the various roles that police will cover, control of exhibits, movements between the hot/cold zones and officer safety. Police were instructed to deal with minor matters, such as cannabis cautions, on site, as arrests were time consuming. They were also told that not all vehicles needed to be stopped and that officers would be taking a break every three to four hours. The site controller drew a site plan onto a white board and talked about the hot/cold zone in detail.

The independent officer also addressed the briefing, and said that he would not be able to offer any advice to officers during the operation because this was not his role. He told officers to be wary of armed drivers, and to act professionally.

The following day, which was the first day of the operation, a minor briefing was held.

8.1.4.3. Typical scenario

Police at this operation trialled a number of different strategies to both maximise the number of vehicles screened and minimise the time that vehicles were delayed at the checkpoint, including having two queues of vehicles in the cold zone. As mentioned above, vehicles from both sides of the road were directed into the one site.

8.1.4.4. Typical search

For the majority of searches, the caravan was used as an interview room. Police generally tried to observe privacy by searching people behind their vehicles, and out of view of the general public.

8.1.4.5. Debrief

At the end of the operation a debrief was held. The major results were announced at this debrief, including a large seizure of cannabis and a weapon (a cross bow). Officers were forthcoming with suggestions for improving future operations, including:

- having operations which were at least 12 hours long
- allowing local police stations to determine the days of the operation
- having an on-site computer
- providing information from previous debriefs to officers organising future operations
- consulting more with Victorian police officers.

Officers also offered feedback about some other aspects of the operation, including many comments that having two queues in the cold zone was potentially dangerous. There was also a general agreement that there should have been more resources available, including more investigators, videos, cameras, tapes, batteries and exhibit books.

8.1.5. Ombudsman's observations

In total, our observers viewed about 50% of vehicles that were stopped (365 of 724). We observed 68% of searches (32 of 47).

The majority of vehicles we observed were sedans, four-wheel-drives or station wagons (60%). Heavy vehicles only comprised 10% of vehicles we observed. The vast majority of drivers were male (75%). We estimated that the majority of drivers stopped were aged between 40 and 60 (48%), while 29% of drivers were aged between 20 and 40.

During this observational session, we also timed stops in the cold zone for various parts of the day. We timed seven stops on the first day, 15 on the second day and 47 on the third day. The average time for cars to be stopped in the cold zone when calculated this way was four minutes and seven seconds.

As was found in other operations, a few drivers reacted with laughter at the idea of being searched for drugs. One driver said 'This beats a breathalyser'.²⁰⁰ There were also employees who worked on a nearby estate who were stopped several times during the operation.

Our observers noted that the dogs attending this operation tended to jump up on the vehicles stopped in the cold zone. The handlers did their best to control this behaviour, and there were no major incidents as a result of a dog jumping on someone's vehicle.

Although most scribes were adept at dealing with drivers in a professional and friendly manner, one scribe was particularly robotic, and at times, very rude to drivers. This officer was later spoken to by a senior police officer.

Below is a description of a search we observed.

8.1.5.1. Case V91

Driver: Not applicable

Passenger/s: Two men spoken to by police

Vehicle: Coach

Found: Small quantity of cannabis

Approximate search time: Not recorded

A coach was stopped by police and a positive indication was made of luggage in the hold by the drug dog. Two men were taken off the coach in relation to the two items of luggage indicated. The men were taken to the rear of the coach where a search of their bags was conducted. While this location was chosen for privacy, passengers on the coach were still able to see the men being searched by standing up in the coach. The search was explained to the men and one man watched while the other man's luggage was searched. Police removed the contents of his bag but were careful not to dirty them. No drug was located in the bag and the man was asked by police to assist in re-packing it. That man was then allowed to return to the coach and the next man's luggage was searched. Less than a teaspoon of cannabis was located in a metal case in this man's luggage. The man stated he did not know this item was in the bag. He was again cautioned by police. Police removed all the contents of the bag and asked the man if they could place them on the ground. The man agreed to this. No further drug was located. When police replaced the contents of the bag an attempt was made by them to dust the items off. The man was given an informal warning in relation to the cannabis and allowed back on the coach.

8.2. Deniliquin LAC

8.2.1. Location

The operation conducted by Deniliquin LAC occurred at Hay at the same site where the previous operation was held. For a description of the Hay site, please see 'Chapter 6 Case study one'.

8.2.2. Supporting information

The incidents relied upon to support the warrant application from Deniliquin LAC were the same as those relied upon by Deniliquin LAC for their first application, except that a seizure which occurred during the first border operation under the Act in Hay was added. This incident involved the seizure of 4 grams of amphetamine.²⁰¹

Deniliquin LAC also included an intelligence report which detailed information provided by Victorian Police about the modus operandi for a particular drug supplier. This intelligence report was also relied upon by Wagga Wagga LAC in their warrant application.

8.2.3. Physical description of location

For a detailed description of the Hay site, see paragraph 6.3. Only one side of the Sturt Highway was used for this operation, to capture traffic travelling from Adelaide to Sydney.

The operations conducted by Deniliquin LAC were held late at night, and weather conditions were extremely cold. In fact, police set up a bonfire in a tin drum to stay warm.

8.2.4. General description of the operation

As mentioned above, the operation was only conducted on one side of the road. During the three days of the operation, there was an unusually low number of vehicles travelling in both directions. This is reflected in the number of cars stopped and searched.

8.2.4.1. *Times and numbers of police*

There were 13 police officers in attendance, including the dog handler. The police involved in this operation had all been involved in the first operation at Hay (see case study one). The operation began at about 8pm each night and finished at approximately 2am.

8.2.4.2. *Police briefing*

The site controller addressed the briefing on the first day. The information provided included that the objective of the operation was to target the trafficking of prohibited drugs across border areas. The site controller explained that there were three operations taking place concurrently. He noted that there might be vehicles that had already been searched by Barrier LAC but that these vehicles should be searched anyway. The site controller stated that the 'main mission' was to target cars, hire vehicles, pantecs and any trucks with intelligence information recorded.

He emphasised that the warrant was to be shown to anyone who wanted to see it.

The site controller then explained the legislation and emphasised that it does not create a new search power. He then gave a very detailed explanation of the procedure for screening and searching a vehicle, as follows:

- Highway Patrol officers would direct vehicles into the 'cold area' with a glowing baton. They were instructed to only target cars at this stage and to let vehicles go by when a vehicle was in the 'hot area'. Highway Patrol officers would also direct vehicles back onto the highway.
- A scribe would read out the script word for word. After the script was read, a section 12 notice was to be provided to the driver. Once this was done, the dog would go around the vehicle. The site controller emphasised the importance of waiting until the script was read and section 12 notice handed to the driver before commencing the screen of the vehicle with the dog.
- The dog would screen the vehicle, and if there was an indication, this would be communicated to the scribe by the dog handler. The scribe was then to notify the site controller.

- The site controller would then issue the driver with a caution indicating that a search would be carried out pursuant to s 37(4) of the Drug Misuse and Trafficking Act.
- The lead investigator would then take over once the car was in the 'hot area'. The site controller encouraged investigators to deal with people 'on-site'. For example, issuing them with a field CAN instead of charging them and bringing them back to the station.

The site controller informed the briefing that a police prosecutor was in attendance to provide advice and to monitor the operation.

The police prosecutor informed officers that they were not permitted to open the door of a truck unless there was an indication. He also said that the legislation did not permit officers to ask drivers to step down from the cabin, and that this could only be done once there was an indication or where an officer formed a reasonable suspicion.

A debrief was held each night after the operation to get feedback from officers, and a briefing was held on each day before the operation commenced.

At the first debrief it was generally agreed that the numbers of vehicles travelling through the location was unusually low. Police also said they had difficulty identifying whether a truck should be stopped at night, because a vehicle could not be clearly seen until it was very close. Officers commented that the script was being paraphrased because drivers did not understand the script when it was read verbatim.

At the next day's briefing officers were advised by the site controller that they would have the same duties as they had the night before. He emphasised that the mission of the operation was not to target heavy vehicles unless there was intelligence information. He also advised that police have a responsibility to deal with defective vehicles. A short debrief was held that night, during which the extremely light traffic flow was noted.

The briefing for the last day of the operation was very similar to the briefing for the second day. The debrief again noted the low traffic flow. One senior officer commented that the success of operations depended on the 'luck of the draw'.

8.2.4.3. *Typical scenario*

As local police emphasised in the briefings, the traffic flowing through the site was unusually low. This is reflected in the small number of vehicles stopped by police.

In accordance with advice from the police prosecutor, in contrast to all other operations, scribes did not ask drivers of heavy vehicles to step down from their cabins. As noted by one of our observers:

...when the scribe stopped trucks he was required to climb up the truck to the window and was therefore literally hanging off the side of the truck speaking to the driver. In most cases that driver did not turn the truck off.²⁰²

8.2.4.4. *Typical search*

Only two searches were conducted during this operation. One of these searches is described below.

8.2.4.5. *Debrief*

A minor debrief was held on the last day of the operation, however it was very short.

8.2.5. **Ombudsman's observations**

Our observers viewed all of vehicles that were stopped (30), and all searches conducted by Deniliquin LAC (2).

According to our notes, the average time taken to conduct a stop in the cold zone was one minute. The overwhelming majority of drivers were male (97%). The majority of vehicles were either heavy vehicles (41%) or sedans (34%). The estimated ages of drivers were in fairly equal proportions for the 20-30 age group (38%), the 30-40s (31%) and the 40-50s (22%).

One of our observers listened to the CB radio during the operation in a police vehicle:

I listened into the CB radio on and off and there was certainly a lot of talk about the operation. I did not hear anyone saying that the site should be avoided but certainly drivers were talking about the fact that police were looking for drugs.²⁰³

In keeping with the directions of the site controller to only target cars, hire vehicles, pantecs and heavy vehicles with intelligence, several heavy vehicles were observed to be allowed to pass by the site without being stopped.

Below is a description of a search we observed.

8.2.5.1. Case Z6

Driver: Male, twenties

Passenger/s: Male, under eighteen years of age

Vehicle: Sedan

Found: Cannabis

Approximate search time: 37 minutes

After the vehicle had stopped at the checkpoint, the driver wound his window down and police commented upon the smell of cannabis in the vehicle. The driver was given a notice relating to the search and issued a caution. While the vehicle was being conveyed to the hot zone police observed the young passenger with his hands down the back of his trousers. Police asked the passenger to alight from the vehicle and conducted a pat search of him. A tin containing cannabis was located. Police asked the passenger whether he had been in trouble with police before and he indicated he had been on a bond in relation to a petty theft in Victoria. A search of the vehicle was commenced and was video recorded. The drug dog was taken through the vehicle and a smoking device located. The passenger indicated he was the owner of this and when asked what he intended to do with it he stated, 'Smoke the stuff you just took off me'. A Swiss Army knife was located in the vehicle and the driver was spoken to about it. The driver indicated to police he did not know the knife was in the vehicle.

Police then established the passenger was a juvenile and indicated to him that they could not interview him further without an adult present. The driver then indicated that he was the passenger's cousin and the passenger agreed that police could continue to question him with his cousin present. The passenger was questioned in relation to the cannabis and smoking device and made full admissions. The passenger asked if he would have to appear in court and police conferred with each other before indicating that they would be issuing a juvenile caution to him.

The driver was then questioned in relation to his consumption of alcohol and was breath tested with a positive result. Our observer was later informed that after the driver's arrest, he was subject to further analysis at the police station and found to be over the blood alcohol limit in the low range.

8.3. Wagga Wagga LAC

8.3.1. Locations

The operation conducted by Wagga Wagga LAC occurred over three days, at a different site each day. These sites covered three major routes between Sydney and Adelaide; and Sydney and Melbourne. The sites for the third day was Tarcutta township, which was the site of the first operation conducted by Wagga Wagga LAC, described in case study two. The other sites are described below.

8.3.1.1. Hume Highway, near Tarcutta

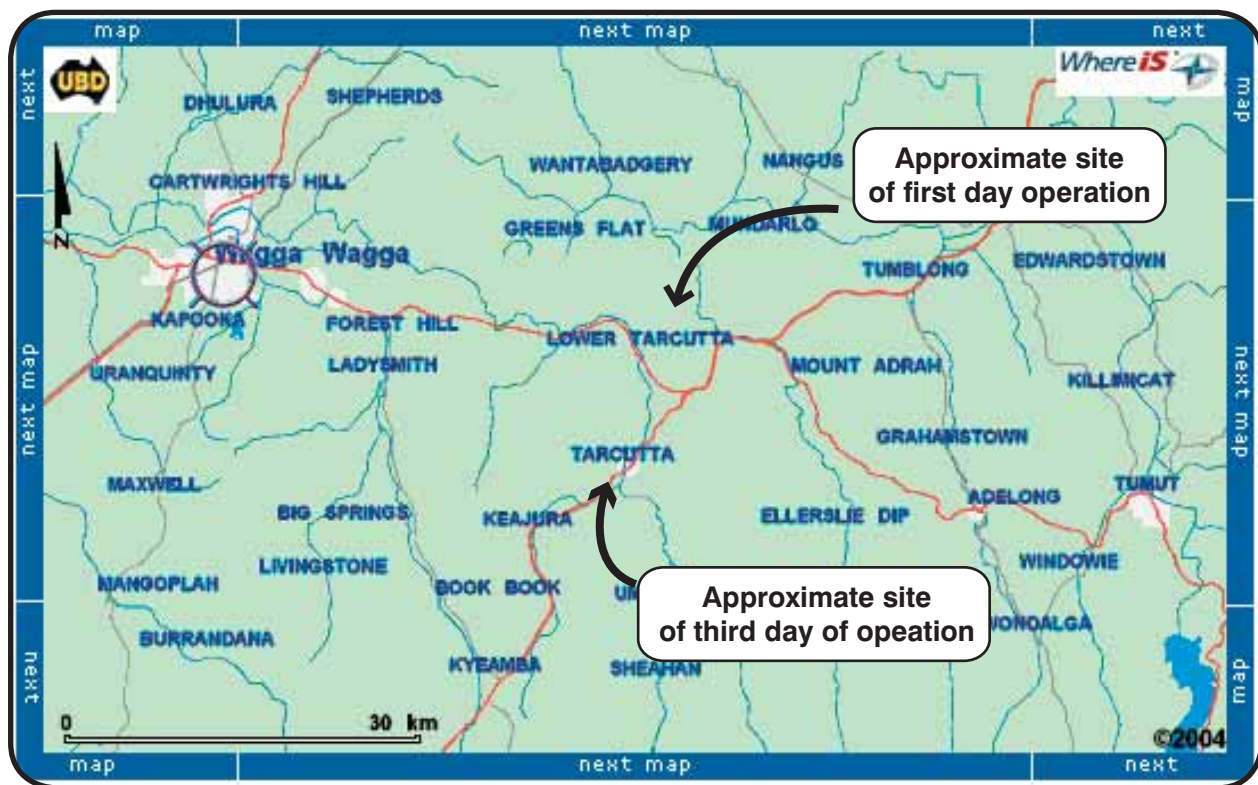
This was where the first day of the operation was held. This section of the Hume Highway had three lanes of traffic travelling in both directions. Each side of the road was separated by a wide grass median strip.

The site was a rest area for truck drivers on the Hume Highway. There were no amenities, it was just a space which had been created on the shoulder of the highway, large enough to fit two or three heavy vehicles.

The site was about 4 kilometres before the exit to the Snowy Mountains Highway, and about 10-15 minutes drive from the Tarcutta township.

The traffic that goes through this site is usually travelling between Sydney and Adelaide or Sydney and Melbourne.

Figure 11. Sites of the first and third day of the Wagga Wagga operation

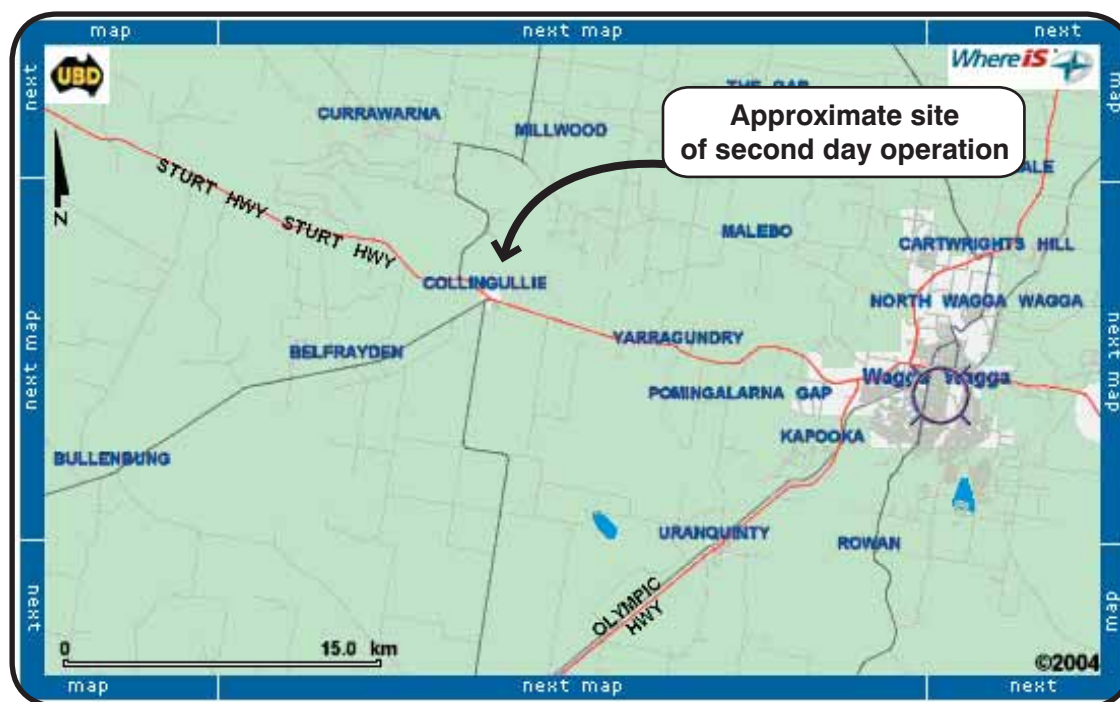


Source: From Sensis Whereis website: <http://www.whereis.com.au/whereis/mapping/maplink.do?maplinkId=119724&brandId=1>
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8.3.1.2. Sturt Highway, Collingullie

The second day of the operation was held on the Sturt Highway, on the outskirts of Collingullie. This site was also a truck stop, set up to fit one or two heavy vehicles. There were no toilets, but some tables and garbage bins were available. The traffic that goes through this site is usually travelling between Sydney and Adelaide.

Figure 12. Site of the second day of the Wagga Wagga operation



<http://www.whereis.com.au/whereis/mapping/maplink.do?maplinkId=119728>

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8.3.1.3. *Hume Highway, Tarcutta Township*

The traffic that goes through this site is usually travelling between Sydney and Melbourne.

8.3.2. Supporting information

The supporting information about major drug seizures in the search warrant application was divided into three sections, corresponding to the three locations at which the operation was conducted.

8.3.2.1. *Hume Highway, near Tarcutta*

The first part of the warrant application provided information to support the conduct of the operation on the Hume Highway, four kilometres south of Snowy Mountains Highway. There were four incidents described between 1998 and 2001 which involved vehicles which were stopped on the Hume Highway, but which had been travelling on the Sturt Highway.

Three incidents involved significant seizures of cannabis, and one involved a seizure of 132 tabs of LSD. All involved vehicles were travelling from Adelaide.

8.3.2.2. *Sturt Highway*

This section of the application was entitled 'Sturt Highway' and was in support of conduct of the operation at Collingullie. It began with a broad description of all seizures which occurred between 1997 and 1999. Then followed a short description of each of the major seizures which occurred between 2000 and 2003.

According to the application, between 1997 and 1999 there were 15 seizures of indictable quantities of cannabis or heroin. There was also a seizure of an indictable quantity of ecstasy.

There were an additional 48 seizures which were individually described. These occurred between 2000 and 2003. The majority occurred in 2000 or 2001, with only three seizures occurring in 2003. The majority occurred in Deniliquin LAC (37 seizures or 77%) and most of those that occurred in Deniliquin LAC occurred in Hay.

More than one type of drug was seized in 12 of these incidents. Cannabis and amphetamine were seized most often, with cannabis seized in 38 of these incidents (79%) and amphetamine seized in 15 incidents (31%). Also seized was ecstasy (two occasions), heroin (one occasion), cannabis seeds (two occasions) and cannabis resin (one occasion).

The average amount of cannabis found was 5.4 kilograms, with seizures ranging between 3 grams and 35 kilograms. The average amount of amphetamine found was 24 grams, with seizures ranging between 1 gram and 114 grams.

Six incidents involved heavy vehicles, and six involved hire vehicles. Twenty records involved vehicles registered in other States.

8.3.2.3. *Hume Highway, Tarcutta township*

This section in the search warrant application was entitled 'Hume Highway' and the information in it supported the conduct of an operation at the Tarcutta site. It began with a broad summary of seizures which occurred between 1997 and 1999. There then followed a short description of each of the seizures which occurred between 2000 and 2004.

According to the application, between 1997 and 1999 there were a total of 14 seizures of indictable quantities of drugs, including cannabis, heroin, amphetamines and ecstasy.

Excluding the incidents between 1997 and 1999, the incidents described were the same as the ones relied upon for the warrant application for the first operation conducted at Tarcutta, plus one additional incident.²⁰⁴

The additional incident referred to the seizure of 16.7 grams of amphetamine in early 2004.

8.3.2.4. *State Crime Command Drug Squad briefing*

This information was in support of all three sites. It was identical to the information included in the first warrant application from Wagga Wagga LAC.²⁰⁵

8.3.2.5. *Intelligence reports*

This application included five intelligence reports outlined in the first warrant application from Wagga Wagga LAC (see paragraph 7.2.4), and three additional intelligence reports.

One of the additional reports was made in 2003, by an informant who was registered with the Victorian Police. This report was also relied upon by Deniliquin LAC (see paragraph 8.2.2).

Two of the additional reports were submitted in 2004. The first related to information from Victorian police that hire cars were being used to secrete drugs and transport them to Victoria. The second report related to information that the services provided by a freight company were being used to transport drugs throughout NSW.

8.3.3. Physical description of location

For a detailed description of the Tarcutta township site, see 'Chapter 7 Case study two (Wagga Wagga) at paragraph 7.3.

8.3.3.1. *Operation sites*

As mentioned above, the site at Collingullie, and the site on the Hume Highway near Tarcutta were originally created as rest stops for heavy vehicles on major highways, and as such, were fairly rudimentary. However, the site at Collingullie had previously been used for major traffic operations.

Figure 13. Collingullie site



Source: Photograph taken by Ombudsman observers

8.3.3.2. *Weather conditions*

The weather was extremely cold for all three nights of the operation. These weather conditions presented fewer problems for police and the drug detection dog, than the hot weather. The following was noted by one of the officers in an interview we conducted:

Officer: This time, as you were well aware, it was quite, very cold.

Interviewer: Was that better or worse [than extremely hot weather]?

Officer: I think it has its own difficulties... but I think that the cold affects the dogs less adversely than the heat did. It was obvious that the dogs, as well as the majority of the police, were struggling in the heat, and... whilst it was bitterly cold and tiring again, I don't think the weather contributed to any adverse sort of effect on the dogs.²⁰⁶

Another officer we interviewed commented that:

I found the first one at Tarcutta physically draining because I was a searcher, and with the heat and climbing in and out of cars and trucks and getting suitcases and stuff out, I found that very draining. This one I didn't find as exhausting, despite being on my feet all the time... I didn't hit the wall like I was in the last one.²⁰⁷

8.3.3.3. *Amenities*

NSW Police arranged for a Random Breath Testing (RBT) truck from Sydney to be driven down to Wagga Wagga LAC for the operation. These types of RBT trucks are normally only available to metropolitan LACs. The RBT truck was driven each night to the relevant site before the operation began.

The RBT truck had a fridge, a microwave, coffee and tea facilities, a toilet, an external work bench, a mobile COPS terminal and an internal rest area.

8.3.4. General description of the operation

8.3.4.1. Times and numbers of police

Compared with the first operation run by Wagga Wagga LAC, this operation involved a smaller number of police, with around 19 officers working each night. There was only one drug detection dog at the operation.

The operation started at about 9pm and finished between midnight and 2am each night.

8.3.4.2. Police briefing

There was a major briefing on the first day of the operation. The operation commander briefly outlined the legislation. The operation commander said that the fact that the operation was being held at three different sites in the Wagga Wagga LAC meant that it would be harder for vehicles to avoid being detected, and that he hoped that this would mean that they get more seizures. He also emphasised that people being searched need to be made aware that they are being audio recorded.

He mentioned that at the previous operation, 1,000 cars came through the site, which resulted in 100 indications and 30 seizures. He commented that officers should be mindful that not every search would result in something being found.

He asked officers to be aware of other offences which came to their attention during the operation. He advised that if reasonable suspicion was formed under other police powers they should act upon that reasonable suspicion, as long as the people who were subject to the powers were kept informed about what was going on.

He also advised officers who were not immediately occupied with a search to feel free to 'check things out', for example, to run radio checks on the vehicles.

The site controller outlined general police powers of stop, search and detain. The site controller then outlined some general and specific intelligence about drug supply. He included some advice about safety, the various roles in the operation and how the detection dog works. He advised that there was nothing to prevent police officers from conducting a search by consent, whether or not officers had reasonable suspicion. The Operation Commander added that an indication by the dog on the car was sufficient to form a reasonable suspicion to search the people in the car.

The dog handler said that if the dog indicated a car in the cold zone, he would take the dog past the car in the hot zone again. The dog handler also asked police to line up luggage or bags on the road behind the car, as that worked well for the last operation.

As with the previous operation at Wagga Wagga LAC, there was a briefing at the beginning of each of the following days of the operation at the police station.

At the first of these briefings, one of the investigators asked that searching be slowed down, and not rushed. The site controller agreed, and said that officers are to defer to the investigator about anything to do with searching. The site controller advised police not to worry too much about people having to wait to be searched, as everyone would be attended to eventually.

The investigators also suggested that one person be nominated to do all radio checks and that all traffic matters should be handed over to Highway Patrol officers. The site controller agreed with these suggestions.

The inspector and the site controller then reminded everyone to be conscious of their safety when walking around the site. He also advised everyone to wear warm clothes, and to remember to wear their reflective vests.

The site controller informed everyone that Deniliquin LAC would be conducting their operation at Hay at about the same time, and that Hay was three hours away. He advised that if scribes at Collingullie were stopping people who had previously been stopped at Hay, police would change sites.

No significant issues were raised at the briefing which occurred on the last day of the operation.

8.3.4.3. *Typical scenario*

Due to the reduced numbers of police officers, for most of the operation only one side of the road was used. For the operation at the Tarcutta Township and Collingullie, both sides of the road were set up, but not constantly operative. Officers would switch back and forth between the two sides of the road according to where they were needed, and the dog handler would also switch back and forth according to where he was needed.

This approach seemed to work well, as it gave police some flexibility to divert resources where they were needed most. For example, if traffic was relatively quiet on one side of the road, police would switch over to the other side and concentrate on traffic travelling in the other direction.

Flexibility was a theme for this operation. Based on intelligence, police worked together to target vehicles to be directed into the site, rather than stopping every car. Also, scribes would sometimes give an informal explanation of why the driver had been stopped *before* reading the script they were required to read. This was presumably in response to some drivers who thought the warrant related specifically to them when read the script without a prior informal introduction.

Care was taken to re-create the 'corridor of safety' used by Wagga Wagga LAC at their last operation.

8.3.4.4. *Typical search characteristics*

Due to the comparatively low numbers of police available during this operation, at times searches were delayed. When there were one or two vehicles in the hot zone, this seemed to tie up all available police and searches took longer to conduct. Usually, the site had to be temporarily closed, as there were no police available to deal with cold zone traffic. As one of our observers noted:

Drivers had to wait – sometimes for the dog/detectives/video operator/video charger to become available. Delays appeared to be caused by the fact that police and the dog had to keep crossing the road, and because a high proportion of cars were indicated and had to queue in the hot zone, which obviously takes longer than general detection in the cold zone.²⁰⁸

When this occurred, resources were stretched, as described by one officer:

Quite often, there [were] a couple of times I was on one side of the road with a seizure and then I'd be called to the other side of the road. So someone would either have to stop the search over there, or gather everything and then wait for me to get over there.²⁰⁹

The RBT truck was sometimes used for female person searches.

8.3.4.5. *Debrief*

There was no formal debrief. A short debrief was held on site in the RBT truck, and officers were asked to fill in the debrief form that had been used at the previous Wagga Wagga operation.

At this short debrief, one officer said that he thought section 12 notices were a waste of paper. One of the searchers said that having the local hotel right next to the search area at the Tarcutta Township site was a problem, and that she would hate to be someone who was being searched there.

8.3.5. **Ombudsman's observations**

In total, our observers viewed about 63% of vehicles that were stopped (122 of 194). We observed all searches conducted at Wagga Wagga LAC.

Just over half of the vehicles we observed were either sedans or four-wheel-drives (52%), while 34% of vehicles stopped were heavy vehicles. The majority of drivers were male (88%), and most drivers were between 30 and 50 (61%).

As already noted, police from Wagga Wagga LAC made a significant seizure of amphetamine. This was not as a result of an indication from the drug detection dog. Rather, it was as a result of questioning from police, and a search by consent.

When asked about the fact that the dog did not indicate on this car in the first instance, a senior police officer commented:

There was a large quantity of air freshener, air scents, deodorant, within the vehicle. I'm not saying that's why the dog didn't [indicate] it's probably really a better question for the dog handler to explain, given that he's aware of the reactions of the dog... the dogs aren't infallible, same as the people that we use aren't infallible, it has to be basically a cooperation between all of them to get a result like that.²¹⁰

This search was observed by one of our observers, and is described below.

Our observers noted that police from Wagga Wagga LAC displayed excellent team work and good organisation and communication skills. Police also demonstrated an ability to be flexible and adapt to situations.

8.3.5.1. Case Q7

Driver: Male, 31 years of age

Passenger/s: None

Vehicle: Sedan

Found: Total 1 kilo 17 grams of amphetamine

Approximate search time: 1 hour 43 minutes

The drug dog made no indication after circling the vehicle. The dog handler indicated the vehicle was clear and police spoke to the driver. The driver stated he was driving from Sydney to Melbourne and consented to a search of the boot which was empty. The driver was unable to produce his licence as he claimed he had left it 'at a mate's place'. Police inspected his wallet which contained some cash and no identification. The driver stated the vehicle was owned by his sister. The drug dog was taken over the vehicle including through the boot and again made no positive indication. A large amount of cash was located under the driver's seat and the driver told police it was the sum of \$7000 with which he was going to buy a car.

Police suspended the search until a video recorder was located and then recorded the rest of the search. At one point, the investigator asked for the video operator to come closer but the video operator said that he did not know how to change the focus of the recorder. Police counted the money and confirmed the sum. The driver was cautioned. The rear seat was removed and police located two plastic packages containing a white crystal substance. The driver denied any knowledge of this. The detective speculated this substance was ice (amphetamine) and a quantity to the value of perhaps half a million dollars.

Both packages were weighed and collectively came to 1 kilogram and 17 grams. The packages were placed in drug exhibit bags and entered into the exhibit book, which the driver refused to sign. Police indicated that they would not be asking the driver any further questions until they were at the police station. The driver claimed he had not been cautioned but police indicated they had cautioned him earlier. The driver stated he had not heard the caution due to the noise of passing trucks. The driver originally objected to police video recording the search. However, when police turned the video off, he then indicated that he preferred that it continue to record. In response, police turned the recorder back on. The driver was taken to the station and his vehicle towed.

8.4. Costs

NSW Police provided the following information about the costs of this operation:²¹¹

Cost type	Wagga Wagga	Deniliquin	Barrier	Total
Base wages	\$11,773	\$11,190	\$17,150	\$40,113
Operational preparations	\$250	\$724	\$1,426	\$2,400
Post operational reporting	\$1,472	\$0	\$214	\$1,686
Travelling allowance	\$4,829	\$437	\$667	\$5,933
Overtime	\$1,280	\$0	\$515	\$1,795
Shift allowances	\$416	\$426	\$1,764	\$2,606
Meals	\$0	\$0	\$0	\$0
Vehicle related expenses	\$582	\$1,470	\$361	\$2,413
Equipment hire	\$0	\$0	\$500	\$500
Total	\$20,602	\$14,247	\$22,597	\$57,446
Total excluding base wages	\$8,829	\$3,057	\$5,447	\$17,333

8.5. Results

The major result from these operations was the seizure of approximately one kilogram of amphetamine by Wagga Wagga LAC at Tarcutta, and three kilograms of cannabis by Barrier LAC. These were the only two indictable quantities of drugs found during the review period.

8.5.1. Cannabis seizure

Police at the operation in Barrier LAC found three kilograms of cannabis in a vehicle, in two packages in a pillow case.²¹² The passenger admitted to owning a small amount of cannabis also found in the vehicle, but neither the driver or passenger admitted to owning the three kilograms of cannabis. In their police interviews, both gave a consistent description of a hitch hiker they had picked up and claimed that the drugs must have belonged to the hitchhiker. Police had the packaging of the three kilograms of cannabis tested for fingerprints but were unable to locate any fingerprints.

The investigations manager of Barrier LAC agreed that the case should be suspended since it would be impossible to prove that either of them were in possession of the drugs.

Therefore, no one will be charged in relation to this seizure of cannabis.

8.5.2. Amphetamine seizure

Police at the operation in Wagga Wagga LAC found \$7,000 cash in the car and one kilogram of an amphetamine, known as 'ice', in a package concealed under the back seat bench.²¹³ The driver said the cash was to buy a vehicle, and he denied all knowledge of the drugs. Police sought DNA evidence to establish whether the driver had handled the package of amphetamine, but the DNA evidence was inconclusive. The case proceeded to a committal hearing at local court – which is a hearing where a magistrate determines whether the case had a reasonable prospect of a conviction at trial.²¹⁴

The magistrate found that there was no reasonable prospect of a conviction, and dismissed the charges. The magistrate considered the available evidence, which was, as admitted by the prosecutor, largely circumstantial. The magistrate noted that:

...the defendant had been reasonably cooperative. He'd allowed the searches to take place or had made no objection to them. He had answered questions, he did not deny his knowledge of the cash. As soon as the drugs were located there was a total denial by him of the knowledge of the drugs in the car at all. He maintained that denial throughout subsequent interviews consistently...²¹⁵

The magistrate also considered other points of evidence which might reflect unfavourably on the defendant, such as the fact that the driver gave a false first name, and the fact that the driver had little luggage with him, despite claiming that he was travelling between Sydney and Melbourne for several days. However, the magistrate found that there were reasonable explanations for these facts – the driver was not licensed, and the cash would have provided travelling money.

In making his decision to dismiss the charges, the magistrate said that:

*It is not [an] unreasonable hypothesis that the drugs could have been placed in the car by another family member or by a third party in Sydney for transport to another family member in Melbourne. Whilst these hypothesis are perhaps not as likely as the hypothesis upon which the Crown relies...they don't need to be as likely. The presence of any reasonable hypothesis consistent with innocence is sufficient.*²¹⁶

At the time of writing, no appeal had been lodged.

8.5.3. Results summary

Below is a summary of results from all three operations.²¹⁷

Table 9. Results Summary for all three LACs

	Barrier	Deniliquin	Wagga Wagga
Total number of vehicles stopped	724	30	194
Vehicles searched	47	2	27
Percentage of vehicles stopped that were searched	6.49%	6.67%	13.92%
People searched	65	5	48
Total weight of cannabis found (grams)	3744.7	5	530
Total weight of amphetamine found (grams)	0	0	1017
Number of indictable quantities of any drug found	1	0	1
Cannabis cautions issued	8	0	8
Number of persons charged	8	1	11

Source: NSW Police Information Package 3.

8.5.4. Charges

Below is a description of charges laid as a result of these three border operations. In addition to drug charges, police prosecuted two drink driving charges, one weapons offence and one assault charge.

Table 10. Charges resulting from case study three

Charge ref	Offender profile	Brief facts	Charges	Proved/ Not proved	Sentence/ Result
13	Male, 23 years, no prior convictions	Police found three lots of cannabis in the vehicle, one in a plastic container and two in resealable bags. The total weight was 46.6 grams.	Possess prohibited drug	Proved	\$100 fine + \$61 court costs
14	Male, 52 years, prior convictions	Police located several resealable bags of cannabis under the driver's floor mat, the total weight of which was 30 grams. Police also found a small plastic container in the console, which contained a metal cone with cannabis in it. The driver refused to answer any questions about the cannabis. The driver was arrested and entered into custody. He declined to participate in a recorded interview.	Possess prohibited drug	Proved	\$1,200 fine
15	Male, 23 years, no prior convictions	Police found a bag of cannabis in an esky that was in the rear tray of this Ute. The driver admitted that it was his. The total weight was 17.4 grams.	Possess prohibited drug	Proved	\$100 fine + \$61 court costs
16	Male, 24 years, no prior convictions	Police noticed that the driver's breath smelt of alcohol. He admitted to drinking 4-5 pints of beer earlier that day. The driver was given a breath test which was positive. The driver's breath analysis reading was 0.115. The driver was also unlicensed.	Drive with middle range PCA	Proved	Defendant didn't appear at court – s 25 warrant to issue (warrant for arrest)
			Unlicensed for Class	Proved	Defendant didn't appear at court - s25 warrant to issue (warrant for arrest)
17	Male, 21 years, no prior convictions	In the hot zone, police found a crossbow and four arrows in the car. The driver said they were his, and that he did not have a permit for them.	Possess/use a prohibited weapon w/o permit	Proved	\$100 fine + \$63 court costs
18	Male, 22 years, no prior convictions	Police found two resealable bags of cannabis in the front of the vehicle, the total weight of which was 22 grams. The driver said he owned the cannabis.	Possess prohibited drug	Proved	\$100 fine + \$61 court costs
19	Male, 55 years, no prior convictions	A cannabis plant 2 cm tall was located between the front seats of the car.	Cultivate prohibited plant	Proved	\$200 fine + \$61 court costs

Charge ref	Offender profile	Brief facts	Charges	Proved/ Not proved	Sentence/ Result
20	Male, 30 years, prior convictions	When police began searching this car, the front passenger and owner of the car handed over to police a tin and a pipe. The tin contained about 3 grams of cannabis. Police found a further tin in the car, which contained about 4 grams of cannabis. A third amount of cannabis was found in two packages in a pillow case. Together, the packages weighed 2.956 kilograms. Neither admitted ownership of the larger amount of cannabis. Both mentioned that they had picked up and dropped off a hitch hiker earlier in the day. Nobody has been charged in relation to the large amount of cannabis found.	Possess prohibited drug	Proved	s 10 dismissal (no conviction recorded)
			Possession of equipment for administering prohibited drug	Proved	s 10 dismissal (no conviction recorded)
21	Male, 33 year, no prior convictions	Police noted alcohol on the driver's breath. The driver said he had had a drink about half an hour before. A breath test was positive for alcohol. The driver's breath analysis reading was 0.075.	Drive with low range PCA	Proved	\$400 fine and 6 month disqualification
22	Male, 54 years, no prior convictions	Police found 20 grams of cannabis in this car. The driver said it was for personal use.	Possess prohibited drug	Proved	\$200 fine
23	Male, 38 years, prior convictions	The passenger handed to police an amount of cannabis weighing 3 grams. In addition to admitting it was his, for personal use, the passenger said that the cannabis had come from a plant he had grown.	Possess prohibited drug	Proved	s 10 dismissal (no conviction recorded) + \$63 court costs
			Cultivate prohibited plant	Not proved	Dismissed
24	Male, 18 years, no prior convictions	The driver told police that there could be a small tin which used to have cannabis in it, in the car. The tin was found to have remnants of cannabis in it. Police also located another small tin which had 11 cannabis seeds in it. Police also found a pipe in the car. The seeds weighed less than 1 gram. Police determined that the driver was not entitled to a cannabis caution, and charged him at the scene.	Possess prohibited drug	Proved	s 10 dismissal (no conviction recorded)
			Possession of equipment for administering prohibited drug	Proved	s 10 dismissal (no conviction recorded)

Charge ref	Offender profile	Brief facts	Charges	Proved/ Not proved	Sentence/ Result
25	Male, 37 years, no prior convictions	There were two people in this vehicle, a woman and man. The woman's case is described directly below. The man said there was cannabis in his shirt pocket and in the car. One gram of cannabis was found on his person, and 57 grams in a box in the car. He said it was for personal use. He was charged at the scene.	Possess prohibited drug	Proved	s 10 dismissal (no conviction recorded), and 12 month good behaviour bond
26	Female, 38 years, no prior convictions	Police found two lots of cannabis amongst the luggage of the abovementioned vehicle, which belonged to this woman. They also found some cannabis in her pocket. The total weight of the cannabis found was 284 grams. The woman admitted that the cannabis was hers, and that it was for personal use, to control her epilepsy.	Possess prohibited drug	Proved	s12 bond (9 months suspended sentence, which is also a good behaviour bond)
27	Male, 30 years, no prior convictions	This vehicle was a hire pantec - a type of truck commonly used for moving furniture. There were four passengers. The back of the truck was searched, and a small bag of cannabis was found weighing 28 grams. Two of these men from the truck admitted they had joint ownership of this cannabis. Police found a second amount of cannabis weighing 73 grams, which a third man admitted to owning.	Possess prohibited drug	Proved	s 10 dismissal (no conviction recorded) and a 12 month good behaviour bond plus \$61 court costs
28	Male, 21 years, no prior convictions		Possess prohibited drug	Proved	s 10 dismissal (no conviction recorded) and a 18 month good behaviour bond plus \$61 court costs
29	Male, 24 years, no prior convictions		Possess prohibited drug	Proved	s 10 dismissal (no conviction recorded) and a 12 month good behaviour bond plus \$61 court costs
30	Male, 34 years, prior convictions	The driver told police he had cannabis on his person. He handed over a resealable bag of cannabis, weighing 11 grams. ²¹⁸	Possess prohibited drug	Proved	\$300 fine plus court costs \$63

Charge ref	Offender profile	Brief facts	Charges	Proved/ Not proved	Sentence/ Result
31	Male, 27 years, no prior convictions	The driver handed a 'joint of cannabis' weighing one gram, to police. The car was searched, and police found 20 grams of cannabis under the driver's seat. The driver said it was for personal use.	Possess prohibited drug	Proved	\$250 fine and \$61 in court costs
32	Male, 32 years, no prior convictions	In the cold zone, the driver said he had been in Sydney for three days, and was returning home to Melbourne. He was unable to produce any ID. When asked, he gave a false name and date of birth. The dog did not make an indication on the car. The driver allowed police to search the car. Police found \$7,000 in cash, which the driver said was for buying a car. Police then found a white plastic bag under the rear passenger seat, with two bags of amphetamine in it, weighing 1.017 kilogram in total. The dog was taken past the two bags and gave an indication. The driver was arrested, and entered into custody. The driver declined to participate in a police interview. While in custody, the driver gave his real name to police.	Supply prohibited drug larger than commercial quantity	Not proved	Dismissed
			Possess prohibited drug	Not proved	Withdrawn and dismissed
			Driver/rider state false name or address	Proved	\$500 fine
			Unlicensed driver	Proved	
			Goods in personal custody suspected being stolen	Not proved	Withdrawn and dismissed
33	Aboriginal Male, 40 years, prior convictions	When this vehicle was stopped, a police officer saw 'blood throughout the motor vehicle'. The police officer also saw movement under a blanket in the front passenger seat. Police asked for the blanket to be taken off, and a woman was seen with extensive facial injuries. The woman said that the driver was her brother (when he was in fact her de facto) and both the woman and the driver claimed that the injuries were as a result of a fight with other people. The drug detection dog then made an indication on the car, and police began searching it. During the search 'an extensive amount of blood splatter' was found in the vehicle. Once police established the driver's identity, he was arrested. During the incident the woman was taken to hospital, and the police report says that she had life threatening injuries.	Maliciously inflict grievous bodily harm	Awaiting district court trial	
			Maliciously inflict grievous bodily harm with intent	Awaiting district court trial	

Source: Information downloaded from COPS

8.5.5. Cannabis cautions

Cannabis cautions were only issued by Barrier and Wagga Wagga LACs. Police from Deniliquin LAC issued one juvenile caution.²¹⁹ The juvenile was a passenger in a car which had been indicated by the drug detection dog in the cold zone. The juvenile was searched, and police found a tobacco tin with approximately 5 grams of cannabis in it. As he was a juvenile, and had no criminal history, he was given an official juvenile caution. This incident was observed by our researchers, and is described in more detail at paragraph 8.2.5.1.

Table 11. Cannabis cautions resulting from case study three.

Event Ref	LAC	Offender profile	Date of offence	Brief facts
31	Barrier	Female, 52 years	28/04/2004	The driver admitted to having cannabis in her possession. An amount of cannabis was found, weighing 5.2 grams.
32	Barrier	Male, 22 years	28/04/2004	Police found 'a small bag of GVM [green vegetable matter] in the centre console'. Police also found two 'joints' and three water pipes made from drink bottles. The total weight of cannabis found was 5 grams.
33	Barrier	Male, 37 years	29/04/2004	It is not clear from the event narrative whether the cannabis was found or handed over to police. The total weight was 11.2 grams.
34	Barrier	Male, 22 years	29/07/2004	Police located a small bag of cannabis. The total weight was 10 grams
35	Barrier	Male, 38 years	29/04/2004	The driver told police he had some cannabis in the lining of the car ceiling, near the rear vision mirror. The total weight was 5.4 grams.
36	Barrier	Male, 37 years	30/04/2004	The person issued with this caution was aboard a coach that had been stopped. Police saw the person take something from his bag and put it down his pants. Police boarded the bus and spoke to the person. The person disembarked from the coach and the person's luggage was also taken out of the coach. The person admitted that he had cannabis in his possession, and he was then searched. The total weight was 2 grams.
37	Barrier	Male, 49 years	30/04/2004	Police found 10 grams of cannabis on the driver.
38	Barrier	Female, 22 years	30/04/2004	Police found a bag of cannabis in a hand bag on the floor under the passenger seat. There was no record of the weight.
39	Wagga Wagga	Male, 38 years	29/04/2004	The driver handed over to police 3 grams of cannabis.
40	Wagga Wagga	Male, 27 years	29/04/2004	Police found 1 gram of 'green vegetable matter' in a 'small dash compartment'.
41	Wagga Wagga	Female, 41 years	30/04/2004	The driver handed over to police 3 grams of cannabis.

Event Ref	LAC	Offender profile	Date of offence	Brief facts
42	Wagga Wagga	Male, 25 years	30/04/2004	Police found two bags of cannabis in the car, with a total weight of 9 grams. The first was found in a chip packet, and the other in a sock in a suitcase.
43	Wagga Wagga	Male, 33 years	1/05/2004	After the indication from the dog, the driver admitted to police that he had a small amount of cannabis. In the hot area, he handed over a small metal tin with 1 gram of cannabis and tobacco in it.
44	Wagga Wagga	Male, 20 years	30/04/2004	Police found 10 grams of cannabis underneath the front driver's seat.
45	Wagga Wagga	Male, 52 years	2/05/2004	Police found two 'joints of cannabis' in a packet of cigarettes. No weight was recorded on the police record.
46	Wagga Wagga	Male, 18 years	1/05/2004	A bag in the cargo area of a coach was indicated by the drug detection dog. The owner of the bag was spoken to. His bag was removed from the bus and searched. The owner of the bag said there was a small amount of 'grass' in his bag. The approximate weight of the cannabis was 1 gram.

Source: Information downloaded from COPS

Endnotes

¹⁹⁹ Note that an amount between 1 kilogram and 25 kilograms of cannabis is an indictable quantity under the *Drug Misuse and Trafficking Act*; and an amount of amphetamine between 5 grams and 250 grams is an indictable quantity under the *Drug Misuse and Trafficking Act*.

²⁰⁰ Ombudsman observer notes C.

²⁰¹ See Chapter 6: Case study one (Deniliquin).

²⁰² Ombudsman observer notes D.

²⁰³ Ibid.

²⁰⁴ See Chapter 7: Case study two (Wagga Wagga) at paragraph 7.2 for Tarcutta supporting information.

²⁰⁵ See Case study two at paragraph 7.2.2 and 7.2.3.

²⁰⁶ Interview KK.

²⁰⁷ Interview LL.

²⁰⁸ Ombudsman observer notes E.

²⁰⁹ Interview LL.

²¹⁰ Interview KK.

²¹¹ NSW Police Costing Information.

²¹² See charge reference 20 in Table 10 for outline of facts.

²¹³ See charge reference 32 in Table 10 for outline of facts.

²¹⁴ *Criminal Procedure Act 1986*, s.64.

²¹⁵ *Director of Public Prosecutions v Saleh Osman* (unreported), Wagga Wagga Local Court, 30 August 2004 at p.8.

²¹⁶ Ibid at p.9.

²¹⁷ Police from Deniliquin LAC issued one juvenile caution for possession of cannabis. See paragraph 8.5.5.

²¹⁸ It is not stated in the event narrative why he was not issued with a caution, but it may have been because of the nature of his prior convictions. It is noted that cannabis cautions are entirely discretionary.

²¹⁹ Event reference 47

chapter 9: case study four (Griffith)

This operation was the fourth under the Act, and was held between 8 and 10 July 2004. Unlike the other operations, there were no Ombudsman observers present for this operation. The information regarding the conduct of the Griffith segment of Operation Carting contained in this case study derives from information provided by NSW Police.²²⁰

The operation involved the establishment of checkpoints at two sites, Sandigo and 'The Birdcage'. These locations are heavy vehicle/truck stops located approximately 75 kilometres apart on the Sturt Highway. Sandigo is located within the Narrandera border area, while 'The Birdcage' is specifically referred to in the Act as the central point of another of the border areas.²²¹

9.1. City of Griffith

Griffith is in the heartland of the Riverina and the Murrumbidgee Irrigation Area. Situated 750 kilometres from Sydney, 450 kilometres from Melbourne and 797 kilometres from Adelaide, it sits at the centre of a triangle formed by Hay (153 kilometres away), West Wyalong (155 kilometres) and Narrandera (96 kilometres). It is at the centre of the Griffith Local Area Command, which takes in much of the surrounding area and includes West Wyalong to the east, Narrandera to the south-east and Hillston to the north west.

While not situated on any major highway, the City of Griffith is serviced by and accessible from the Sturt, Newell and Mid Western Highways. A sizeable agricultural sector, particularly in food, wine and fibres, and an associated tourism sector sees significant traffic movements through and around the area, indicated in part by the more than 130 semi trailers that leave from Griffith each day.²²²

Figure 14. Map of Griffith



Source: The Griffith Visitor Centre's website (www.griffith.nsw.gov.au/GriffithVisitorsCentre.html)

9.2. Supporting information

Two drug detection warrants were sought for this operation, one for each location. In support of the application for the warrants, 55 seizures of drugs between 1997 and 2004 and 6 intelligence reports made between 2000 and 2004 were relied upon.²²³ Most of the events occurred in 2000-2001. There were also several reports of incidents which occurred in 2004.

Of these 55 incidents, there were 43 (78%) where there was possession of cannabis leaf in amounts ranging from 4 grams to just over 12 kilograms. The average amount found was 3.7 kilograms. Amphetamines were found in 12 (22%) of incidents, in quantities ranging from 0.5 grams to 11.5 grams. The average amount found was 3 grams. There was one incident where 26 grams of ecstasy was found.

Of the six intelligence reports cited in support of the application one was made in May 2004, four were made between March and November 2003 and one was made in July 2000.

9.3. Physical description of the locations

9.3.1. Locations of operation

'The Birdcage' is located approximately 35 kilometres south of Griffith at the intersection of the Sturt and Newell Highways and is the centre of one of the designated border areas established by the Act. The site is approximately 300 metres in length from the entry to the exit and 30 metres in width. The operation was conducted on both sides of the roadway to stop east and westbound traffic.²²⁴

Figure 15. Approaching the westbound stop at 'The Birdcage'



Source: NSW Police Information Package 4

Figure 16. Approaching the eastbound stop at 'The Birdcage'



Source: NSW Police Information Package 4

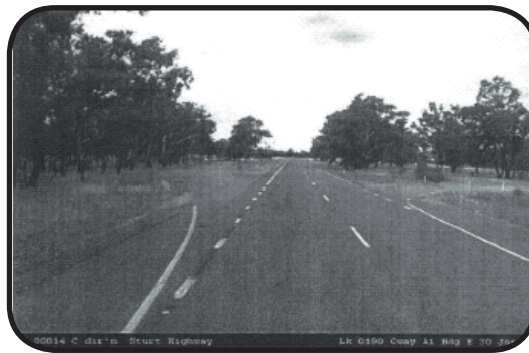
According to the maps and plans submitted in support of the application for the warrant Sandigo is located 19.8 kilometres south east of the intersection of the Sturt and Newell Highways at Narrandera, which places it just 200 metres inside the perimeter of the Narrandera border area. The site is approximately 350 metres in length from the entry to the exit and 30 metres in width. Again, inspection areas were established on both sides of the roadway to stop east and west bound traffic.²²⁵

Figure 17. Approaching the westbound stop at Sandigo



Source: NSW Police Information Package 4

Figure 18. Approaching the eastbound stop at Sandigo



Source: NSW Police Information Package 4

9.3.2. Weather conditions

During the course of the operation Griffith experienced cold to mild conditions with the temperature ranging from minus 2 to 14 degrees on 8 July and 3 to 16 degrees on 9 July.²²⁶ Similar temperature minima and maxima were experienced at Narrandera.²²⁷ Inclement weather on 10 July resulted in the cancellation of the operation for that day.

9.4. General description of the operation

A review of the operation was conducted by police two days after the operation. The review noted that inclement weather had forced the cancellation of the third day of the operation. The review also noted that traffic was appropriately slowed down by signage, the site was well marked by 'witches hats', safety corridors were created with 'witches hats' and the sites were well lit.

9.4.1. Times and numbers of police

The operation was conducted over two days, with officers deployed from Griffith and Wagga Wagga LACs, and two drug detection dogs. The operation was conducted between 8:00am and 8.30pm on the first day, and between 2:00pm and 2:30am on the second day.

9.4.2. Police briefing/debrief

We did not attend this operation, so we were not privy to the information given at the briefing, nor were we privy to the debrief. However, a report on the conduct of the operation noted that it had been conducted according to the legislation and SOPs, and in accordance with the risk assessment and Traffic Control Plans. Feedback from the public was said to be very positive with minimal disruption and delay.²²⁸

9.5. Costs

NSW Police provided the following information about the costs of this operation:²²⁹

Cost type	Griffith
Base wages	\$17,505
Operational preparations	\$267
Post operational reporting	\$100
Travelling allowance	\$0
Overtime	\$0
Shift allowances	\$1,884
Meals	\$0
Vehicle related expenses	\$3,000
Equipment hire	\$0
Total	\$22,756
Total excluding base wages	\$5,251

9.6. Results

9.6.1. Summary of results

No indictable quantities of drugs were located in the course of this operation. Two Field Court Attendance Notices (FCAN) were issued. Three cannabis cautions were issued. One Traffic Infringement Notice was issued. One driver was also processed for mid-range PCA.

Table 12. Results summary

Total number of vehicles stopped	567
Vehicles searched	14
Percentage of vehicles stopped that were searched	2.47%
People searched	20
Total weight of cannabis found (grams)	6.4
Total weight of amphetamine found (grams)	0
Number of indictable quantities of any drug found	0
Cannabis cautions issued	3
Number of persons charged	2

Source: NSW Police Information Package 4

9.6.2. Charges

Two FCANs were issued and there was one instance of mid range prescribed concentration of alcohol.

Table 13. Charges resulting from Case study four

Charge ref	Offender profile	Brief facts	Charge/s	Result	Sentence
34	Male, 22 years, two previous cannabis cautions	A joint and small tin containing cannabis was located in vehicle. The accused admitted that he owned the items and that the items contained cannabis. Less than 2 grams of cannabis located. FCAN issued	Possess prohibited drug/plant	Proved	s 10 dismissal + \$63 court costs
35	Male, 31 years, licence suspended	Asked to produce license. Claimed he did not have it on him. Details checked and established that licence was suspended. FCAN issued.	Drive while suspended	Not yet heard	

Source: information downloaded from COPS

9.6.3. Cannabis cautions

Below is a short description of all cannabis cautions issued during the operation.

Table 14. Cannabis cautions resulting from case study four

Event ref	Offender profile	Date of offence	Brief facts
48	Male, 22 years	8-Jul-04	Police located a small bag containing green vegetable matter (0.60 grams) in a keycase in the passenger's pocket.
49	Male, 45 years, SA resident	8-Jul-04	A small joint, amounting to 1.4 grams, was located in the offender's vehicle.
50	Male, 53 years	9-Jul-04	Police found a plastic resealable bag containing cannabis leaf (gross weight was 2.1 grams) in a toiletries bag. A tin containing cannabis leaf was found in an overhead compartment. The offender admitted to owning the cannabis found in the toiletries bag but not the tin. Vehicle was part of a fleet of trucks and a large number of persons had access to the vehicle.

Source: Information downloaded from COPS and information supplied by NSW Police

Endnotes

²²⁰ NSW Police Information Package 4.

²²¹ See *Police Powers (Drug Detection in Border Areas) Act*, s.3(1).

²²² Information from the Griffith Visitor Centre's website: <http://www.griffith.nsw.gov.au/GriffithVisitorsCentreAboutGriffith.htm>.

²²³ NSW Police Information Package 4.

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ Information from the Australian Bureau of Meteorology's website: <http://www.bom.gov.au/climate/dwo/200407/html/IDCJDW2053.200407.shtml>

²²⁷ Information from the Australian Bureau of Meteorology's website: <http://www.bom.gov.au/climate/dwo/200407/html/IDCJDW2094.200407.shtml>

²²⁸ *Ibid.*

²²⁹ NSW Police Costing Information.

chapter 10: case study five (Albury)

This was the fifth operation under the Act, and the first operation conducted by Albury LAC. The operation was held between 29 and 30 July, and took place on the Hume Highway, which forms the main street for the township of Holbrook. The operation took place on one day for a four-hour period.

10.1. Township of Holbrook

Holbrook is almost halfway between Melbourne and Sydney on the Hume Highway. It is about 480 kilometres south of Sydney. Holbrook is perhaps most famous for a submarine situated outside a visitors centre on the Hume Highway, in the main part of Holbrook.

10.2. Supporting information

The search warrant application included a section entitled 'Information summary' and a section entitled 'Historical information relating to seizures on the Hume Highway'.

10.2.1. Information summary

This section stated that there have been 23 interceptions of vehicles on the Hume Highway since 2002 resulting in an indictable quantity of prohibited drugs being seized. The total weight of each drug seized since 2002 is listed, including 2,700 grams of cannabis, 229.5 grams of amphetamines, 186 grams of heroin and 186 grams of ecstasy.

The information summary also referred to a warrant that had previously been granted for operations under the Act at the Tarcutta site, which is also on the Hume Highway. The application used the results from Tarcutta as part of its supporting information, stating that during the Tarcutta operation, 988 vehicles were stopped and 93 were searched. The summary stated that no indictable quantities of drug were seized, however, 246 grams of cannabis was seized in total.

10.2.2. Historical information relating to seizures on the Hume Highway

This section began with an overview of seizures of indictable quantities of drugs between 1997 and 1999. During this time, 14 seizures of indictable quantities of drugs were made, including seizures of cannabis, amphetamines, ecstasy and heroin.

This section also included a description of 35 incidents between 2000 and 2004 where a large quantity of drugs had been seized. Fourteen of these incidents occurred within the Albury LAC. The majority of these incidents involved amphetamine (20 or 57% of seizures), with the average amount of amphetamine seized being 15 grams. The largest seizure of amphetamine was 72 grams.

Cannabis and ecstasy were also seized a number of times, in large amounts. The average amount of ecstasy seized was 231 grams, and the average amount of cannabis seized was 8610 grams. There was also one seizure involving the chemicals required to manufacture amphetamine.

A large proportion of vehicles involved in the incidents described were heavy vehicles (14 or 40%). There were also three incidents involving coaches.

10.2.3. Current intelligence holdings from NSW Police

This section included 11 intelligence reports describing information received by police about possible drug supply between 2003-2004. The intelligence described what drugs were allegedly being transported, and in some cases cited specific companies whose employees were involved in drug couriering. The reports also described modus operandi, such as how drugs were taken on board coaches.

10.3. Physical description of the location

10.3.1. Location of operation

The operation was held on the Hume Highway, in front of the submarine tourist attraction. It was also diagonally opposite a local hotel. The highway at this spot consisted of one lane in each direction, with a road shoulder on both sides of the road.

10.3.2. Weather conditions

The weather got progressively colder as the night wore on. It began raining toward the end of the operation.

10.3.3. Amenities

The local State Emergency Services provided a tent with coffee and tea facilities, and a couple of chairs for officers to rest in. The Visitors' Centre outside the submarine tourist attraction provided public toilets.

10.4. General description of the operation

10.4.1. Time and number of police

This operation was held for one night only, between 9.30pm and 1.30am. It was originally intended to finish at approximately 3am, but it got called off early due to rain. Our observers were informed several times by a senior officer that the operation was held for one night only because 'it was a case of we crawl before we walk'.²³⁰

There were 21 police in attendance, including the drug detection dog handler.

10.4.2. Police briefing

The operation commander outlined the powers given to police under the Act. He also outlined the search process, and said that searches were to be conducted in the presence of the independent officer.

The operation commander made copies of the warrant available to other police if they wanted to view it. He then gave a description of the various roles required to conduct the operation. He advised searchers to be aware for potential DNA and fingerprint evidence on exhibits seized.

The operation commander then gave an outline of other specific powers that police might rely on during the operation, such as general police powers of search.

The operation commander also advised police to ask for cooperation from members of the public, and ensure that they have reasonable privacy when conducting the searches.

The site commander went through the roles each officer would perform. He advised police that although their main purpose for conducting the operation was to detect drugs, police shouldn't ignore traffic offences.

The dog handler addressed the briefing and advised police that the drug detection dog would go around the car after the section 12 notice had been issued. The handler said that he should not have to speak to the driver at all.

During the briefing, officers were told that they did not have the power to ask truck drivers to step down from the cabin, but that from an occupational health and safety perspective, it is best to do so, especially for the scribe.

10.4.3. A typical scenario

The script given in the cold zone during this operation was slightly different to the scripts read by police scribes in previous operations. It was shorter, and was read verbatim from the section 12 notice, which was also slightly different to all other section 12 notices.

There was a large curb next to the site where police waited until a car was stopped by a Highway Patrol officer. Once the vehicle had come to a complete stop, the scribe would move from the curb and speak to the driver.

Initially, one scribe was doing this job as well as recording number plates, however, after an hour or so the operation commander suggested that two other officers help out with this task, and between the three of them, they took turns being scribe.

Scribes made a point of asking drivers of heavy vehicles to stand against their vehicles during the initial dog screening process in the cold zone.

10.4.4. A typical search

Only one search was conducted during this operation. It is described in more detail below at paragraph 10.7.1.

10.4.5. Debrief

As mentioned above, the operation finished early due to rain. At the debrief, comments and suggestions included:

- An officer suggested that people should be searched inside a tent in future. Another officer suggested that conducting the operation during the day would be more beneficial, as heavy vehicles are bound to avoid the site, and more passenger vehicles would come through the site.
- The dog handler said that the wet weather may have been affecting how well the drug detection dog was performing. The handler also suggested that the number of police present for the operation was too many for one dog – the more police there are the less rest the dog would get.
- An officer with Highway Patrol said that he had been listening to the CB radio during the operation, and that it was likely that heavy vehicles were taking a detour. He suggested that setting up a simultaneous operation at the detour route would be a good idea.

10.5. Costs

NSW Police provided the following information about the costs of this operation:²³¹

Cost type	Albury
Base wages	\$16,748
Operational preparations	\$1,934
Post operational reporting	\$1,427
Travelling allowance	\$0
Overtime	\$0
Shift allowances	\$579
Meals	\$300
Vehicle related expenses	\$1,600
Equipment hire	\$100
Total	\$22,688
Total excluding base wages	\$5,940

10.6. Results

10.6.1. Summary of results

Below is a summary of results from this operation.

Table 15. Results summary

Total number of vehicles stopped	75
Vehicles searched	1
Percentage of vehicles stopped that were searched	1.33%
People searched	1
Total weight of cannabis found (grams)	0
Total weight of amphetamine found (grams)	0
Number of indictable quantities of any drug found	0
Cannabis cautions issued	0
Number of persons charged	0

Source: NSW Police Information Package 5

10.6.2. Charges

No charges were laid as a result of this operation.

10.6.3. Cannabis cautions

No cautions were issued as a result of this operation.

10.7. Ombudsman's observations

We observed 88% of vehicles (66 of 75) which were stopped at this site. We observed the only search that was conducted. According to our notes, the average time taken for a stop in the cold zone was two minutes, ranging from one to twenty five minutes.

Most vehicles we observed which were stopped were heavy vehicles (69% or 46 of 67). Only one female driver was observed for the whole operation. We estimated the ages of drivers, and it appeared as though the majority were aged between 30 and 40.

Generally, this operation seemed to be well organised. However, the traffic calming strategy did not appear to be successful, because some trucks and a few cars were not able to stop in time, or did not appear to be able to stop. The Highway Patrol Officer let several cars drive past the site as a result of this situation. In addition, two cars appeared to deliberately avoid the site. Both vehicles were pursued, and brought back to the site, however, neither vehicle was indicated or found to contain prohibited drugs. Both vehicles were released after being screened by the dog.

Officers did not seem too concerned with the fact that a few vehicles did not slow down sufficiently to be directed into the site. An officer we interviewed commented:

Look, I happened to debrief the officers involved, I spoke to them briefly. In real terms, what I saw there I've seen at RBT sites, I've seen it at radar sites like that in the past. You get certain people, for whatever reason you can be there with a police car and you have the road blocked, and it's an unfortunate reality these days that you'll have motorists stop and say 'What do you want me to do?' And you've got a cone and a torch and you've waving them no, and dare you say, it's common sense [that] you're meant to be coming in here or I'm diverting traffic, but some individuals will [not understand that].²³²

The cold zone seemed narrower than at other sites we had observed as the zone could just fit the width of a heavy vehicle. This may have been why scribes waited on the sidewalk rather than in the cold zone before approaching the driver. As noted by one police officer we interviewed:

I did have a traffic officer tell me that he would have rather [have had] the road, the cold area, the cold zone, be a little bit wider.²³³

Our observers also noted that several drivers of heavy vehicles were beginning to take their pants off after disembarking from their cabins. Our observers sought an explanation for this strange behaviour. A police officer said that heavy vehicle drivers thought that the tent (which was a tea and coffee facility for police) had been set up to conduct urine tests on drivers. She discerned this from listening to CB radio for most of the night.

As noted above, there was only one indication from the drug detection dog during the whole operation. Police officers became a bit restless, as commented by one police officer:

Yeah...I found after a few hours it was quiet and the results weren't coming, which was expected anyway because it is a random sort of operation. So I found some of the police were getting a little bit bored maybe.²³⁴

Perhaps as a consequence of this, police were diligent about acting upon traffic matters, and several Traffic Infringement Notices were issued throughout the night.

There was only one search conducted during this operation, and it is described below.

10.7.1. Case AB11

Driver: Male, forties

Passenger/s: None

Vehicle: Truck

Found: Smoking device

Approximate search time: 39 minutes

A positive indication was made by the drug dog on the driver of a heavy vehicle. The indication was made on the driver while he was in the cold zone during the initial screening of the vehicle. The man became fidgety and agitated while the search was conducted. Police asked the man if he had anything to declare and the man indicated he was in possession of a smoking device (a bong). The man was searched and his pockets emptied. The man started to unzip his trousers and was told this was not necessary. His shoes were removed and searched and his wallet inspected. While this was occurring other police officers searched the cabin of the truck. Police requested the driver's assistance in locating the smoking device and he told them where it was. The device was located and entered in to the exhibit book. No drugs were located in the vehicle and when the search was completed the man was allowed to go. One police officer commented to other police that the "exhibit was not worth the paper it was recorded on."

Endnotes

²³⁰ Interview MM.

²³¹ NSW Police Costing Information.

²³² Interview MM.

²³³ Interview NN.

²³⁴ Interview NN.

chapter 11: comparative case studies

It is not within the scope of this review to examine in detail the many different strategies that police could employ to detect the transportation of indictable quantities of prohibited drugs. Having stated this, it is useful to consider some of the alternatives currently used by NSW Police, and other officials, to stop and sometimes search vehicles.

In this chapter we discuss three alternate methods of setting up checkpoints and stopping vehicles, which were all raised with us in the context of this review.

We do not suggest that these methods, or variations on them, represent the only options available to police to stop vehicles for the purpose of detecting the cross-border transportation of drugs. Elsewhere in this report we discuss the use of controlled operations, and in our legislative survey we refer to powers under the *Police Powers (Vehicles) Act 1998* to establish road blocks. There are likely to be other options that police may wish to explore in addition to those we have briefly mentioned in this report.

11.1. NSW/Qld border operation

11.1.1. Operation Aims

Over two and a half days in May 2004, police conducted a 'Vikings' operation along the NSW and Queensland border. The operation was 'designed as an interdiction into criminal activity and traffic violations utilising the joint forces of New South Wales Police ... and Queensland Police ...border commands.'²³⁵

The operation was to target:

- bulk inter-state trafficking of cannabis and other prohibited drugs
- stolen property
- stock theft
- traffic offences.

11.1.2. Conduct of the Operation

NSW and Queensland police met regularly prior to conducting the operation. A total of seven locations along both sides of the NSW/Qld border were chosen as RBT sites. Back roads were preferred to major thoroughfares because of intelligence suggesting that offenders were avoiding 'heavily policed major highways'. One site was an off-shore marine site run by the NSW Police Marine Command.

Each site was controlled by two police officers and staffed by between four and six officers at any one time. Police worked 12 hour shifts, rotating over 24 hour periods. Over the entire period of the operation approximately 50 NSW Police and 50 Queensland police were deployed. Approximately 20 officers from the NSW Police Marine Area Command were also involved.

Although local police working on the back road sites applied to use a NSW drug detection dog during the operation this request was not approved. This was because the Dog Unit considered that use of the drug detection dogs in this way was of questionable legality.

The Marine Police Command made use of one drug detection dog from the NSW Police Dog Unit to assist in screening vessels for drugs. Authority to use the drug detection dog on vessels is found in a combination of section 357C of the *Crimes Act 1900* and section 4 of the *Police Powers (Drug Detection Dogs) Act 2001*.²³⁶ To stop and detain a vessel police must possess reasonable suspicion in relation to an offence.²³⁷ Police records do not note whether any vessels needed to be stopped prior to police boarding them or whether they were already stationary at the time.

The operation made use of Queensland police drug detection dogs (on the Queensland side of the border) and NSW Police firearm and explosive detection dogs were also deployed.

11.1.3. Searching vehicles

The Act does not apply along the NSW/Qld border. Thus there was no applicable power to randomly stop vehicles for the purpose of screening them for prohibited drugs.

On the New South Wales side of the border the operation was conducted as a variation on typical RBT stops conducted regularly by police.²³⁸ That is, police pulled over vehicles to conduct breath testing. Once the vehicle had been stopped, police in some instances formed a reasonable suspicion that prohibited drugs may be in the vehicle and conducted a search of the vehicle and its occupants. This reasonable suspicion may have been formed because, for example, police could smell cannabis coming from the vehicle, or police could see suspicious items in the vehicle. Alternatively, radio checks on the vehicle may have raised police suspicions. In some instances police searched the vehicle with the consent of the driver.

The following are two examples of searches taken from event narrative records:²³⁹

Example 1

About [time, date], Police were conducting Stationary Random Breath Testing as a result of operation VIKINGS, along the [name of road, suburb].

Police conducted a breath test upon the driver of vehicle [number plate] a white pantec truck. ...

The driver [name of driver] was subjected to a breath test. During the time that Police were speaking to the POI [name] he was very agitated and appeared to be nervous. The POI was questioned in relation to his movements along the road and the POI's agitation appeared to increase.

Radio checks were conducted upon the POI which revealed intelligence for cultivation and supply of cannabis.

*The POI was questioned in relation to the contents of the vehicle. The cab and rear section of the vehicle were searched with negative result ...*²⁴⁰

Example 2

On the [time date] police conducting random breath testing on [street name, suburb] as part of Vikings Richmond/Tweed ... spoke to the accused [name] about traffic matters. A smell of cannabis smoke was smelt on the accused. He was searched with a small amount of cannabis leaf found in his possession. He made a full and open confession as to his knowledge of the drug. He told police it is for his own personal use, to experiment with, and for recreational use. He does not use cannabis daily. He met each and every criteria for a cannabis caution.

*Cannabis caution [number] issued at scene.*²⁴¹

11.1.4. Results

Combined NSW and Queensland figures for the operation show that almost 4,000 vehicles were stopped and drivers breath tested. Of these 4,000 approximately 1.6% or 65 were subject to searches. Twenty vessels were also boarded. Thirty-nine people were arrested and 59 charges laid.

In NSW, 19 people were charged, with a total of eight drink driving offences, nine traffic offences, seven drug offences and seven other offences (including firearms offences, custody of a knife, and goods in custody offences).²⁴²

In NSW, nine cannabis plants and in excess of 2760 grams of cannabis (not including cannabis cautions) were seized. All drug charges resulted in convictions including two cultivation charges and one charge for supply. Nine cannabis cautions were also issued.

These results were praised as a 'great success' by Assistant Commissioner, Mark Goodwin from NSW Police.²⁴³

Acting Superintendent Keogh from Surfers Paradise Police (Qld) was reported in the media as stating: 'Its certainly going to make couriers who want to transport drugs from state to state really stop and think.'²⁴⁴

A senior officer from the State Crime Command Drug Squad commented to us that he felt the NSW/Qld border operations were strategically superior to those set up under the trial established by the Act. This was primarily because the RBT operations would be less obvious to passing traffic and because they were more flexible. He said:

You're not broadcasting it [the operation]. That's where the border legislation was – it's like a big neon sign sitting out there saying, (it is actually a big neon sign!), sitting out there saying, you know, ... 'There's a drug stop up ahead' or whatever. ... I know they've had specific signage and so, why would you announce that sort of activity? Whereas with a mobile RBT type thing you can set up anywhere ... back streets, main streets, you could target actual local areas ... If there's a geographical area there that you want to look at, you know, that has quite a substantial drug supply network [you could set up there].²⁴⁵

11.1.5. An alternative to large scale operations under the Act

This operation used RBT-style traffic stops as 'dual purpose' stops which also assisted in the detection of prohibited drugs. We discuss some of the issues in relation to RBT stops, including safety issues, less stringent traffic management arrangements and legal issues in the next section.

11.2. Random Breath Testing operations

In the context of police operations to tackle cross-border drug transportation, operational police have referred to RBT to illustrate the different site requirements for RBT operations compared with sites set up under the Act.

11.2.1. RBT operations

A typical RBT operation involves police directing vehicles off the road into a site where drivers undergo breath analysis. If the driver's breath analysis is positive then they are arrested and conveyed to a local police station for the purpose of further, more sensitive breath analysis.

RBT operations may be conducted with as few as two police officers. Where there are two officers, one is responsible for pulling vehicles off the road²⁴⁶ and recording the registration details, while the other officer conducts the testing. A Highway Patrol vehicle with an illuminated message bar usually indicates the purpose of the police operation.

Larger RBT operations on highways will sometimes involve the RTA insofar as the RTA will provide traffic-calming signage to ensure that vehicle speed is reduced prior to the RBT site.

Police are not required to obtain a warrant to conduct RBT operations. Nor are police required to consult or seek approval from the RTA about the sites they use.

11.2.2. Occupational health and safety

Central to any police operation is the requirement on NSW Police (as an employer) to ensure the health, safety and welfare of their employees.²⁴⁷

In a recent Industrial Relations Commission decision²⁴⁸ it was held that NSW Police had failed to ensure that there was a safe system of work for a police officer who was struck by a speeding vehicle during a Stationary Speed Enforcement (LIDAR) operation.

While the potential risk involved in a police officer stepping onto the road to stop speeding drivers was acknowledged by the Commission, it held that NSW Police did not actively take steps to manage the risks by providing adequate instruction or training to the police officer. Instead, NSW Police had left decisions regarding safety to the individual officer. Boland J said the following in regard to this practice:

A system that relies almost exclusively on an employee's skills and experience to ensure safety is no system of safety at all especially given that in this case, although [NSW Police] had identified the risk to safety involved in the stopping procedure, it took no steps to manage the risk in an effective manner.²⁴⁹

In response to this decision NSW Police have modified procedures in relation to the management of workplace risk for officers conducting RBT and LIDAR operations.²⁵⁰ The modifications are contained in the current SOPs that police are required to adhere to when carrying out static on-road operations.²⁵¹

The main objective of the SOPs is to assess and manage the risk at the site so as to secure and promote the health, safety and welfare of police officers. The following discussion on the assessment required for RBT operations illustrates how the risks are managed.

11.2.3. RBT site assessment

NSW Police regularly assesses RBT sites to ensure that they are suitable to conduct operations. After an initial assessment a site is reviewed annually to take account of any changes that may have occurred. The site assessment takes into account physical features such as lighting, road surface, field of vision, stopping area, and the class of road.

An integral part of the site assessment is the calculation of the 'exclusion zone'. This is the distance between the point at which police are located and the targeted vehicle (to be subject to the RBT). If a vehicle has entered the exclusion zone police are not to step out onto the road as part of the operation. The calculation of the exclusion zone factors in the variables of speed limit, reaction distance and braking distance.²⁵² For example, on a dry sealed road with a speed limit 60km/h, the exclusion zone is 55 metres. This means that police must not step onto the road if a vehicle is less than 55 metres away.

A further requirement of the site assessment is the identification, where practicable, of an 'escape route', which is an area where police may move to in cases where moving vehicles or other hazards present an immediate safety risk to a police officer.

11.2.4. Application of RBT style procedures to operations conducted under the Act

Many police officers have commented to us that the safety and site requirements in the Act and related SOPs are onerous and that they would prefer to work within the RBT/LIDAR operational guidelines.

The RBT/LIDAR procedures have recently been updated to accommodate the criticism contained in the decision of the Industrial Relations Commission discussed above. The main difference in the SOPs for the two types of operation now appears to be limited to the requirement that the RTA be consulted about the site for operations under the Act. In contrast, police retain the responsibility for site assessment for RBT/LIDAR operations. Whilst conducting operations using RBT/LIDAR style procedures would arguably free police from some of the requirements to consult with the RTA, police would still need to adhere to appropriate occupational health and safety requirements similar to those in the revised RBT/LIDAR SOPs.

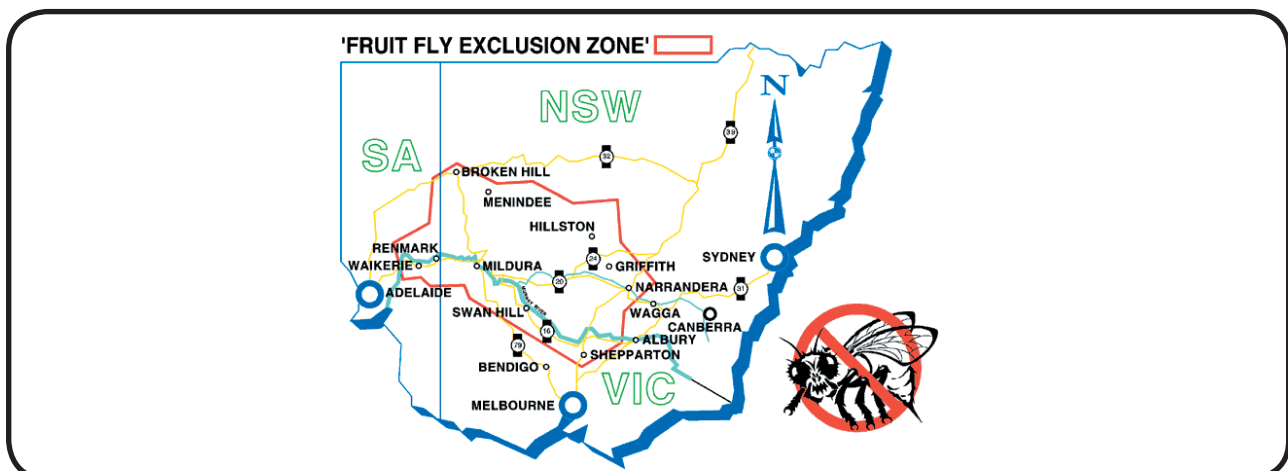
It should also be noted that RBT/LIDAR operations are designed to detect very different types of offending (namely the detection of traffic related offences) to the drug trafficking offences targeted under the Act. However, as we discussed at 11.1 above, cross-border drug transportation operations based on RBT-style sites have been conducted near the NSW/Qld border. The requirements and processes for setting up each site are far less labour and resource intensive, but it remains to be seen whether this is at the cost of more rigorous traffic calming and other safety features.

11.3. Fruit Fly inspection operations

In the context of police operations to tackle cross-border drug transportation, operational police,²⁵³ the media²⁵⁴ and the judiciary²⁵⁵ have commented about the breadth of powers exercised by fruit fly inspectors compared to those exercised by police.

Fruit fly inspectors operate in a similar area to that where police are entitled to use the Act. In New South Wales, authorised fruit fly inspectors²⁵⁶ operate in a quarantine area known as the fruit fly exclusion zone. This is the area inside the bold line on the map below.

Figure 19. Map of the fruit fly exclusion zone



Source: From the NSW Department of Primary Industries' website (<http://www.agric.nsw.gov.au/reader/pe-qff/qff-ffezmap1.gif>)

11.3.1. Powers exercised by inspectors

Fruit fly inspections aim to minimise the introduction of potentially infected fruit into the quarantine area. In New South Wales, the Department of Primary Industries is responsible for fruit fly inspections in the quarantine area. A source from within the department quoted figures that 6% of vehicles entering the quarantine area carry fruit and approximately 1 in every 2000 vehicles will carry infected fruit.²⁵⁷

The power to regulate or prohibit the introduction of things likely to introduce disease affecting fruit and plants is contained in section 4 the *Plant Diseases Act 1924*. The power to stop vehicles at an authorised site, inspect their contents, seize potentially infected fruit, and demand the name and address of the driver is contained in section 13 of the *Plant Disease Act 1924*. Inspectors do not need a warrant to set up inspection sites and randomly stop vehicles.

Authorised fruit fly inspectors do not issue on the spot fines and nor do they have any powers of pursuit. After fruit is seized, the details of the driver who was found with the fruit are forwarded to a regulatory officer within the NSW Department of Primary Industries who makes the decision as to whether to issue a Self Enforcement Infringement Notice (SEIN).

Although the inspectors are empowered to operate anywhere in the exclusion zone, in practice four fixed sites are utilised. These are located at Sandigo, Kamarah and the Newell Highway in the Riverina district, and at Broken Hill.

11.3.2. RTA approval

The RTA have approved the four sites utilised by fruit fly inspectors. The approval process includes the development of a traffic flow plan and the installation of permanent signage which aim to protect the safety of both the inspectors and the travelling public. It is worth noting that inspections only occur during daylight hours and not at dawn, dusk or at night. Inspections are not carried out when temperatures exceed 38°C.

An integral part of the traffic flow plan is the traffic calming strategy that involves the staged speed reduction of vehicles approaching the inspection site using permanently hinged signage that is simply opened when an operation is taking place. A typical calming strategy would be the reduction in speed from 100km/h to 40km/h over a distance of approximately 1.5 kilometres. This is the same requirement for police operations under the Act and indeed one of the sites used by fruit fly inspectors is also used by police to carry out operations under the Act.

After the RTA has approved the traffic flow plan there is no requirement for fruit fly inspectors to advise the RTA when carrying out inspections.²⁵⁸

Sources from within the NSW Department of Primary Industries acknowledge the ease with which the sites may be avoided, but state that educating the public is the best approach to the problem of introducing fruit flies into the exclusion zone. The reason why inspections are not carried out at unapproved locations is because occupational health and safety is paramount when conducting inspections. Thus there is no scope for random inspections at sites that do not have an approved traffic flow plan.

11.3.3. A typical scenario at a fruit fly inspection site

There are usually three operational staff at an inspection site. One traffic controller, who has undergone RTA approved training, directs traffic into the site. Two inspectors then process the vehicles that are directed into the site by the traffic controller.

At any one time there is a maximum of three vehicles at the site. It is worth noting that heavy vehicles are generally not subject to inspections because they are considered low risk for the introduction of infected fruit.

When the vehicle comes to a stop an inspector introduces him or herself and then reads a brief and simple script to the driver of the vehicle:²⁵⁹

I am a person, authorised under the Plant Diseases Act. It is part of my duties to check vehicles for fruit introduced into the New South Wales Fruit Fly Exclusion Zone. Here is my identification.

Drivers are then asked where they have travelled from, and whether they are carrying any fruit. After recording this information the inspector says the following to the driver:

I require you to open your boot and glove box, and to check your cabin. Thank you.

If no fruit is located the driver is asked a few questions as part of a voluntary survey regarding fruit fly exclusion zone signage and is then free to leave the site.

If fruit is located during the search of the vehicle, the type and quantities are recorded and the inspector then says to the driver:

It is an offence under the Plant Diseases Act to introduce fruit into the Fruit Fly Exclusion Zone. I require you to tell me your full name and residential address. It is an offence not to answer or give a false name or residential address.

Drivers are given an opportunity to explain why they have brought fruit into the fruit fly exclusion zone.²⁶⁰

Before leaving the site drivers found with fruit are given a one-page information sheet that simply describes the purpose of the inspection, the authority under which inspectors operate, and the potential consequences of taking fruit into the exclusion zone.²⁶¹

11.3.4. Information and education

The NSW Department of Primary Industries takes proactive measures to educate the travelling public by erecting signs that inform drivers of both the prohibition and the possible fine for carrying fruit into the zone. For example, vehicles approaching one of the sites pass no less than eight signs before they reach an inspection site. Below are two examples of permanent signs which aim to inform and educate:

Figure 20. Example of sign used



Source: Supplied by the NSW Department of Primary Industries

Figure 21. Example of sign used



Source: Supplied by the NSW Department of Primary Industries

Endnotes

²³⁵ NSW Police, Operational Orders, 'Vikings – Richmond/Tweed 9595', Richmond Local Area Command, 14-16 May 2004, p.3.

²³⁶ For the text of relevant sections see Appendix H.

²³⁷ *Crimes Act 1900*, s.357D.

²³⁸ On occasion vehicles may also have been stopped because of traffic infringements.

²³⁹ Some of the detail has been omitted for privacy purposes.

²⁴⁰ Event reference 51.

²⁴¹ Event reference 52.

²⁴² Some people were charged with more than one offence.

²⁴³ NSW Police, *Police Weekly*, Vol 16 No 22, 7 June 2004, p.8.

²⁴⁴ G. Stolz, 'Two-state blitz halts drug flow at border', *The Courier Mail*, <http://news.com.au>, 17 May 2004.

²⁴⁵ Interview K.

²⁴⁶ NSW Police have developed a 'Police Hand Signals' guide for police officers.

²⁴⁷ *Occupational Health and Safety Act 2000*, s.8.

²⁴⁸ *Inspector Covi v The Crown in the Right of the State of NSW (NSW Police)* [2004] NSWIRComm 128 (28 May 2004).

²⁴⁹ *Ibid* at para [53].

²⁵⁰ *Inspector Covi v The Crown in the Right of the State of NSW (NSW Police) No 2* [2004] NSWIRComm 400 (17 December 2004) at para [35].

²⁵¹ NSW Police, Traffic Services Branch, Standard Operating Procedures RANDOM BREATH TESTING, July 2004; NSW Police, Traffic Services Branch, Standard Operating Procedures STATIONARY SPEED ENFORCEMENT (LIDAR) OPERATIONS, August 2004.

²⁵² The SOPs contain a table that sets out the exclusion zones based on the variables of speed limit, reaction and braking distance.

²⁵³ Conversation with NSW Ombudsman researcher during an operation.

²⁵⁴ 'Revealed: Toothless police and our drugs highway', *Daily Telegraph*, 6/5/02, p.4.

²⁵⁵ *Police v Lazenby; Police v Mlaco; Police v Holmes & Leonard; Police v Egan & Egan* (Written judgment of voir dire inquiries of Magistrate Dowd, Unreported, Hay Local Court, 6 March 2001) at p.33.

²⁵⁶ *Plant Diseases Act 1924*, s.11.

²⁵⁷ Interview L.

²⁵⁸ This is to be contrasted with police conducting operations under the *Police Powers (Drug Detection in Border Areas Trial) Act 2003* who are required to consult with the RTA prior to each operation notwithstanding that the site and the traffic management plan remain unchanged. See 12.9 'Traffic Management' for further discussion.

²⁵⁹ NSW Department of Primary Industries, '2004-2005 FEEZ vehicle inspection' sheet.

²⁶⁰ They are asked: 'Is there any reason why you have introduced fruit into the Exclusion Zone?'

²⁶¹ A copy of the 'Information Sheet' is in Appendix G.

part three: contents

Chapter 12: Implementation of Legislation	112
12.1. Information in support of warrant applications	113
12.2. Warrant application process	114
12.3. Definition of search area	116
12.4. Requesting to see the warrant	119
12.6. When to conduct screening	123
12.7. Privacy	124
12.8. Asking heavy vehicle drivers to step down from the cabin	129
12.9. Traffic management	131
12.10. 'Roving' vehicles	135
12.11. Video taping practices	136
12.12. Part 10A of the <i>Crimes Act 1900</i> and video taping	139
Chapter 13: Factors that affected police practice	147
13.1. Brief and debriefs	147
13.2. Supervision of children and young persons	147
13.3. People from non-English speaking backgrounds	148
13.4. Protection of occupant's possessions	149
13.5. Drug detection dogs	149
13.6. Extensive searches	152
13.7. Dissemination of information about operations	153
13.8. Amenities	156
13.9. Police officer OH&S issues	157
13.10. Other policing functions during an operation	157
Chapter 14: Cost Effectiveness	161
14.1. Financial Costs	162
14.2. Results	164
14.3. Disruption of drug trade	165
14.4. Other measures of effectiveness	166
14.5. Reducing the financial burden	169
14.6. Operational and legislative impediments to effective law enforcement	171
14.7. Alternative methods of targeting inter-state drug trafficking	173
14.8. Summary and concluding comments	175

chapter 12: implementation of legislation

In this chapter, we discuss how police implemented the Act. In particular, we focus on the legislative provisions of the Act, and police action to give effect to them.

Overall, operations we observed were well organised, and police acted in a professional manner. Most vehicles stopped in the cold zone were not detained for more than five minutes, and the vast majority of people were dealt with in a friendly manner by police. Drug detection dogs and handlers were not overly intrusive in their screening and dogs were kept under control.

We describe the many challenges faced by police in implementing the legislation, and note areas which may require some amendment or change in police policies.

12.1. Information in support of warrant applications

As mentioned in Chapter 2 'Background', the Act was introduced, in part, to allow police to act upon generic intelligence about vehicular drug trafficking across NSW borders.

We examined the intelligence and information used by police in their applications for warrants under the Act. The supporting information used by police was not necessarily specific or recent. For example, the information included in the SOPs to assist police in establishing grounds for warrants *only* contains information about seizures which occurred between 1997 and 2001.²⁶² It is noted that one application relying solely on this information was successful.

As noted in Chapter 5 'Conducting an operation', all LACs relied at least partially on this information. Many LACs also included more recent information, as well as intelligence reports. One LAC also relied upon a briefing from the State Crime Command about successful operations which had targeted drug suppliers using vehicles to courier drugs across State borders.

As observed by a senior officer from the State Crime Command Drug Squad we interviewed, this contrasts starkly with the type of information which is normally required to satisfy an application for other search warrants:

My concern initially was the intel or information that had to be supplied... [was] over a broad period of time. You had the likes of 'this happened three months ago'. Now, if we were to go and do a search warrant with that, we'll get laughed at because of recency... So for them to say okay, this has happened over a month ago all these cars used to come through – okay, we'll give you a warrant for that - it just flew in the face of what we have to do day in day out with our search warrants to say that there's drugs, or manufacture, or process, or something being conducted in that place.²⁶³

We note that all drug detection warrant applications to date have been granted.

There is no requirement in the legislation that the generic intelligence supporting warrant applications meet any standard in terms of recency. On the basis of what is known as 'generic' information, three LACs have conducted two operations at the same site and have not seized any indictable quantities of drugs on either occasion.

The community, through Parliament, has supported this expansion of powers to effectively police drug trafficking across state borders. However, due consideration must be given to possible infringement of civil liberties and privacy which may occur in small communities when police repeatedly conduct operations at the same site over short periods. Subjecting local people to frequent checkpoints must be balanced against the likelihood that indictable quantities of prohibited drugs will be found.

When applying to the Commissioner or Deputy Commissioner for authorisation to apply for a warrant, section 5(2) specifically requires the applicant to state whether or not a previous application for authorisation was made, and if so, whether or not authorisation was granted. Police are also required to report about the execution of the warrant to the eligible judge who granted the warrant.²⁶⁴

However, there is no corresponding requirement when police are applying to an eligible judge for another warrant for the same search area. While the Act does incorporate section 12C(1) of the *Search Warrants Act 1985*, which provides that if a warrant is refused, the same application cannot be made unless further information is provided which justifies the second application, it does not incorporate section 12A(1)(e) of the *Search Warrants Act*. This clause requires details of any previous warrant application refusal to be provided to the authorised justice. Consequently there is no requirement to inform a judge of a prior refused application.

Thus there is no specific law requiring police to state whether or not an application had previously been made in relation to the site, nor whether such application was granted or refused, nor to provide the results of any recent previous operations.²⁶⁵ Therefore, in considering warrant applications, the eligible judge is not given an opportunity to take into account the results of any previous operations or applications.²⁶⁶

To properly assess generic intelligence about a particular site it would seem prudent to include recent intelligence about operations at that site – including those operations during which no indictable quantities of drugs were seized. A pattern of operations of this nature may indicate that the modus operandi of drug traffickers has altered (perhaps in response to the legislation) and that if there is no additional intelligence information suggesting otherwise, it may be considered that future operations may be ineffective.

Accordingly, it would be appropriate if the Act were amended to require that applications for warrants include the results of any recent operations (and applications for warrants) conducted at the site nominated in the warrant application.

12.1.1. Recommendation

Section 6(2) of the Act be amended to include the requirement that drug detection warrant applications include:

- A statement as to whether or not a previous application for a warrant at the same site has been made in the previous 12-month period, and if so, whether or not the warrant was granted.
- If the application was granted, a statement outlining the results of the operation.

12.2. Warrant application process

A number of issues arise from the drug detection warrant application process.²⁶⁷

12.2.1. Obtaining the drug detection warrant

Section 5 of the Act provides:

(1) *A police officer may apply to the Commissioner or a Deputy Commissioner of Police for an authorisation to apply for a drug detection warrant.*

...

(5) *An authorisation has effect for the period specified in the authorisation (being a period not exceeding 72 hours).*

Once the authorisation is granted the police officer must apply for the warrant within 72 hours as the authorisation is only valid for this period.²⁶⁸

NSW Police are of the view that the application time is prohibitive in terms of preparing for an operation and they suggest that the 72-hour application time should be extended to seven days.²⁶⁹

While little additional work would seem to be necessary in the time between authorisation and the application for the warrant (because the warrant application contains virtually the same information as the application for the authorisation), the proposed extension would appear to have little impact outside of NSW Police.

Making arrangements for the Commissioner (or Deputy Commissioner) of Police and the eligible judge of the Supreme Court of New South Wales to both be available within a 72-hour period may pose unnecessary difficulties.

The NSW Police suggestion that an authorisation remain valid for seven days is supported.

12.2.2. Commencement of drug detection warrant

Section 14 of the Act provides:

- (1) *An eligible judge²⁷⁰ who issues a drug detection warrant must specify in the warrant the time when the warrant is to expire.*
- (2) *The time specified is to be not later than 72 hours after the issue of the drug detection warrant.*

This means that from the time the judge signs the warrant police have a maximum of 72 hours during which they can exercise the functions under the Act.

Because NSW Police want to maximise the period during which they can set up checkpoints, often, operations are scheduled to commence immediately after the judge issues the warrant. The warrant is then faxed to the operational commander who has gathered sufficient police officers from local stations to conduct the operation. Most operations have involved in excess of 20 police which is a significant commitment of resources from small country stations.

NSW Police are of the view that the 72-hour warrant period creates operational deployment and management challenges, and may also impact upon operational effectiveness. These issues are discussed below.

12.2.2.1. Deployment and management challenges

Police need to prepare rosters, operational orders, training and hire equipment up to seven days prior to any operation under the Act. Police must make these arrangements without actually knowing whether an operation will go ahead. If an operation were postponed or cancelled because a judge did not issue a warrant, police would have to redeploy officers.

Police have commented that in theory officers could be redeployed at 24 hours notice, but in practice there are limitations on how operationally effective such redeployment can be.

For example, for one operation police started the briefing at the site of the operation before the judge had actually signed off the warrant. A senior police officer noted the possible consequences of this strategy as follows:

Had he [the judge] not issued the warrant, then I would have had all those resources, things like the lighting towers and the trailers, the sites and everything that had been prepared would have easily been for nothing.²⁷¹

To illustrate the point police cite the example of the dog handler and drug detection dog. The NSW Police Dog Unit is based in Menai, about an hour's drive from Sydney. The handler and dog must travel by road to a site and are usually deployed from Sydney 24 to 36 hours prior to an operation. This results in the handler and dog actually arriving at the location of the operation immediately prior to the time the eligible judge is predicted to issue the drug detection warrant. Thus in the event that the operation were cancelled, valuable police resources would not be utilised.

In addition, most operations take place in smaller LACs where staffing of an operation requires the involvement of many key personnel. One senior police officer interviewed stated that operations under the Act are:

...extremely labour intensive [which has]... a significant effect on general police duties [because] all of our high ranking specialised officers were called from their normal activities.²⁷²

12.2.2.2. Operational effectiveness

NSW Police are of the view that the 72-hour warrant period provides a degree of certainty to drug traffickers insofar as they are able to predict when an operation is due to conclude. Whilst the Act gives police the option of seeking a further warrant at the end of the 72-hour period,²⁷³ this would involve the same administrative burdens detailed above.

NSW Police have suggested the following alternatives to the 72-hour drug detection warrant provision to enhance the impact of the Act:²⁷⁴

- A warrant period of 28 days enabling police to conduct short, sharp and unexpected operations of two to three hours at anytime during the warrant period. This strategy is intended to keep drug traffickers guessing about when the checkpoints would be operational.
- A warrant that specified the time the warrant comes into force within a 28-day period giving police sufficient time to prepare for an operation.
- A 72-hour warrant that enabled an operation to be commenced at anytime within a two-week period.

The Police Association of NSW has also recommended that the warrant period be extended to a 30 day period during which police can set up a check point on particular routes at any time.²⁷⁵

The last option nominated by NSW Police is supported in principle by the NSW Ombudsman. We have written to the Attorney General and the Commissioner of Police to this effect.²⁷⁶ The Attorney General's Department advised this office that:²⁷⁷

A proposed amendment concerning the time for execution of the warrant is expected to be considered by Cabinet in early 2005. If the amendment is approved by Cabinet it will then proceed to drafting stage.

12.2.3. Recommendation

The Act be amended to permit the execution of a 72-hour drug detection warrant at anytime within a period of 14 days from when the warrant is granted.

Parliament consider amending the time that an authorisation from the Commissioner or Deputy Commissioner has effect in section 5(5) of the Act from 72 hours to seven days.

12.3. Definition of search area

Section 7 of the Act provides:

The search area for which a drug detection warrant is issued must consist of not more than 3 areas, each of which must:

- be located in a border area, and*
- be not more than one square kilometre in area.*

We have noticed in some cases that police presume that the one square kilometre area mentioned in section 7 automatically applies to a site nominated in the warrant. However, it is our view that the search area for any particular operation (that is, the area in which the powers granted to police are permitted to be exercised) is limited to the area specified in the warrant.

In most warrant applications, only a small area was cited. For example, for one operation, a warrant was granted for the following area:

*The Hume Highway at the northern end of the township of Holbrook, between the intersections of Wallace Street and Prospect Street, Holbrook. GPS S 34.7145402 and E 147.3208598, approximately 150 metres in length from the entry area to the exit.*²⁷⁸

Clearly, no reference was made to a one square kilometre radius in this warrant, and it is our view that the warrant applied only to the 150 metre area specified.

On the other hand, we have also cited a warrant where the search area was defined as:

*...a site within a 20-kilometre radius from the place known as the Birdcage and located on the Sturt Highway approximately at latitude 34 degrees 35 minutes 50 seconds South and longitude 145 degrees 56 minutes 4 seconds East, a designated area under the Act. The GPS for westbound traffic for this site is S34'52. 361 – E 145'70.096.*²⁷⁹

A conservative reading of this search area would suggest that the search area was a specific geographical point within a 20-kilometre radius – a mathematical point in space logically impossible to occupy. However, a generous interpretation could mean that police were permitted to exercise powers within a 20-kilometre radius from a fixed point. Given that section 7 of the Act specifically prescribes the maximum size of a search area as not more than one square kilometre, police should include a more precise definition of the search area in warrant applications.

The SOPs advise police to:

*Attach topographical maps to the affidavit, which clearly and precisely depict the search area.*²⁸⁰

However, in practice, police have not consistently provided maps in their applications. Those maps which have been provided did not depict the search area graphically but acted more as a reference for the text description of the search area in the application.

It would be advantageous for police to more carefully draft the area cited in warrant applications to ensure it is operationally practical and maximises operational flexibility.

12.3.1. Expanding the search area

During the second reading speech of the bill, the Hon. John Hatzistergos, Minister for Justice, said:

*The limit of three one kilometre search areas gives police the scope to establish multiple checkpoints simultaneously or move them to maintain the element of surprise, but balances this against the need to have traffic moving freely. I note that police can establish multiple checkpoints simultaneously within each of the one kilometre square zones. This permits police to set, for instance, a checkpoint on a main road and simultaneously on a nearby side road, to stop drug traffickers bypassing the checkpoint on the main road.*²⁸¹

NSW Police are of the view that the one square kilometre radius limits the ability of police to re-locate a check point once a site becomes known to drug traffickers with the result that drug traffickers are able to simply avoid the checkpoint. Police have suggested that there is a 'critical need' to extend the one square kilometre requirement to ensure police have more flexibility and mobility during an operation and in order to maintain the element of surprise.

The police suggestion for a wider search area is based on the fact that once operations are established information regarding the location is readily disseminated via CB radio and other communication networks.

If the aim of these operations is to detect trafficking of indictable quantities of prohibited drugs, then there seems little value in police continuing to run a checkpoint once the location of an operation has been widely broadcast.

Police are currently able to obtain warrants which simultaneously cover three sites within a border area. The difficulty in terms of operational flexibility seems to be more related to the nature of the operational set up than to the size of the search area. Moving an operation from one site to another may involve considerable effort relocating large scale lighting, setting up signage, and potentially moving facilities like portable toilets and privacy screens. Even more significant is the fact that, according to police SOPs, the site must currently be pre-approved by the RTA and to date less than ten sites have been approved. Only sites with particular features will be approved by the RTA under its current policy. According to a senior officer from the RTA:

*...generally what we try to do is pick locations where the infrastructure is already in place. In other words there was a wide enough shoulder at a good sight distance and a good area where you could have separation between where the police were working and the through traffic.*²⁸²

In contrast to these operations, police on the NSW/Qld border have been able to conduct operations targeting drug trafficking using only six to eight officers per site and with minimal infrastructure. However basic amenities were provided including 'toilet facilities, meal preparation and consumption areas/tables/chairs.'²⁸³ This 'low key' operational set up would seem to better meet police requirements in terms of flexibility and the element of surprise. The operational set up was also more covert in nature, operating largely as an RBT, reducing the likelihood that the focus on drugs would become well known and hence also minimising the need to re-locate. For more information about one operation on the NSW/Qld border see Chapter 11 'Comparative case studies'.

12.3.2. Expanding the definition of border areas

NSW Police have suggested that the scope of the Act be widened to cover the 'road transport of indictable quantities of prohibited drugs' throughout New South Wales.²⁸⁴ It is noted that this would result in a significant shift in focus of the Act insofar as the trial was confined to border areas based on generic intelligence that pertained to those areas.

Police cite the snowfields as an example of an area where the Act could be used if the scope were extended. We note that there is currently no impediment to police conducting operations under the Act on roads in the snowfields area as they are contained within the existing 100kilometre border area zone. However, police would still need to demonstrate to a judge that the area is being used, or will be used, in connection with the supply of indictable quantities of prohibited drugs.

When asked during parliamentary debate about the bill, why the legislation was limited to border areas, Mr West MP stated:

*There is evidence of drug smuggling in the area of the trial, along the borders of South Australia and Victoria.*²⁸⁵

The Police Association of NSW supported this suggestion, recommending that the Act should apply state-wide, or at the very least to all NSW borders.²⁸⁶

The suggestion to increase the scope of the Act to cover all of NSW would seem to involve extending the application of the Act to areas where the geographically specific problem of drug trafficking is unlikely, or has not been demonstrated, to exist to the same degree.

Widening of the scope of the Act as suggested would enable police to set up roadside check points anywhere in NSW where there was sufficient intelligence in relation to the supply of indictable quantities of prohibited drugs. Potentially, this would allow police to stop and screen vehicles using drug detection dogs in urban and suburban areas far from state borders.

NSW Police are currently able to utilise drug detection dogs in most public places in New South Wales with a warrant issued by a magistrate or registrar of a Local Court.²⁸⁷ Police are not, however, authorised to detain persons for the purpose of screening them with a drug detection dog.²⁸⁸ Further, it is questionable whether police are able to screen vehicles using drug detection dogs because of doubts as to whether a person within a vehicle can be regarded as being in a public place.²⁸⁹ Thus, extending the scope of the Act to all roads in New South Wales would be a considerable expansion of police powers. This would require careful examination by Parliament.

Given that the Act has yet to achieve significant results in the detection of drug trafficking of indictable quantities of prohibited drugs in the current trial border areas (and no successful prosecutions for drug supply), the utility of extending the scope of the Act to all roads in NSW is questionable. To date the most common drug-related result from these operations has been the issue of a cannabis caution. It is questionable whether the community would support extending the scope of resource intensive legislation to allow stopping and screening of vehicles in urban areas in the knowledge that mostly small amounts of cannabis for personal use would be found.

NSW Police have also suggested that consideration should be given to extending the border areas of the Act to include the border between NSW and Queensland to ensure that all practical road routes into NSW are covered by the legislation.²⁹⁰

There is a certain logic to including the border between NSW and Queensland within the scope of the Act. However, as discussed further below, it is our view that prior to making any decisions in relation to the scope of the Act, consideration should be given to whether the legislation, as it currently stands, is appropriate to meet the objectives of the Act. That is, whether this legislation effectively facilitates the detection of trafficking of indictable amounts of prohibited drugs.

12.3.3. Recommendation

NSW Police amend the SOPs to provide additional guidance about search area descriptions to police making warrant applications under the Act.

12.4. Requesting to see the warrant

Legislation obliges police to show the warrant to anyone it applies to. Section 15 of the Act adopts certain sections of the *Search Warrants Act 1985*, including section 16, which provides:

A person executing a search warrant shall produce the warrant for inspection by an occupier of the premises if requested to do so by that occupier.

Although section 16 refers to 'an occupier of the premises' the SOPs make clear that the officer in charge of each site is to have a copy of the warrant, and is to show it to any person in the search area who requests to see it.²⁹¹

The independent officer was usually the officer responsible for holding the warrant during the operation. There were many instances where members of the public enquired about the warrant. As described in the following extract from one of our observer's notes, police were not always well-informed of the requirement to show a copy of the warrant:

The driver asked for a copy of the warrant. The independent officer said he didn't have a warrant on him, and that he didn't have to supply it to the man... The independent said that he had seen the warrant. The details of the driver and passenger were taken. The dog was then taken past both of them, but no indication was made.... [The observer then] noted that the site controller was showing the man a copy of the warrant. The site controller asked the driver if he had any questions, and he said, 'no'.²⁹²

We also observed that some drivers incorrectly thought that the warrant applied specifically to them.

Apart from one briefing, at which the site controller emphasised that the warrant should be shown to anyone who wanted to see it,²⁹³ police did not mention this requirement at briefings. To ensure that operational police are aware of this requirement, it is recommended that police be regularly reminded at briefings that persons stopped at checkpoints have a right to view the warrant.

12.4.1. Recommendation

NSW police incorporate into their policy and procedures documents that police officers be regularly reminded at briefings that each person stopped under the Act has a right to view the warrant.

12.5. Providing information to drivers

The Act requires police to provide information to drivers verbally and also in the form of a notice. We discuss these methods of providing information to drivers below.

12.5.1. Reading the script

Section 9(3) of the Act requires that police provide certain information to the driver at a check point.

When done appropriately, providing this information goes some way to reassuring concerned drivers. However, we have observed some difficulties with the way in which police provide this information.

As recounted in Chapter 5 'Conducting an operation and results', police read the following script, or something similar, to drivers in the cold zone:

Good Afternoon/Evening Sir/Madam. Could you please switch off your vehicle?

*My name is Sergeant/Constable *** attached to [police station].*

You have been stopped as a result of the execution of a drug detection warrant issued under the Police Powers (Drug Detection in Border Areas Trial) Act 2003. A Drug Detection Dog will be used to assist in the detection of prohibited drugs or prohibited plants that may be located within your vehicle. The dog will be walked around your vehicle when carrying out this function.

I must warn you that failure or refusal to comply with this request, may be an offence and I seek your co-operation in carrying out this function. A written notice containing particulars will be provided to you as a result of carrying out these functions.²⁹⁴

While this fulfils the requirements of the Act, it was apparent that it was unintelligible to many drivers. This is perhaps a consequence of the unnecessarily formal language. We have also observed drivers become concerned when they hear the phrase 'drug detection warrant'. Some drivers misunderstand the script and have the impression that the warrant applies only to them. For example, one driver we observed asked, 'Am I being arrested or something?'²⁹⁵

Many officers complained to us that the script is unnecessarily long. Our observers agreed with this assessment noting that drivers frequently made comments such as, 'Don't you get tired of saying that to everyone?'²⁹⁶ or 'Sick of reading that yet?'²⁹⁷ One observer noted:

Driver comments to police officer that he should have a tape recorder to play out the spiel rather than keep repeating it. 'You'll have a dry throat by the end of the day!'²⁹⁸

The majority of police officers we observed paraphrased the script into a short and simple message either before or after it was read in full. We have observed that this was far more effective in providing information about the operation. For example, at one operation, a scribe developed a practice of saying, after reading the script, 'In a nutshell, the dog will go around the car to sniff for drugs.'²⁹⁹

In addition to the script which must be read by scribes, if the dog indicates on the vehicle, the driver must be read an equally long and formal script by the site controller and the investigator. We have observed that these scripts sometimes alarm drivers to such an extent that the useful information the scripts contain is not conveyed.

The requirement that a script be read, word for word, is not required by the Act. A possible reason for such a standard approach is:

The reason they went for the spiel is that if there's a plea of not guilty then everyone really doesn't have to think 'OK, well I've stopped 475 cars over a three day period – what did I say to car number 51?' So this way they can go 'This is what I said, I know I said it because I said the same thing every time, time in, time out.'³⁰⁰

When we interviewed police, we received a lot of feedback about the script. Here is a sample of quotes from these interviews:

They lose you. You see that they're bewildered... Realistically you lose them after the first line.³⁰¹

...right after [reading the script] I'd say, 'Would you like me to explain what I just said?' and most of them say, 'Yeah,' [and I would say] 'Look, we've stopped you, we'll have a dog go around your car and detect if there's any drugs on board. It won't be very long, you'll be out of here in 5 minutes.' [And they would say] 'Oh yeah, that's fine.'³⁰²

*I'm sure as I was reading it most people would be sitting there going, 'Police have stopped me. OK, it's got something to do with drugs, yeah that's fine you can do whatever you have to.' I don't know if they ever fully listened to the whole spiel and knew exactly what was going on, so I think they just sort of, went yeah, 'Police have stopped me for drugs, so, yeah, let them search.'*³⁰³

*[The script has got to be] shorter and to the point because, they just get sick of listening to you. 'What are you rambling about? Just hurry up and get on with it.'*³⁰⁴

The Police Association of NSW received similar feedback from police officers. It said that the script is:

*to [sic] long, detailed and contains relatively formal language and is not suitable for communicating the purpose of the checkpoint to drivers.*³⁰⁵

However, a few police officers felt that the script was appropriate:

*I thought it was appropriate the amount of explanation we went into. When you pull up someone for an RBT, you say a similar sort of spiel, you know 'you've been pulled over for the purposes of an RBT.' People are entitled to know why they're being stopped. A lot of people would be feeling tired by the time they get to... a lot of the places that we're setting up, so it doesn't hurt to have a bit of a chat and explain what's going on.*³⁰⁶

Echoing the sentiments expressed to us by the majority of frontline police, NSW Police has formally advised that it regards the current arrangement as impractical.³⁰⁷ This was also acknowledged in the Interim Evaluation Paper which notes that:

*Police experience suggests that the public 'switch off' after the first sentence is read to them, resulting in a confused look at the completion of the reading.*³⁰⁸

NSW Police suggested in their formal submission that police could indicate to drivers that the stop is for the purpose of searching for prohibited drugs, and then hand the driver a pamphlet outlining the details of the operation.³⁰⁹ The Police Association of NSW recommended that the script be shortened and put into simpler terms.³¹⁰

We agree with the NSW Police position on this matter. It is noted that in Chapter 11 'Comparative case studies', fruit fly inspectors also read a script when stopping vehicles to check for fruit. This script is informative, but is in plain English. It also guides the person reading the script to provide certain information on the happening of certain events. This method may also be an effective way of communicating information to a driver about the exercise of police powers. We note that in order to produce a simplified script, an amendment to section 9(3) of the Act may be required.

At the time of writing, no concrete measures have been implemented to address this issue.

12.5.2. Section 12 notices

Section 12 of the Act provides:

- (1) *A police officer who exercises a function under a drug detection warrant must give the person subject to the exercise of the function a written notice containing the following particulars:*
 - (a) *the name of the police officer and his or her place of duty,*
 - (b) *the date, time and place at which the function was exercised.*
- (2) *The notice must be given before, on or as soon as practicable after exercising the function.*

Section 9(1) of the Act lists the functions that a police officer may exercise whilst executing a drug detection warrant.³¹¹ The functions include:

- establish a check point
- stop vehicles at a check point
- use a dog to screen vehicles stopped at the check point or within the search area
- seize and detain prohibited drugs found as a result of a screen or search of a vehicle or person
- seize and detain anything that the police officer suspects may provide evidence of an indictable offence
- give reasonable directions to facilitate the exercise of any of the powers.

A strict application of section 12 would result in absurd consequences requiring numerous section 12 notices to be handed to individuals stopped at a checkpoint. For example, persons subject to the exercise of a function may not be limited to the driver of the vehicle but may also include passengers. The number of notices required to be issued may also be exacerbated in the instance of passengers on coaches whose journey is interrupted by the checkpoint and whose luggage is screened by the drug detection dogs. It appears that the Act may require that all passengers be issued with a notice. Additional functions, requiring the provision of additional notices, are exercised in respect to persons and vehicles searched in the 'hot zone' following an indication by a drug detection dog.

The Act also appears to require that the officer exercising the function *personally* give the 'subject' person the notice.

The number of police required to give notices and the number of persons to whom notices must be given may be so cumbersome in practice that it is impossible for police to properly comply with the requirements of the Act and also conduct a professional operation. In addition, the sheer volume of notices received by drivers and passengers may be a source of confusion rather than a source of clear information about the implementation of the Act.

The NSW Police SOPs for the Act advise police to whom the section 12 notice should be issued:³¹²

Give a Section 12 Notice to any person who is subject to the following functions:

- a) the driver of a vehicle who is stopped at a check point*
- b) any person upon whom a dog is used to carry out general drug detection*
- c) any person from whom a substance suspected of being a prohibited drug is seized*
- d) any person to whom a direction is given for the purpose of facilitating the exercise of a power under the Act.*

Observers from the NSW Ombudsman have noted that from an operational perspective, police find it difficult, if not impossible, to comply with section 12, or even with the more limited instructions in the SOPs. Observers have noted various approaches by police attempting to realistically implement the section 12 notice provisions.

In general, our observers found that police have been thorough in handing drivers of vehicles notices under section 12. However, passengers in vehicles stopped and screened by drug detection dogs are not routinely provided with section 12 notices. Rarely have police been observed providing notices to passengers who are searched. We have not witnessed any drivers or passengers given directions under the Act, being provided with notices about the exercise of this function. However, the distinction between a 'reasonable direction' under the Act and a 'request' by a police officer is sometimes less than clear.

On one occasion an observer specifically noted that police did not provide a section 12 notice to a passenger who was searched as a result of an indication on the vehicle. Police told the observer that the section 12 notice was not required because the passenger was being searched as a result of powers in the *Drug Misuse and Trafficking Act 1985* and thus police were not performing a function under the Act.

Similarly, observers have noted that coach passengers are usually not given a section 12 notice notwithstanding that their luggage has been screened by a drug detection dog.

12.5.2.1. NSW Police view of section 12

NSW Police are also of the view that the current requirements for providing information to persons subject to the exercise of a function under the Act are cumbersome and impractical. NSW Police made the following point in their submission to our review:

As each function is conducted the officer performing that function is required to hand a section 12 notice to the subject person. This process is quite time consuming and interferes with the flow of the operation. On many occasions motorists do not seem to fully understand the explanation police read out. Police are then required to re-explain in simple terms [that] 'Police are searching for drugs'.³¹³

NSW Police have suggested the following improvement:

Police could simply indicate to motorists that they have been stopped to search for prohibited drugs. Police would then hand the driver a pamphlet style document outlining the operation.³¹⁴

The Police Association of NSW said that its members found the number of section 12 notices required to be issued was cumbersome and impractical.³¹⁵ The Police Association of NSW recommends that the Act be amended so that it is clear that only one section 12 notice needs to be issued, when first stopped at the checkpoint.

12.5.2.2. Comment

It appears that section 12 is designed to provide a safeguard for persons subject to the exercise of functions under the Act, to ensure clear information is provided about the exercise of police functions. This is fully supported. However, the mechanisms specified in the Act do not appear to accomplish this objective. It is considered that there are more appropriate methods to ensure that persons stopped and/or searched at checkpoints are provided with suitable information.

12.5.3. Recommendations

The Act and/or SOPs be amended taking into account the following:

- A single information pamphlet be developed in plain English which sets out the aim of the legislation and the various stages of screening and searching that may occur at a checkpoint.
- The pamphlet be provided to all drivers stopped at checkpoints and to any passengers in searched vehicles (excluding public passenger vehicles) or anyone who has their luggage searched.
- The pamphlet include a section on which a police officer involved in a particular vehicle stop, must put their details and the time and date of the stop.
- The pamphlet be translated into languages likely to be encountered in border operations.
- Pamphlets should also be provided to any person who requests further information about the checkpoint.
- NSW Police develop a new script which provides information in a manner that effectively communicates the purpose of the stop and the exercise of police powers.

12.6. When to conduct screening

Section 9(3) of the Act requires police to provide the driver with certain information *before* a drug detection dog can screen a vehicle:

A police officer must, before exercising a function under subsection (1)(c), provide the person subject to the exercise of the function with the following:

- (a) evidence that the police officer is a police officer (unless the police officer is in uniform),*
- (b) the name of the police officer and his or her place of duty,*

- (c) *the reason for the exercise of the power and the nature of the procedures to be carried out,*
- (d) *a warning that failure or refusal to comply with a request of the police officer, in the exercise of the function, may be an offence.*

However, for some of the operations we observed, dogs were screening vehicles before the driver had been spoken to by a scribe. This was usually rectified during the first day of the operation, and handlers generally waited for a sign from the scribe that the script had been read prior to screening the vehicle.

It is clearly good practice to explain the reasons for police actions *prior* to screening by police dogs. This should be emphasised at operations briefings.

12.6.1. Recommendation

NSW Police incorporate into their policy and procedures documents that police officers be regularly reminded at briefings to explain the reason for the vehicle stop to drivers before screening the vehicle with the drug detection dog.

12.7. Privacy

Section 13(a) of the Act requires that police provide reasonable privacy to people who are stopped according to the Act:

A police officer who exercises a function under a drug detection warrant must ask for the person's co-operation and carry out the function:

- (a) *in a way that provides reasonable privacy for the person subject to the exercise of the function,*

Our observers noted that initially, efforts to afford privacy were not a major priority for police when conducting searches of vehicles and people. As reported by one of our observers:

The driver says 'Its not fair what you're doing mate. You're incriminating someone'...The driver is allowed to make a phone call. He is overheard saying that it's 'really embarrassing' with everyone going past. He asks police if it's OK for him to turn off his lights and they let him do so.³¹⁶

Although during briefings senior police advised searching officers to do their utmost to protect the privacy of people being searched, this was often difficult due to the location of the operations and the resources available.

Privacy was an ongoing issue during the review period. We raised our general concerns about privacy at the Steering Committee. Privacy was also an issue considered by NSW Police in their Interim Evaluation Paper, which noted that privacy had been raised during debriefs.³¹⁷ The paper recommended that temporary screens should be used to address privacy.³¹⁸

Below is a description of some issues relating to privacy.

12.7.1. People searched in the hot zone

People who had been detained and spoken to by police in the hot zone were scrutinised by passers-by and people who were stopped in the cold zone. This was potentially humiliating for people who were known locally and for drivers of commercial vehicles whose peers might be passing by. In addition, most sites did not have a proper facility to conduct a search of a person in a safe and private place. If necessary, a strip search would have been inappropriate to conduct at most sites.

The configuration and location of each site had some impact on the privacy police could afford to members of the public. For example, at one checkpoint, almost the entire site was not visible from the main road. This lessened the exposure experienced by people stopped in the site. At another site, searches were often conducted in full view of patrons from a local hotel.

Some operational police were aware of privacy concerns:

*I don't know how they felt about been spoken to the police on the side of the road and people seeing them talking to us. Although no one mentioned that except for the one lady...*³¹⁹

*I know if it was me that was in one of those cars I would have no personal objection to what was going on. But probably on the side of the road I might feel a little embarrassed and ducking down and hiding my face a little...*³²⁰

As mentioned above, in one of the recent revisions of the SOPs, police were advised to put up a hessian screen or something similar to separate the hot and cold zones. This was intended to help protect the privacy of people being searched.³²¹

As at the time of writing, one LAC had acted upon this suggestion and utilised a piece of hessian to separate the hot and cold zones to better protect the privacy of motor vehicles searched. We had the opportunity to observe the first day of this operation.

Figure 22. Hessian screen



Source: Photograph taken by Ombudsman observer.

The hessian screen was 10-15 metres long. The police van and some police vehicles also formed part of the screen separating the hot and cold zones. We found that the screen did seem to provide good privacy for average sized vehicles, particularly when combined with the existing trees and the police van and other police vehicles. However, larger vehicles, such as heavy vehicles, could not be accommodated. The screen was low enough that officer safety was not jeopardised.

A large tent was utilised in operations by another LAC to carry out person searches. The tent had a dual purpose of providing a stand-down coffee and tea area for police, as well as being an area where persons could be searched in private. During the briefing for the operation the site commander advised that the tent was provided to protect the 'dignity and privacy' of the persons being searched.³²²

At some sites, privacy will be difficult to accommodate, particularly at operation sites located in townships. However, where the site is able to provide some privacy, any consideration given to privacy must also be balanced against officer safety issues. As noted by NSW Police:

*The provision of privacy to motorists will need to be balanced by operational circumstances, such as the extremes of weather and officer safety.*³²³

12.7.2. Searches of coach passengers

Coach passengers whose bags had been indicated were called off coaches and sometimes searched in front of their fellow passengers. They were often initially spoken to by police officers in view of their fellow passengers, and on several occasions, we observed passengers openly staring or getting off the coach to better see what was occurring. For example:

The luggage hold under the bus was opened. The dog went into the luggage area. The dog indicated a particular black back pack. The owner of the back pack came down off the bus. He was a Korean man about 25+. The site controller talked to him but the man did not seem to understand. He was being spoken to in close proximity to the bus and in full view of the passengers. The police officer was going to some lengths to explain what was going on in plain English. The man provided the key to his bag. The investigator tried to read the script to the man. He showed him the written document and read it to him at the same time. The man was shaking. Police moved the man to a less visible location to talk to him further, and to search the bag. Nothing was found, and he was released.³²⁴

In the above incident, during the protracted attempts to explain to the man what was occurring, one of our observers spoke with the independent officer, and raised her concerns about the privacy of the man being searched. The man was then moved to a less visible location, as described.

Below is another example of an incident where passengers of coaches were subject to the scrutiny of their fellow passengers:

[When the coach was approached by the observer, a woman and a man were out of the bus, though they were not together.] The woman looked very upset. Her eyes were red and it looked as though she had been crying... At that point, the woman was quietly crying. She asked a police officer for a tissue but he didn't have one. Both the man and woman were standing in view of the passengers in the bus... [After her bag was searched] the woman was then told she could get back onto the bus. The search of the man's bag was then conducted. All of the contents of his bag were taken out, including clothes and underwear... Plastic bags he had were opened, including one plastic bag which contained cigarette halves. This bag had seeds in it as well. The bag was held up to the man, and this made it visible to passengers on the bus. Three passengers got off the bus to have a cigarette.³²⁵

Some police were aware of the privacy concerns in relation to coaches. One police officer made the following comments:

Plus the privacy sort of issue...I'm just sort of thinking...if I was pulled up, and I had nothing on me, but the dog indicated I did...if I was the poor bloke getting back on the bus I'd be fuming! So...I think you've got to sort of have some private area that we can take them into...³²⁶

Searching of coach passengers generally improved with each operation that was conducted. At operations observed later in the review period, officers usually made an effort to take passengers immediately to a place not visible to the rest of the coach for the search to be conducted, as demonstrated in this incident:

A coach was stopped, and the dog was put through the luggage hold. A back pack and a small pack in the luggage compartment were indicated. People in the coach were standing up in the coach to see two men who were taken off the coach. The two men were taken behind a car so that the passengers on the coach couldn't see them, but passengers were still standing up to try and see what was going on.³²⁷

12.7.3. Searching cabins of heavy vehicles

During more invasive searches of heavy vehicles in the hot zone, police would thoroughly search the cabin, and sometimes a drug detection dog was lifted up into the cabins of heavy vehicles. This occasionally happened in the cold zone as well, with the consent of the driver.

At one operation a truck driver complained that the drug detection dog was walking all over his bed which was located in the cabin. The driver suggested that the dog should have to 'wear socks'.³²⁸

We also received a few submissions from truck drivers who made statements in relation to this issue:

*We would ask that when searching cabins of vehicles that officers respect the personal property of drivers... if gear is taken out of cabins [while] the search is conducted. Police should before allowing police dogs to enter vehicle explain to drivers the powers relating to dog searches and if possible maybe hand to the driver a copy of the Act. Consideration should also be taken by the officer of adverse weather conditions using dogs in the cabins on drivers' contents.*³²⁹

*I wouldn't even let my own dog into my bed so why would I let police dogs in my bed in my second home?*³³⁰

Our observations were that not all heavy vehicle drivers took issue with police searching their cabins. Some heavy vehicle drivers said that they didn't own the truck.

However, if police decide to search the cabin of a heavy vehicle they should be mindful that the cabin is not only the place where heavy vehicle drivers work, it may also be where they sleep and keep their personal possessions.

12.7.4. Recording details of persons searched

A large proportion of vehicle searches resulted in no prohibited drugs being found (see results at paragraph 14.2). However, details were taken of all vehicles, drivers and passengers searched in the hot zone. And as discussed at paragraph 12.11 'Video taping practices', most searches were video taped.

Information from these operations is entered into COPS as an event, as described in Chapter 3 'Methodology'. If no drugs are found, this is reflected in the event narrative. Here is an example of a typical event narrative where no drugs were found:

*At [time] and [date] the [vehicle of interest] and [persons of interest] were stopped during operation Carting at [location]. They were stopped under Police Powers (Drug Detection in Border Areas Trial) Act 2003. The drug dog gave a positive indication on both the [vehicle of interest] and [persons of interest]. They were searched with a negative result.*³³¹

In addition, the incident type is recorded as an 'ACTUAL PERSON SEARCH – DRUGS MISUSE & TRAFFICKING ACT – ITEM/OBJECT NOT FOUND – DRUG RELATED'.

By contrast, if drugs are found, a lengthy narrative is recorded, noting in detail what occurred, including what was said by the person searched. The incident type is recorded on COPS as 'ACTUAL DRUG DETECTION – POSSESS DRUG/PLANT – DRUG RELATED'.

Official records of persons searched as result of indications by drug detection dogs initially arose as an issue in the context of the Ombudsman's review of the *Police Powers (Drug Detection Dogs) Act*.³³² In response to the concerns of some police and members of the public about appropriate recording where no offence had been committed, NSW Police developed a policy for police recording searches following indications by drug detection dogs: *Recording Drug Detection Dog Incidents*. In summary, the policy advises that in the absence of any other intelligence or other information, police should not make intelligence records (known as 'information reports') of incidents where persons were searched but no offence detected. Police must, however, make event records entitled 'Actual Person Search'. According to NSW Police:

*...the policy and the mandatory use of the 'Person Search' category provides the most appropriate and auditable record of searches conducted as a results of drug detection dog indications.*³³³

According to NSW Police, there are no adverse ramifications for persons with records of an 'Actual Person Search' where no offence was committed. These records are not used in criminal history checks for employment:

*NSW Police only provides criminal history records for employment purposes when required to do so by legislation. Where information is released, records relating to unsuccessful searches ... are not included.*³³⁴

Nevertheless, persons searched who have committed no offence will have a permanent record of the incident on COPS:

...it is NSW Police policy not to remove Events from the COPS system – they are maintained as permanent records of Police actions.³³⁵

Unless necessary for use in court proceedings (that is, in cases where an offence was detected), videos taken during an operation are only available for viewing by NSW Police and the NSW Ombudsman's Office. Videos are kept in storage by the relevant LAC. During some operations, video operators were instructed to tape over searches where no drugs were found.

As far as we are aware, NSW Police received one complaint which referred to the issue of recording the details of persons searched. Part of that complaint is extracted below:

My daughter was one of those searched on Friday night at [name of site] and the sniffer dog apparently detected drugs. None were found but my daughter was left with the clear impression that the officers firmly believed that drugs had been present and she was lucky. This I object to! Unless traces remain for a considerable period (it is a second hand car we have had for two years) there were (sic), and never have been, any drugs in the vehicle.

Accordingly I seek your advice on the reliability of sniffer dogs, what is recorded, against my daughter and what happens to all 'evidence', including videotape collected.³³⁶

NSW Police replied in writing to this man advising him that a record on COPS was made but that 'NO adverse intelligence or comment is recorded against your daughter.'³³⁷

It is worth noting that in this situation, as in most incidents of searches where no offence is detected, there was no obligation on the man's daughter (who was a passenger in the vehicle) to provide her name or other personal details to police.

One submission from a Community Law Centre also raised concerns about police presuming that a drug dog indication implied that a person was involved with drugs, even in cases where no drugs were found:

Furthermore, people being searched in sniffer dog operations undergo a humiliating and intrusive procedure. Many people are treated as guilty of a drug offence before a search has taken place, and, in some cases, even after a search has revealed no illicit substances.³³⁸

We are currently conducting a review of the *Police Powers (Drug Detection Dogs) Act 2001*. We have received a significant number of submissions and some complaints in relation to the type of information recorded about people searched as a result of a drug dog indication, where no drugs are found. Many submissions have also raised privacy issues. These matters will be discussed further in our final report of the Drug Detection Dogs review.

12.7.5. Repeat searches

In several operations, people who lived or worked locally were repeatedly stopped in the cold zone over the course of the operation.

Typically, these people were read the entire script again, issued a notice again, and the dog was taken around the car again. In one instance, an Ombudsman observer noted that a man had been stopped three times. As he was read the script and issued a notice, he said 'I'll add one more to the pile.'³³⁹

In another situation, a driver jokingly suggested 'If we give it [the notice] back to you, can you [then] just give it back to us?'³⁴⁰ We also observed the following conversation:

Driver: You're gonna get to know my car quite well soon.

Police: You've been stopped before?

Driver: Yeah, three times. And you will again when I come back.³⁴¹

During one operation, police advised that this was necessary as a person could potentially have drugs in the car the second or third time they came through. As one police officer we interviewed said to us, 'You can't really afford... to give them the free pass...'.³⁴² Another officer commented that the same thing happens when they conduct RBT.³⁴³

However, in another operation, it was clear that Highway Patrol officers were letting vehicles that had already been searched pass by the site without being stopped again. In yet another operation, vehicles which were transporting goods back and forth from a nearby business were permitted to drive past the site.

We appreciate the police position that it is important to have the ability to search such vehicles again, as it is possible that prohibited drugs could be on board at a later time. We support the exercise of police discretion in making these decisions on a case by case basis.

12.7.6. Recommendations

The SOPs be amended to emphasise that searches of coach passengers be conducted away from the coach and not within easy view of other coach passengers.

All future police operations under the Act make use of privacy screens or other appropriate facilities to afford reasonable privacy to persons searched at checkpoints.

If police continue using sites close to hotels, tourist attractions or other venues frequented by members of the public, measures be taken to ensure that persons and vehicles searched are afforded reasonable privacy.

In its efforts to provide reasonable privacy to persons searched, NSW Police continue to meet its obligation to minimise safety risks for police officers carrying out their duties.

When searching cabins of heavy vehicles, police officers, and particularly dog handlers, give due consideration to the fact that some drivers of heavy vehicles live and work in their cabins.

12.8. Asking heavy vehicle drivers to step down from the cabin

Section 11 of the Act provides:

- (2) *A police officer using a dog to carry out general drug detection under a drug detection warrant must comply with the following:*

...

- (e) *the police officer must not direct a person to open the door of a vehicle unless the police officer is entitled to search the person or vehicle or is otherwise entitled to give such a direction,*

Section 3 of the Act contains the following definition:

- (2) *In this Act, a reference to a search of a person or vehicle that a police officer is entitled to carry out is a reference to a search that the police officer is entitled to carry out under any other Act or law.*

12.8.1. Interpretation of the legislative provision

It is arguable that the Act does not authorise police to ask heavy vehicle drivers to step down from the cabin for the purpose of explaining the checkpoint to the driver and issuing a section 12 notice. That is, a request to step down from the cabin could be characterised as a direction to open the door of the vehicle which is expressly prohibited by section 11(2)(e) of the Act.

However, section 11(2)(e) also permits police to direct a person to open the door of a vehicle if they are otherwise entitled to do so. It could be argued that section 9(1)(f) which allows police to give reasonable directions to facilitate the exercise of any powers in section 9 would permit this direction to be made. (Directions issued under this section would need to be accompanied by an appropriate section 12 notice as giving a direction is exercising a function under the Act.)

Section 11(3)(a) also permits police to use a dog to carry out general drug detection in the back of a goods vehicle and other non driver/passenger areas. This is generally not possible with heavy vehicles unless the driver steps down from the cabin and either assists police or directs police.

12.8.2. Officer safety and practical difficulties

The cabin in which drivers of heavy vehicles sit is usually raised some distance from the ground. In addition, although drivers usually turn their ignition off, the engines of these vehicles take some time to 'idle down' and during this time generate considerable noise. For these reasons it is very difficult for police to communicate with drivers who remain in their cabin.

At all but one operation, police requested heavy vehicle drivers to step down from the cabin. At the operation where officers were directed by the local police prosecutor not to ask the driver to step down, observers from the NSW Ombudsman noted the risk to the safety of the police officers when mounting the side of heavy vehicles to communicate with the driver. Not only was there a risk that the officer may lose his or her footing and fall, but there was also the possibility that the driver would open the door and accidentally strike the officer.

We questioned a senior police officer about the practice of asking heavy vehicle drivers to step down from the cabin and the officer made the following remarks:

I think that we started right from the beginning [saying] I'm not going to have officers climbing up and down trucks. Every truck has a different configuration – a ladder or step to get in and out. If you were to slip off that step it's a reasonable fall back onto the roadway. And it's safer all round if the driver's down on the ground talking to us, that way we are not climbing up and down, it's his truck and he's used to getting up and down. If there is a weapon secreted in the cabin, he's removed from that, until we can make an assessment of what's going on. All in all that's probably one of the major safety issues. We hadn't considered it in the SOPs ...but ...there's really no other way to do it than to get the drivers out.³⁴⁴

Observers from the NSW Ombudsman noted that the practice of asking drivers to step down from the cabin appeared to be necessary to ensure the safety of police officers.

12.8.3. Use of drug detection dogs to screen heavy vehicle drivers

Observers noted that as a consequence of the driver being out of the vehicle, the drug detection dog sometimes screened the heavy vehicle driver as well as the outside of the vehicle. On occasion this led to an indication on the driver by the drug detection dog. This in turn led to a search of the driver and the vehicle. Observers were left to wonder whether the indication would have occurred if the driver remained in the vehicle.

When we asked a dog handler whether the drug detection dog could pick up the scent of a prohibited drug from the cabin of a heavy vehicle, we were told that it is more difficult. The handler said that the scent would drop down, but went on to suggest that it would be harder if the driver did not open the door.³⁴⁵

Observers did not witness any complaints from drivers regarding the request to come down from the cabin. Indeed, drivers would sometimes disembark from the cabin without being requested to do so and it appeared that heavy vehicle drivers were accustomed to stepping down from the cabin when stopped by police.

12.8.4. NSW Police view

NSW Police are of the view that the practice of asking heavy vehicle drivers to step down from the cabin is not contrary to the spirit of section 11(2)(e) of the Act. Police suggest that the provision is a safeguard that restricts police from searching a vehicle without forming a reasonable suspicion.³⁴⁶

NSW Police point out that the practice of asking drivers to step down from the vehicle is necessary for both communication and operational safety reasons. Police suggest that drivers are invited to step down from the cabin voluntarily and note that they are not aware of drivers declining the invitation to step down from the cabin.³⁴⁷

The Police Association of NSW is of the view that mounting the side of a heavy vehicle is a risk to their health, safety and welfare. The Association highlights the fact that police have not been trained to do this and may be vulnerable to assault.³⁴⁸

12.8.5. Legislative amendment

Drivers of ordinary vehicles are not asked to get out of their vehicles. In fact they are often asked by police to remain in the vehicle if they try to get out. It may be that the fact that heavy vehicle drivers get out of their cabin means that these drivers are more likely to be screened by the drug detection dog than other drivers. The legislation already subjects commercial vehicles to a greater level of police scrutiny than other vehicles (by allowing cargo areas to be opened and screened by dogs). However, it could be argued that additional screening of the driver is of a different nature to additional cargo screening.

The NSW Ombudsman believes that the Act should be amended to remove the current legislative ambiguity surrounding the police practice of asking heavy vehicle drivers to step down from the cabin. NSW Police have also noted that they would benefit from an amendment confirming their authority to ask drivers to step down from the cabin in order to comply with section 12, and ensure officer safety. The Police Association also recommends that the Act be amended to allow police to ask drivers of heavy vehicles to step down from their cabins.³⁴⁹

We support this recommendation with the proviso that NSW Parliament also consider whether this would entail additional screening of heavy vehicles drivers and if so, whether such screening is warranted.

There are many factors to be considered. For example, it is noted that heavy vehicles are already subject to a higher level of scrutiny under the Act, as it permits police to open areas of a commercial vehicle which is used for the transport of goods.³⁵⁰

NSW Parliament has also recently discussed a drug testing trial aimed at heavy vehicle drivers:

*For some time there has been concern about drug-taking by heavy vehicle drivers, and the Government is responding to that concern. Unfortunately, an emerging number of heavy vehicle drivers are using speed to keep awake, cannabis to get to sleep and then speed to return to their shift. That is an enormous road safety problem. Far too many heavy vehicles are figuring in our accident statistics...*³⁵¹

We also note the comments of one magistrate about the stresses that may be faced by heavy vehicle drivers and the serious impact of drug taking on public safety. In this case, a heavy vehicle driver admitted he had 4.6 grams of speed in his possession:

*Obviously the whole issue of the use of amphetamines by people who are in the industry that you are in, has huge implications for both you as an individual and your family, and your capacity to carry out a livelihood, and indeed for public safety... I can certainly say to you those matters are taken very, very seriously by the Court because there is that very real issue of public safety... I accept that at the time you felt...and you were probably quite right, that you were not capable of carrying out your living without breaking the law in some way or another. As I say, it does not make it acceptable... and I do wish that the time would come that someone in the industry would show some leadership about it.*³⁵²

12.8.6. Recommendation

The Act be amended to allow police to ask drivers of commercial vehicles to step out of their vehicles, provided the Parliament determines that heavy vehicle drivers should be subject to a higher level of scrutiny than other motorists.

12.9. Traffic management

In this section, we discuss aspects of traffic management which are governed by the Act. Firstly, we discuss the requirement that police consult with the RTA before making an application for authorisation to apply for a drug detection warrant.

We then discuss the traffic implications of the requirement that police conduct operations as quickly as is reasonably practicable.

12.9.1. Consultation with the RTA

Section 5 of the Act provides:

(2) *The application for an authorisation is to be made in writing and contain the following particulars:*

...

(d) *a statement setting out the consultation that has taken place with the Roads and Traffic Authority,*

...

The purpose of the RTA consultation is to minimise traffic disruptions and to promote road safety during searches.³⁵³

The RTA has been involved in the planning and development of traffic control plans for all sites where operations have taken place. This included inspections and risk assessments for each site. Further, the RTA has assisted NSW Police by funding and carrying out essential infrastructure and engineering works at each site such as road upgrades, signage and lighting.

The SOPs currently state that police must consult with the NSW RTA Liaison Officer before applying to the Commissioner or Deputy Commissioner to apply for a warrant.³⁵⁴ The SOPs explain that the reason for the consultation is to ensure that there is a minimal disruption of traffic, and that road safety is promoted.

12.9.1.1. Police view of the traffic management arrangements

NSW Police are of the view that fresh consultations are not required for operations at sites where traffic management plans have been already developed. For the purposes of complying with section 5(2)(d) of the Act, police suggest that a short supplementary statement that contact has been made with the RTA would be sufficient.³⁵⁵

NSW Police are also of the view that some of the site requirements for operations under the Act are onerous when compared to the requirements for conducting RBT operations. In particular, police feel that the signage and lighting requirements are excessive. It is worth noting that the Act requires police to erect signs to indicate the presence of a check point. Section 10 provides that:

A police officer who establishes a check point under this Part must ensure that signs are erected to indicate the presence of the check point.

The initial traffic control plans were developed on the basis of total road closure. That is, it was originally envisaged that police would establish roadblocks and every vehicle would be stopped and screened. This explains the extensive traffic calming strategies and signage requirements.

However, as none of the operations have adopted a full road closure strategy, police are of the view that there is scope to reduce the traffic management requirements. NSW Police informed us that they are currently working with the RTA on this issue.

NSW Police have noted that the current traffic control plans make checkpoints visible 1-2 kilometres away with the potential to impact on operational effectiveness insofar as drivers are able to take evasive action to avoid the checkpoint. For example, some police have observed heavy vehicles pulling over before the site and these police believe that drivers are waiting for the operation to cease before proceeding.

One senior police officer interviewed thought the site (and legislative) requirements were too onerous. The officer used the example of RBT to illustrate the point:

... we can set up an RBT site on the highway with probably four police and that involves the same risks as stopping cars for a search. You're wheeling cars in out of the mainstream traffic off the highway, ... giving them a spiel under a different Act, then [subjecting] them to a function. We don't have to have an independent officer present, we don't give them a piece of paper to say why they've been stopped, we don't have ... all these sign postings and everything and it's essentially the same type of operation, it's for a different purpose but it's the same function. Because we're stopping them for a different function, we're going through this whole range of ... precautions and conditions that is really [complicating] the issue beyond what it needs to be.³⁵⁶

Interestingly, it was anticipated that the requirement that police erect signage around an operation might counteract the aims of the legislation. As expressed by the Member for Albury, Mr Aplin MP:

This is advertising! If we have literate drug traffickers, we can warn them, 'You are approaching a detection area. Please turn around now to avoid being detected.'³⁵⁷

12.9.1.2. RTA view of traffic management arrangements

The RTA initially developed traffic control plans for sites in accordance with the guidelines for traffic control at RTA work sites. A senior officer from the RTA who was interviewed as part of the review said that the RTA:

... initially designed [the traffic control plans] for 100% capture which means we blocked the road, lowered the speed limit until we brought the traffic speed down into a controlled environment and then had all of the vehicles entering the detection area where the dogs were.³⁵⁸

The RTA have advised us that the traffic control plans for some sites have been modified to accommodate the need for flexibility required for police operations under the Act. The traffic control plans now allow for individual vehicles to be directed into the site rather than providing for 100% capture.³⁵⁹

The RTA representative we interviewed acknowledged the police desire to further tailor the traffic control plans:

I mean [I understand] the police from their point of view. I appreciate going from random breath testing, where they have nothing, to something that is really quite a lot of whistles and bells ... And it does alert drivers quite a distance away that an operation is happening. But, I would say of the night-time operation that the lights that they have on police cars ... out in the middle of the bush ... would be obvious.³⁶⁰

The RTA advised us that the joint consultation process with police was very successful. Consensus was reached on the suitability of sites in terms of safety, traffic management and necessary upgrading works.³⁶¹

12.9.2. Efficiency of traffic flow

Section 13 of the Act provides:

A police officer who exercises a function under a drug detection warrant must ask for the person's co-operation and carry out the function:

...

(b) *as quickly as is reasonably practicable.*

The ability of police to screen a vehicle 'as quickly as is reasonably practicable' was dependent on the way that traffic was controlled by police in the cold zone.

As described in Chapter 5 'Conducting an operation', for most operations, a vehicle was guided into the site and formed part of a single queue of vehicles in the cold zone. Vehicles were guided out of the site by an officer standing at the exit of the site. If a vehicle was indicated by the drug detection dog, it was guided into the hot zone.

Figure 23. Cars queuing in the cold zone



Source: Photo taken by Ombudsman observers.

This worked well, and in most cases did not seem to jeopardise the safety of vehicles or police officers. There were one or two incidents which brought into question the safety of vehicles, but by and large, these were isolated incidents. As mentioned above, most vehicles were not detained for more than five minutes.

In any event, at most sites police did not have much choice as to how they directed traffic in and out of the cold zone, because space at the site was limited.

However, during one operation, police made use of a site which incorporated a large area on one side of the road. Police at this site trialled a number of different queuing strategies to take advantage of this space and to minimise waiting times for vehicles.

Firstly, police directed traffic from both sides of the road into the site, which meant that police were directing vehicles to turn right across a major highway.

Secondly, at times, when the site was busy, police formed vehicles into two queues in the cold zone. This maximised the number of vehicles which could be screened. To do this, vehicles in the first queue were directed out of the queue to form a second queue. This appeared to create some confusion as drivers often thought they were being directed to leave the site altogether. This also meant that there were a number of officers and dogs in a range of positions at any one time in the cold zone.

At other times at this site, when only one queue was used, if vehicles were queued behind a vehicle which was being held up (for example, if police were making enquiries about the driver) vehicles at the back of the queue which had already been screened were directed to overtake vehicles in front and leave the queue.

The safety risks of these arrangements were raised by police officers at the debrief. However, two officers we interviewed supported having two lanes in the cold zone, provided that an officer directed traffic appropriately into the two lanes.³⁶² One of these officers thought that most drivers were cautious and were driving slowly.

There were other instances where police deviated from a traffic control plan agreed upon with the RTA. For example, for at least one operation, the RTA plan assumed that every passing vehicle would be stopped during the operation. However, in practice police did not stop every vehicle. If police are to deviate in any significant way from the agreed traffic control plan, then there should be consultation with the RTA and/or WorkCover about any safety risks involved. This is particularly the case if the practice of forming two lanes of vehicles in the cold zone or directing traffic to turn right across a major highway is to be adopted at future operations.

12.9.3. Recommendations

NSW Police incorporate into their policy and procedures documents that if the practices of forming two lanes of vehicles in the cold zone and/or directing vehicles to turn right into check points across major highways, are to continue at future operations, NSW Police should consult with the RTA and/or WorkCover about any safety risks involved.

If police are to deviate in any significant way from the traffic control plan agreed with the RTA, then NSW Police should consult with the RTA and/or WorkCover about any safety risks involved.

12.10. 'Roving' vehicles

During a number of operations, police deployed 'roving' vehicles before the site. These were deployed for different purposes by different site commanders.

At one operation, as mentioned below at paragraph 13.7 'Dissemination of information about operations', these vehicles were deployed mainly to dissuade heavy vehicles from stopping before reaching the site.

At another operation, the roving vehicles were there for the purpose of scouting for information about vehicles approaching the site. For example, a roving vehicle might alert officers at the site that a hire vehicle was approaching.

At yet another operation, the roving vehicles were used to identify vehicles which were stopping or turning around. At the briefing, it was mentioned that a police vehicle would be placed 20 kilometres on either side of the checkpoint. If police saw any vehicles stopping, they would speak to them, and if they were suspicious, they would be directed into the site. These officers were warned to be tactful as people may have had legitimate reasons to stop.

While the first two uses of roving vehicles does not appear to present any legal difficulties, it is questionable whether the third use is permitted.³⁶³

It is an offence to fail or refuse to stop if directed by police into the site.³⁶⁴ Therefore it would be reasonable for police to stop a vehicle which has driven past the site despite being directed in.

It is questionable whether or not police are otherwise permitted to stop vehicles – for example, in a situation where a roving Highway Patrol officer saw a vehicle do a u-turn 20 kilometres before the site. The legality of a decision to pull over a vehicle would depend on whether the circumstances were sufficient to base the formation of a reasonable suspicion (under other police powers) to stop a vehicle. Police can stop vehicles if they have a suspicion that there is a prohibited plant or drug in the vehicle,³⁶⁵ or if they suspect that there is anything stolen or anything used in the commission of an indictable offence in the vehicle,³⁶⁶ or if the vehicle can be connected to any indictable offence.³⁶⁷ The mere fact that the vehicle performs a u-turn prior to a checkpoint might not on its own be enough to meet the reasonable suspicion threshold. Some vehicles might be turning around for reasons which are not related to prohibited drugs or any indictable offence, for example, drivers may simply be trying to avoid the inconvenience of being stopped.

Although police have a power to issue reasonable directions under the Act, it is clearly stated that this power only exists in the search area.³⁶⁸ It is noted that, to date in their warrant applications police have, perhaps inadvertently, applied for areas much smaller than the one square kilometre permitted under the Act. This is discussed in more detail in paragraph 12.3 'Definition of search warrant.'

If a vehicle is or has been stopped before the site on reasonable grounds, and is not within the search area specified in the warrant, police do not have any power to direct a vehicle into a checkpoint, unless the driver consents. However, if a reasonable suspicion exists to search the vehicle under other police powers, then a search could be conducted at the location where the vehicle was stopped.

12.10.1. Recommendation

The SOPs be amended to make clear to police officers conducting operations under the Act the extent and limits of their power to:

- stop vehicles outside the search area
- direct vehicles outside the search area into the checkpoint.

12.11. Video taping practices

The SOPs for the Act state the role of the Video Operator as follows:

*This officer will videotape each search conducted within the 'Hot Area'. Each search will be taped on a separate tape and maintained in accordance with current search videotape operating procedures.*³⁶⁹

Although the SOPs make reference to 'videotape operating procedures', we are not aware of any NSW Police policy or procedure document which comprehensively outlines video taping procedures. Rather, we found an education package dated June 2000, and a few short pieces of advice about video taping events in various policy documents, including the Police Service Handbook³⁷⁰ and the Search Warrant SOPs.³⁷¹ The advice in both of these latter documents was not very detailed.

Police briefings did not usually provide advice about how to properly video record searches. As a result, our observers noted that individual police officers exercised diverse video taping practices.

We observed only one briefing where clear and practical guidelines were given about video taping. Our observer's notes of what was said at the briefing are as follows:

*Start with a ten second burst on the car with the rego. No one should touch the car until the investigator has completed his spiel to the driver and finished talking to the driver and occupants. This should also be videoed. The aim is to have only one thing going on at a time so the video operator can capture everything. Don't search the boot and the front seats at the same time. Quality issues about videoing discussed – the importance of getting people in the frame, if the video operator thinks they missed something e.g. because a noisy truck went past, they should request that the dialogue be repeated. If there is a find the searching should stop for a moment so that the video operator can film the find.*³⁷²

As well as observing video taping procedures, we reviewed a number of videos, provided by NSW Police at our request. These videos were recorded during two different operations conducted during the trial of the Act. The videos documented a total of 39 search incidents over six days. The review of these videos identified a number of issues which are discussed below.

12.11.1. Which parts of the search were recorded?

Our observations were that it was standard procedure for police to audio visually record searches of persons and vehicles that were conducted in the hot zone.

Our review of videos found that in 77% (30 out of 39) of the searches the video recording began when the vehicle was already located in the hot zone. This meant that it was unclear how long the vehicle had been in the hot zone prior to police activating the video recorder and that any incidents which may have occurred during this time were not recorded.

In 92% (36 out of 39) of the searches videoed the initial script given by the investigator to the driver appeared to be videoed in full. In the remaining 8% (3 out of 39) of the searches the taping began approximately half way into this script.

In most cases the end of the search, and any follow up, was recorded. However, 13% (5 out of 39) of the recordings ended prior to the completion of the search and conclusion of the follow up action.

In 46% (18 of 39) of the searches videoed it was apparent that persons had been searched. Only one person search was not recorded on video. This was due to a request from the persons being searched which was respected by police.

In just under half (18 out of 39) of the recorded vehicle searches, drugs and related implements were found. Of these 18 videos, four did not record the discovery of the items.

In a third (13 out of 39) of the searches videoed, it was apparent that admissions were made by the vehicle occupants. On all occasions, these admissions were recorded.

12.11.2. Quality of recording

In 71% (28 out of 39) of the searches videoed the quality of the video was problematic at some point. Reasons for the poor quality of the videos included:

- In some searches the backs of searchers or the ground was being videoed for lengths of time while the search was continuing.
- In 18% (7 out of 39) of the searches videoed the tape was at times fuzzy and distorted making it difficult for the viewer to discern what was occurring. Most of these distortions occurred in search videos which were videoed on a particular day suggesting that it was a problem with the equipment or the operator on that day.
- In 23% (9 out of 39) of the searches video taped the video operator stood at least 1-2 metres away from the vehicle being searched making it impossible for the viewer to discern what was occurring during the search.

In 51% (20 out of 39) of the searches videoed the sound on the tape was poor at some point. This meant that it was difficult at times to determine what was being said between police and the vehicle's occupant/s. Reasons for the poor audio appeared to include:

- Wind interference and/or traffic noise.
- Distortions due presumably to some technical malfunction.
- Failure of the video operator to move close enough to the persons conversing.
- Too many activities being conducted at the one time. At times the search of a vehicle was being videoed whilst significant conversations occurred between the vehicle's occupants and other police outside the car.

12.11.3. Identifying which car was being recorded

The number plates of the vehicles being searched were videoed in 28% (11 out of 39) of the searches videoed. In one operation all of the number plates of the vehicles were clearly videoed and were listed on the cover of the video for easy reference. In the other operation none of the number plates of the vehicles were purposely videoed. This led to some problems accurately identifying vehicles and also made it difficult to marry the video recordings with other police documentation for the operation.

12.11.4. Continuity and fragmentation

In 15% (6 out of 39) of the searches video taped the tape was stopped and started again resulting in significant gaps in the search activity being recorded. In half (3) of these video recordings the camera was stopped and started three or more times.

In 27% (10 out of 39) of searches videoed, more than one activity related to the search was conducted at the same time. This often meant that:

- The video recording of the vehicles being searched was prioritised over the recording of significant conversations with the vehicle's occupant/s outside the car.
- Two or more police were searching in different parts of the vehicle at the one time resulting in the capture on video of only one part of the search.
- Police were searching bags on the ground beside the vehicle whilst other police were searching the vehicle. This resulted in the capture of only one part of the search on video.

In a number of searches it was determined by police that an occupant of the vehicle was to be issued with a cannabis caution. The officers issuing the caution stated that the video camera was to be turned off whilst the caution was given. This occurred and the tape was restarted on completion of the cautioning.

12.11.5. Consent

Our observers noted that police officers did not always seek consent for video taping. When permission was withheld we observed police officers agree to turn the video off completely; or advise that they would turn the sound off (or delete the sound at a later stage); or simply tell the person of interest that their objection had been noted and continue to video tape the search.

In our review of videoed searches, it appeared that in only 8% (3 out of 39) of those searches videoed did the police directly request the consent of the vehicle occupants to video the search.

In 59% (23 out of 39) of the searches videoed the police appeared to advise the vehicle occupants that the search 'will be video taped'. In the remaining 33% (13 out of 39) of searches there was no reference on the video to the fact that the search was being videoed.

Examples of phrases used by police in advising vehicle occupants of the video included:

This search and the conversations we have are going to be video taped.

Anything you say or do is being recorded on video. Do you understand that?

The search will be taped on video and that is for the Ombudsman.

Everything is going to be recorded on video okay?

There was no outright objection to the video recording of the search from any occupants of vehicles subjected to a search in the videos we viewed. However, in one search, after being told that the search must be video taped, the driver held a white sheet of paper in front of her face and stated 'That's fine – as long as we are not video taped.' The police replied 'We will try and keep you guys out of it as much as possible.' It appears that as a result of this request the searches of these persons (conducted in the tent) were not recorded on video.

12.11.6. Guidelines

As noted above, we were unable to locate any comprehensive guidelines for videotaping in the field. While we could not find any guidelines or SOPS specifically developed for video taping, we did discover the 'Video/Audio Recording of Search Warrants and Planned Operations Education Package' (the education package).³⁷³ As the name suggests, the education package is tailored toward video recording of search warrants and controlled operations. Although this package is currently available to police, we understand that it is due for revision.

The education package states that:

*...video recording provides the most reliable account of what occurred and serves as an additional valuable tool to eliminate both corruption and unjustified complaints.*³⁷⁴

While the package is more detailed than any other statement of video taping policies we could find, it appears to offer little practical guidance for video recording in the field such as recordings that occur during operations under the Act.

NSW Police have recently developed Standard Operating Procedures (SOPs) for 'In Car Video' (ICV).³⁷⁵ In our view, these SOPs provide good practical advice for video taping events. The SOPs provide detailed guidance on operational aspects of ICVs and emphasise the importance of:

- narration by the officer – audio can be used as a contemporaneous notebook
- vehicle, officer and person of interest placement
- obtaining consent for audio recording
- ensuring that there is no interruption in the recording of the interaction
- maintenance and quality control issues regarding the equipment.

It is beyond the scope of this review to comment on how all video taping in the field should be done. However, our brief review of video taping in the field highlights the need for additional detailed guidance for police. Video taping guidelines or SOPs for video taping could include advice about the following:

- the importance of quality video recording should be stressed to police during pre- operation briefings
- the video operator should ideally be trained and skilled in using the available equipment
- police involved in searching activities should be directed to conduct searches to ensure that all activities can be adequately captured on the video
- if any items of interest to police are found during a search, they should be shown to the camera
- the secure storage and appropriate disposal of videos.

We have also made some suggestions for improving video taping in order to protect the interests of police and suspects during investigations in the field. These are discussed in more detail below at paragraph 12.12.2.

As well as video taping guidelines, some guidance about video taping could be included in the SOPs for operations under the Act. Such guidance could include the following:

- Prior to using the camera, video operators should ensure that the camera and audio are operating correctly.
- Prior to using the camera in each search an assessment of the time remaining on the recording media should be made to ensure adequate time for completion of the search.
- The video recorder should be activated as soon as possible on observing a vehicle entering the hot zone.
- The time and date should be stated at the beginning of each video recording.
- The video operator should be close enough to the search to clearly record search activities.
- A search should be videoed in full where practicable. Once the camera is activated, it should not be turned off until the completion of the search. If the video camera must be turned off, verbal reasons should be given as to why it is being turned off.
- Each search video should, where reasonably practicable, include the following:
 - the registration number of the vehicle to be searched
 - the initial police script in the hot zone including reference to the video and audio recording and cautioning
 - police questioning of vehicle occupants
 - any search of persons
 - any search of bags or other items taken from the vehicle.

12.11.7. Recommendations

NSW Police consider developing guidelines or SOPs for video taping investigations in the field, taking into consideration our discussion of video taping in this report, particularly at paragraph 12.11.6 and 12.12.2.

The existing NSW Police Video/Audio Recording of Search Warrants and Planned Operations Education Package be updated to reflect any new guidelines or SOPs for video taping searches.

The existing SOPs for border operations be amended to give better guidance about video taping procedures, taking into consideration our discussion of video taping in this report, particularly at paragraph 12.11.6 and 12.12.2.

12.12. Part 10A of the *Crimes Act 1900* and video taping

In this section we discuss the applicability of Part 10A of the *Crimes Act 1900*, which establishes safeguards for persons under arrest, to operations conducted under the Act. We also discuss how video taping practices could both benefit police in the context of Part 10A, and assist in providing some protection to suspects.

12.12.1. Part 10A of the *Crimes Act 1900*

In 1997 the *Crimes Act 1900* was amended to include a new Part 10A. The purpose of the new Part 10A was outlined by the (then) Attorney General, the Hon. J. W. Shaw during the second reading of the Crimes Amendment (Detention after Arrest) Bill. The Attorney General said the new Part 10A:

*...[creates] a regime whereby police are empowered to detain persons in custody after arrest for the completion of investigatory procedures, but only for strictly limited periods. A detailed system is set out whereby police and citizens will know precisely their rights and obligations. In short, the bill strikes a proper balance between allowing the police to make legitimate investigations of alleged offences on the one hand, and, on the other hand, safeguarding the rights of ordinary citizens suspected of committing these offences.*³⁷⁶

Part 10A of the *Crimes Act* and the associated regulation³⁷⁷ establish a number of safeguards for a person detained after arrest for the purpose of undertaking further investigation of the alleged offence. The safeguards require police to immediately convey a person under arrest to a designated police station where he or she will be introduced to a custody manager who will independently inform the person of their rights and assist the person to exercise those rights.

Section 355(2) of the *Crimes Act* defines 'arrest' in broad terms:

- (2) *A reference in this Part to a person who is under arrest or a person who is arrested includes a reference to a person who is in the company of a police officer for the purpose of participating in an investigative procedure, if:*
 - (a) *the police officer believes that there is sufficient evidence to establish that the person has committed an offence that is or is to be the subject of the investigation, or*
 - (b) *the police officer would arrest the person if the person attempted to leave, or*
 - (c) *the police officer has given the person reasonable grounds for believing that the person would not be allowed to leave if the person wished to do so.*

However:

- (3) *A person is not taken to be under arrest because of subsection (2) merely because the police officer is exercising a power under a law to detain and search the person or to require the person to provide information or to answer questions.*

During the second reading of the bill the (then) Attorney General explained that the broad definition of arrest was recognition that:

*... even when a person in custody is not formally under arrest, that person may feel or believe that he or she is not free to leave the company of police. Such perception may arise because of something said or implied by the police, but equally it may arise when the person's belief does not arise from actions of police. [Part 10A] ensures that, where appropriate, a situation of that sort is treated in the same way as a situation in which the person is formally under arrest.*³⁷⁸

NSW Ombudsman researchers have observed occasions where individuals detained by police at the site of an operation have not been processed in a manner prescribed by Part 10A. For example, researchers have observed police conduct what appears to be formal questioning of persons detained at the site of the operation after an offence has been detected. This is usually for the purpose of investigating facts that led to the issue of a FCAN or cannabis caution.

Our observers did not have concerns with the practice of issuing an FCAN or cannabis caution at the site of the operation. Indeed, it was noted that in such situations the individuals involved were processed in a relatively quick and efficient manner without the need to be conveyed to a police station for formal processing.

It is clear that issuing an FCAN or cannabis caution to an individual on-site is administratively convenient. However, the question arises as to whether the legal rights of the individual are sufficiently protected by this process and whether this departure from Part 10A is within legal parameters and in accordance with notions of public interest.

NSW Police provided the following response when asked about their view on the application of Part 10A during operations under the Act:

NSW Police is aware of the current difficulty that exists where a police officer has arrested a person for the purpose of issuing an FCAN, CIN,³⁷⁹ or penalty notice (albeit 'technically') and wishes to ask that person questions before issuing the relevant notice and releasing them. It is acknowledged that strict compliance with Part 10A of the Crimes Act would require that person to be taken back to a police station prior to any questioning, presented before a custody manager, informed of their rights and given an opportunity of exercising those rights.

However, strict compliance with Part 10A in some circumstances would defeat the purpose of CINs, FCANs and penalty notices as an alternative to formal arrest and processing. As such, NSW Police has to date, approached the issue from a risk assessment perspective. Having been made aware of the risks (of having evidence obtained in questioning ultimately excluded) police are in a position to make an informed decision as to whether to remove the person to a police station for questioning. Applying such an approach, it is clear that the longer that the person is detained for an investigative procedure and the more important the evidence obtained during that time will be to any subsequent prosecution, the greater the risk that there will be exclusion of the evidence – and therefore the greater the need to process the person in accordance with Part 10A.³⁸⁰

One of the key objectives of Part 10A is to ensure that certain valuable safeguards are afforded to individuals detained by police for the purpose of further investigating an alleged offence. However, it appears that the objectives of Part 10A may operate to defeat the purpose of legal processes that are designed to provide a degree of administrative convenience when individuals are processed 'in the field'. This office has noted this perhaps unintended consequence in the context of our review of the Criminal Infringement Notice scheme.³⁸¹

For a number of reasons, including those set out below, there is a pressing need to clarify the relationship between Part 10A and recent innovations allowing on-the-spot processing of some less serious offences:

- With increasing use by police of on-the-spot processing, the approach of managing the risk that evidence will be disallowed is likely to be increasingly inadequate.
- Deliberate departure from the law as set out in Part 10A may not seem like a reasonable risk to victims of (albeit less serious) crimes when matters fail at court.
- By not complying with Part 10A, police may be unilaterally abrogating the rights of suspects in favour of convenience and an approach based on risk management. NSW Police may also be exposing themselves to liability for acting without lawful authority.³⁸²

NSW Police have advised this office that they have sought legislative amendment to address the current difficulty that strict compliance with Part 10A creates for police.³⁸³

We agree that legislative clarification is necessary to balance the need for individual safeguards against the objective of administrative convenience. However, the form of this amendment should be given careful consideration.

The recent amendments³⁸⁴ to the *Search Warrants Act 1985* are an acknowledgement that the current law requires that persons under arrest be immediately taken to a police station, entered into custody and informed of their rights by the custody manager, including the right to legal representation. These amendments, which attempt to import many of the Part 10A safeguards to the site of execution of a search warrant, reflect the significance of such protections in ensuring a fair process of arrest and charge.

With appropriate cautioning and a professional technique, audiovisual recording of each incident is likely to afford some of the important protections provided by Part 10A to suspects and persons of interest questioned by police. The appropriate use of audiovisual taping may go some way to assisting policy makers to resolve the difficulties associated with the application of Part 10A in the field.

However it is also important that any legislative amendment not create a loophole allowing police to avoid Part 10A safeguards by processing persons in the field who would ordinarily be formally entered into custody at a police station.

12.12.2. Recording investigations in the field

Section 281 of the *Criminal Procedure Act 1986* requires that police must electronically record any admission made by a suspect in the course of official questioning, otherwise evidence of the admission will be inadmissible in court (in the absence of a reasonable excuse).

In broad terms, 'official questioning' can be understood as questioning of a suspect which occurs after police have a reasonable suspicion that a suspect has committed an indictable offence. Given that police are required to have a reasonable suspicion prior to conducting a search, all questioning of drivers of vehicles being searched in the hot zone would most likely be official questioning. In contrast, questioning of persons stopped at checkpoints, whose vehicles are not indicated by a dog nor the subject of any other suspicion, would probably not fit the criteria of official questioning.

Also requiring consideration in this context is the *Listening Devices Act 1984* which prohibits the use of listening devices (which includes audio-visual cameras) to record private conversations. If police record the sound during the video recording of a search this would probably amount to using a listening device to record a private conversation.

However, the *Listening Devices Act* includes a number of exceptions to the prohibition. One exception is express consent. Often, police ask the person they wish to video if they consent to the recording. Our observers found that usually the person would agree to being recorded. However, as discussed above, in some instances people object to being video recorded.

It is likely that in this instance police may continue to record on the basis of section 5(3)(b)(i) of the *Listening Devices Act* which provides:

[The prohibition] does not apply to the use of a listening device by a party to a private conversation if ... a principal party to the conversation consents to the listening device being so used and the recording of the conversation is reasonably necessary for the protection of the lawful interests of that principal party.

This provision has been given a fairly broad interpretation by the courts.³⁸⁵ Arguably police have a lawful interest, for example in preventing false allegations of misconduct being made, or providing evidence about any incident.

We note that an amendment has been made to the *Listening Devices Act* in relation to the use of ICVs by NSW Police.³⁸⁶ The amendment gives police officers the authority to record conversations with drivers without first obtaining their consent. A similar amendment is recommended to clarify the position in relation to video and audio recording under the Act.

The NSW Court Of Criminal Appeal judgment in the case of *R v Jiminez*³⁸⁷ lends further weight to the view that video taping of searches is necessary to protect the lawful interests of police. This case related to the NSW police practice of video taping the execution of search warrants. In that case, police said that they found two balloons of heroin in the appellant's underpants. At the trial the appellant argued that he had been 'fitted up' by police. Police had video recorded part of the search but had not recorded the search of the appellant when the heroin was allegedly found.

Police advanced a number of reasons for failing to record the search. However, these were found to be 'unconvincing' by the court. Smart JA concluded:

*The evidence as to the non-filming of the search of the appellant's person was unsatisfactory. The excuses advanced to justify such non filming lack weight. The video camera was available in the flat and used to record minor matters but not what mattered. No good reason was advanced for taking such a course. The need to film the critical part of the search was obvious to all. The purpose of having a video camera at any search is to avoid disputes.*³⁸⁸

Although this incident occurred in the context of a search warrant executed at private premises, the objectives of video recording would equally apply to searches carried out during operations under the Act.

A more restrictive interpretation of the audiovisual recording allowed by the case and statute law is reflected in the current police video/audio recording education package. The package states that police should go through the following process when initiating a video recording:

All persons whose actions are being video recorded, or whose conversation is likely to be received by the microphone and recorded, is (sic) to be cautioned that the video camera is in operation and asked whether they have any objections to their conversation being recorded.

The form of caution will be in two parts:

'A video/audio recording device is operating. You do not have to say or do anything but anything you say or do will be recorded and may be used in evidence. Do you understand that?' (record any response given).

'Do you have any objection to our conversation being recorded?' (Record response given).

If a person objects to their voice being recorded, the objection should be recorded by the video camera, following which the audio capability of the camera is to be switched off.³⁸⁹

It is noted that it is not clear whether this specifically applies to investigations in the field. However, assuming that it does, the form of caution may require some review in light of the above discussion.

If appropriately done, the audiovisual recording of searches and questioning could act as a safeguard for both police and suspects by providing documentation of the circumstances of the search and questioning. As well as being in the interests of police to video tape searches, video taping addresses some of the concerns that we have outlined above about adherence to Part 10A for matters which can be dealt with on-the-spot.

However, as demonstrated above, guidelines on video taping in the field are not comprehensive. It is important to emphasise that the benefits provided to suspects by video taping could be easily eroded if the taping is not done appropriately. NSW Police need to develop a comprehensive approach to video taping investigations in the field which is fair and just to both police and suspects.

At paragraph 12.11 above, we have already discussed ways in which current video taping practices could be improved. In the interests of improving videoing to protect both police and suspects, we note that any new guidelines for video taping in the field could also take into consideration the following:

- a failure to video record important aspects of a search may attract criticism from the courts (as in Jiminez above) and may jeopardise police prosecutions
- video taping procedures should reflect that all suspects should be cautioned about any admissions they might make on video
- when a suspect is being questioned, the video and audio should be focused solely on the conversation taking place.

12.12.3. Recommendations

Parliament consider appropriate amendments to the Listening Devices Act 1984 to explicitly permit video and audio recording of police actions conducted pursuant to drug detection warrants under the Act.

Police comply with the requirements of Part 10A of the Crimes Act 1900 unless and until an appropriate legislative amendment is made.

Parliament consider an appropriate amendment to Part 10A of the Crimes Act 1900 to facilitate processing away from a police station of persons suspected of committing offences. These considerations should include:

- Preference to deal with less serious offences – those which can be managed on-the-spot (such as Criminal Infringement Notices, cannabis cautions, and in some circumstances, Field Court Attendance Notices) – without the requirement to attend a police station.
- Where appropriate – including drug operations conducted under the Police Powers (Drug Detection in Border Areas Trial) Act 2003 – the audio-visual recording of interactions between the police and the suspect.
- Where – because of the nature of the offence or other reason – it is not appropriate to process a suspect in the field, the provisions and protections of Part 10A apply.

Endnotes

- ²⁶² See paragraph 5.4.1.2 for further discussion.
- ²⁶³ Interview K.
- ²⁶⁴ *Police Powers (Drug Detection in Border Areas Trial) Act* s.15; and *Search Warrants Act*, s.21.
- ²⁶⁵ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.6(2).
- ²⁶⁶ Although by co-incidence the same judge who received a prior report on the execution of a warrant may also consider the next warrant application this would be a matter of chance. In addition, we understand that records of reports on the execution of warrants are not readily available to judges.
- ²⁶⁷ The drug detection warrant process is described in more detail at paragraph 5.4 'Obtaining a warrant'.
- ²⁶⁸ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.5(5).
- ²⁶⁹ NSW Police submission, 15 October 2004, Q16.
- ²⁷⁰ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.4 defines who is an eligible judge.
- ²⁷¹ Interview F.
- ²⁷² Commander Survey E.
- ²⁷³ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.14(4).
- ²⁷⁴ NSW Police submission, 15 October 2004, Q17.
- ²⁷⁵ Police Association of NSW submission, 12 November 2004, p.4.
- ²⁷⁶ Letter to Attorney General dated 30 April 2004 and letter to Commissioner of Police dated 3 September 2004.
- ²⁷⁷ Attorney General's Department of NSW response to draft report, 13 December 2004.
- ²⁷⁸ NSW Police Information Package 5.
- ²⁷⁹ NSW Police Information Package 4.
- ²⁸⁰ NSW Police, *Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004*, p.28.
- ²⁸¹ NSWPD, Legislative Council, 25 June 2003, p.2044.
- ²⁸² Interview M.
- ²⁸³ NSW Police, Operational Orders, 'Vikings – Richmond/Tweed 9595', Richmond Local Area Command, 14 – 16 May 2004, p.10.
- ²⁸⁴ NSW Police submission, 15 October 2004, Q24.
- ²⁸⁵ NSWPD, Legislative Assembly, 2 July 2004, p.2705.
- ²⁸⁶ Police Association of NSW submission, 12 November 2004, p.6.
- ²⁸⁷ *Police Powers (Drug Detection Dog) Act 2001*, s.8.
- ²⁸⁸ *Police Powers (Drug Detection Dog) Act 2001*, s.10(b).
- ²⁸⁹ Ministry for Police submission in response to *Discussion Paper: Review of the Police Powers (Drug Detection Dogs) Act*, 30 August 2004, p.12.
- ²⁹⁰ NSW Police submission, 15 October 2004, Q24.
- ²⁹¹ NSW Police, *Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004*, p.36.
- ²⁹² Ombudsman observer notes F. For further details of this incident, please see Appendix A – Case U5.
- ²⁹³ See paragraph 8.2.4.
- ²⁹⁴ NSW Police, *Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, Annexure P*.
- ²⁹⁵ Ombudsman observer notes G.
- ²⁹⁶ Ombudsman observer notes H.
- ²⁹⁷ Ombudsman observer notes J.
- ²⁹⁸ Ombudsman observer notes K.
- ²⁹⁹ Ombudsman observer notes L.
- ³⁰⁰ Interview N.
- ³⁰¹ Interview O.
- ³⁰² Interview P.
- ³⁰³ Interview Q.
- ³⁰⁴ Interview R.
- ³⁰⁵ Police Association of NSW submission, 12 November 2004, p.3.
- ³⁰⁶ Interview N.
- ³⁰⁷ NSW Police submission, 15 October 2004, Q9.
- ³⁰⁸ NSW Police Interim Evaluation Paper, 20 August 2004, p.27.
- ³⁰⁹ NSW Police submission, 15 October 2004, Q9.
- ³¹⁰ Police Association of NSW submission, 12 November 2004, p.3.
- ³¹¹ For a detailed outline of the provision see Chapter 4 'Legislative Survey'.
- ³¹² NSW Police, *Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004*, pp.38-39.
- ³¹³ NSW Police submission, 15 October 2004, Q9.
- ³¹⁴ Ibid.
- ³¹⁵ Police Association of NSW submission, 12 November 2004, p.5.
- ³¹⁶ Ombudsman observer notes M.
- ³¹⁷ NSW Police Interim Evaluation Paper, 20 August 2004, pp.32-33.
- ³¹⁸ Ibid, p.32.

- ³¹⁹ Interview D.
- ³²⁰ Interview A.
- ³²¹ NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, p.37.
- ³²² Ombudsman video review.
- ³²³ NSW Police submission, 15 October 2004, Q7.
- ³²⁴ Ombudsman observer notes N. For further details of this incident, see Appendix A – Case D54.
- ³²⁵ Ombudsman observer notes O. For further details of this incident, see Appendix A – Case T54. The observer was not present for the initial stop of this coach.
- ³²⁶ Interview Q.
- ³²⁷ Ombudsman observer notes P. For a description of this incident, please see paragraph 8.1.5.1.
- ³²⁸ Ombudsman video review.
- ³²⁹ Australian Long Distance Owners & Drivers Association Inc submission at pp1-2.
- ³³⁰ Submission 1.
- ³³¹ Event reference 53.
- ³³² See NSW Ombudsman, *Discussion Paper: Review of the Police Powers (Drug Detection Dogs) Act*, June 2004, pp.30-34.
- ³³³ NSW Police, Drug Detection Dog – Pre-planned Job Request Form, Version 2.1, July 2004. See Appendix F.
- ³³⁴ Ministry for Police submission in response to *Discussion Paper: Review of the Police Powers (Drug Detection Dogs) Act*, 30 August 2004, pp.3-4.
- ³³⁵ *Ibid*, p.4.
- ³³⁶ Complaint 1.
- ³³⁷ *Ibid*.
- ³³⁸ UTS Community Law Centre submission.
- ³³⁹ Ombudsman observer notes Q.
- ³⁴⁰ Ombudsman observer notes R.
- ³⁴¹ Ombudsman observer notes S.
- ³⁴² Interview N.
- ³⁴³ Interview Y.
- ³⁴⁴ Interview N.
- ³⁴⁵ Interview T.
- ³⁴⁶ NSW Police submission, 15 October 2004, Q20.
- ³⁴⁷ *Ibid*.
- ³⁴⁸ Police Association of NSW submission, 12 November 2004, p.5.
- ³⁴⁹ *Ibid*, p.6.
- ³⁵⁰ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.11(2)(f).
- ³⁵¹ The Hon. Carl Scully, NSWPD (Proof), Legislative Assembly, 11 November 2004, p.33.
- ³⁵² *Police v Dai Collins* (unreported), Hay Local Court, 6 July 2004, pp.1-2.
- ³⁵³ The Hon. John Hatzistergos, NSWPD, Legislative Council, 25 June 2003, p.2043.
- ³⁵⁴ NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, p.20.
- ³⁵⁵ NSW Police submission, 15 October 2004, Q22.
- ³⁵⁶ Interview E.
- ³⁵⁷ NSWPD, Legislative Assembly, 2 July 2003, p.2702.
- ³⁵⁸ Interview M.
- ³⁵⁹ RTA submission, 6 December 2004.
- ³⁶⁰ Interview M.
- ³⁶¹ RTA submission, 6 December 2004.
- ³⁶² Interviews U and V.
- ³⁶³ We note, as we have in Chapter 2 'Background', that the court has a discretion to admit unlawfully obtained evidence, under s.138(1) of the *Evidence Act 1995*. In exercising this discretion, the court must consider whether the desirability of admitting the evidence outweighs the undesirability of admitting evidence which has been obtained unlawfully.
- ³⁶⁴ See paragraph 4.1.7 for a description of the legislative provisions that create the offences.
- ³⁶⁵ *Drug Misuse and Trafficking Act*, s.37(4)(b).
- ³⁶⁶ *Crimes Act 1900*, s.357E.
- ³⁶⁷ *Police Powers (Vehicles) Act 1998*, s.10(1)(a).
- ³⁶⁸ *Police Powers (Drug Detection in Border Areas Trial) Act 2003*, s.9.
- ³⁶⁹ NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, p.40.
- ³⁷⁰ NSW Police, NSW Police Handbook, 31 January 2003.
- ³⁷¹ NSW Police, Standard Operating Procedures – Search Warrants, 31 October 2002.
- ³⁷² Ombudsman observer notes T.
- ³⁷³ NSW Police, *Video/Audio Recording of Search Warrants and Planned Operations*, Distance Education Centre – Education Package, June 2000.
- ³⁷⁴ NSW Police, *Video/Audio Recording of Search Warrants and Planned Operations*, Distance Education Centre – Education Package, June 2000, p.5.
- ³⁷⁵ NSW Police, *In Car Video – Standard Operating Procedures*, Version 1, November 2004.
- ³⁷⁶ NSWPD, Legislative Council, 26 June 1997, pp.11234-5.

³⁷⁷ *Crimes (Detention after Arrest) Regulation 1998*.

³⁷⁸ NSWPD, Legislative Council, 26 June 1997, pp.11235-6.

³⁷⁹ Criminal Infringement Notice.

³⁸⁰ NSW Police submission, 15 October 2004, Q19.

³⁸¹ Forthcoming final report on the NSW Ombudsman review of The Trial of Criminal Infringement Notices by NSW Police.

³⁸² It is noted that the NSW Ombudsman is represented on the Attorney General's Part 10A Working Group as an observer.

³⁸³ NSW Police submission, 15 October 2004, Q19.

³⁸⁴ See the *Crimes Legislation Amendment Act 2002*, Schedule 10. Although passed by the Parliament, at the time of writing these amendments have yet to take effect.

³⁸⁵ See for example, *R v Le* [2004] NSWCCA 82 (7 May 2004); *Violi v Berrivale Orchards Limited* [2000] FCA 797 (14 June 2000); *Estate of Nicola Alvaro, deceased, Public Trustee v Alvaro* [1995] SASC 5183 (19 July 1995).

³⁸⁶ *Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Act 2004*. Assented to on 15 December 2004.

³⁸⁷ [2000] NSWCCA 390 (6 October 2000).

³⁸⁸ *Ibid* at para [66].

³⁸⁹ NSW Police, *Video/Audio Recording of Search warrants and Planned Operations*, Distance Education Centre – Education Package, June 2000, p.8.

chapter 13: factors that affected police practice

In this chapter we discuss the many factors which affected police practice during the review period. The focus is on practical matters not the subject of particular requirements or regulation under the Act or other laws.

During the early stages of implementing the new legislation police noted any practical or strategic concerns and attempted to rectify these problems in subsequent operations. As more operations were run, police improved upon many of their practices.

We note many of the good practices which were adopted by police as well as some practices which would benefit from further consideration or adjustment.

13.1. Brief and debriefs

Initially, police were conducting a briefing at the beginning of the first day of each operation and a debrief at the end of the last day of the operation. Toward the end of the review period, LACs were conducting briefs and debriefs each day.

The practice of briefing and debriefing each day of the operation, whether it be after the operation each day or at the beginning of the operation the next day, appeared to work well. The debrief allowed police to provide feedback and resolve any issues which arose during the operation that day. This information could then be used to improve the operation conducted the next day.

It also allowed managing police to reinforce key operational messages such as the importance of safety and how to conduct searches. For example, at one debrief we observed on the second day of a three day operation, the site commander reminded officers that they should be aware of privacy issues especially in relation to coaches.³⁹⁰

13.1.1. Recommendation

NSW Police incorporate into their policy and procedures documents that a brief and debrief should be conducted for each day of the operation.

13.2. Supervision of children and young persons

On occasion, children and young persons were passengers in vehicles which were searched in the hot zone.

At the beginning of the review period, police had not specifically considered how children and young people would be dealt with while their parents were being spoken to or subjected to a search. We observed a number of occasions where children were taken aside, and at times, left unattended.

For example, one of our observers noted the following:

The three children got out of the car and were directed over to the open back of a police vehicle where they could sit and wait in the shade. The children were left on their own, with neither a police officer nor an adult from the car accompanying them. Soon after, the woman went over to them. At various times throughout the search they were left alone, or attended to by the woman or the man. At one point, the smallest boy was using his drink bottle to pretend to shoot the police around him... The woman asked 'Can I just go back to my kids?' She was asked to stay where she is for the moment, and she was cautioned.³⁹¹

At one operation later in the review period, consideration was given to where children, or other passengers, might wait while their parents were being dealt with. However, at this operation no children were passengers in vehicles which were searched.

At another operation, also later in the review period, police brought a TV, video recorder and children's video tapes to keep entertained any children whose parents were being subjected to a search.

NSW Police has advised us that it regards the safety and supervision of children as important, and has informed us that the SOPs will be amended to include guidelines to address this issue.

Some preliminary suggestions are that where two parents are present, only one parent is searched at a time, or that an officer is assigned to supervise children.³⁹²

13.2.1. Recommendation

NSW Police incorporate into their policy and procedures documents an instruction that the needs of children and young people be considered during operations, and in particular where children will wait and who will take care of young children while their parents are being detained.

13.3. People from non-English speaking backgrounds

Observers have noted that some drivers appeared not to understand the information that was provided to them because of English language difficulties. Language issues are likely to arise frequently because operations are conducted on major roads between popular tourist destinations. For example, as noted by one of our observers:

*Asian man - didn't speak much English. Couldn't understand being told to stop the vehicle. Driver looked totally confused when the statement was read, then he started nodding. He nodded when asked if there were drugs in the car. [The police officer] said to [the] handler, 'They're nodding but I don't think they've got any idea.'*³⁹³

In these situations, some police attempted to utilise a standard phrase book which is available to all NSW police. It contains the translation of seven commonly used police phrases in 28 languages, including 'Please accompany me to the police station and I will contact an interpreter' and 'You are not under arrest, I just want to find out more about what happened'.³⁹⁴ While helpful to some degree, the book does not contain phrases which are designed for use in the context of a border operation, as explained by an officer we interviewed:

*I [can] think of two occasions where a multi-lingual phrase book, which only had six questions in it, didn't help out at all. A more thorough guide [with] maybe ten pages of different questions [would be good]. You could say, 'Yeah, you're not under arrest, we want to ask further questions.' But we didn't have those questions there. [When we were talking to] that Korean gentleman [we were] going, how can you explain...to him [that] 'The dog's smelled drugs on your bag, we're just going to look through there'? You could see it was very intimidating for him.*³⁹⁵

Otherwise, police improvised, as demonstrated by the following example:

*One of the searchers began to more closely inspect the contents of the bag. Some red balls in a small clear tube were singled out and the detective asked the driver what it was. Through mime and broken English, the driver explained that it was to help calm a full stomach, and police appeared to accept that. The investigator announced that the bag was OK.*³⁹⁶

NSW Police have suggested that a pamphlet, presumably translated into different languages, would assist in addressing the issue of communicating with people from non-English speaking backgrounds.³⁹⁷ The Police Association of NSW agreed with this suggestion.³⁹⁸ However, given that current operations are part of a trial, NSW Police are of the view that:³⁹⁹

. . . the allocation of NSW Police resources to the production of any pamphlet including translated advice for people from NESB [non-English speaking backgrounds] is not appropriate at this time.

If the NSW Parliament determines that the Act is to continue, NSW Police will then consider the most appropriate action to take in respect to providing advice to NESB . . .

At a recent operation, NSW police were advised to take some measures to assist people who may not have English as their first language. To this end, interpreters were made available via phone for the duration of the operation.⁴⁰⁰

13.3.1. Recommendation

If a pamphlet is devised to replace the section 12 notice, that it be translated into a variety of languages for distribution to people whose first language is not English. Alternatively, interpreters be made available on mobile phone to translate information provided by police at operations.

13.4. Protection of occupant's possessions

The occupants of many vehicles searched during border operations were tourists, people travelling between major cities, or people moving furniture between major cities. In order to search these vehicles properly, police would often lay out the entire contents of the vehicle directly on the road or dirt behind the car.

During one operation a person being searched complained to police about the fact that they had placed belongings on the ground. Police responded promptly by placing plastic garbage bags under the belongings in order to protect the items.⁴⁰¹

At other operations, a piece of tarpaulin was made available to protect the occupant's possessions. If police are going to continue to conduct operations, it is reasonable to assume that a number of vehicles searched will contain considerable luggage. Therefore, it would be good practice if police anticipated this and took some measures to protect people's possessions, such as bringing a piece of tarpaulin with them to the operation.

13.4.1. Recommendation

NSW Police incorporate into their policy and procedures documents that when searching vehicles, police officers provide some measure of protection for a persons' possessions from dirt and dust on the ground.

13.5. Drug detection dogs

Three issues in relation to the use of drug detection dogs during these operations have come to our attention.

13.5.1. Use of 'pseudo'

At one of the operations observed, a handler was seen by an observer sprinkling a white powder onto the carriage of a heavy vehicle, apparently without the knowledge or consent of the driver. After the dog was taken past the area and had made an indication on the white powder, the handler brushed the powder off the truck onto the ground. The vehicle was not subjected to a search.

When the observer later asked the handler about this incident, the handler responded that the powder was 'pseudo', a substance which handlers commonly use for training purposes.

We have since been informed that pseudo is the closest approximation to heroin and cocaine possible, without the powder being toxic or intoxicating. The pseudo mimicking each drug is a different powder. Pseudo is used for training purposes at the dog unit kennels, when no-one with authorised access to the 'drug safe' is available (the drug safe contains authentic samples of drugs).

At the time, there were no guidelines regulating the use of pseudo by drug dog handlers.

We raised our concerns about the use of pseudo with a senior police officer, and the issue was subsequently discussed at a Steering Committee meeting. It was resolved that the SOPs would be amended to reflect that pseudo should only be used on police vehicles. The SOPs have now been amended. The current version of the SOPs state that:

*Vehicles utilised for the training and motivation of drug detection dogs being deployed during cross border operations must be restricted to Police motor vehicles or other vehicles utilised by the NSW Police for that purpose. Any vehicle the subject of any such operation must not be utilised at any time.*⁴⁰²

In other words, only police vehicles can be used for training purposes, and any vehicle stopped under the Act cannot.

We note that the use of training aids such as pseudo has the potential to become problematic in a range of situations and environments, not just those relating to border operations. Accordingly, this should be addressed by the SOPs for the Dog Unit, or in a policy or procedural document applicable to all drug detection dog training aids.

13.5.2. Efficacy of drug detection dogs

Drug detection dogs, like humans, are not infallible. A common theme in our observers' notes was how drug detection dogs were affected by the weather and their environment.

In extremely hot weather, we have observed dogs become listless and unable to sustain their energy for long periods of time. Their paws also seemed to be affected by hot asphalt on the road. As described by one officer we interviewed after an operation held in particularly hot weather conditions:

*There was no real shade... even the dogs were feeling it, like, limping around because of the hot tar...*⁴⁰³

It was the handler's responsibility to manage these situations. The dog unit introduced dog booties in the second operation held under the Act to protect the dog's paws from being damaged. The leather booties tended to draw a lot of attention from drivers, with many people commenting or asking questions about them. For example, one driver said 'The dog's wearing shoes!'.⁴⁰⁴

Figure 24. Picture of police dog Bill, in dog booties



Source: Taken by Ombudsman observers

Various strategies have been employed to counteract the affects of extremely hot weather, including keeping dogs hydrated and in sheltered areas when they are not working, dipping their paws in cold water, and using the 'dog booties'.

In extremely cold weather, these issues do not seem to arise. For this reason, some handlers have commented that holding the operation at night better suits the dogs.⁴⁰⁵

During one operation, a handler informally commented to us that drug detection dogs do not work as well in the rain as they do in dry conditions. The handler said that the rain inhibits the movement of any scents in the air, and so the dog is less able to pick up scents from a distance.

We also note that one of the major finds during the review period, where police found 1 kilogram of amphetamine concealed under the back seat of a vehicle, did not arise as a result of an indication by the drug detection dog. The dog screened the vehicle and made no indication.

We have also observed that handlers are concerned with keeping the motivation of drug detection dogs up during periods where no indications are made. As evidenced by the number of vehicles searched compared to the number of vehicles stopped, this is not an uncommon scenario for a drug detection dog.

As discussed later in this report at 14.2 'Results', the rate of finding drugs or other contraband as a result of searching is approximately 31%. It is noted that not all searches arose from a drug dog indication, therefore the rate of finding drugs as a result of a drug dog indication is lower than this figure.⁴⁰⁶

NSW Police has acknowledged that there are challenges for drug detection dogs deployed during extreme weather conditions and for long hours. NSW Police advised that in addition to the measures we describe above, drug detection dogs need to be trained to adjust to these specific environmental conditions.⁴⁰⁷ As at the time of writing, no advice has been received about whether or not such training has been implemented.

We received one submission which questioned the efficacy of police relying solely on an indication by a drug detection dog to form the 'reasonable suspicion' necessary to conduct a search. The submission referred to the finding reported in an Ombudsman's Discussion Paper⁴⁰⁸ that drug detection dog indications led to police locating prohibited drugs in 27% of searches. The submission went on to state:

... a vehicle search will only be carried out following an indication from a drug detection dog on assessment of the vehicle. Therefore this practice permits a decision based on the response of the dog, rather than the formation of a 'reasonable suspicion' by the police officer. It is submitted that this is not consistent with the legal formation of the 'reasonable suspicion' threshold test.⁴⁰⁹

The issue of accuracy of drug detection dogs and their use in the formation of reasonable suspicion will be fully canvassed in our report of the review of the *Police Powers (Drug Detection Dogs) Act 2001*, due in mid 2005.

13.5.3. Visibility of dogs

While the SOPs provide that police must wear reflective vests so that they are more visible to drivers, there is no such requirement for drug detection dogs.

At one operation we observed, the handler had purchased a reflective vest for the drug detection dog so that he was in less danger.

Figure 25. Reflective vest for drug detection dog



Source: Photograph taken by Ombudsman observer.

Because dogs are lower to the ground than people it is easy for drivers to fail to see them when they move their vehicle. Although dog handlers keep the dogs on a lead and are vigilant in terms of safety, dogs are vulnerable when working in close proximity to vehicles. In addition, some drug detection dogs are black and their visibility is minimal during operations held at night.

13.5.4. Recommendations

The Dog Unit SOPs, or a similar document, be amended to include a policy regulating the situations in which 'pseudo' may be used as a training aid for drug detection dogs.

NSW Police provide reflective vests or use other appropriate methods to ensure drug detection dogs are visible during operations conducted under the Act.

13.6. Extensive searches

During the first operation, a heavy vehicle was indicated by a drug detection dog. The cargo area of the vehicle was virtually full of kitty litter stacked in pallets. Two drug detection dogs were taken through the cargo area, and both indicated the lower level of pallets. Police could only see as far down as the top layer of pallets. After some deliberation, police decided not to unload the vehicle and search the cargo for drugs.⁴¹⁰

During another search at the first operation, police suspected that drugs might be hidden in a spare tyre. However, police were unable to dislodge the tyre from the wheel. They called a mechanic to the site, but the mechanic was unable to assist. They then took the car to a service station in the town centre, where the tyre was eventually opened. No prohibited drugs were found and the driver was allowed to leave the site.⁴¹¹

During a different operation, police had to decide whether to unpack a load of food in a hot dog van. Police realised that this would involve potential food contamination issues. On this occasion police spoke to the driver and examined the outside of the boxes. The independent decided not to conduct a search that involved opening the boxes.⁴¹²

At the second operation, police were fortunate to have a forklift made available to them which was on stand-by in case a situation arose where an extensive search of a heavy vehicle was required. They were also fortunate to have an officer participating in the operation who was licensed to drive a forklift. Ultimately, they were not faced with a similar situation, so the forklift was not used.

Other than this special measure, no other steps were taken during any other operations in anticipation of potential extensive searches of vehicles.

It is likely that in the future, situations will arise in which police will need to make decisions about whether or not to conduct more extensive searches, potentially using expensive resources such as forklifts or mechanics. Police have advised us that deciding whether or not to search fully laden vehicles is not an uncommon scenario for operational police.⁴¹³

The issues are described below by an officer who we interviewed:

Yeah, for anything that was sizable, they'd have to have like a forklift there. Obviously we could get a whole operation and not need the forklift, that then wastes a day of hiring a forklift... I mean they look after money as much as they can to make sure they don't waste it, so I can understand that equipment not just sitting there because it's going to go to waste... [but] if someone's going to hide drugs, I mean you're not going to put them on top of the palette at the most easiest spot. You're going to have them in the hardest spots.⁴¹⁴

This issue was discussed at Steering Committee meetings. Police have advised that any decisions about extensive searches are the responsibility of the Operation Commander, and that in making any decisions, a number of issues should be considered, including:⁴¹⁵

- the size of the vehicle and type of goods being carried
- any previous intelligence or other information that may justify a detailed search of the vehicle
- the prevailing weather conditions or site specific factors
- the likely cost of a detailed search and the likely damage to goods being carried (eg cold produce)
- the perceived strength of the indication by a detection dog.

Assessing whether or not to invest considerable resources and impose significant inconvenience on drivers to conduct extensive searching is one of the most difficult decisions police must make during these operations. Although such decisions need to be made on a case-by-case basis by a suitably senior officer, we are of the view that additional guidance should be provided to police in the SOPs. The elements of making such decisions referred to above should be incorporated into the SOPs and into police briefings prior to operations. We note, however, that NSW Police are of the view that:

*Developing guidelines in this regard would unreasonably complicate and restrict the proper exercise of Police discretion in such instances.*⁴¹⁶

13.6.1. Recommendation

The SOPs be amended to include guidelines to assist police in making decisions about whether or not to extensively search a vehicle.

13.7. Dissemination of information about operations

In order to prevent people from avoiding an operation, keeping the details of the operation confidential until the operation begins is vital. It was brought to our attention that information about operations can leak before an operation starts.

It was also brought to our attention that immediately after an operation begins, information about it spreads quickly amongst heavy vehicle drivers.

13.7.1. Consultative planning

Some police officers have told us that the consultation and other planning requirements may lead to unintended leaks of information about operations, such as when and where they will be conducted. Here are some examples of comments made to us:

*So, yeah, with the operation this size there's going to be problems with the amount of police involved that have had to organise. People talk, nothing against the integrity of the police involved, people talk. That's just human nature, that's what happens. And as you would know there's the Steering Committee. Look at how many people are on the steering committee [when] we designated the first operation to be at Hay. And, it's nothing against their integrity, but there's a lot of people involved. In the future hopefully it doesn't have to go through them to stamp it.*⁴¹⁷

*Some problems we had with the current legislation are the requirements of notification... With the planned operations, it would be good to call them when we want them. I understand the need for approval, but they're just placing restrictions on us to getting out there.*⁴¹⁸

*Sometimes it's our own people that are the problem, you know, just through simply innocent conversation.*⁴¹⁹

It is true to say that police must plan the operation weeks in advance. For example, the task of preparing the application to apply for a warrant alone is onerous and may take many days. This application contains specific details about the operation, and passes through several hands before reaching the Commissioner or Deputy Commissioner for approval. Additionally, planning police must ensure that staff with specific skills are available to participate in the operation, which would require planning rosters in advance.

Our observers noted some examples of information being leaked before an operation. For example, about an hour prior to an operation, an observer bought a drink at a local shop. Police had only just arrived at the site. While waiting in a queue to pay for her drink, she overheard a cashier telling her customers what kind of operation was taking place, at what time the operation was being conducted and for how many days.

We are also aware of a serious internal police complaint in which it is alleged that a police officer informed criminals and local heavy vehicle drivers of the details of impending operations. This complaint is currently being investigated.⁴²⁰

It is somewhat inevitable that details of large-scale operations will be accidentally leaked by police officers. This happens during other police operations. While with some high visibility police operations leaks may be fairly inconsequential, operations designed to apprehend drug traffickers are likely to be significantly compromised by the early spread of information. This is why operations conducted by the Drug Squad are tightly controlled, ideally with information passing only to those who 'need to know'.

Police would be considerably aided in preventing the leaking of information if they were not required to conduct such large scale operations with numerous officers and a long and extensive consultative planning process.

Such concerns point to the incompatibility of the current legislative framework with its objective of the interception of indictable quantities of prohibited drugs.

13.7.2. CB radio

From our observations of operations and debriefs and interviews with police officers, it is clear that details of each operation are easily and quickly disseminated across major transport routes through truck driver networks, particularly via Citizen Band (CB) radio.

CB radio is used by most truck drivers to communicate with other truck drivers, and is available to anybody with the right equipment. Some police also have access to CB radio in their vehicles.

Evidently, once one truck driver has been stopped at a site, in a matter of hours many truck drivers on the same route will know that an operation is being conducted. This will cause some drivers to change routes or stop before reaching the site and continue only when the operation has finished. It could also allow drivers to dispose of any contraband before arriving at the site. The following extracts from our observer's notes indicate the extent of this problem:

*The driver said 'The blokes in Queensland have known about this since Tuesday. You really think if anyone had anything there they'd be coming through here?'*⁴²¹

*The driver said: 'People here have been talking about this for three days... why does everyone know about it?'*⁴²²

*While waiting for [the site controller], the driver said, 'This is all the talk up the Nepean Highway!'*⁴²³

*The driver commented, 'The blokes know to stay off the highway now!'*⁴²⁴

*The scribe asked this driver about whether he had heard about it on the radio. The driver said, 'I only heard about it 20ks out.'*⁴²⁵

Many police officers we interviewed agreed that this was a hindrance:

*Well, two weeks before we had [the operation], the media were ringing up and saying 'there's a big job going to happen in you area, we know about it, what do you know?' and we're going, 'We don't know anything.'*⁴²⁶

*The difficulty with the heavy vehicles is their CB radio network is better than any radar detection device or mobile phone that you could ever have. We had reports of substantial increased traffic going up [another highway] to avoid the site...*⁴²⁷

*But you know there's the chatting amongst the truckies. So as soon as we're out there doing a block or something, the word's out and they all know.*⁴²⁸

*As soon as you pull over the first truck and they leave the site it's just going to be all over the roads. So, I think, yeah, it's pretty much of a defeat. You'd have to be an absolute idiot after that first truck to still have anything left on board. Unless you hadn't heard about it, they might not know it's a drug operation or something like that, but it's pretty hard to keep the information from them.*⁴²⁹

The Police Association of NSW also agreed that in the heavy vehicle transport industry, drivers are able to avoid the site through CB radio.⁴³⁰

Some police have suggested to us that truck drivers work in concert with other truck drivers to ensure that they won't be stopped at the site while the operation is being conducted. When one or two trucks are stopped in the cold zone, they will tell other truck drivers that the site is not capable of fitting any more heavy vehicles in the cold zone. Truck drivers who are waiting kilometres before the site then continue along their way, confident in the knowledge that they can't be stopped until the cold zone has been cleared.

It has also been suggested to us by police that sometimes large numbers of truck drivers agree to drive through the site in close proximity to each other, and that the first truck agrees to accept a fine for failing to stop. This is explained by a police officer we interviewed:

*...by blockading the site...they back up so that there's anything from, say, 20 trucks to a 100 trucks in a row, and they just drive on through the site end to end. And they're virtually impossible to stop, because no one's prepared to step out in front of the first one, and generally an agreement... [is] reached between the truck drivers, [whereby] the first truck driver will wear the fine for ...failing to stop...*⁴³¹

Our observers have noted truck movements that appear to be consistent with this explanation by police. Our observers have also had the opportunity to listen to CB radio during an operation, and truck drivers were heard warning approaching truck drivers about the operation.

The communication network is not foolproof. however, as evidenced by case study five,⁴³² in which truck drivers were under the mistaken impression that police were taking urine samples to test truck drivers for drugs.

Similar communication could be achieved with mobile phones. Some police have suggested to us that sophisticated drug traffickers could conceivably use two vehicles to transport prohibited drugs. Under this hypothetical arrangement, the first vehicle, without any drugs in it, would stay well in front of a second vehicle transporting drugs. The first vehicle would then warn the second vehicle of any oncoming police activities.

It is important to note that avoiding the site is not necessarily evidence that heavy vehicles are involved in the transportation of drugs, as explained by an officer we interviewed:

*Yeah, there's probably others sneaking off around the back way, and that may have also nothing to do with drugs. They might be sneaking off around the back way because their logbook is not up to date or they've driven three days over their time. I don't think because a vehicle drives around the site you automatically assume that they've got the 100 kilos [of prohibited drugs] on board.*⁴³³

It is also evident that this type of communication occurs with most policing activity on the highways, such as RBT or the use of speed cameras. As described by one police officer:

*If you're stopped out [on] the road doing a random breath test, the CB radio is alive for the next 100 kilometres. Or they're checking logbooks – 'watch out they're checking log books' and it's alive. You've got a Highway Patrol car heading north on the Hume highway, all the trucks going south are saying 'watch out, they've got one heading north.'*⁴³⁴

At one or two operations, police used 'roving patrol cars' before the site to ensure that truck drivers were not banking up before the checkpoint. At other operations, heavy vehicles were not targeted and were often waved past the site as police preferred to stop non-commercial vehicles. Roving vehicles are discussed in more detail at paragraph 12.10.

We have also received information that police have set up RBT sites on alternative routes to create the impression of another 'checkpoint'.⁴³⁵

NSW Police have formally acknowledged that drug couriers may be taking steps to avoid operations conducted under the Act.⁴³⁶ NSW Police suggest that their ability to counteract the dissemination of information through CB radio or mobile phone is hampered by three factors.

Firstly, the fact that warrants last for a maximum of 72 hours. The suggestion here is that because it is generally known that warrants last for only three days, some traffickers may simply avoid a checkpoint for three days.

Secondly, because the site must be constructed to meet safety specifications, police take up to one hour to set up the site. This means that passing truck drivers are able to warn other drivers of the checkpoint before it is even operational.

And finally, because of the requirement that RTA consultation is required, police are limited to a few static positions which the RTA approve of, which may assist drug traffickers to map their routes around these locations.

As suggested by one officer we interviewed:

*[There is] only [one] way we [can] overcome the CBs...[and that is if] they don't know how many nights it's running, they don't know where it's been and you may have a person that just didn't know what it's about, we may have caught some that way.*⁴³⁷

13.8. Amenities

Most of the locations chosen for operations to date have had limited facilities for police. Most sites had no toilet, chairs, tables or shelter. If an officer needed to go to the toilet, it was necessary to drive to one.

Notably, at most sites there was no 'stand down' area – which is an area where police can take a rest break when the site is not busy. Police who were not busy were usually forced to stand for long periods of time in extreme weather conditions (either extremely hot or cold). A few officers sat in their vehicles.

Many officers we interviewed commented that this was unacceptable to them:

*If we are going to spend that much money...let's spend a little more money to make sure that our troops are well feed, well watered and well catered for.*⁴³⁸

*...if I said if success was based on how much shelter they gave the police in relation to shade, they went poor[ly]. I mean [they said] 'We normally get 40-45 degree heat.' So [they] knew it was going to be hot and yet they didn't supply anything for shade [or] seats. I mean, where did you sit down - On a bumper bar?*⁴³⁹

It is noted that the Vikings operation conducted on the NSW/Qld border, which was not part of Operation Carting, considered catering needs well in advance. The operational orders included the allocation of staff to prepare, cook all meals and clean up afterwards. The operational orders provided a detailed description of that meal:

*Meals will be BBQ based, with salads, meats, breads, drinks, fruit etc. Police with special nutritional needs, (ie vegan/vegetarian) should inform the Site Manager for their site to cater for your needs prior to Wednesday.*⁴⁴⁰

Only one LAC we observed provided a comparable facility. This LAC funded a barbeque and cold drinks at the police station during the meal break.⁴⁴¹

The Act requires police to choose sites which have been approved by the RTA. As such, sites are likely to be chosen with a priority on safety rather than facilities for police. Priority is also likely to be placed on the strategic value of the location.

At one operation an RBT truck was utilised. The RBT truck provided basic facilities, such as a toilet, meal facilities and an interview area. Since the truck is mobile the facilities could be made available during operations at other locations.

Our observers have witnessed the difficult, and sometimes extreme conditions that police endure for long periods during these operations. These same police must deal with members of the public for long periods of time, and we expect them to be courteous and professional. Providing reasonable rest, toilet and meal facilities for police would assist in maintaining their motivation and enthusiasm in performing what can be repetitive and tiring tasks.

NSW Police have advised us that based on the success of the RBT truck a command vehicle has been acquired for use by Southern Region LACs for future operations.⁴⁴²

13.8.1. Recommendation

NSW Police ensure that reasonable rest, toilet and meal facilities are available for police officers performing functions at operations conducted under the Act.

13.9. Police officer OH&S issues

As with much police work, these operations entail some risks to the occupational health and safety of officers. These risks are primarily related to the movements of vehicles in a confined place, and dealing with potentially dangerous and/or armed people.

The potential danger caused by dealing with traffic was perceived by most police we interviewed as no different to an ordinary traffic operation, for example:

I would say [the OH&S issues for these operations are] very similar to any normal traffic stop or random breath testing site. It'd be the same OH&S principles.⁴⁴³

However, the risks are not insignificant. As described by one officer:

You are coming out of a 110 [kilometres per hour zone], into a 100, into a 50, [then] into a 40. We needed a lot of room, not only for the safety of ourselves setting up in amongst the traffic, but the safety of road users.⁴⁴⁴

These risks have been managed to some extent in the operations. As the RTA are already involved in the preparation and approval of sites, some assurance is given in terms of the safety of police officers and members of the public. The sites involve thorough signage, flood lighting (if the operation is held at night) and a requirement that reflective vests are worn by all officers.

Despite these assurances, our observers found that some sites were particularly hazardous. Some sites were very narrow and some sites had poor visibility. Police had to improvise safety arrangements to address risks which were not anticipated by the RTA traffic control plan. For example, at one site, police created a 'corridor of safety' between the cold zone and the highway to better protect scribes talking to drivers in the cold zone. This was done by placing bollards in a way which created a space between the highway and the cold zone which was wide enough for an officer to stand in while talking to drivers.

In terms of dealing with potentially dangerous and/or armed people, most officers commented that these considerations are no different to officer safety issues they have to deal with on a daily basis, and officer survival skills were relied upon. For example, most officers we observed wore appropriate gloves while searching vehicles and people. As observed by one officer:

I suppose in real terms you never know who you're stopping but that's...a policeman's lot.⁴⁴⁵

NSW Police also take other measures to address OH&S issues including:⁴⁴⁶

- encouraging field commanders to use a risk management tool (this is included in the SOPs)
- detailed SOPs used to guide planning, which reinforce roles and responsibilities
- the conduct of post-operational debriefing sessions to identify areas of improvement.

We have discussed at paragraph 12.8, an additional OH&S issue which arises when considering whether drivers of heavy vehicles should be asked to disembark from their vehicle before being spoken to by police.

13.10. Other policing functions during an operation

At most briefings, police were told that the focus of the operation was on detecting drugs. At one or two briefings, officers were told to also be aware of other offences, and to use their ordinary police powers and discretion in relation to these other offences. For example, police were told to be aware of drivers who appeared to be intoxicated.

It is natural to assume that in the course of any given vehicular operation, a range of offences requiring immediate action may come to the attention of NSW Police. The SOPs state:

*Operation members are not required to attend to minor general policing incidents. However, members will, in every instance respond in an appropriate manner to incidents requiring an urgent response or where their support is requested at major incidents.*⁴⁴⁷

The SOPs also give some advice about breath and drug testing:

*Where a driver appears to be affected by alcohol or another drug, it would be appropriate to administer a breath test. If the result of that test does not allow you to arrest the person for a breath analysis, you are entitled to administer a sobriety test, and if appropriate, take the person to a hospital to obtain a blood/urine sample for analysis.*⁴⁴⁸

While police detected a range of other offences while conducting operations, ranging from vehicle defects to a serious physical assault, police did not routinely check for non-drug related offences. For example, they did not routinely breathalyse drivers, nor did they routinely check the logbooks of heavy vehicle drivers. To some police officers, this seemed a wasted opportunity:

*...there were instances there where truck drivers were stopped and automatically [handed over] their logbook [which was] handed back without being checked. Now that to me is wasting an opportunity. I understand the concepts of the legislation – don't get me wrong, but if you are going to go to that much trouble and set it up, as an added bonus isn't road safety still an issue? And fatigue management, vehicle compliance... It wouldn't have taken much effort to have one more person there breath testing them. You know, sticking a tube in everyone's mouth as they went past. That's thousands of breath tests to create a bigger high profile image...*⁴⁴⁹

It is noted that dealing with such offences tied up officers and prevented them from helping out with other aspects of the operation. This in turn effected how police were able to deal with vehicles stopped in the cold zone, and vehicles being searched:

*I know that you would certainly get some police officers that would say, 'Well, you know we're there, why shouldn't we be able to do [other functions]'. The only problem... is that you will reduce your effectiveness. Because...you can random breath test people, you can do all sorts of things at the same time, but you're going to impact on the inconvenience of the public and all those sorts of things 'cause you're going to slow everything up.*⁴⁵⁰

Under the Act, police have been given the power to randomly stop vehicles for the purpose of detecting drugs. If police were to systematically attempt to detect other offences, this could be seen as an abuse of the power they have been given. This is more so for powers which are regulated by other laws, such as random breath testing.

As explained by the corporate spokesperson for the legislation and Southern Region Commander:

*Clearly, I didn't want police to be... abusing the legislation by using it as a coverall to catch motorists for every minor defect on a motor vehicle... we need police to have the flexibility and the discretion to make decisions on the ground at the time relative to what the situation is without being too prescriptive about it in every circumstance...*⁴⁵¹

We would support this approach – that is, we would support giving police the discretion as to when to act upon offences that may come to their attention. We note that police deal with such situations on a daily basis. In general, our observers have noted that police have been more than reasonable in dealing with various offences which come to their attention. On more than one occasion, police averted serious crimes, one example of which was commented on by a senior officer:

*Now I think the true upside of it all was that we located a badly assaulted woman in the back of one of the vehicles. She was concealed under a blanket in a semi-conscious state, and as soon as we found her we sent her straight off to the hospital. But there's medical evidence showing damage to her brain, and that if we didn't find her and she hadn't received medical attention then she would have died.*⁴⁵²

There have been one or two isolated incidents where officers were perceived to be over zealous in dealing with minor traffic offences, however they were not of major concern.

This issue was raised by our representative at a Steering Committee meeting.⁴⁵³ NSW Police advises that the Steering Committee:

*...reaffirmed the need for police to exercise common sense during operations and not to be seen to be using the Act to enforce minor traffic offences.*⁴⁵⁴

In their formal submission, NSW Police specified a few offences which it expects NSW Police to take action for, including vehicle safety issues, serious traffic offences (including alcohol related offences), and serious criminal offences.⁴⁵⁵

13.10.1. Use of firearm and explosives detection dog during an operation

The SOPs state that it is legitimate to use a firearm and explosives detection dog (FED dog) during operations:

*Where a vehicle has been legitimately stopped pursuant to a drug detection warrant for the purpose of carrying out general drug detection, a firearms/explosives detection dog may also be used at that time to carry out 'general firearms or explosives detection' on the vehicle and its occupants.*⁴⁵⁶

The SOPs also state that nobody is to be specifically detained for the purpose of screening a vehicle for a firearm, unless a reasonable suspicion arises, and suggest that:

*... 'general drug detection' and 'general firearms or explosives detection' should be conducted simultaneously.*⁴⁵⁷

Despite this advice, it appears that FED dogs were not utilised during any operations. One LAC did request a FED dog for an operation, but:

*... the region commander and the commander of the dog unit had decided that it was not appropriate to use a firearms detection dog in this type of operation.*⁴⁵⁸

Under the legislation which regulates police use of FED dogs there is no restriction on the use of a FED dog in any public place, including roads. Therefore, as the SOPs suggest, there is no legal impediment to the use of FED dogs during border operations. It is unclear why the region commander and Commander of the dog unit decided not to use FED dogs for operations under the Act.

However, if a FED dog is utilised during border operations, NSW Police should consider providing some information to each driver about the use of the FED dog as well. This would not require legislative amendment, it could be included in the SOPs. However, we note that:

*NSW Police does not consider, at this time, that it is necessary to disclose information to drivers on the use of FED dogs. However, this issue will be further considered at the next Steering Committee meeting.*⁴⁵⁹

13.10.2. Recommendation

If police utilise FED dogs during an operation, consideration should be given to an appropriate form of disclosure to drivers.

Endnotes

³⁹⁰ Ombudsman observer notes U.

³⁹¹ Ombudsman Observer notes U.

³⁹² NSW Police submission, 15 October 2004, Q8.

³⁹³ Ombudsman observer notes V.

³⁹⁴ NSW Police, *Multilingual Phrase Book*.

³⁹⁵ Interview W.

³⁹⁶ Ombudsman observer notes W.

³⁹⁷ NSW Police submission, 15 October 2004, Q10.

³⁹⁸ Police Association of NSW submission, 12 November 2004, pp. 3-4.

- 399 Ministry for Police response to draft report, 10 December 2004.
- 400 Ombudsman observer notes T.
- 401 Ombudsman video review.
- 402 NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, p.42.
- 403 Interview W.
- 404 Ombudsman observer notes X.
- 405 Interviews T and X.
- 406 The nature of police records kept about searches has limited our ability to accurately calculate what percentage of vehicle searches following a drug dog indication resulted in a finding of prohibited drugs.
- 407 NSW Police submission, 15 October 2004, Q13.
- 408 NSW Ombudsman, *Discussion Paper: Review of the Police Powers (Drug Detection Dogs) Act*, Sydney, June 2004.
- 409 UTS Community Law Centre submission.
- 410 Ombudsman observer notes M.
- 411 Ombudsman observer notes Y. For further details of this incident, please see Appendix A – Case C77.
- 412 Ombudsman observer notes T.
- 413 NSW Police submission, 15 October 2004, Q14.
- 414 Interview P.
- 415 NSW Police submission, 15 October 2004, Q14.
- 416 Ministry for Police response to draft report, 10 December 2004.
- 417 Interview Y.
- 418 Commander Survey D.
- 419 Ibid.
- 420 Complaint 3.
- 421 Ombudsman observer notes Z.
- 422 Ombudsman observer notes AA.
- 423 Ombudsman observer notes BB.
- 424 Ombudsman observer notes CC.
- 425 Ombudsman observer notes DD.
- 426 Interview W.
- 427 Interview A.
- 428 Commander Survey A.
- 429 Interview Q.
- 430 Police Association of NSW submission, 12 November 2004, p.4.
- 431 Interview B.
- 432 See paragraph 10.7 'Ombudsman's observations'.
- 433 Interview N.
- 434 Interview N.
- 435 Submission 2.
- 436 NSW Police submission, 15 October 2004, Q15.
- 437 Interview Z.
- 438 Interview A.
- 439 Interview AA.
- 440 NSW Police, Operational Orders, 'Vikings – Richmond/Tweed 9595', Richmond Local Area Command, 14 – 16 May 2004, p.10.
- 441 Albury LAC.
- 442 NSW Police submission, 15 October 2004, Q11.
- 443 Interview J.
- 444 Interview R.
- 445 Interview H.
- 446 NSW Police submission, 15 October 2004, Q12.
- 447 NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, p.40.
- 448 Ibid, pp.43-44.
- 449 Interview A.
- 450 Interview H.
- 451 Interview with NSW Police Corporate Sponsor, 27 September 2004.
- 452 Commander Survey C.
- 453 Held on 28 May 2004.
- 454 NSW Police submission, 15 October 2004, Q23.
- 455 Ibid.
- 456 NSW Police, Police Powers (Drug Detection in Border Areas Trial) Act 2003 - Standard Operating Procedures, Version 1.6, Date Revised 20 August 2004, p.43.
- 457 Ibid.
- 458 Interview F.
- 459 Ministry for Police response to draft report, 10 December 2004.

chapter 14: cost effectiveness

When the Act was introduced to Parliament, the Hon. John Hatzistergos, Minister for Justice, stated:

*[The Act]...is specifically aimed at detecting the trafficking of indictable quantities of prohibited drugs, not offences of minor possession.*⁴⁶⁰

The ability of police to use the Act to effectively target drug supply was brought into question by members of Parliament when the Bill was being debated.⁴⁶¹ One member of Parliament suggested that the exercise of powers under the Act would be 'a huge waste of police resources in rural NSW.'⁴⁶²

During our review, the issue of cost effectiveness has been brought to our attention by NSW Police on numerous occasions. The issue was also given significant attention in the Interim Evaluation Paper drafted by the Project Steering Committee.⁴⁶³ Cost effectiveness was also repeatedly raised with us in our interviews with police. Some examples of comments made by operational police are set out below:

*Probably, for the amount of resources we've pumped into it... I don't think it was that effective. In terms of the cost benefit...we just seem to be getting, we got a fair few small hits. You know, that's great, but [we] only [got] one sort of decent hit...*⁴⁶⁴

*I thought... well what am I standing out here for ten hours doing that when I'm just getting a little bit of speed or dope? So that was a bit frustrating, but, I think generally it ran really well.*⁴⁶⁵

*...I thought it was a reasonable success, but they're very resource intensive. Like, for example, the number of police [needed] to comply with the legislation... they're very costly – the travel expenses, the overtime, the dog being transported all the way from Sydney.... But, [combined] with the fact that it was a three-day operation with [a number of] police, in reality you've got to ask, was this the most cost-effective or resource-effective way to do this?*⁴⁶⁶

*Well you saw last night yourself, there was a lot of police out there... I just wonder [if] the results [are] as effective as [they] could be... if they were to... run continuously, the challenge in my view is, do we get as much benefit out of this operation as we might out of running a different sort of controlled operation, given the resources that have got to be applied...?*⁴⁶⁷

Cost effectiveness was also a concern expressed in one submission to our review:

*... we submit that resources expended in drug dog detection are wasted apprehending small-time drug users, people with addictions, and very occasionally a small-time dealer.*⁴⁶⁸

Factors effecting cost effectiveness are not always easily quantified and compared. Some of the benefits and costs involved in police work cannot readily be assigned a particular quantifiable value. It is important to also keep in mind that quantities of drugs seized and financial estimates are not the only factors which are worthy of consideration in measuring cost effectiveness. Our discussion will provide actual costs of operations as estimated by NSW Police as well as the results of operations in terms of drug seizures and other offences which were detected. A number of other factors are also considered and discussed below.

14.1. Financial costs

We requested NSW Police to provide a financial estimate of the costs involved for each operation, specifying that they provide information about certain costs such as wages and travel allowance. We also asked NSW Police to provide details of any 'one off' costs involved in implementing the legislation, such as site improvements. We were provided the following information:

Table 16. Table of costs

	1-3 Feb	19-21 Feb	29 Apr-1 May	29 Apr-1 May	28-30 Apr	8-10 Jul	29-30 Jul	14-16 Oct	19-21 Oct	
	Deniliquin	Wagga	Wagga	Deniliquin	Barrier	Griffith	Albury	Griffith	Albury	Total
Days of operation	3	3	3	3	3	3	1	3	3	25
Total number of officers involved	40	46	15	13	19	38	21	19	23	234
Base wages	\$32,038	\$43,805	\$11,773	\$11,190	\$17,150	\$17,505	\$16,748	\$10,748	\$20,051	\$181,008
Operational preparations	\$3,620	\$1,426	\$250	\$724	\$1,426	\$267	\$1,934	\$134	\$640	\$10,421
Post operational reporting	\$0	\$214	\$1,472	\$0	\$214	\$100	\$1,427	\$67	\$0	\$3,494
Travelling allowance	\$4,082	\$5,336	\$4,829	\$437	\$667	\$0	\$0	\$0	\$531	\$15,882
Overtime	\$0	\$0	\$1,280	\$0	\$515	\$0	\$0	\$0	\$0	\$1,795
Shift allowances	\$2,337	\$4,704	\$416	\$426	\$1,764	\$1,884	\$579	\$0	\$0	\$12,110
Meals	\$0	\$0	\$0	\$0	\$0	\$0	\$300	\$100	\$280	\$680
Vehicle related expenses	\$2,007	\$484	\$582	\$1,470	\$361	\$3,000	\$1,600	\$1,600	\$1,294	\$12,398
Equipment hire	\$0	\$800	\$0	\$0	\$500	\$0	\$100	\$0	\$0	\$1,400
Total	\$44,084	\$56,769	\$20,602	\$14,247	\$22,597	\$22,756	\$22,688	\$12,649	\$22,796	\$239,188
Total excluding base wages	\$12,046	\$12,964	\$8,829	\$3,057	\$5,447	\$5,251	\$5,940	\$1,901	\$2,745	\$58,180

Source: Information provided by NSW Police

As indicated in the table above 234 police officers have been involved in nine operations conducted under the Act over a total of 25 days.

Table 17. Table of costs to RTA

Description	Cost
Improvement works (widening and sealing of road shoulders)	\$130,000
Provision of signage & associated traffic management devices	\$280,000
RTA staffing costs (preparing traffic control plans & sign design)	\$10,000
Hiring of lighting towers/equipment trailers	\$10,000
Total cost to RTA	\$430,000
Less infrastructure to be used by the RTA in the future	\$309,000
Total cost to RTA excluding infrastructure to be used by RTA	\$121,000

Source: Information provided by the RTA⁴⁶⁹

As indicated above, the RTA has spent a total of \$430,000 as a result of these operations.

The total infrastructure investment was \$410,000. This consists of \$130,000 for site improvements including the widening and sealing of some roads, and \$280,000 for the purchase of signs and other traffic management devices, such as electronic signs and bollards. A total of nine sites have been established and are operational.

In addition to infrastructure investment, \$10,000 was spent by the RTA to pay for staff to conduct site inspections, prepare traffic control plans and design signs. A further \$10,000 (approximate value) was spent by the RTA hiring equipment such as lighting towers and trailers. These costs relate to items specifically required by NSW Police for operations under the Act.

The RTA has advised this office that the infrastructure investments to the value of \$309,000 can be utilised by the RTA and other agencies for multiple purposes, such as heavy vehicle and fruit fly inspections. This leaves a total of \$101,000 worth of infrastructure improvements (at four of the nine sites) which the RTA advises were carried out specifically for the trial. However, it is recognised that NSW Police may be able to utilise these sites for other purposes such as RBT and fatigue management operations.

Including all information available to us about costs incurred by NSW Police and the RTA, the total cost of running these nine operations has been \$669,188.

However, if base wages are excluded from NSW Police costs, the total cost to NSW Police has been \$58,180. Base wages are costs that would have had to have been met, regardless of whether or not the operation was held. In addition, if RTA investments which can be used for other purposes are excluded from RTA costs, the total cost to the RTA has been \$121,000. Calculated on this basis, the total cost to the NSW Government has been \$179,180.

It is noted that the above cost assessment does not consider any opportunity cost – that is, the benefit lost from not using the same resources for other purposes. For example, one could question whether any benefit was lost from not having the same police officers conducting other police work such as street patrols instead of participating in these operations. As described by some officers we interviewed:

*...we've got 40, 50 police out there for three days. I know what I could do with 40 or 50 police over three days, and the results I could achieve, and the impact I could have on local crime. Bearing in mind that over that time we've got... none of our TAG police, none of our Highway Patrol police and... a lot of our other police unavailable to address crime in the local area...*⁴⁷⁰

*It has a significant effect on general police duties. Again, the last operation was staffed by mainly the Crime Manager Unit, preventing them from their normal duties... we're talking about the Youth Liaison Officer, the Domestic Violence Officer, Intelligence Officer ...people like that, all our high ranking specialised officers were called from their normal activities.*⁴⁷¹

*Well, also we've got to take police from their normal activities, like the Highway Patrol. So that means a reduction in RBTs, and other patrol activities.*⁴⁷²

The opportunity cost of operations conducted was highlighted by the Police Association of NSW in their submission:

*Whilst [an] operation was in progress, it left the command and other surrounding commands with little or no proactive presence aside from first response commitments to address local issues, which on occasions has made it difficult to meet local targets and priorities.*⁴⁷³

This is discussed in more detail below, in our discussion of the impact on LAC resources at paragraph 14.5.2.

14.2. Results

Below is a table summarising the main results of operations to date:

Table 18. Table of results

	1-3 Feb	19-21 Feb	28-30 Apr	29 Apr-1 May	29 Apr-1 May	8-10 Jul	29-30 Jul	14-16 Oct	19-21 Oct	
	Deniliquin	Wagga Wagga	Barrier	Deniliquin	Wagga Wagga	Griffith	Albury	Griffith	Albury ⁷⁴	Total
Total number of vehicles stopped	646	988	724	30	194	567	75	432	153	3809
Vehicles searched	65	93	47	2	27	14	1	12	30	291
Percentage of vehicles stopped that were searched	10.06%	9.41%	6.49%	6.67%	13.92%	2.47%	1.33%	2.78%	19.61%	7.64%
People searched	46	159	65	5	48	20	1	19	48	411
Total weight of cannabis found (grams)	86.1	247	3744.7 ⁴⁷⁵	5	530	6.4	0	12.1	168.51	4799.81
Total weight of amphetamine found (grams)	7	1	0	0	1017 ⁴⁷⁶	0	0	0	0.41	1025.41
Number of indictable quantities of any drug found	0	0	1	0	1	0	0	0	0	2
Rate of finding drugs										
Vehicle searches resulting in drugs	8	29	15	1	17	4	0	4	8	87
Vehicle searches resulting in implements only	1	0	0	0	0	0	1	0	0	2
Total number of searches where something found	9	29	15	1	17	4	1	4	8	89
Percentage of vehicles searched where something was found	14%	31%	32%	50%	63%	29%	100%	33%	27%	31%

Source: Information provided by NSW Police and from COPS

As outlined, police have conducted nine operations to date. Police have stopped a total of 3,809 vehicles, and searched 291 (or about 8%) of those. In total, police have seized about 4.7 kilograms of cannabis and just over 1 kilogram of amphetamine.

Only two indictable quantities of drugs have been seized overall – one of cannabis and one of amphetamine. As noted previously, neither of these seizures resulted in a conviction for the supply of prohibited drugs. In one case, the State prosecutor was unable to prove that the person driving the vehicle was in possession of the amphetamine found in his car. In the other, no one was charged in relation to an indictable quantity of cannabis found in a vehicle because police decided that they would not be able to prove possession.

The results in the table below only reflect actions for which charges were laid. They do not reflect traffic infringement notices issued by police during operations. It is noted that at the time of writing, 15 infringement notices were recorded on COPS as being issued during Operation Carting.

It is also noted that no charges were brought in relation to offences created by the Act, such as failing or refusing to comply with a direction from a police officer.⁴⁷⁷

Table 19. Table of legal outcomes

	1-3 Feb	19-21 Feb	28-30 Apr	29 Apr-1 May	29 Apr-1 May	8-10 Jul	29-30 Jul	14-16 Oct	19-21 Oct	
	Deniliquin	Wagga Wagga	Barrier	Deniliquin	Wagga Wagga	Griffith	Albury	Griffith	Albury	Total
Cannabis cautions issued	5	25	8	0	8	3	0	2	0	51
Number of persons charged	7	5	8	1	11	2	0	2	5	41
Total number of charges	14	5	11	1	17	2	0	3	9	62
Number of drug related charges	11	5	7	0	14	1	0	2	8	48
Charges proven/guilty pleas	12	5	10	1	13	1	0	Not yet heard	8	50
Dismissed/withdrawn	2	0	0	0	4	0	0	0	0	6
Section 10 dismissals or bonds	2	0	2	0	8	1	0	0	0	13
Court ordered fine	10	5	6	1	5	0	0	0	8	35
Other	0	0	A* B*	0	0	C*	0	0	D*	6

* A: One defendant on two charges did not appear, warrant for arrest issued B: One defendant on two charges not yet heard C: One defendant on non-drug related charge not yet heard D: One defendant on one charge not yet heard

Source: Information provided by NSW Police and from COPS

14.3. Disruption of drug trade

One of the major benefits which may be achieved by these operations, other than the seizure of indictable quantities of drugs, is the disruption of the drug trade. Disruption could occur in a number of ways. The operation might:

- delay a courier from delivering prohibited drugs
- force a courier to take an alternative route
- force a courier to use alternative means – that is, not via a vehicle, or
- it may dissuade trafficking altogether.

This was pointed out to us repeatedly by police in our interviews with them:

Based on the evidence that we've got over the last ten years, you would reasonably assume that over a three-day period a large quantity would have come along this route. So because we didn't get anything, it's either not come, or they've had to go out of their way to take it round somewhere else. So it has targeted the drug supply, because it's disrupted what 'he' was going to do. 'His' drugs haven't moved from here to here... Obviously the more we can disrupt, eventually the more desperate they'll get, then they've got no choice but to come through us.⁴⁷⁸

Yeah, we're still not getting a tenth or a hundredth of what's going up and down the various highways, but... at least it may cause some type of doubt in somebody's mind to move some stuff. And if we can alter the behaviour of a number of people just through fear that they might be detected, we're going to win.⁴⁷⁹

...well in terms of resources and return on an investment do you say, 'Gee was it worth all that or not,' because [in the bigger picture you've got to ask] 'How much do you actually stop?' And you can never know...you can never realistically measure how big of an impact you [have] had in regard to that particular route that people are travelling.⁴⁸⁰

I can be 100% effective in achieving my objective of preventing road trauma by simply being there without issuing a ticket all day. But... if [I constantly measure my performance by tickets issued], I would be seen as a poor performer, despite the fact that the roads that I have patrolled might have been accident free for the period that I have been out there. So similar to this, I don't think that you can judge the effectiveness by the short-term results. It has got to be a long-term thing. Whilst we know what we got, we can't really evaluate how much we prevented.⁴⁸¹

Quantifying the disruption of a drug network is difficult. Perhaps one of the concrete ways to identify whether policing activity is affecting drug supply is to look for any changes in existing drug markets.

However, NSW Police have formally advised that it is not aware of any reduction in the quantity of illicit drugs trafficked across state borders. NSW Police advise that this is better determined over a period of at least one to two years.⁴⁸²

14.4. Other measures of effectiveness

You just can't use post-operation generated results to determine whether the operation was a success. I look at the large number of vehicles stopped, the massive high profile that was created, the fact that we all learnt something about how the operation was run, no one got killed or injured, to my knowledge no serious complaints have come out of the operation – and that, to me, is a success.⁴⁸³

The quantifiable results of an operation are not the only measurement of its effectiveness. In this section, we look at the other indicators of effectiveness brought to our attention in the course of our review.

14.4.1. Community support

NSW Police cited the effect on the community as a measure of the effectiveness of the operation.⁴⁸⁴ We have also noted that the community reaction to operations has been largely positive, or impartial.

Generally, members of the public were not resistant to being stopped by police. Most people stopped in the cold zone were very accommodating. As one officer we interviewed said:

*The vast majority of people were just accepting. They weren't saying 'this is fantastic' but they didn't oppose it.*⁴⁸⁵

Some were vocally supportive of the operation. Here are some examples of supportive statements from drivers noted by our observers:

*This is really good. You should do this more often.*⁴⁸⁶

*Grouse - it's about frikkin' time [police began doing these types of operations].*⁴⁸⁷

*I understand what you're trying to do and I agree with it totally.*⁴⁸⁸

*Yeah, catch the bastards.*⁴⁸⁹

*It's good to see, as far as I'm concerned, best thing that could happen. If there's one thing that annoys me, it's drugs.*⁴⁹⁰

*That's good. I'm all for it.*⁴⁹¹

*I hope you catch the crooks. I don't mind being stopped as long as you catch 'em.*⁴⁹²

We also received an email response to an advertisement placed in a local newspaper.⁴⁹³ The individual commented:

Drugs are a major problem for individuals and communities, and this is a safe and controlled method to

*intervene in the hidden crime. I encourage the NSW Police to keep up their efforts to protect innocent and vulnerable members of the community.*⁴⁹⁴

Many people we observed were so amused by the situation that they reacted with laughter at the mention of drugs when being read the script by the scribe.⁴⁹⁵ People also frequently commented on the novelty of the situation, for example, one of our observers noted that a driver commented in the cold zone 'This is interesting isn't it?'⁴⁹⁶ while another driver we observed remarked 'How cool is this!'.⁴⁹⁷ Another driver said 'Get outta here!' when the scribe mentioned the drug detection dog.⁴⁹⁸

While most drivers of heavy vehicles complied with police, some were very negative. It was apparent to our observers that drivers of heavy vehicles did not appreciate being held up. For example, during the cautioning of a driver in the hot zone, the investigator asked if the driver had any objections, and the driver said 'Nah, just get on with it!'.⁴⁹⁹ In another example, our observer noted: 'Driver asks how long it's going to take. He says 'I'm not being a smart arse but I've got a timetable to keep.'⁵⁰⁰

However, not all heavy vehicle drivers had this reaction, for example, one driver we observed said: 'In all the years I've been driving trucks I've never been stopped for drugs. It's a good idea.'⁵⁰¹

We also noted that during one operation the independent officer would ask persons if they had any complaints about the search procedure after it had been concluded.⁵⁰² This appeared to be a good 'customer service' strategy in that it gave the persons searched an opportunity to reflect on the procedure and air any grievances they had.

NSW Police has also asserted that the impact on motorists has been minimal and that there has been a negligible effect on traffic flow.⁵⁰³ We agree that most motorists were only delayed for a few minutes and we are unaware of any impact on overall traffic flow. The impact on those persons pulled over and searched (especially those who had committed no offence) is difficult to estimate. We are aware of only a couple of minor complaints as discussed below.

NSW Police has also stated that there has been little to no impact on local communities 'due to the hours each operation was conducted'.⁵⁰⁴ We have observed that while a few operations have been conducted in remote areas, several operations have been conducted next to local businesses, such as truck stops, service stations, hotels and in one case, a tourist information centre. Our observers have also noted that some local workers and residents have been stopped on numerous occasions on the one day as they carry out their normal routines in the area.

Some police have advised us in interviews that they have received some negative feedback about operations:

*Well the only negative bit of publicity we got... from a community person was a woman in a roadhouse that had close links with a lot of trucking people that came through and was very disappointed about the drug site being set up near [location of operation] interfering... with her customers. So that she believes that she lost some custom as a result of that.*⁵⁰⁵

*We have complaints from people in the vicinity where we undertake the operations, like just last week we got one from local council in the vicinity of a local landmark that attracts a lot of visitors and our presence stopped a lot of people going there.*⁵⁰⁶

The owner of a local business close to one of the sites said:

*Well, it's certainly not good for business. No doubt about that... You know, like, to set up a big operation out the front of any business I would imagine, without any advance notice whatsoever in my opinion, and anyone who's said anything opinion, rude.*⁵⁰⁷

We are also aware of two formal complaints from a members of the general public, which contained some negative feedback about operations. The first complaint was from the father of a woman who had been stopped and searched, with nothing found. He wrote to the NSW Commissioner of Police and cited the low success rate of the operation. In his email, he questioned the reliability of the drug detection dogs and asked what information had been recorded about his daughter who had been searched, with no drugs located. He also said:

*Whilst I do not object to the campaign, I do object to the inference that she [his daughter] was lucky and that there were clearly traces of drugs in the car.*⁵⁰⁸

This complaint is discussed in more detail in our discussion of privacy in Chapter 12 'Implementation of the legislation' at paragraph 12.7.4.

A second complaint was received by the NSW Ombudsman from a tourist attraction located in close proximity to one police operation.⁵⁰⁹ The complaint was that police conducted an operation at the park alongside the small town's tourist attraction without any warning to the local community. It was alleged that the operation resulted in a drop in travellers choosing to stop in the town to visit the tourist attraction and have refreshments in the attraction's café or to 'stop, revive and survive'.

As per NSW Ombudsman complaint handling procedures, the complaint was forwarded to NSW Police for resolution. NSW Police conducted an informal resolution with the complainant which involved a senior officer meeting with the complainant to discuss the concerns. The officer explained to the complainant that it was not possible to consult with the tourist attraction or the local community because of the nature of the operation insofar as the operation required secrecy because it was targeting the trafficking of prohibited drugs. The officer also explained the site was chosen in conjunction with the RTA which had prepared a traffic control plan designed to reduce the impact on passing traffic as well as the town itself. NSW Police advised us that the complainant was satisfied with the explanation.

One submission to our review commented that the legislation contravened the International Covenant on Civil and Political Rights (ICCPR) because its application was 'arbitrary'. In particular, concerns were raised that:

*...police may conduct vehicles searches on the basis of an often erroneous indication by a drug detection dog; that individuals searched experience an unreasonable degree of embarrassment and humiliation; and that there is a lack of concrete results in reducing drug crime, evidences the excessiveness and randomness of this legislation.*⁵¹⁰

14.4.2. High visibility policing

NSW Police has also stated that high visibility policing was another measure of the effectiveness of these operations.⁵¹¹

High visibility policing (HVP), sometimes known as saturation policing, is a term used to describe high profile police operations in which uniformed police conduct highly visible patrols in public places. Operation Vikings is perhaps the best known HVP operation in NSW. HVP is strongly endorsed by NSW Police and the NSW Government.

HVP can take many forms, and could include RBT and street patrols.

The HVP aspect of border operations may indeed lead to positive outcomes cited by police, such as 'enhanced community satisfaction in terms of reducing the fear of crime'.⁵¹² As mentioned above, police did receive positive feedback from some members of the community along these lines.

An in-depth study of the positive effect of HVP was beyond the scope of this review. It is noted, however, that the 'high visibility' nature of these operations may run counter to the aims of the operations. It seems counter-intuitive to have simultaneous operational strategies of:

- providing a highly visible police presence to reassure members of the public, and
- conducting an intelligence based operation designed to intercept traffickers of indictable quantities of drugs.

One strategy relies on a high profile police presence and the other depends upon a level of secrecy and surprise.

This view was articulated by two officers we interviewed:

*...the very fact we're conducting the operations is really high visibility. It's good for the community as they see we're trying to do something and that's great. But, for the crooks, when we're out there, we're just letting them know [sic] to come back another time or to go in a different direction.*⁵¹³

*Under the current legislation they're more like high visibility policing as a focus, rather than the element of surprise. The people in South Australia know within half an hour of us setting up or maybe even sooner, with their tracking units and mobile phones.*⁵¹⁴

Another senior officer from the State Crime Command Drug Squad confirmed that 'quality results' were far more likely to occur through discreet, covert operations than through the kinds of operations conducted under the Act. According to this senior officer, the indictable quantities of drugs that were detected were 'more good luck than good management'.⁵¹⁵

14.4.3. Minor drug offences and other offences detected

Police expressed the following views in interviews:

If you look at it in terms of what it was established to do, seize indictable quantities of drugs... you could say it was a failure in those terms. But looking at it in balance, look at the number of vehicle's stopped and the number of indications that the drug detection dogs got, which resulted in cannabis seizures...⁵¹⁶

Whilst there are some issues, it's certainly not a waste of time. If we're not catching the big ones, we're getting something.⁵¹⁷

Despite seizing only two quantities of indictable drugs during the review period (approximately three kilograms of cannabis and one kilogram of amphetamine), police did seize many small amounts of cannabis and some small amounts of amphetamine. Police also took action on a range of other offences which were not related to drugs. A more comprehensive discussion of the results of operations, including the prosecution of non-drug offences, can be found at paragraph 14.2 'Results'.

Not including the indictable quantities of drugs seized, NSW Police found a total of approximately 1.7 kilograms of cannabis, and approximately 25 grams of amphetamine. As detailed above at paragraph 14.2, police issued 51 cannabis cautions over the review period. A total of 41 people were charged, and 62 charges were laid. Of the 62 charges laid, 48 were drug related.

The other types of offences which police detected included a life threatening assault, driving under the influence of alcohol and possession of prohibited weapons. Police also issued many traffic infringement notices for offences such as driving without a seatbelt and vehicle defects. We have not noted how many infringement notices were issued for each operation.

While the benefit to the community of police detecting minor drug offences and other crimes is not to be understated, it is questionable whether these achievements justify the expenditure required to set up these operations. It is arguable that similar results could be achieved through other police operations which are not as resource intensive. As commented by a senior officer we interviewed:

They're extremely labour intensive. We've gotten very small amounts of cannabis. For us, there's only been a really small amount of seizures.⁵¹⁸

As noted above, the Minister clearly stated when introducing the bill into Parliament⁵¹⁹ that detecting and prosecuting these types of crimes is not the primary objective of the Act.

14.5. Reducing the financial burden

NSW Police have proposed two ways of reducing the financial burden of operations conducted under the Act.

14.5.1. Drug detection dog in the Southern Region

Police considered placing drug detection dogs in the region as a way to counteract some of the costs incurred. Currently, all NSW dog handlers are based in Sydney, and therefore have to travel to border areas for each operation. Dog handlers must travel by car because the dogs use the vehicle to sleep in during breaks between operations. Not only do dog handlers lose two days in travelling, NSW Police incurs an expense in granting dog handlers a travel allowance.

In its Interim Evaluation Paper, the Project Steering Committee observed that placing a drug detection dog and handler in the Southern Region would also benefit the region generally because the dog handler would be more readily available for other types of operations such as search warrants and searches of licensed premises.⁵²⁰

This view was endorsed by the Police Association of NSW, who pointed out that having a dog available in the region would assist police in responding to intelligence about drugs quickly. The Police Association of NSW also recommended that any dogs deployed to the region should remain the responsibility of the Dog Unit, so that standards for dogs and handlers could be maintained.⁵²¹

NSW Police has advised us that this proposition is unlikely to be given any serious consideration unless these operations happened on a more frequent basis in the future.⁵²²

14.5.2. Impact on LAC resources

As discussed above, there is an opportunity cost involved in these operations. The fact that each LAC bears the cost of the operation means that resources are scarce for normal police activities. The impact of these operations on LAC resources has been brought to our attention by NSW Police on a number of occasions:

So, not only is it a substantial drain on our resources, it's just a substantial drain on the resources of our neighbouring commands. And what issue that we're addressing? We're not addressing the local issues, okay? We're not addressing local crime issues. We're addressing the interstate movement of large quantities of drugs which, to be a little cynical, doesn't have any huge direct impact on our local crime... Speaking practically, we're really addressing issues here for metropolitan commands. We're looking at the movement of drugs between the capital cities...⁵²³

The last operation was at the end of a six-week roster and coincided with major protest action at a coalmine, where we had to commit resources. It was a bit of a nightmare. I mean, we pulled it off, but it was a bit of a nightmare.⁵²⁴

No, that issue [of not being able to deal with local matters] didn't arise, but I can see that it could be a problem. Particularly because of the size of this command, with over 500 kilometres distance between some areas it does raise concerns if something happened on the other side of the command and I would have to redeploy police, well that would be an issue... Just as I said, the resources are a problem.⁵²⁵

Interestingly a community forum to discuss the issue of alcohol-related street crime coincided with a police operation under the Act.⁵²⁶ The particular operation, which involved 21 police officers, only resulted in the confiscation of a cannabis-smoking implement. Whilst we do not have any evidence to suggest that LAC resources were compromised by the operation, it is worth noting that some local retailers believe more visible policing might address local street crime such as vandalism of local businesses.⁵²⁷ Indeed attendees at the forum may have been dismayed to learn that 21 local police officers were engaged in an operation directed at cross border drug transportation whilst they were discussing the issue of local street crime and calling for more police resources in the local community.

The issue of police resources in areas where operations under the Act have been conducted has been raised in the media. One media article suggested that some smaller communities might be left without police because their officers are redeployed to larger towns to cover police who are on sick leave or training programs.⁵²⁸ Whilst the article pointed out that in some instances actual police strength of the LAC exceeded the authorised strength, it noted that day-to-day staffing numbers fluctuated for varying reasons, which included sick leave and training courses.

The Project Steering Committee's Interim Evaluation Paper contained arguments in support of supplementary funding for Local Area Commands which conduct operations. The paper observed that:

The staging of regular operations beyond the trial period is beyond the resourcing capabilities of individual Local Area Commands.⁵²⁹

It was suggested that funding be drawn from existing State-wide funding commitments, such as Operation Vikings. This was also a view endorsed by the Police Association of NSW, which said that:

Police believe that they meet all the criteria that is required to receive Vikings funding. All operations conducted under this Act are high visibility policing operations and necessitate the use of resources from both neighbouring commands and specialists resources that are not attached to the command, which is due to the collective requirements of the current legislation.⁵³⁰

NSW Police advised that it acknowledges that considerable resources are required to stage operations. However, it advised that measures have been taken to reduce the impact of operations on individual LACs, presumably as a result of reducing the staff required to run an operation. Additionally, it commented that most operations (not just those conducted under the Act) place demands on LAC resources.⁵³¹

14.6. Operational and legislative impediments to effective law enforcement

As outlined in previous chapters, there are a number of operational and legislative impediments which seem to affect the ability of NSW Police to run a successful operation according to the Act. A large number of police we interviewed commented that aspects of the Act were unworkable. For example, one officer we interviewed said:

*[The Act is] making it overcomplicated, it's reducing the likelihood that we'll actually be successful, and it's consuming way too many resources.*⁵³²

While NSW Police acknowledge that the operations have not yet justified the costs incurred, they have also suggested that this could be overcome by amending the legislation.⁵³³

In principle, we agree that in some respects the Act is an unwieldy tool to use for the detection of significant drug supply. In many respects it can be argued that provisions in the legislation have impeded police from running an effective campaign against the vehicular supply of drugs across State borders. We have discussed which aspects would benefit from amendment or improvement in previous chapters.

Below we have summarised the major impediments described earlier. We also raise some additional difficulties faced by police in the successful law enforcement of interstate drug trafficking.

14.6.1. Restrictions on warrant parameters

The warrant can be issued for a maximum of three days and only in certain locations. This may assist drug couriers to avoid the site by either waiting out the three days or driving around the nominated site (see paragraphs 12.2.2 and 13.7).

14.6.2. Traffic management

In effect, the RTA must approve each site used in the operation, and their approval is dependent on a number of safety measures being implemented. Safety measures include extensive sign posting alerting drivers to the operation, signs to reduce speeds safely, and adequate lighting. Such measures alert vehicles to a police presence well before the site. Potentially, this could cause drug couriers to avoid the site altogether. While ideal for safety reasons, it may counteract the aims of police (see paragraph 12.9).

14.6.3. Dissemination of information

Due to the resource intensive nature of these operations, and the warrant requirements, long term planning of the operation is necessary. It is also necessary to consult with a range of people and agencies about each operation. This may lead to some details about the operation being leaked to members of the public.

The dissemination of information about operations also happens quickly and easily over the CB radio network. Within a matter of hours, all heavy vehicles travelling near the site are aware that an operation is being conducted (see paragraph 13.7).

14.6.4. Luck of the draw

One topic not previously discussed in this report is the random nature of these operations. Although randomly stopping vehicles is often cited as an advantage of these types of operations, many police we interviewed suggested that one of the main reasons that there were not more seizures of indictable quantities of drugs was just bad luck:

...if you were looking for a specific target I don't think you'd be able to pick the target in an operation like that. I think you'd have to rely upon some pretty handy information as far as times, dates, places and things like that... But if you're looking for something as far as a blanket hit goes... at the end of the day it's a bit like a lottery. If

*you get it, you get it. If you don't, you don't... at the end of the day, it's just pure luck.*⁵³⁴

*...I think there's a little bit of luck involved. You might strike it and you might not, like last night...*⁵³⁵

Indeed, a similar comment was made by the Assistant Commissioner, in a regional newspaper article, which noted that no traffickers had been caught yet. The Assistant Commissioner is quoted as saying 'It's the luck of the draw'.⁵³⁶

14.6.5. Proving possession of prohibited drugs

Even if police succeed in seizing indictable quantities of drugs, it is questionable whether each seizure will be successfully prosecuted. As described in case study three, there were two seizures of indictable quantities of drugs, and neither resulted in a conviction for the supply of prohibited drugs.

In the first case, the prosecution of a seizure of one kilogram of amphetamine was not successful because the driver denied all knowledge of the amphetamine. The prosecution could not establish that the driver was in possession of the amphetamine concealed in his vehicle. The case was dismissed by the Local Court on a finding that no *prima facie* case was established.

In the other case, police seized nearly three kilograms of cannabis. Although the passenger admitted to possessing a small amount of cannabis which was also found in the vehicle, neither the driver nor passenger admitted to owning this large amount of cannabis. NSW Police attempted to establish possession by conducting finger print analysis on the cannabis found, but there was no evidence to support a prosecution. Consequently no charges have been laid in relation to the three kilograms of cannabis.

The problem of proving possession was highlighted in another case arising from an operation under the Act. In this case, police found 73 grams of cannabis in a vehicle containing three men. One of the men admitted ownership of this large amount. The magistrate hearing the case said that:

*...the police may have, and I emphasise 'may have' had difficulty proving that you are the person that owned it, especially when there is [sic] three people in the car. Your admissions as to ownership removed that difficulty for them.*⁵³⁷

We also note that during one operation, police found a resealable bag containing 2 grams of cannabis and a smoking pipe. The bag was found at the entry to the site. Police did not know who had dropped it there, and the bag has been sent for fingerprinting.⁵³⁸ At the time of writing, nobody had been charged in relation to this find.

According to a senior officer from the State Crime Command Drug Squad we interviewed this is the most difficult thing for police to overcome:

*That's the hardest part ... You can't prove it's sole possession.*⁵³⁹

He felt that more emphasis should be concentrated on developing ways to ensure possession could be established rather than 'putting on a great big fan fare' as he described the manner operations were currently conducted under the Act.

This is not a recent phenomena. In the 2001 case of *Police v Leonard*⁵⁴⁰ a similar scenario was played out.⁵⁴¹ In this case, Mr Leonard was a passenger in a vehicle. The driver was stopped for a RBT. The test was negative. Coincidentally, the police conducting the RBT had been involved in the arrest of Mr Leonard in 2000 so they recognised him immediately. A police radio check on the driver also revealed intelligence for drug related matters. On that basis, the vehicle was searched. Police found 15 vacuum-sealed bags of cannabis weighing a total of 3.180 kilograms in a fake second fuel tank. During police interviews, neither the driver nor Mr Leonard admitted to being aware that the cannabis had been concealed in the vehicle.

The case against Mr Leonard was dismissed as the prosecution could not establish that he had possession of the cannabis. In finding no *prima facie* case, the magistrate stated:

*I am satisfied that there is no evidence before the Court, as has properly been conceded by the prosecution, that could establish either exclusive possession by the defendant or some form of co-possession. And there is no evidence before the Court which could indicate to the Court in the circumstances that the defendant had any knowledge of the existence of the cannabis at that stage.*⁵⁴²

It is noted that while Mr Leonard was not convicted, the driver was convicted of supplying prohibited drugs.⁵⁴³

14.6.5.1. Declaring vehicles drug premises

We note that it may be possible for police to circumvent the difficulties of establishing possession if they are able to establish that a vehicle in which significant amounts of prohibited substances are found is a drug premises. Police could then charge occupants with the offence of being found on, entering or leaving a drug premises⁵⁴⁴ or the offence of organising a drug premises.⁵⁴⁵

These offences attract a maximum penalty of \$5500 or 12 months imprisonment, or both, for a first offence, and \$55,000 or five years imprisonment, or both, for a second or subsequent offence.

Under the *Police Powers (Drug Premises) Act 2001*, which is also being reviewed by the NSW Ombudsman,⁵⁴⁶ a vehicle is included within the definition of a drug premises.⁵⁴⁷ In order to be declared a drug premises, police must prove that the premises were being used for the unlawful supply or manufacture of any prohibited drug (other than cannabis leaf, oil or resin).⁵⁴⁸

Significantly, the offences mentioned above have a reverse onus of proof – that is, there is a presumption of guilt. In order to be acquitted of the offence of being found on, entering or leaving a drug premises, the accused person must prove that they had a lawful purpose or lawful excuse for being on the drug premises. In order to be acquitted of the offence of organising a drug premises, an accused person must prove (on the balance of probabilities) that he or she did not know that the premises was being used as a drug premises.

These provisions were introduced to address similar evidentiary difficulties that police encountered in attempts to prosecute occupants of drug premises. Without admissions, police were unable to establish that any of the occupants of the household had exclusive possession of the drugs found there.

Exploring this option in appropriate cases may provide police with an additional avenue for successful prosecution in matters involving prohibited drugs other than cannabis.

14.7. Alternative methods of targeting inter-state drug trafficking

One police officer we interviewed commented:

*[It would be] a very arrogant – a very brave – man to say [these operations have] a major effect [on drug supply] 'cos, I mean, I guess if you've got a drug on board that you could sell [for] quite a few thousands of dollars more than what you paid, your incentive is to get around whatever obstacle we put in front of them. The only thing I can honestly say is – an answer with a question would be: what do we do if we don't do it?'*⁵⁴⁹

Although the current mode of conducting operations under the Act has been subject to some criticism, the question remains - what strategies could police utilise to better target the vehicular supply of prohibited drugs over state borders?

14.7.1. Joint NSW/Qld border operation

In a previous chapters, we have noted similar operations which have been conducted without a similarly prohibitive legislative scheme. Notably, in the first half of 2004 LACs in northern NSW conducted a joint operation with Queensland police which had a number of aims, including targeting drug supply.⁵⁵⁰ The results of this operation were highly publicised.⁵⁵¹

As discussed, each site was less resource intensive than any of the border operation sites. However, the results were at least comparable with operations under the Act with at least two seizures of an indictable quantity of drugs. This is compared to three-quarters of operations under the Act (7 out of 9) at which no indictable quantities of drugs were found. All those charged in New South Wales with drug offences in the NSW/Qld operation pleaded guilty.⁵⁵²

Although we have not attempted to quantify costs for the NSW/Qld operation, at least on the face of it the joint operation appears to have taken place on a substantially smaller budget. Whether the results of the operation are repeatable is at this stage unknown. However, this type of operation may present a useful alternative to the resource intensive operations that are currently conducted under the Act if suitable safety guidelines are in place.

14.7.2. RBT sites

At paragraph 11.2 we discussed the way in which RBT is conducted. Similar to border operations, RBT involves randomly stopping vehicles and pulling them away from the ordinary traffic flow into a separate area.

RBTs have been successfully conducted for many years. The scheme does not require police to consult with the RTA about RBT sites. Following a recent decision by the Industrial Relations Commission police have further improved their practice and SOPs.

As the NSW/Qld border case study shows, RBT operations have been conducted with the dual purpose of conducting RBT and detecting other offences, including drug transportation offences. Police are able to conduct these operations within the law.

However, there may currently be legal impediments to screening vehicles with a drug detection dog at RBT sites because the *Police Powers (Drug Detection Dogs) Act 2001* specifically states that it confers no power on police to detain a person not otherwise authorised to be detained.⁵⁵³ Thus police would need to take the dog around a vehicle within the period the vehicle was lawfully detained for the purpose of the RBT. This use of drug detection dogs may risk attempts by police to artificially lengthen the time taken for an RBT in order to give the drug detection dog time to screen a vehicle. If police wish to use drug detection dogs at RBT sites it may be preferable for police to seek a limited legislative amendment which permits drug dogs to be used in this way.

Similarly, there is no general power for police to stop a vehicle in order to conduct screening with a drug detection dog (other than by warrant in specified search areas under the Act). Where a drug dog is present and ready for screening there may be a question as to the purpose of the vehicle stop – was the purpose to conduct the RBT or was it for the drug screening? Police may need to seek a legislative amendment to clarify that as long as one purpose of a vehicle stop is lawful (the RBT) a second purpose for the stop will not on its own render the vehicle stop unlawful.

In random screening exercises drug detection dog indications have been found not to lead to the detection of any drugs in the majority of searches. When drugs are found they are very rarely large quantities. Although the extension of police powers to allow drug detection dogs to be used at RBT sites may seem an attractive option when compared with the resource intensive operations conducted under the Act, such an extension of powers must be considered with caution. Random vehicle stopping with drug detection dogs is likely to lead to a significant number of searches from which nothing is found and is unlikely to frequently lead to the detection of large scale drug trafficking.

NSW Police might wish to consider limited legislative amendment to clarify police powers in this area. Alternatively, police may wish to consider conducting operations similar to those conducted on the NSW/Qld border at which NSW police did not use drug detection dogs at RBT stops but relied instead on other intelligence or circumstances to raise a reasonable suspicion.

14.7.3. Covert operations

The State Crime Command has successfully prosecuted this segment of the drug market by conducting covert operations, also known as controlled operations. These operations usually involve monitoring the activities of the principals involved, gathering evidence proving their involvement, and evidence demonstrating that a transaction and delivery took place.

We are aware of many successful operations conducted by the State Crime Command, involving the vehicular supply of prohibited drugs across state borders. These were described in a brief from the State Crime Command attached to border warrant applications from Wagga Wagga LAC. These operations include:

- Strikeforce Lambay – an ongoing investigation into the transportation of drugs via coaches. The investigation has been conducted for three years now, and has resulted in multiple arrests.
- Strikeforce Corkscrew – arrested several persons for the supply of cannabis from South Australia to NSW via secondary fuel tanks. Evidence was gathered through telephone interceptions, financial records and surveillance.
- Strikeforce Astronomers – several persons arrested for transporting cannabis and a precursor used to manufacture amphetamine from SA to NSW. Evidence was gathered through telephone interceptions and surveillance.

- Strikeforce Winstead – a current investigation into the movement of amphetamines and precursors between multiple states around NSW.
- Strikeforce Kalapa – resulted in the arrest of man who trafficked 18,852 cold and flu tablets via coach across state borders.

A senior officer from the State Crime Command Drug Squad argued that controlled operations were a better use of resources than operations which randomly target vehicles:

I think a more concentrated effort towards actual targeting is where you have to go. As opposed to – which this [legislation] has been - a blanket, tarpaulin type of effect... They'll find ways and means of getting around it. So, with covert operations I think is the best way to go.⁵⁵⁴

There may also be some limitations of this approach. Covert and controlled operations are often resource intensive and may take many months or years of work before any results are obtained. Moreover, because police are keen to protect their methods of gaining evidence it is also difficult for police to promote this work publicly.

In addition, as pointed out by one senior officer we interviewed, although the State Crime Command can take action in relation to high level drug supply, it does not target the middle market, which often involves transportation of prohibited drugs via vehicles:

...As far as I see it, the State Crime Command are really responsible [for] the level of drug dealing... [which] involves the interstate movement of drugs. But the interstate movement of drugs also involves what they call middle level quantities... which are indeed indictable quantities. [This middle market is] not addressed I think adequately by the organisation... There's a service gap, or a police response gap, between street or local level drug dealing and high level drug dealing... We've got the State Crime Command who essentially deal with large-scale drug dealing at a very - at a high level. They won't become involved in middle level drug trafficking... It's not their charter. It is beyond their capability... to address middle level drug trafficking because of the resources required... There's a gap there and it's a real issue and it's been an issue for a number of years... [That middle market] may well involve... interstate transportation of drugs.⁵⁵⁵

14.8. Summary and concluding comments

Overall, the first 10 months of the Act saw the deployment of 234 police over 25 days during nine discreet operations in Southern and South-western NSW.

These operations have resulted in the detection of two indictable quantities of prohibited drugs. Neither of these detections resulted in successful prosecutions.

In addition to these indictable quantities, police seized a total of approximately 1.7 kilograms of cannabis, and approximately 25 grams of amphetamine. Fifty-one cannabis cautions were issued between January and October 2004. A total of 48 drug related charges were laid.

We have received no convincing evidence to support the proposition that there has been a disruption to drug trade as a result of operations conducted under the Act. Indeed, we are aware of two incidents during the review period where police seized significant amounts of prohibited substances in border areas outside of operations conducted under the Act.⁵⁵⁶

The total cost to NSW Police and the RTA of conducting these operations amounts to \$669,188. A more conservative estimate of *additional* costs, excluding base wages and infrastructure that may be used by the RTA in the future, amounts to \$179,180.

With all these resources and no successful prosecutions for indictable quantities of drugs, it seems difficult to argue that the operations conducted under this Act have met their objective of 'detecting the trafficking of indictable quantities of prohibited drugs'⁵⁵⁷ in a cost effective manner.

Although operations of this nature do, as a by-product, result in the detection of other offences, particularly traffic related offences, police routinely conduct highway and other patrols to deal with these offences. Legislation of this type would seem an inappropriate mechanism to target minor traffic and drug offences. Similarly, although there may be evidence of public support for high visibility operations of this type, there are more effective and targeted means of providing public re-assurance and meeting community policing objectives.

It is also acknowledged that police detected and took action in relation to one very serious assault, which very nearly led to a death, in the course of one operation. However, such outcomes may occur with many forms of public patrolling and are largely dependant on chance. What was not dependant on chance in that case was the swift and appropriate police response and the persistence with which the matter was followed up in the face of a number of obstacles.

NSW Police have formally recognised that the results to date have not justified the costs incurred by the NSW Government:

*To date, the limited results of operations have not justified the costs incurred by NSW Police and other agencies. However, it must be acknowledged that the legislation is still in a trial stage and a true 'return on investment' is unlikely to be realised in the short term. It is more likely that benefits will be realised in the medium to longer term, provided proposed improvements to processes are adopted through legislative amendment.*⁵⁵⁸

Endnotes

⁴⁶⁰ NSWPD, Legislative Council, 25 June 2003, p.2044.

⁴⁶¹ See Chapter 2 'Background' at paragraph 2.6 'Legislative response'.

⁴⁶² Ms Lee Rhiannon, NSWPD, Legislative Council, 1 July 2003, p.2421.

⁴⁶³ NSW Police Interim Evaluation Paper, 20 August 2004, pp.21, 35-39.

⁴⁶⁴ Interview Q.

⁴⁶⁵ Ibid.

⁴⁶⁶ Commander Survey C.

⁴⁶⁷ Interview H.

⁴⁶⁸ UTS Community Law Centre submission.

⁴⁶⁹ RTA submission, 6 and 13 December 2004.

⁴⁷⁰ Interview E.

⁴⁷¹ Commander Survey E.

⁴⁷² Commander Survey B.

⁴⁷³ Police Association of NSW submission, 12 November 2004, p.2.

⁴⁷⁴ Police also seized 7 grams of hashish, 7 grams of ketamine, and 2.9 grams of a grey powder which has yet to be analysed.

⁴⁷⁵ The indictable quantity seized was 3 kilograms. The remainder was comprised of several smaller seizures of cannabis.

⁴⁷⁶ The indictable quantity seized was 1017 grams.

⁴⁷⁷ *Police Powers (Drug Detection in Border Areas Trial) Act*, s.16. See paragraph 4.1.7 for a description of the legislative provisions that create the offences.

⁴⁷⁸ Interview N.

⁴⁷⁹ Interview Z.

⁴⁸⁰ Interview with NSW Police Corporate Sponsor, 27 September 2004.

⁴⁸¹ Interview A.

⁴⁸² NSW Police submission, 15 October 2004, Q3.

⁴⁸³ Interview A.

⁴⁸⁴ NSW Police submission, 15 October 2004, Q4.

⁴⁸⁵ Interview X.

⁴⁸⁶ Ombudsman observer notes EE.

⁴⁸⁷ Ombudsman observer notes FF.

⁴⁸⁸ Ombudsman observer notes GG.

⁴⁸⁹ Ombudsman observer notes HH.

⁴⁹⁰ Ombudsman observer notes JJ.

⁴⁹¹ Ombudsman observer notes KK.

⁴⁹² Ombudsman observer notes LL.

⁴⁹³ See Appendix J for a copy of the advertisement.

⁴⁹⁴ Submission 3.

⁴⁹⁵ Ombudsman observer notes MM.

⁴⁹⁶ Ombudsman observer notes NN.

⁴⁹⁷ Ombudsman observer notes OO.

⁴⁹⁸ Ombudsman observer notes PP.

⁴⁹⁹ Ombudsman observer notes QQ.

⁵⁰⁰ Ombudsman observer notes RR.

501 Ombudsman observer notes SS.
502 Ombudsman video review.
503 NSW Police submission, 15 October 2004, Q4.
504 Ibid.
505 Interview with NSW Police Corporate Sponsor, 27 September 2004.
506 Commander Survey B.
507 Interview BB.
508 Complaint 1.
509 Complaint 2.
510 UTS Community Law Centre submission.
511 NSW Police submission, 15 October 2004, Q4.
512 Ibid.
513 Commander Survey B.
514 Commander Survey D.
515 Interview K.
516 Interview A.
517 Commander Survey D.
518 Commander Survey E.
519 The Hon. John Hatzistergos, NSWPD, Legislative Council, 25 June 2003, p.2044.
520 NSW Police Interim Evaluation Paper, 20 August 2004, p.7.
521 Police Association of NSW submission, 12 November 2004, pp.2-3.
522 NSW Police submission, 15 October 2004, Q5.
523 Interview E.
524 Commander Survey E.
525 Commander Survey C.
526 The forum was reported in 'Lock-out knocked out – Meeting discusses 'draconian' idea', *The Border Mail*, 30 July 2004, p.12.
527 'More beat police the only answer', *The Border Mail*, 28 July 2004, p.4.
528 'Lack of police is hitting us hard', *The Daily Advertiser*, 15 November 2004, pp.1-2.
529 NSW Police Interim Evaluation Paper, 20 August 2004, p.23.
530 Police Association of NSW submission, 12 November 2004, p.2.
531 NSW Police submission, 15 October 2004, Q6.
532 Interview E.
533 NSW Police submission, 15 October 2004, Q2.
534 Interview S.
535 Interview J.
536 '268 stopped but no traffickers', *The Daily Advertiser*, 3 February 2004, p.4.
537 *Police v Daniel Joseph Davis* (unreported), Albury Local Court, 10 August 2004, p.1.
538 NSW Police Information Package 6.
539 Interview K.
540 (Unreported), Hay Local Court, 6 August 2001.
541 The defendant, Mr Leonard, was the same man that police failed to successfully prosecute in 2000. As discussed in Chapter 2 'Background', this first case against Mr Leonard in 2000 was one of the precursors to the Act.
542 *Police v Leonard* (unreported), Hay Local Court, 6 August 2001, p.3.
543 Event reference 57.
544 *Police Powers (Drug Premises) Act*, s.12.
545 *Police Powers (Drug Premises) Act*, s.14.
546 At the time of writing, the report on the review of the *Police Powers (Drug Premises) Act 2001* was in the process of being finalised.
547 *Police Powers (Drug Premises) Act*, s.3 (1).
548 *Police Powers (Drug Premises) Act*, s.11(1).
549 Interview P.
550 See paragraph 11.1 for more details of this operation.
551 'Two-state blitz halts drug flow at border', *news.com.au*, 17 May 2004; 'Dozens charged after border blitz', *ABC News Online*, 17 August 2004; 'Cross-border crackdown', *Daily Telegraph*, 18 May 2004, p.3; 'Border drug run link is alleged', *Northern Star*, 17 May 2004, p.3; 'More crackdowns to come', *Daily News*, 18 May 2004, p.5.
552 It is noted, however, that court transcripts reveal that neither of these incidents appeared to involve people involved in a serious supply network.
553 *Police Powers (Drug Detection Dogs) Act*, s.10(b).
554 Interview K.
555 Interview E.
556 Event reference 55 and 56.
557 The Hon. John Hatzistergos, NSWPD, Legislative Council, 25 June 2003, p.2044.
558 NSW Police submission, 15 October 2004, Q2.

part four: contents

Chapter 15: Conclusion	181
15.1. Police conduct	181
15.2. Public feedback	181
15.3. Results	181
15.5. Scope for amendment and improving police practice	182
15.5. Costs	182
15.6. Continuation of the trial	182

chapter 15: conclusion

These extraordinary powers have been enacted on the basis of beliefs and expectations based on generic intelligence. This carries with it the responsibility to assess whether results of activities under the Act support continuation of the powers in current or varied form on the basis that the Act is an effective response to the problem of cross border drug trafficking.⁵⁵⁹

Essentially, this report aims to assist the Parliament to make the above assessment. It is apparent that to date the implementation of the legislation has not effectively met the objectives of the Act. However, the central issue to be addressed in the assessment is whether the Act can meet its objectives in a cost effective way if given additional time, some legislative amendments and some changes to police practice.

15.1. Police conduct

Overall police have implemented the legislation professionally. We found no evidence of inappropriate targeting or discrimination by police in their decisions to stop and/or search vehicles. Police made genuine efforts to act in accordance with the legislation and where this was not operationally feasible, police made efforts to act in accordance with the spirit of the legislation.

As with all new legislative instruments there has been a teething period during which police have become familiar with legislative requirements and some areas of police practice have been identified for improvement. We found that police on-site and at the Project Steering Committee were receptive to our critical feedback and generally attempted to deal constructively with problems as they arose.

15.1.1. Drug detection dogs and handlers

We have noted a number of factors which seem to affect the efficacy of drug detection dogs during operations under the Act. We note in particular one of the major finds of prohibited drugs did not result from an indication from a drug detection dog.

The accuracy and use of drug detection dogs in general will be discussed in our forthcoming review report on the *Police Powers (Drug Detection Dogs) Act 2001*. Handlers took reasonable precautions to keep the dogs under control and there were no incidents of aggression from the dogs.

Some concerns were expressed by drivers about dogs entering cabins of heavy vehicles, and police should have regard for this when considering whether or not to use a drug detection dog in a cabin. However, if police are required to conduct an appropriately thorough search, little can be done to prevent this.

15.2. Public feedback

Most comments from members of the public stopped at sites were positive and police were, on the whole, friendly and diligent in explaining to people why they were being stopped. Occasionally, people expressed some dissatisfaction about being stopped but police generally handled these incidents well.

We are aware of two formal complaints from members of the public in relation to operations under the Act. These are outlined in our discussion of community support at paragraph 14.4.1 'Community support'. The first complaint was of a relatively minor nature and was amenable to quick resolution by NSW Police. The second complaint was also of a minor nature and NSW Police informally resolved the issue.

15.3. Results

While police conduct has not been an issue of concern during this review, it is apparent that no amount of professionalism could overcome the evident inability of operations conducted according to the Act to yield significant results.

Only two of nine operations located indictable amounts of prohibited drugs. Neither of these were successfully prosecuted.

Overall, 31% (89) of the 291 search incidents found prohibited drugs or related items. The figures for some operations were startlingly poor – one operation mobilised 21 officers for one day and found one bong; another operation deployed 13 officers over three days and found 5 grams of cannabis on a juvenile. Thirty-eight officers conducted another operation for two days locating 6.4 grams of cannabis.

From time to time operations of this nature may lead to the interception of indictable quantities of prohibited drugs. However, it is unlikely that large scale, highly visible exercises in random vehicle stopping will meet the objectives of the legislation. That is, it is unlikely that these operations will detect amounts of prohibited drugs of sufficient magnitude and with sufficient frequency to justify the substantial resource outlay by NSW Police and other agencies.

15.4. Scope for amendment and improving police practice

NSW Police has suggested that amendments to the Act are required to address some of the legislative impediments which they believe have so far prevented a 'return on investment'. We agree that should Parliament decide to continue the trial of the Act, a number of amendments to the legislation would make it more practical for police and less susceptible to some of the strategic problems which currently result from various requirements in the Act.

We have made a number of recommendations along these lines, including recommendations to:

- **Enhance the ability of police to use the legislation**
 - Alter time restrictions on the execution of the warrant
 - Reduce onerous traffic management requirements
 - Simplify excessive and confusing notice provisions
- **Improve police practice**
 - Better and more consistently protect privacy
 - Make appropriate arrangements for the care of children
 - Better explain the provisions of the Act to all persons subject to the functions in the Act and especially to those persons whose first language is not English
 - Improve quality and consistency of approach to video recording
 - Provide better basic amenities for officers and members of the public.

However, these amendments may do little to address the shortcomings of the legislation in meeting its primary objective which is the detection and prevention of cross-border trafficking of indictable quantities of prohibited drugs.

15.5. Costs

NSW Police has advised us that:

With the 'one off' investment in checkpoint upgrades by the RTA now made, future costs are likely to be limited to hiring of equipment and Police personnel costs. The cost of future operations will most likely reduce as LACs streamline processes and improve procedures.⁵⁶⁰

Future infrastructure costs may be limited if no new sites requiring upgrades are proposed. However, the increased flexibility of checkpoint locations that NSW Police also desire may run counter to this proposition.

Another suggestion by NSW Police, of extending the application of the Act to the Queensland border, or to all of NSW, would also seem to involve substantial additional costs in assessing and potentially upgrading new sites.

15.6. Continuation of the trial

NSW Police have asserted that any return on investment 'for the Act is unlikely to be achieved in the short term'.⁵⁶¹ Presumably NSW Police is of the view that with amendments and more time, better results will be achieved. However, it could equally be postulated that over time drug traffickers will only become more familiar with police strategies and better at circumventing them.

It might be suggested that a continuation of the trial is the only way to effectively assess whether or not the NSW Police view is accurate. However, a continuation of the trial will also involve a significant financial commitment from NSW Police and it is questionable whether the continued allocation of significant resources to this project is in the public interest.

As discussed above, the impact of amendments and practical changes is difficult to predict and at least some senior police believe that it would be better to consider different approaches rather than attempt to patch up an essentially flawed strategy. For example, we asked one senior officer from the State Crime Command Drug Squad if it was worth trying to amend the legislation to make it more workable. This was his response:

*No. Well, the results to date have indicated that it's not a worthwhile strategy. So why continue with it when we can perhaps think of something else outside the square? Do something different.*⁵⁶²

We are inclined to agree with this view.

We have suggested a number of different strategies that police might utilise to better target the vehicular supply of drugs across state borders. Many of these suggestions reflect advice from police officers we have interviewed during the review. It is suggested that it would be beneficial for NSW Police to consider these and any other options available to them. It may be appropriate to explore or trial other methods which may be more cost effective and strategically sound.

15.6.1. Recommendation

In light of the findings of this report, Parliament give consideration to allowing the Police Powers (Drug Detection Border Areas Trial) Act 2003 to expire according to section 23 of the Act.

Should the Parliament consider that an extension of the trial is warranted, recommendations 1 to 32 be implemented.

NSW Police consider the advantages and disadvantages of alternative means of targeting the vehicular supply of drugs across state borders.

Endnotes

⁵⁵⁹ Attorney General's Department of NSW submission, 4 November 2004.

⁵⁶⁰ NSW Police submission, 15 October 2004, Q2.

⁵⁶¹ Ibid.

⁵⁶² Interview K.

contents: appendices

Appendix A. Selected descriptions of searches observed	189
1) Case C75	187
2) Case C77	187
3) Case D54	188
4) Case E6	188
5) Case I18	188
6) Case J17	189
7) Case K21	189
8) Case K26	189
9) Case M26	190
10) Case N17	190
11) Case O3	191
12) Case P8	191
13) Case T36	192
14) Case T54	193
15) Case U5	193
16) Case U41	194
Appendix B. Further information about methodology	195
Observational Research	195
Interviews	196
Appendix C. Letter to NSW Police outlining our information requirements	197
Appendix D. Memorandum of Understanding	200
Appendix E. Observational research checklist	208
Appendix F. Recording drug dog incidents	209
Appendix G. Information sheet issued during fruit fly inspection operations	211
Appendix H. Other relevant legislation	212
Appendix J. Advertisement placed in local and industry newspapers	213
Appendix K. List of submissions	214
Appendix L. Acronyms and abbreviations	215

Appendix A. Selected descriptions of searches observed

1) Case C75

Driver: Male, twenties

Passenger/s: Females, twenties

Vehicle: Sedan

Found: Nothing

Approximate search time: 21 minutes

A positive indication was made and the vehicle was directed to the hot zone. The driver indicated the vehicle did not belong to them and they did not know the surname of the owner. They did not have a key to the glove box. The driver said they definitely did not have anything in the car and the female appeared bewildered when the police officer explained that the drug detection dog had made a positive indication. The dog handler said the dog had indicated the rear section of the vehicle and the boot was searched thoroughly with nothing found. The handler then took the dog through the vehicle and the dog made a positive indication on the front passenger seat. The contents of the centre console were searched with nothing found. At this point the detective decided to terminate the search and the couple were asked whether they had any complaints or comments. No complaint or comment was made.

2) Case C77

Driver: Male, thirties

Passenger/s: None

Vehicle: Sedan

Found: Nothing

Approximate search time: 76 minutes

A positive indication was made on the vehicle. Police had received information that this vehicle was approaching and may be carrying equipment for the hydroponic cultivation of cannabis. After having the search explained to him the driver indicated he did not speak English and did not understand. Police explained the search again in simpler terms and made sure the driver understood what an illegal drug was. The driver indicated he spoke only Greek and Albanian but when police produced a phrase book containing a number of languages including Greek, the driver was unable to identify a language he was prepared or able to communicate in. Police struggled to explain the search to the man in way that he could understand.

Police told us that computer records linked the driver with intelligence relating to the manufacture and trafficking of prohibited drugs. The driver indicated he had no illegal drugs in the vehicle.

The driver was questioned in relation to a number of items suspected of being hydroponic equipment located in the boot of the vehicle. The driver indicated he had been asked by a friend to purchase and transport these items. During the search the drug dog made a number of strong indications at the rear of the vehicle, in the front console and of the spare tyre. All areas of the vehicle were thoroughly searched and attempts were made to remove the tyre from the spare wheel. A mechanic was called to do this.

The driver repeatedly indicated that he was cold and eventually, after his jacket was searched, police provided it to him. The driver also indicated he was in a hurry and frequently pointed to his watch.

The mechanic was unable to remove the tyre and told police the wheel was not appropriate to the model of the vehicle. Police determined to take the tyre to a mechanic shop for closer inspection. The driver accompanied police with the tyre.

3) Case D54

Driver: Male, mid twenties

Passenger/s: Other coach passengers

Vehicle: Coach

Found: Nothing

Approximate search time: 24 minutes

A coach containing passengers was detained and the drug dog screen explained by police to the driver and passengers. The luggage hold under the coach was opened and the drug dog made a positive indication on a particular item of luggage. The owner of the item was identified and spoken to by police beside the vehicle in view of the passengers on the coach. The Korean owner of the bag did not appear to understand what was going on. Police attempted to explain in simple language the basis for the search. Search documents were read to the man while he looked at them. The man was shaking visibly at this time. The man provided police with the key to his luggage. At this point an Ombudsman observer intervened and asked whether the man could be moved to a position of privacy to have his belongings searched. Police agreed to this request, the search was conducted further away from the coach. No illegal drugs were located in the luggage. Police indicated to the Ombudsman observer that had drugs been located on the man an interpreter would have been located before any further action was taken by police.

4) Case E6

Driver: Male, mid twenties

Passenger/s: None

Vehicle: Hatchback

Found: No prohibited drugs, Chinese herbs

Approximate search time: 17 minutes

A positive indication was made and the vehicle was directed to the hot zone where the search was explained in simple language to the man. Delays were experienced while a video camera was located. The search was explained again and consent was provided for the purpose of the recording. The drug dog made a number of positive indications around the glove box, passenger seat and rear of the vehicle. A thorough search was conducted and no illegal drugs located. The driver's luggage was searched and various Chinese medicines, pills and confectionery were located. The driver appeared willing to assist police and indicated the pills located were an aid for digestion. The drug dog made positive indications on a plastic bag which police inspected. Prohibited drugs were not found in the bag.

5) Case I18

Driver: Male, mid thirties

Passenger/s: None

Vehicle: Heavy vehicle

Found: Nothing

Approximate search time: 30 minutes

A positive indication was made by a drug dog on a truck driver after he alighted from his vehicle at the checkpoint. The driver told police he was not in possession of any illegal drugs but was taking a program of herbs for longevity. The search was explained and agreed to by the driver. Police searched his pockets and the cabin of the vehicle. The driver told detectives he did not know who else drove the vehicle once his job was completed. He had been using the vehicle for a few days. The driver appeared to be nervous and police commented upon this. Police located a box of small bottles, inspected the contents closely and questioned the driver about them. The driver said these were mineral supplements for his health. While the driver chatted with one of the investigators he appeared to relax. He mentioned to police that there was a fair bit of talk about the police operation on the CB radio.

The search was terminated and the driver asked if he had any questions. The driver asked why the dogs made a positive indication and the detective suggested it might be residual drugs left by other persons using the truck.

6) Case J17

Driver: Female, twenties

Passenger/s: Male, thirties

Vehicle: Sedan

Found: Amphetamine

Approximate search time: 35 minutes

A positive indication was made and the vehicle directed to the hot zone where the search was explained and a caution provided. Both persons were pat searched. The male was found to be carrying a large amount of cash in his wallet, which he explained by stating he had been at the greyhound races. The female driver appeared to be in a distressed state during the search of the vehicle by drug dogs. The male passenger was taken back to the station to be strip searched. The female driver confessed to possessing a bag of speed which she produced from her handbag. The female was concerned about going to gaol, asked police not to tell her partner and not to video record her face. She was arrested and taken to the station for further searching. The male returned with police and the drug dog made a positive indication on his bag, which was searched with nothing found. The man was then informed he could go back to the station and wait for his partner.

7) Case K21

Driver: Female, thirties

Passenger/s: Male, thirties and child

Vehicle: Station wagon

Found: Cannabis

Approximate search time: 29 minutes

A positive indication was made and the vehicle was directed to the hot zone where the search was explained. The female passenger made admissions to possession of a drug and located it in the glove box. The driver stated there were more drugs under the passenger seat which had been thrown there prior to being stopped by police. The passenger was allowed to hold the child and appeared at ease and comfortable answering questions of police. A repackaged cigarette was located and the female stated it contained cannabis leaf. The female told police that was all there was, but when she was reminded by police of previous references to a bag with more drugs, she quickly admitted she lied and told police it was in the vehicle somewhere. The drug dog made positive indications around both the driver and passenger seats and a bag of cannabis was located under the passenger seat. Police questioned the driver in relation to the drug and were told it was cannabis leaf. Police appeared to be mindful of their behaviour in front of the child and acted appropriately. The driver was issued with a cannabis caution and the family were allowed to leave.

8) Case K26

Driver: Male, thirties

Passenger/s: Males, forties

Vehicle: Sedan

Found: Nothing

Approximate search time: 53 minutes

Police stopped the vehicle at the checkpoint. Police asked if the men had any drugs in their possession. The men told police they were Muslim and did not believe in taking drugs. Police directed the men to the hot zone and were asked to alight from the vehicle. A detective explained the search to the men. The men told police the vehicle did not belong to them but was owned by a labourer who worked on their tobacco farm in Victoria. The men were pat searched and the vehicle searched. Police suspected the men of involvement in the smuggling of tobacco and they were closely questioned in relation to their luggage and other possessions in the vehicle. The drug dog was taken past all of the luggage, after unpacking it from the vehicle and a positive indication was made. Cash to the sum of \$5,300 was located in a brown paper

bag. The driver was initially evasive with police when questioned about the money, but later explained it was the proceeds from the sale of a car. Police asked the driver to witness their examination of his laptop computer. The driver said, 'OK. But you didn't ask me if you could open any files.'

No illegal drugs were located in the search. The men were allowed to leave after the detective spoke to the driver about carrying large amounts of cash.

9) Case M26

Driver: Male, twenties

Passenger/s: None

Vehicle: Hatchback

Found: Cannabis

Approximate search time: 15 minutes

The driver of the vehicle appeared extremely nervous when pulled over by police. He was directed to the hot zone and was cooperative. The man admitted to having cannabis in his possession for his personal use. The man produced from his vehicle a small amount of cannabis wrapped in paper and gave it to police. He told police he had been caught drink driving two years previously but had no other involvement with police. The man was shaking throughout the search and told police he was nervous. Police issued the man a cannabis caution and he was allowed to leave.

10) Case N17

Driver: Male, thirties

Passenger/s: Female, forties, four children under 18 years of age

Vehicle: Sedan

Found: Cannabis, smoking device

Approximate search time: 1 hour 3 minutes

A positive indication was made by the drug dog and the driver admitted to possession of a cannabis smoking device. The vehicle was directed to the hot zone and the search explained to the occupants. The driver told police there was no cannabis in the vehicle, just the smoking device. The driver was calm and cooperative and opened the boot of the vehicle for police to search. The driver told police he had no identification and it was established the vehicle was unregistered and he was unlicensed. The driver said he had been charged for these matters three days earlier. The vehicle was searched and cannabis located in a tin in the vehicle. The female passenger was questioned about this and became extremely upset, making admissions in relation to ownership of the drug.

The driver was allowed to attend to the children. A number of identification documents and credit cards were located in the vehicle and the driver was evasive when questioned about them. The credit cards located were subsequently identified as stolen. The driver stated these items belonged to the previous owner of the vehicle. Licence plates were also located in the vehicle and the driver told police these must have been picked up by the kids. These plates as well as the plates on the vehicle were seized, as were the identification documents and credit cards. Police escorted the family to a local hotel where arrangements were to be made for them to stay overnight.

11) Case O3

Driver: Male, 24 years of age

Passenger/s: None

Vehicle: Utility

Found: Cannabis, smoking device

Approximate search time: 1 hour 5 minutes

Police quickly identified that the driver had poor comprehension skill and possibly had some form of intellectual impairment. Police made efforts to communicate effectively and appropriately with the man. There were significant delays to the search due to the processing of another vehicle in the hot zone. During this period an officer identified that the driver did not have his P plate properly displayed and he was asked to attach it. The driver was eventually directed to the hot zone for a search and was informed it would be video recorded. The man's hands were visibly shaking. The drug dog made a positive indication of the man when he was out of the vehicle. The man was pat searched and asked to empty his pockets and remove his shoes, socks and jumper. The drug dog made positive indications in the cabin of the vehicle and a tin was located containing residue of green vegetable matter, 11 seeds, a resealable bag and a pipe. Further delays were experienced while police located the exhibit book. The man agreed to be interviewed after receiving a caution and made admissions to possession of the objects found and possession of cannabis for personal use. The man was issued a court attendance notice and advised to talk to his mother and a lawyer prior to attending court. A cannabis caution could not be issued due to possession of the seeds and the pipe. The detective communicated slowly and kindly with the man.

12) Case P8

Driver: Male, twenties

Passenger/s: Female, thirties

Vehicle: Hire van with SA number plates

Found: Total 358 grams cannabis

Approximate search time: 1 hour 32 minutes

A positive indication was made by the drug dog and the vehicle was directed to the hot zone. The female passenger in the vehicle appeared to be very concerned. The male driver was asked by police if he had been smoking cannabis and the driver replied he had. He did not appear to be concerned. The couple were asked to alight from their vehicle and police radio checks were conducted. A detective then explained the search to them and they were asked if they had any drugs in their possession. The driver indicated he had cannabis in his possession. At this time the drug dog was making a number of strong indications in the back of the vehicle. A considerable amount of luggage was taken from the back of the vehicle and lined up on the roadside for the drug dog to screen. The driver and passenger were spoken to and searched and small bags of cannabis were located on both of them. The drug dog screened the luggage twice and on both occasions made strong indications on three items of luggage. The drug dog was taken through the vehicle and made a positive indication in the passenger door. The detective spoke to the driver who then reached in and pulled out a roll of plastic containing approximately one ounce of cannabis. The detective questioned the driver about this.

The couple were then asked to identify which items of luggage they owned. The passenger was cautioned and spoken to in relation to the cannabis found on her. She appeared reluctant to answer questions and asked the detective if she could refuse to answer. The detective continued to ask her questions and she continued to respond. She appeared to be very nervous. The luggage belonging to her was identified and the detective asked her whether it contained any cannabis. She said, 'I thought I didn't have to answer any questions'. The passenger then asked the detective for identification and he provided it. As part of his routine questioning the detective asked the couple whether they were aware that cannabis was illegal in NSW. During the search of her luggage police located a bag of ground coffee and the woman stated, 'That's a drug but I believe it is legal in this state'. Police located a plastic bag containing cannabis. The detective questioned the woman about this and she refused to answer any questions. The detective went away and came back some time later and again spoke to the woman. He asked her if she was prepared to answer the questions. The woman asked if there were any adverse implications in her not answering and

the detective said no. The woman then said she was happy to cooperate but did not wish to talk. She thanked him for asking her. Another plastic bag containing cannabis was located in an item of luggage belonging to the woman. The woman denied this cannabis belonged to her. The detective then told the woman that she was under arrest and she became extremely upset and began to cry. The woman indicated she was an epileptic and may be at risk of having a seizure.

The male driver of the vehicle remained quiet and stony faced while police continued to search the luggage. The driver appeared to become irritated and indicated to police a box they were searching had already been searched. He began to re-pack this box after offering to do so. The driver attempted to hurry up the remainder of the search and said to one officer in an irritated tone, 'Don't stand there looking at me, it's taking long enough as it is'. There was a lot of luggage in the vehicle and the search took some considerable time to complete. The cannabis was booked in and weighed in the presence of the couple. The cannabis in possession of the woman weighed approximately 300 grams and the cannabis in possession of the driver weighed approximately 58 grams. The driver was issued with a court attendance notice. The driver took photographs of the woman having her drugs weighed. The driver commented that it must cost police 'a fortune' to conduct this operation for what is a 'victimless crime'. The detective responded, 'I'm not a legislation maker!'

The detective told the Ombudsman observer that he had arrested the woman to ensure she turned up at court and was subject to bail conditions. The woman requested video tape reference numbers before being taken to the station. She was told she would be further searched there by a woman officer. The driver was left to re-pack the vehicle.

13) Case T36

Driver: Male, twenties

Passenger/s: None

Vehicle: Kombi van

Found: Cannabis

Approximate search time: Not recorded

The driver admitted to police he had 'a little' when police asked if he was in possession of any drugs. The drug dog also made an indication. The driver was an Israeli national who indicated to police he could speak 'a little' English. Police asked the man to alight from the vehicle and sought his permission to video record the search. The man was directed where to stand by police while police conducted the search so that he could see what was happening. Police asked the man to remove his hands from his pockets.

The contents of the vehicle were removed by police and placed on the ground at the rear of the vehicle. A small amount of cannabis was located in a plastic container located in the extendable roof of the vehicle. This was shown to the man and he was asked if there was more. The man indicated there was more located in a bottom cupboard. A canister containing cannabis was located and he confirmed that this was what he was referring to. When asked whether there were any more drugs the man said there were not. The man was told he was under arrest and asked if he understood this.

The man indicated to police that he had been travelling with friends but they had separated temporarily. He was carrying their luggage as well as his own. The identification of other persons was located in the van and photocopies of identification documents were also found. The man indicated these copies were made in case the originals went missing. A lunch bag size plastic bag full of cannabis was located in a backpack and the man indicated that he did not own this. The drug dog made a positive indication at the passenger door of the vehicle and plastic panelling was removed and a torchlight shone inside without any drug located. A number of packaged or prescription drugs were examined by police before the search was terminated. The man was again told he was under arrest, cautioned, and taken into a police bus to be further questioned.

14) Case T54

Driver: Not applicable

Passenger/s: One male and one female spoken to by police

Vehicle: Bus

Found: Cannabis seeds

Approximate search time: Not recorded

A bus was stopped by police and the drug dog made a positive indication in relation to luggage in the possession of a female and a male passenger. The bus driver told police that he would have to inform other drivers that he was going to be delayed. The man and woman were directed off the bus and made to stand beside the vehicle. They were in view of other passengers on the bus. The woman became very upset and began to cry. Delays to the search were experienced while a video recorder was located. The search was conducted under the door of the luggage compartment and out of sight of the other passengers at the request of the Ombudsman observer. The woman's backpack was searched first in front of the other male passenger. She was asked whether there was any reason the dog would indicate her bag. She said no. The officer conducting the search asked if there was anything sharp in the bag and proceeded to feel around the bottom of the bag without removing the contents. The woman was asked if anyone she knew used drugs and she replied, 'Everybody'. No drug was located and police asked the woman whether she had any complaints about the manner in which she had been searched. She said, 'No'. The woman was then allowed to get back on the bus.

The man's luggage was searched more thoroughly with all contents removed. Underwear and other clothing, batteries, creams, and cigarettes were examined and plastic bags opened. One plastic bag was located which contained half a cigarette and some seeds. Three passengers from the bus left the vehicle to smoke a cigarette and could observe the search. The seeds were counted in front of the man and he was taken over to a police truck to be interviewed. The Ombudsman observer was later informed that the man received an informal warning in relation to the seeds.

15) Case U5

Driver: Male, forties

Passenger/s: Female, thirties

Vehicle: Four wheel drive

Found: No drugs

Approximate search time: Not recorded

A positive indication was made of a four wheel drive vehicle. The drug dog stood on its hind legs at the driver's door of the vehicle and the handler placed her hands under its paws to avoid scratching the paintwork. The dog then sat down, being a positive indication. The driver of the vehicle asked police whether the dog was 'alcoholic' (referring to whether the dog could detect alcohol). Police directed the driver to the hot zone and the search was explained to him. When the drug dog entered the vehicle, the driver said to the police 'I don't want the dog in the car, mate.' The officer responded, 'Well that is what's going to happen'. The man asked, 'Since when is it legal to let animals in my car?' Police gave the man a brief explanation of legislation. The man was also provided with a notice relating to the search. Police asked and the man indicated he had no problem with the search being video recorded.

The female passenger was spoken to and indicated she had paracetamol in her handbag but no illegal drugs. Luggage from the vehicle was removed. The dog screened the luggage and inside the vehicle. The man asked police for a copy of the warrant and was told by the independent police officer that a warrant had been sighted but it was not necessary to show it to him. The independent officer later sought advice on this and the warrant was shown to the man. The dog was taken around the man and woman with no indication made. The man was taken to the rear of a police caravan where he was searched. The man was not happy with being searched and became argumentative with police. No drugs were located and the search was terminated. The couple were allowed to leave and were thanked for their cooperation.

16) Case U41

Driver: Male, thirties

Passenger/s: Male, thirties

Vehicle: Truck

Found: Cannabis, smoking device

Approximate search time: 12 minutes

A positive indication by the drug dog was made on the driver's door of a heavy vehicle. The truck was directed to the hot zone and the search explained to the men. The passenger admitted that he had a small quantity of cannabis in his possession and stated that he had it for his personal use. The police officer thanked him for his honesty and cooperation. The passenger was asked if he had been arrested for cannabis or anything else in NSW before and he replied, 'No'. The passenger helped police locate a smoking device and a small amount of cannabis. The drug dog made a positive indication in relation to the driver. Both men were pat searched with their shoes removed and the search video recorded. The officer thanked the driver and told him police would need to speak with the passenger and he was directed as to where to park the vehicle and wait.

Appendix B. Further information about methodology

In this section we have included some additional information about the conduct of direct observations and interviews.

Observational Research

A fairly standard process was followed for each observational session.

As explained in Chapter 3 'Methodology', the NSW Ombudsman and NSW Police agreed to a Memorandum of Understanding (MOU) to govern key aspects of the conduct of direct observation of police activities under the Act. This MOU is appended at Appendix D.

The NSW Police SOPs for the Act required the applicant for the warrant to notify the NSW Ombudsman of forthcoming operations. Once notification was received, and dates and location established, suitable observers from the Ombudsman's office were assigned to the operation. Two observers were assigned to each operation. In total six observers attended police operations over the course of the review.

All observers received a kit containing a copy of the Act, guidelines for conducting operations (attached to the MOU at Appendix D), NSW Police Standard Operating Procedures, first aid pack, fluorescent safety vest, phone numbers for out-of-hours contact persons from the Ombudsman's office, and a form to complete for each incident observed. All observers were briefed about the operations and warned not to divulge the details of the operation to anyone other than specified individuals within the Ombudsman's office.

Conduct of observers at operations

Observers were encouraged to conduct observations for the entire period of operations. However, we were also mindful of the need to take meal and rest breaks as sites usually had no nearby facilities and weather conditions were on occasion extreme. Observers also took time out from observing to take photos of the site. For these reasons, and because two observers cannot comprehensively monitor up to 40 police, aspects of each operation were not observed.

Police briefing

One observer generally spoke to the police briefing prior to the operation to introduce themselves, explain their role and answer any questions. During this briefing observers made clear to police that the purpose of observations was not to monitor the conduct of individual officers and that there would be no reporting of the mistakes or inadequacies of individuals. Rather, the purpose of the observations was to get a sense of how the legislation worked in practical situations and to get a first hand view of the challenges police face and the impact of the legislation on members of the public. Making this distinction was important because of the Ombudsman's other roles in the investigation and oversight of complaints about police officers.

Observers also informed police that any serious misconduct or corrupt activities witnessed would be dealt with formally.

Observers also asked police to 'keep an eye out' for them and to let them know if any enhanced risks were involved in any interaction with members of the public. Police were encouraged to tell observers if they were in the way or inadvertently hindering them in the exercise of their functions.

After the briefing observers followed police to the site, watched them set up the site if this was still occurring and then started observing the conduct of the operation.

On-site

Much of the observers' time was spent standing next to the assigned scribe and noting details on the incident form about drivers and passengers and also noting any comments by police, drivers or others. Observers were encouraged to stand close to the interaction between police and members of the public to be able to see and hear what was going on. Observers also needed to take care not to hinder police in their duties.

If a vehicle was directed into the 'hot zone' to be searched, an observer would follow to observe the search. Observers were advised to note details about the conduct of the search, police behaviour and the comments and demeanour of drivers and passengers. No incident form was provided for this aspect of the observation and observer notes generally formed a narrative about the search. Because searches often involved the simultaneous conduct of several functions (for example searching the vehicle, talking to the driver and/or passengers, searching persons, entering exhibits) observers were not able to observe every aspect of a search incident. Observers generally did not observe formal interviews with suspects conducted after offences had been detected by police.

In general, we found that police quickly became used to our presence. Although it is not really possible to say whether police altered their behaviour in a substantial way because of our presence, we can say that police appeared to be comfortable with us and provided feedback that our observations were not overly intrusive or inconvenient.

Observers did not make contact with members of the public. However, on occasion, members of the public would ask about the identity of observers. In these situations police provided a basic explanation, usually along the lines that observers were independently evaluating police.

Providing feedback to police

While the main role of the observer was to note down what happened at operations rather than to affect the conduct of operations, on occasion observers informed police of their concerns about particular incidents – sometimes at the time of the incident. Usually observers did this because they were concerned that the privacy of persons searched was not being sufficiently protected by police. Observers also agreed to provide police with feedback about the conduct of the days' operation prior to the commencement of the next days' activities. This 'action-research' approach to the review meant that we were able to assist police in improving the conduct of operations in a manner consistent with our role in protecting the public interest. We felt that it would not be fair to police or those members of the public being stopped and/or searched to not reveal our concerns until we produced our final report.

Where possible, observers also attended de-briefs conducted by police after operations. This was an opportunity to hear from police about their positive and negative experiences during the operation and to provide feedback about our observations.

After each operation we also provided more formal feedback to police at the Steering Committee.

On their return to the office observers entered data from their incident forms and other notes into a spreadsheet and typed up their notes from briefings and de-briefings. Observers also usually conducted an informal de-brief with the Ombudsman Project Manager.

Interviews

As noted in Chapter 3, we interviewed 51 police officers of varying ranks and areas of specialisation for the review. In addition we interviewed seven other interested parties. Where possible we conducted interviews immediately following operations to ensure that police could easily recall their experiences of using the legislation.

We have taken care to make each interviewee anonymous. We have done this by coding the reference for each interview. Some interviews have more than one coded reference in order to properly conceal the identity of the interviewee. For example, in a case study we may quote a site controller making comments about a particular operation and call the interview 'Interview A'. However, a quote from the same interview used later in the report, may be referenced as 'Interview B'.

Where it was clear that our best efforts would not offer sufficient protection to individual police, we contacted interviewees and told them prior to publication the comments we had attributed to them. We only included comments from these interviews with the consent of the interviewee.

All interviews were tape recorded other than those conducted via telephone and two interviews which were recorded by hand. During telephone interviews we read out to interviewees what we had noted of their responses to check that we had accurately reflected their intent. Anything to be used as a direct quote from a telephone interview was also read out verbatim to the interviewee for verification.

Appendix C. Letter to NSW Police outlining our information requirements

As described in Chapter 3 'Methodology', we asked NSW Police for certain information at the outset of our review. Below is the text of the letter we sent to the Assistant Commissioner Terry Collins, Commander of the Southern Region, which confirmed our agreement with NSW Police about the information that they would provide us with:

Our reference: ADM/395

Contact: Emma Koorey

Tel: 02 9286 1003

Assistant Commissioner Terry Collins
Region Commander, Southern Region
State Office Block
Level 3, 84 Crown Street
WOLLONGONG 2500

Dear Assistant Commissioner

Re: *Police Powers (Drug Detection in Border Areas Trial) Act*

Please find attached our information requirements for the Ombudsman's scrutiny of the implementation of the above Act. As you are aware, section 22 of the Act provides:

- (1) For the period of 9 months from the date of commencement of this section, the Ombudsman is to keep under scrutiny the exercise of the functions conferred on police officers under this Act.
- (2) For that purpose, the Ombudsman may require the Commissioner of Police to provide information about the exercise of those functions.

Although we have attempted to comprehensively document our information needs, it is possible that over the course of our review new lines of inquiry will need to be pursued. I will consult with you directly should additional information, which differs substantially from that set out in the attachment, be required.

May I take this opportunity to confirm our agreement that information about each police operation utilising the provisions of the Act will be forwarded to this office via EARU within three weeks of the expiration of the relevant drug detection warrant. I also confirm our agreement that advance notice will be provided to the NSW Ombudsman of all operations utilising the provisions in the Act. Where possible this notice will occur at the same time that the Dog Unit is advised of the operation and no later than the time that the application to apply for a warrant is provided to the Commissioner or Deputy Commissioner.

In accordance with past legislative monitoring projects, this office will continue to deal directly with officers in the regions involved in the trial. The Ombudsman reserves the right to maintain the confidentiality of police officers who contribute to the review. We will also continue our practice of consulting NSW Police about major concerns that arise during the review period.

I look forward to working with you on this project.

Yours sincerely

Steve Kinmond
Assistant Ombudsman (Police)

cc. Diane Elphinstone, Manager, External Agencies Response Unit

The attachment to the above letter outlined our requirements in the following terms:

Information referred to in the legislation

For each operation for a 12 month⁵⁶³ period from commencement of the legislation, the NSW Ombudsman requires:

- **Section 5 Applications:** copies of applications to the Commissioner of Police or Deputy Commissioner of Police for authorisation to apply for a warrant, including:
 - all documents/information listed under s.5 (2);
 - all supporting intelligence information provided to the Commissioner or Deputy Commissioner;
 - documentation of the consultation with the RTA (as described in 'Step 2' of the SOPs); and
 - a copy of the operation plan (as described in 'Step 2' of the SOPs). (The Ombudsman accepts that information from telephone intercepts and listening devices cannot legally be provided for the purpose of legislative review.)
- **Source Intelligence:** Arrangements will be made to allow 'on-site' auditing of the intelligence holdings on which the application to the Commissioner or Deputy Commissioner is based; (The Ombudsman agrees that documentation of 'original' intelligence information will be available for supervised inspection only.)
 - **Section 5 authorisations and refusals:** Copies of all documentation of authorisations, refusals and any cancellations of authorisations;
 - **Section 6 applications:** Copies of applications to eligible judges for warrants, including all documents/information specified in s.6 (2) and all documents, specified in 'Step 3' of the SOPs;
 - **Sections 8 warrants:** Copies of all warrants issued and information about any warrant applications refused;
 - **Risk assessments:** A copy of risk assessments referred to in 'step 4' of the SOPs;
 - **Police Actions:** Details, including COPS record numbers, of any CANs or other police actions (e.g. information reports, arrests, penalty notices) which result from the operation. This includes details of any offences detected as a result of the operation, for example offences under s.16 of the Act as well as drug offences, traffic offences, offences in relation to dangerous implements etc;
- **Section 9 information:** Information reporting the:
 - Number and location of all checkpoints established [s.9 (1)(a)];
 - Number and type of vehicles stopped e.g. commercial vehicles or private vehicles [s.9 (1) (b)];
 - Number of vehicles screened* by a drug detection dog [s.9 (1)(c)];
 - Number of persons screened* by drug dog and where known – age, sex, Aboriginality and country of birth/ethnicity of each person screened;
 - Details of any formal directions given under s.9 (1)(f);
 - Documentation in relation to any drugs or other items seized from vehicles/persons as a result of the use of the legislation, including information about drug weight and type; and
 - Number of persons and vehicles searched* by police, including whether searched with reasonable suspicion from a drug detection dog indication or from another source of suspicion.

* Note distinction between 'screening' by a dog and 'searching' by a police officer.
- **Section 12 notices:** A copy of each 'type' of notice provided to affected persons (i.e. if police exercised five different 'functions' we would receive a copy of five different types of notice) and the number of each 'type' of notice issued per operation;
- **Section 17 information:** All the data referred to in section 17 for each operation,
- **Warrants which cease to have effect:** Details/documentation about any warrants which cease to have

effect prior to the completion of an operation, as set out in s.14, and the reason for this;

- **Report to eligible judge:** A copy of the report to the eligible judicial officer on the execution of the warrant and any other documents/records produced according to requirements of s.21 of the *Search Warrants Act*;
- **Copies of operational orders;**
- **Videos:** Copies of, or ability to view, any video recording of the operation;
- **Dog Unit information:** A copy of the Dog Unit results spreadsheet material and access to intelligence information held by the dog unit in relation to the use of the dogs in these operations;
- **De-brief:** Copies of any documents in relation to the de-brief conducted after the operation;
- **Briefs of evidence:** Briefs in relation to prosecutions flowing from the operation;
- Any additional documentation required by in the regulations; and
- Copies of any additional documents required by the SOPs.

General information requirements

Also required are:

- Information in relation to the cost of operations;
- Information/analysis obtained by NSW Police in relation to its evaluation of the implementation of the Act, where practicable;
- Observation of use of the powers as well as attendance at related briefings and de-briefings;
- Conduct of focus groups and interviews with police;
- A copy of the final SOPs and any amended versions;
- Education and training material, and observation of any training sessions; and
- Correspondence, briefings, minutes of meetings relevant to the legislation.

Appendix D. Memorandum of Understanding

As discussed in Chapter 3 'Methodology', we reached a Memorandum of Understanding (MOU) with NSW Police about our observational research. The MOU included guidelines for observers from the Ombudsman's Office, and an information sheet for NSW Police officers about the nature of observational research. The text of this MOU was as follows:

NSW POLICE MOU

Recognition no.:

MEMORANDUM OF UNDERSTANDING

This MEMORANDUM OF UNDERSTANDING is recorded this day of [YEAR] between the **Commissioner of NSW Police in and for the State of New South Wales** of Pacific Power Building, 201 Elizabeth Street, Sydney, Sydney in the State of New South Wales, 2000 (hereinafter referred to as '**NSW Police**' being the first party) and the **NSW Ombudsman** of Level 24, 580 George Street, Sydney in the State of New South Wales, (hereinafter referred to as '**the Ombudsman**' being the second party) and hereinafter jointly referred to as 'the parties' **AND**

WHEREAS:

- A. The NSW Police is established and has responsibilities arising from the *NSW Police Act, 1990* (N.S.W.) including the enforcement of criminal laws involving offences committed within the territorial limits of the State of New South Wales.
- B. The *Police Powers (Drug Detection in Border Areas Trial) Act 2003* ('the Act') has received assent and is expected to commence on 13 January 2004.
- C. Under Section 22 of the Act, for the first 9 months following the commencement of the Act, the Ombudsman is required to keep under scrutiny the exercise of the functions conferred on police officers under the Act and, for that purpose, the Ombudsman may require the Commissioner of NSW Police to provide information about the exercise of those functions.
- D. As part of the Ombudsman's scrutiny function, the Ombudsman has requested that NSW Police assist in facilitating the presence of his officers at the operations carried out under the Act, to act as observers during the conduct of the operation.
- E. The NSW Police and the Ombudsman wish to put in place a Memorandum of Understanding in respect of the establishment and/or formalisation of operational understandings and protocols between them in relation to co-operation in respect of these observational activities under the Act.

The Parties record the following Understandings as follows:

1. RESPONSIBILITIES OF NSW POLICE

The NSW Police records the understandings set out herein and in any Schedule hereto signed by the authorised delegate of the parties ('the Understandings').

NSW Police agrees to co-operate with the Ombudsman in undertaking direct observations of police exercising functions under the Act in accordance with this MOU and Schedule 1 of this MOU.

2. RESPONSIBILITIES OF THE OMBUDSMAN

The Ombudsman records the understandings set out herein and in any Schedule hereto signed by the authorised delegate of the parties ('the Understandings').

The Ombudsman agrees to co-operate with NSW Police in undertaking direct observation of police exercising functions under the Act in accordance with this MOU and Schedule 1 of this MOU.

3. TERM

This MOU takes effect on the date that the second party signs and expires on completion of the Ombudsman's review of the Act.

4. REVIEW and AMENDMENT

The parties acknowledge that Schedule 1 'Guidelines for Observers' may require amendment from time to time, to incorporate changes which are highlighted by the practical implementation of the Guidelines. Any change to the 'Guidelines for Observers' will be the subject of consultation between the Ombudsman and NSW Police.

5. CONFIDENTIALITY

The Ombudsman will maintain confidentiality of information, obtained in conducting observational research for the purpose of keeping under scrutiny the exercise of the functions conferred on police officers under the Act, as required by the legislative provisions of the Act, the Ombudsman Act, and any other relevant legislation.

6. INDEMNITY

The Ombudsman releases and indemnifies and agrees to keep released and indemnified the NSW Police against liability for all direct loss, damage, injury and death including injury to or death of an officer of the Ombudsman or damage to property caused or contributed to by negligent or unlawful acts or omissions by an officer of the Ombudsman in conducting observation activities except to the extent that such loss, damages, costs or expenses arise out of the acts or omissions by the NSW Police, its servants and agents.

7. NO CONTRACTUAL OR ENFORCEABLE LEGAL RELATIONS TO ARISE and RELATIONSHIP WITH LEGISLATION

- (a) The parties expressly agree that this MOU, any Understandings recorded herein and in any Schedules to this MOU, do not create any contractual relations or other legally enforceable obligation between the parties and are not intended by the parties to be enforceable in any court, mediation or arbitration except as may have been set out in this MOU.
- (b) The parties expressly acknowledge that this MOU is not a substitute for any legislation and cannot override any provision in legislation that is inconsistent with this MOU or any Schedule thereto.

Signed on behalf of the Commissioner of
NSW Police in and for the State of New
South Wales by his duly authorised delegate,
Terry Collins, Assistant Commissioner
Southern Region, New South Wales Police

Signed on behalf of the NSW Ombudsman
by his duly authorised delegate,
Steve Kinmond, Assistant Ombudsman,

SCHEDULE No. 1

GUIDELINES FOR OBSERVERS

Monitoring the NSW Police Powers (Drug Detection in Border Areas Trial) Act

Cooperative Observational Research

INTRODUCTION

As part of the project to monitor the exercise by police of powers under the *NSW Police Powers (Drug Detection in Border Areas Trial) Act*, we will be conducting some direct observation of police at checkpoints established under the legislation.

DRUG DOG OPERATION

The operation you will be observing will be conducted at [name of LAC]. It will be necessary to arrive there at [time]. It will involve the random stopping of vehicles at checkpoints in [name of area]. Drug detection dogs will be used to screen vehicles and possibly passengers and drivers.

The contact person for the operation is [name of police officer].

ROLE OF OBSERVERS

Observers will accompany police officers throughout an entire operation, starting with the police briefing and finishing at the end of the operation or police de-brief. Observers will be present at the police briefing prior to the operation and one observer may briefly outline the research project to police officers at the briefing.

It is important that you attempt to establish a rapport with the police you spend the shift with. However, it is preferable that you do not discuss their actions or the specifics of the legislation. You may discuss the research project in general terms. The aim is to make the police feel comfortable with your presence while influencing their behaviour as little as possible. It is important that the police you observe understand that the information is to be used for research purposes only.

During the shift you should observe and record police behaviour relevant to the research project.

WORKING WITH POLICE

Prior to any observation session, observers will meet with the operation commander to discuss any particular risks to observers', police or public safety involved with the operation and to agree on any appropriate action to reduce those risks.

Subject to any agreements made at the above meeting, observers will generally adhere to the following procedure:

- Where appropriate, observers will wear reflective vests.
- Observers will be assigned to discreet aspects of the operation. For example, one observer may be assigned to observe a particular drug dog handler and another observer may be monitoring the car stopping process.
- As a vehicle approaches, observers will stand in a location agreed with police until called forward.
- When the designated officer signals to approach, observers will position themselves close enough to the police interactions with members of the public to hear and see clearly what is happening. Please also be careful not to impede the police in their work and not to place yourself or others in any danger.
- If the designated officer decides that safety risks have increased such that safety is likely to be unacceptably compromised, the designated officer may give observers instructions to reduce these risks. This may include an instruction to leave the checkpoint. Observers will adhere to any safety instructions by police.
- If an observer disagrees with a safety direction, he/she will nonetheless abide by the direction and may choose to discuss any concerns with the operation commander at a mutually convenient time.

-
- If at any time observers feel that their own safety is likely to be or is being unacceptably compromised, observers may opt to leave the checkpoint. If observers do so they must advise the designated officer. If this is impractical at the time, observers will advise another police officer.
 - Observers will attend the police de-brief following the operation, if this is practicable.

Dealing with members of the public

- You should not attempt to talk to or contact members of the public with whom the police have contact. If you are questioned by a member of the public about the police activity, direct the person to a police officer.
- If you *do* need to explain your presence you should keep your explanation brief. It may be sufficient to say that you are an independent observer. If the questioning is persistent, you may need to give your business card to the person and advise them to call you during business hours if they require a more detailed explanation.
- Any person who wishes to complain about your presence should be directed to the Assistant Ombudsman and provided with appropriate contact details.

Observer de-brief

Observers will meet following each observation session to discuss any difficulties with the research and to address any safety or other concerns that may have arisen during the operation. The Research Manager will consult the Assistant Ombudsman about any safety or significant policing issues following each operation.

PREPARATION FOR OBSERVATIONAL RESEARCH

Prior to participating in observational research you should read:

- NSW Police, *NSW Police Powers (Drug Detection in Border Areas Trial) Act Standard Operating Procedures*
- *NSW Police Powers (Drug Detection in Border Areas Trial) Act 2001* & regulation
- S.37 (4) *Drug Misuse and Trafficking Act 1985*

You must also sign the acknowledgement form at the back of these guidelines.

SAFETY

The most important aspect of any observation session is safety. If at any time you feel that you are in, or are about to be in, danger remove yourself from the situation. Everyone should bring a mobile phone with them during an observation session. A mobile phone will be supplied if you do not have access to one.

As stated earlier, if the police believe that your presence as an observer is jeopardising their safety or your safety they may advise you to take action to reduce the safety risks. You must follow police safety instructions. You may also wish to contact one of the emergency contacts, if you believe they can provide you with assistance or advice.

RECORDING INFORMATION

As far as is possible it is your job to *describe* what you observe and not to analyse it. If it is not possible to fully observe something or if your observation is cut short, only describe what you do manage to see or hear. If a police officer explains something to you that you did not personally witness (eg after the search an officer tells you what drugs were found) note this down as the comments of the officer not as your own observation.

If you manage to note down a complete quote from a police officer, person of interest or member of the public note this down clearly as a quote. Otherwise it will be assumed that you have paraphrased.

Record information in as unobtrusive a manner as possible. If you are observing a search, it is better to be there from the start rather than attempt to 'move in' on a search already in progress. This is because it may not be clear to the person searched that you are with the police and they may be more likely to question your presence.

You will be required to write up your notes as soon as possible after the observation session. Usually this is best done on the first working day after the observation session.

CONFIDENTIALITY

NSW Police has agreed to this research project on the basis that no information which identifies individual police officers or members of the public will be published. It is important that information about what you see and hear is kept within the research observation team and that in particular it is not discussed outside the Ombudsman's Office or with any police. It is also important that you do not identify the location of the operation to anyone. General feedback will be given to NSW Police about what we have observed but it will not identify officers and will be centrally coordinated.

In the event that you witness corrupt or criminal conduct you must notify Steve Kinmond, Assistant Ombudsman as soon as possible in the circumstances. Although the project is not set up as a disciplinary or investigative procedure, we have an obligation to act on certain types of conduct.

ORGANISING TRAVEL AND ACCOMMODATION

NSW Police have expressed concerns that the organisation of accommodation in small country towns may alert potential offenders to the possibility of a police operation, and hence affect offender decisions about transportation of prohibited substances.

For this reason, accommodation will be booked in the names of observers and will not refer to the NSW Ombudsman. If police require, observers will choose accommodation out of town, or at recommended hotels/motels.

Where possible, observers will fly to locations, however, if sufficient notice is not able to be provided to allow flight bookings, observers will travel by car.

Observers will have their own means of transport and will not be relying on NSW Police for transport.

OVERTIME/STAFFING

Overtime or travelling time will be paid in accordance with the Crown Employees (Public Service Conditions of Employment) Award 2002. Generally, overtime will be paid at the appropriate rate for any time worked outside bandwidth (ie 7:30 am to 6:30 pm) Monday to Friday or for any time worked on Saturdays, Sundays, or public holidays. You can elect to take leave in lieu rather than being paid for overtime.

In some circumstances travelling time may apply in addition to or rather than overtime.

A staff member who works overtime need not resume duty for at least eight hours. As your safety is of paramount concern, it is recommended that this break be taken. If taking this break means that you commence work in core-time, an appropriate adjustment will need to be recorded on your flexsheet. This adjustment will be recorded as special leave and will not affect your leave entitlements, salary or flex accrual.

The following examples will provide guidance:

Example 1. If you work from 8pm Thursday to 5am on Friday, you should not commence work again until 1pm on Friday. On your flexsheet you will sign on at 1pm and record 4 hours SP in the adjustment column.

Example 2. If you work from 4pm Thursday to 1am on Friday your flexsheet should record you working until 6.30pm. From 6.30pm until the end of your observation shift at 1am you will be paid overtime. You should not resume duty until 9am on Friday morning.

Example 3. If you work from 8pm Friday until 5am on Saturday you will be paid overtime for this period and begin work as usual on Monday.

In rare circumstances your supervisor may direct you to attend work without having an 8 hour break. In these circumstances, overtime rates will continue to apply.

Personnel staff will assist you with overtime, travelling time or with completing your flexsheet.

WHAT TO BRING/WEAR

- Comfortable casual clothes (be prepared for extremes of cold and heat)/rain gear
- Sunscreen/hat
- Water
- Mobile phone
- Emergency contact phone numbers
- Note pad and pen
- Your business card and/or the project officer's business card
- One basic first aid kit will be taken on each observational session

CONTACTS

NSW POLICE Contact:(obtain mobile number)

Emergency contacts: to be advised

Legislative Review Mobile: [mobile number]

Emma Koorey:

POLICE INFORMATION SHEET

Monitoring the

NSW Police Powers (Drug Detection in Border Areas Trial) Act

Cooperative Observational Research

Introduction

On 31 December 2003, the *NSW Police Powers (Drug Detection in Border Areas) Act* came into effect in NSW. The Act provides police with specific powers to randomly stop vehicles at established checkpoints in 'border areas'. NSW POLICE can use drug detection dogs to screen vehicles at these checkpoints. Section 22 of the Act provides for the monitoring, by the NSW Ombudsman, of the operation of the use of this legislation. At the end of this period a report will be prepared for Parliament.

Monitoring the Legislation

The monitoring project will use a range of research approaches to ensure the production of a balanced and comprehensive report about the exercise of the powers in the Act.

We will be analysing records from COPS and material from the Dog Unit's database, as well as conducting community consultations, interviews and focus groups and analysing any relevant complaints. We are also conducting some direct observation of police, and the dogs, as they work. This will provide information about the 'on the ground' issues faced by police and members of the public in the implementation of the Act.

Description of Observational Research

To conduct the research, staff members from the Ombudsman's Office (the 'observers') will accompany police officers while they perform their duties and take note of any incidents of interest to the research project.

Observers will take note of incidents as they occur, and/or take notes at the end of an observation session. Observers will position themselves close enough to an interaction with members of the public to allow the observer to hear and see clearly. However, observers will be careful not to impede police carrying out their duties.

It is helpful if an observer can speak to officers at the police briefing prior to the operation, to explain the purpose of the research and how observers will conduct themselves during the operation.

We have already observed the use of the drug dogs on a number of occasions and at a range of LACs. This has allowed us to acquire a good practical understanding of the use of the dogs and the issues faced by police.

We hope to observe a number of operations but we will take NSW Police advice about operations assessed, because of safety risks, as inappropriate for observation by the Ombudsman.

Following our observational research, we look at COPS events and any other relevant records documenting the operation. For example, copies of operational orders, search warrants and warrant applications where relevant.

How effective is this type of research?

For reviews conducted by the Ombudsman, valuable information is often obtained through the examination of police records, and discussions with police officers about the new police powers.

However, some aspects of the exercise of new police powers can only be properly assessed by direct observation. By accompanying police and directly observing how they use their powers under the Act, the Ombudsman gains information about the 'on the ground' implementation of the Act.

There are, however, a number of factors which militate against this research method providing an authentic view of police behaviour in the field. For example, the presence of an observer from the Ombudsman's Office may influence, consciously or unconsciously, the behaviour of police. In addition, differences may occur in the way observers interpret and record events.

Measures will be taken to minimise these factors. However, it is unlikely that they can be removed altogether. Notwithstanding the limitations of this method, observational research has proved to be a valuable source of

information about police activities in previous research projects of a similar nature. Care will be taken to be aware of and take account of methodological limitations.

Confidentiality

The information gathered as a result of this observational research will be used for research purposes in the monitoring of the implementation of the Act. Individual officers and members of the public will not be identified in the Final Report on the Act or any other published material. General feedback to police about our observations and any concerns we may have will be communicated to police in the course of the research project. The observational research is not intended to be used as evidence in any kind of disciplinary action.

Observers will adhere to Guidelines dealing with confidentiality issues, appropriate behaviour and use of information.

Safety

It is of prime importance that the safety of observers, police and members of the public is not jeopardised by the conduct of the research. The fact that police will determine whether or not an operation is suitable for observational research will assist in minimising risks to all involved. However, it is understood that some risks to safety are present in almost any policing activity.

If at any stage police or observers feel that they are, or will soon be, in a situation where safety is a serious concern either party may terminate the observation session. NSW Police may require that an observer remove themselves from the scene or observers may choose to leave the scene. Observers will heed all police instructions in relation to safety.

We also ask that police 'keep an eye out' for Ombudsman staff during the shift and that the co-ordinator of the operation keeps contact phone numbers for the observers accessible.

Contact with members of the public

Observers will not initiate contact with members of the public during the operation. If members of the public question the presence of the observers, police may give a brief explanation of why they are there, if this is appropriate.

Appendix E. Observational research checklist

Below is the form our researchers used to prepare for observational research:

Station: _____ **LAC:** _____ **Case Study:** _____

Officers attending:

- Check whether LAC has been contacted before. If not, inform EARU of contact first. See below.
- You will usually be advised of the dates and location before any other details. Please make travel arrangements as a priority.

Arrange accommodation and transport (arrange flights and hire car)

Stage 1 – initial contact with LAC

Contact name: _____

Contact phone and fax/email:

Operation dates and times:

Briefing time and location:

- Ask for permission to speak at briefing
- Express intention to conduct interviews after operation – request list of designated roles
- Arrange to discuss risks to observers, police and public safety with operation Commander prior to briefing
- Ask about recommended accommodation

Notes (PTO for more writing space):

Stage 2 – follow up odds and ends

- Fax/email LAC confirmation and information sheet about observational research
- Arrange for 2 emergency contacts

Name and number:

Name and number:

- If necessary, provide 'Guidelines for Observers' for researcher

Stage 3 – essential items

- | | | | |
|------------------------------------|--|---|--|
| <input type="checkbox"/> Back pack | <input type="checkbox"/> Digital watches | <input type="checkbox"/> First aid kit | <input type="checkbox"/> Insect repellent |
| <input type="checkbox"/> Sunscreen | <input type="checkbox"/> Reflector vests | <input type="checkbox"/> Notebooks | <input type="checkbox"/> Voice recorders |
| <input type="checkbox"/> Tapes | <input type="checkbox"/> Spare batteries | <input type="checkbox"/> Laptops | <input type="checkbox"/> Interview questions |
| <input type="checkbox"/> Esky | <input type="checkbox"/> Thermos | <input type="checkbox"/> Digital Camera | |

EARU Notification

We have informed EARU of contact with the following LACs in relation to this review:

- [relevant LACs listed here]

Appendix F. Recording drug dog incidents

As mentioned in Chapter 3 'Methodology', a policy exists to guide police when recording incidents which are the result of a drug dog indication. These guidelines are attached to the form which police must fill out when requesting a drug dog. At the time of writing, these guidelines were given in the following terms:⁵⁶⁴

RECORDING DRUG DETECTION DOG INCIDENTS

The *Police Powers (Drug Detection Dogs) Act 2001* provides Police with the power to use drug detection dogs to detect the presence of illegal drugs on persons in specified places, or by obtaining a warrant.

A drug detection dog will indicate the presence of an illegal drug on a person by sitting next to that person. Once a drug detection dog indicates, Police have a reasonable cause to search the indicated person. The searching officer is responsible for recording drug detection dog incidents as outlined below:

1. Notebooks and the NSW Police Dog Unit Searched Persons/Premises Result Form

All positive indications and subsequent searches should be recorded in officers' notebooks, and on the NSW Police Dog Unit Searched Persons/Premises Result Form provided on Operations involving the dogs.

2. COPS Person Search Event

All searches conducted as a result of a drug detection dog indication should be recorded on COPS as a Person Search Event, with a Search Authority of '*Drugs Misuse and Trafficking Act*' regardless of whether:

- Drugs are found/not found
- Another type of item is found (e.g. a knife)
- The searched person admits/does not admit to contact with illegal drugs

When recording Person Search events as a result of drug dog indications, Police should also take the following into account:

- a. When entering a 'Reason for Search' (i.e. how you determined reasonable cause to search), even if no object was found and no admissions made, your text should include all information which affected your decision to conduct a search, such as
 - The fact that the drug dog indicated the possible presence of an illicit substance on the person
 - Whether the POI's reaction to the drug dog contributed to your decision to perform a search
 - Whether the POI was in a known or suspected location for crime
 - Whether the POI was known to police, and the capacity in which they were known
 - Any admissions made by the POI prior to conducting the search
- b. The narrative for the Person Search incident should contain all relevant information:
 - The location and time of the incident
 - How you developed your reasonable suspicion to search
 - How you addressed the legislative requirements for any police powers you used during the incident
- c. When searches are carried out on a group of individuals as a result of a drug dog indicating the presence of illegal substances on more than one individual in the group, only *one* Person Search incident should be created on COPS. That incident will contain a number of POIs. Do not create a separate Person Search incident for each POI.
- d. Officers verifying events regarding drug dog detections should ensure incidents comply with this Policy.

3. COPS Information Reports

A positive indication from a drug dog does not in itself provide sufficient justification for the filing of an IR.

In the case of a nil find, officers should carefully examine all other available information before deciding to submit an IR (eg admissions of prior use; prior knowledge of the POI; the location where the POI was identified by the dogs etc). IRs should never be submitted simply to record the work activity levels of NSW Police staff. Remember that a COPS 'Person Search' event is the official record of your work and actions.

Officers must be able to justify why they chose to file an IR by completing the appropriate field on COPS. Present requirements for IRs are set out within the 'Policy for the Creation, Classification, Evaluation, Storage, Review and Destruction of COPS Information Reports'. That policy asks officers to ensure they can answer 'yes' to at least one of the following questions:

- Does the IR relate to a person who is the subject of a current intelligence plan, for example, a High Risk Offender (HRO), Medium Risk Offender (MRO) or a Very Important Person (VIP)?
- Does the IR relate to a person who is not a HRO or MRO but is engaging or suspected of engaging in criminal activity or suspected criminal activity?
- Does the IR relate to the activities of a group or organisation who is the subject of a current intelligence plan and/or who is engaging in criminal activity or suspected criminal activity?
- Does the IR relate to a person who has an outstanding warrant?
- Does the IR relate to a known or suspected location for crime?
- Does the IR relate to an entity (non-person) involved in a crime or suspected crime?
- Does the IR relate to a registered Operation?
- Does the IR relate to threats against police or members of the public?

SUMMARY

- 1) All positive indications and subsequent searches should be recorded in officers' notebooks and on the NSW Police Dog Unit Searched Persons/Premises Result Form provided on Operations involving the dogs.
- 2) Each search conducted following a positive drug dog indication should be recorded on COPS as a 'Person Search' event, with an authority under the 'Drugs Misuse and Trafficking Act'.
- 3) The 'Reason for Search' should describe how you formed your reasonable suspicion, that is, how you addressed the legislative requirements to use your powers to search under the Drug Misuse and Trafficking Act.
- 4) Searches carried out on a group should be recorded as one Event with a number of POIs.
- 5) A positive indication from a drug detection dog does not in itself provide sufficient justification for the filing of an IR.
- 6) Under no circumstances should officers be required to file an Information Report (IR) for all positive indications by drug detection dogs.
- 7) In cases where a positive indication from the dogs results in a nil find, officers should carefully consider all available information, and the criteria within the Corporate IR Policy, before deciding to file an IR.

Appendix G. Information sheet issued during fruit fly inspection operations

INFORMATION FOR TRAVELLERS 2003-2004

The NSW Department of Primary Industries operates roadside vehicle inspections as part of its administration of the *Plant Disease Act 1924*.

This inspection place is situated inside the area known as the Fruit Fly Exclusion Zone (FFEZ or Exclusion Zone). The taking of fruit into the Exclusion Zone, unless permission has been specifically granted, is prohibited by legislation.

Entry of fruit into the Exclusion Zone is prohibited because of the risk of transporting the pest Queensland Fruit Fly into the extensive orchard areas in that Zone. Whole fruit that appears unaffected may harbour the pest.

The Act permits fruit found or given by travellers to be seized by inspectors or authorised persons.

Persons, who have brought fruit into the FFEZ, may be required to provide their full name and residential address to an inspector or authorised person. It is an offence to fail to provide this information or to provide false information.

If you have been stopped at an inspection place, and fruit is found in the vehicle or given to inspectors, the fruit will be seized and the Department of Primary Industries will consider the matter, and

- a Penalty Notice (\$200) may be issued and posted to your home address; or
- prosecution action may be taken under the *Plant Diseases Act 1924*

It is important that fruit is not introduced into the Exclusion Zone to maintain freedom from Queensland Fruit Fly in that Zone.

Further information

If you require further information, you may also check the Department's internet website <http://www.agric.nsw.gov.au>



**NSW DEPARTMENT OF
PRIMARY INDUSTRIES**

September 2004

Appendix H. Other relevant legislation

Crimes Act 1900

Section 357C

A member of the police force of or above the rank of sergeant or in charge of a police station or police vessel may at any time with as many members of the police force as he or she thinks necessary:

- a) enter into any part of any vessel,
- b) search and inspect the vessel,
- c) ...
- d) take all necessary measures for preserving peace and good order on the vessel or for preventing, detecting or investigating any offences that may be, or may have been, committed on the vessel.

Police Powers (Drug Detection Dogs) Act 2001

Section 4

- 1) If a police officer is authorised to search a person for the purpose of detecting a drug offence, the officer is entitled to use a dog for that purpose.
- 2) A police officer is, for the purpose of detecting a drug offence, entitled to be accompanied by a dog under the officer's control if the officer is entitled to enter, or be in or on, particular premises in the exercise of the officer's functions.
- 3) ...

Appendix J. Advertisement placed in local and industry newspapers



17299

NSW Ombudsman

Police Drug Detection Operations on Vehicles

The NSW Ombudsman is an independent watchdog organisation. We are currently reviewing a trial which gives NSW Police the power to set up roadside check points in border areas where they stop and screen vehicles for drugs using sniffer dogs.

HAVE YOUR SAY!

As part of our review we are seeking your comments and experiences of these police operations. Your comments will help us in understanding the effect of the trial on individuals and communities. We may use your comments when we report to the NSW Parliament in January 2005. If you provide us with any comments we will not disclose your identity to police, or in our report.

We welcome all feedback and you may contact us by:

WRITING TO:
Drug Detection in Border Areas Trial Review
NSW Ombudsman
Level 24, 580 George Street, Sydney NSW 2000
OR EMAILING: lszaraz@ombo.nsw.gov.au

1800 451 524

(ask to speak to Les)

The above advertisement appeared in the 11 June 2004 issue of *Owner/Driver*.

Similar advertisements appeared in the *Griffith Area News* on 21 May 2004, and in the *Mildura Sunraysia Daily* and *Wagga Daily Advertiser* on 22 May 2004.

Appendix K. List of submissions

- Attorney General's Department
- Australian Long Distance Owners and Drivers Association
- City of Wagga Wagga
- Hay Shire Council
- Ministry for Police
- National Roads and Motorists' Association Limited (NRMA)
- NatRoad
- NSW Police
- NSW Road Transport Association Inc.
- Police Association of NSW
- Roads and Traffic Authority
- UTS Community Law Centre.

Appendix L. Acronyms and abbreviations

Term	Definition
'the Act'	Police Powers (Drug Detection in Border Areas Trial) Act 2003
AJ	Acting Justice
ATO	Australian Taxation Office
CCS	Cannabis Cautioning Scheme (NSW)
CIN(s)	Criminal Infringement Notice(s)
COPS	Computerised Operational Policing System (NSW Police)
DMTA	Drug Misuse and Trafficking Act 1985
Drug Dogs Act	Police Powers (Drug Detection Dogs) Act 2001
FCAN(s)	Field Court Attendance Notice(s)
FED dog	Firearms and Explosive Detection dog
HVP	High Visibility Policing
ICV(s)	In-Car Video(s)
J	Justice
LAC(s)	Local Area Command(s)
LIDAR	Laser speed measuring device
LCM	Local Court Magistrate
MOU	Memorandum Of Understanding
MP	Member of Parliament
NSWPD	New South Wales Parliamentary Debates (Hansard)
OH&S	Occupational Health and Safety
Part 10A	Part 10A of the Crimes Act 1900
POI	Person Of Interest
RBT	Random Breath Testing
RTA	Roads and Traffic Authority
SEIN	Self Enforcement Infringement Notice
SOPs	Standard Operating Procedures
TAG(s)	Target Action Group(s)

NSW Ombudsman

Level 24 580 George St Sydney NSW 2000

Hours of business:

9am–5pm Monday to Friday

or at other times by appointment

Phone: 02 9286 1000

Fax: 02 9283 2911

Toll free (outside Sydney): 1800 451 524

Tel. typewriter: 02 9264 8050

Web: www.ombo.nsw.gov.au