

SUBMISSION TO THE JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT FROM THE CENTRE FOR MARITIME POLICY AT THE UNIVERSITY OF WOLLONGONG

COASTWATCH – HOW IS IT WORKING?

Background

This submission to the review of Coastwatch by the Joint Committee of Public Accounts and Audit (JCPAA) is from the Centre for Maritime Policy (CMP) at the University of Wollongong. The corporate objective of CMP is to contribute to a more comprehensive and coordinated approach to marine affairs and oceans management from the legal and policy perspective. The Centre is a focal point for multi-disciplinary, policy-oriented research, teaching and consulting in Australia and the surrounding regions. Specialist research areas of interest to the Centre include:

- oceans law (including all aspects of the law of the sea), policy, governance and management;
- the management of offshore areas under national jurisdiction;
- maritime enforcement and security;
- marine transport and communications, including marine safety;
- the sustainable use of living marine resources;
- marine science and technology; and
- protection of the marine environment, including measures to prevent pollution.

CMP regularly conducts short courses in the law of the sea and maritime regulation and enforcement. In 1997, the Centre convened a conference in Canberra on *Policing Australia's Offshore Zones: Problems and Prospects* jointly with the Australian Defence Studies Centre at the Australian Defence Force Academy. Papers at this conference comprehensively addressed the range of possible threats in Australia's offshore zones; legal and operational considerations with the enforcement of Australia's maritime jurisdiction; and the political issues which condition arrangements in Australia for policing offshore zones. Particular attention was paid to emerging trends and likely developments in the future. Most of the papers at the conference remain relevant and we would like to draw the Committee's attention to the publication that includes them.¹

¹ Doug MacKinnon and Dick Sherwood (eds), *Policing Australia's Offshore Zones: Problems and Prospects*, Wollongong Papers on Maritime Policy No.9, Centre for Maritime Policy, University of Wollongong, Wollongong, 1997. Other volumes in the series of Wollongong Papers on Maritime Policy relevant to the JCPAA's Review of Coastwatch include:

Tsamenyi, Bateman and Delaney (eds), *The United Nations Convention on the Law of the Sea: What it means to Australia and Australia's Maritime Industry*, Wollongong Papers on Maritime Policy No.3, 1996

Tsamenyi and Herriman (eds), *Rights and Responsibilities in the Maritime Environment: National and International Dilemmas*, Wollongong Papers on Maritime Policy No.5, 1997

Bateman and Rothwell (eds), *Southern Ocean Fishing: Policy Challenges for Australia*, Wollongong Papers on Maritime Policy No.7, 1998

Introduction

This submission first discusses some general trends with Australia's requirements for maritime surveillance and response, and then comments on some issues raised by the performance audit of Coastwatch by the Australian National Audit Office (ANAO). The submission concentrates mainly on the following issues, which are the focus of the JCPAA:

- the role and expectations (both public and government) of Coastwatch;
- the relationship of Coastwatch, as "service provider", and its client agencies, as "service purchasers";
- the adequacy of existing or proposed legislation which underpins Coastwatch's functions;
- whether an Australian Coastguard should be created to take over Coastwatch's functions; and
- some other issues raised by *Audit Report 38, 1999-2000, Coastwatch - Australian Customs Service*.

Developments and Trends

The factors that led to the existing arrangements in Australia for maritime surveillance and response have changed significantly since the Hudson Report in 1987. A fundamental point of this submission is that the Prime Minister's Coastal Surveillance Task Force in 1999 and the ANAO's performance audit took insufficient account of these developments and trends. Specifically these reviews focused mainly on the "boat people" issue. They did not take a holistic view of Australia's requirements for maritime surveillance and response as required to fulfil our rights and obligations under the 1982 UN Convention on the Law of the Sea (LOSC), and reflected in *Australia's Oceans Policy* released in December 1998. We briefly review some of the relevant developments and trends below - with the exception of illegal migration, which was well covered in the 1999 reviews.

Drugs

The major importations of illegal drugs into Australia are by sea. This is reflected in Table 1 that shows that the by far the largest quantities of cannabis seized in 1996-97 used small craft, sea cargo or ship as the means of entry. Use of a ship or small craft can include techniques such as the drugs being slipped over the side in a floating container from a large vessel at a pre-arranged position for later recovery by an Australian vessel, or actual transshipment from a foreign-registered vessel into an Australian fishing vessel or recreational craft that then returns to port without arousing suspicion. We understand from the Australian Federal Police (AFP) that large quantities of illegal drugs enter Australia using techniques such as these.

The biggest ever seizure of heroin in Australia occurred in October 1998. Police intercepted the landing of 434 kgs of the drug as it was being brought ashore on Grant's Beach near Port Macquarie. The drugs had been brought to Australia in the *Uniana*, a converted former Japanese long-line fishing vessel manned by a Chinese and Indonesian crew. The *Uniana* appeared to have been specially modified for her role as a drug smuggler. Additional fuel tanks had been installed and her hold had been modified to

conceal a large seven-metre runabout with a 160hp outboard motor. Her engines were well maintained and she carried sophisticated navigation equipment. The implication is that this may not have been a “one off” voyage to Australia and it is conceivable that the *Uniana* could have escaped suspicion previously due to her similarity in appearance to a long-line fishing vessel.

It may also be relevant to the JCPAA’s review that we believe that two Australian Customs Service (ACS) vessels initially intercepted the *Uniana* but she ignored their signals to stop. The vessel only stopped when the patrol boat, HMAS *Bendigo*, came on the scene and announced that it was an armed naval vessel. This would seem to be a clear demonstration of the importance and deterrent value of armed military or paramilitary patrol vessels for undertaking enforcement activities in offshore areas.

Table 1
Customs Cannabis Seizures 1996-97

Means of Entry	Total	Average Weight (g)
Air Cargo	7	452
Air Passenger or Crew (body)	102	20
Air Passenger (baggage)	98	36
Aircraft Search	1	3
Light Aircraft	1	20,000
Small Craft	8	1,020,317
Parcel Post	687	1.70
Sea Cargo	6	934,087
Sea Crew	1	11
Ship Search	19	551,901
Total	930	

Source: Customs (as reported in *The Australian*, 12 November 1997)

Illegal Fishing

Greater pressure on marine living resources is evident around the world due to increased demand for seafood and the depletion of fish stocks through over-fishing. These factors largely explain activity by foreign fishing vessels in northern Australian waters, and foreign interest in fishing off Australia’s sub-Antarctic islands. All indications are that illegal fishing in Australian waters will increase. The advent of illegal fishing off Heard and McDonald Islands in the Southern Ocean, and possibly also in the future off Macquarie Island and the Australian Antarctic Territory (AAT), has brought a new demanding geographical dimension to coastal surveillance requirements.

The international community has responded to concern over the state of particular fish stocks by a range of global, regional, multilateral and bilateral agreements for fisheries management. Notable among these is the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea (UNCLOS) relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the *Fish Stocks Agreement*). This agreement provides for an elaborate system of compliance and enforcement, including the possibility of physical inspection of vessels on the high seas. Australia will almost certainly become a party to this agreement, which is not yet in force. The *Fisheries Legislation Amendment Act (No 1) 1999* puts in place legislation to amend the *Fisheries Administration Act 1991* and *Fisheries Management Act 1991* to implement the *Fish Stocks Agreement*. We need to consider what these developments mean for our system of maritime surveillance and response.

Marine Pollution

Growing concern for the health of the marine environment is increasingly evident around the world, including in Australia. This concern is evident in reports to the Federal Government, such as the State of the Marine Environment Report, the Torres Strait Shipping Study, and the Report by the Australia and New Zealand Environment and Conservation Council (ANZECC) on Maritime Accidents and Pollution. Coastal states have enforcement powers under LOSC Article 220 in respect of vessels navigating in the EEZ or territorial sea of the state and committing a violation “resulting in a substantial discharge or threatening significant pollution of the marine environment”. The Australian Maritime Safety Authority (AMSA) has prosecuted vessels for these types of offence but so far these prosecutions have been well after the event. Enforcement action at sea may be necessary in the future.

Maritime Terrorism

Offshore oil and gas installations in Australian waters may become targets for maritime terrorists or pirates, particularly the installations in northern waters where they are closer to areas of civil unrest and economic difficulties. Destroying or “hijacking” offshore platforms or sabotaging pipeline systems could become real threats in the future. The security of these installations requires consideration as part of the overall arrangements for maritime surveillance and response.

The Changing Requirement

The requirement for maritime and coastal surveillance in Australia was enlarged by the LOSC, which entered into force in 1994. Australia was one of the big “winners” from that convention gaining one of the largest EEZs in the world. Australia has an enormous maritime area (at least 11.9 million sq. km²) where we have either sovereignty or

² 11.9 million sq.km is the size of the EEZ and continental shelf extension around the mainland of Australia and the island territories. The figure is 14.8 million sq.km when the Australian Antarctic Territory is included as well. P.A. Symonds & J.B. Willcox, “Australia's petroleum potential in areas beyond an Exclusive Economic Zone”, *BMR Journal of Australian Geology and Geophysics*, Vol.11, No.1, Table 1, p.14.

sovereign resource rights, as well as an obligation to protect and preserve the marine environment. This area includes the maritime zones (territorial sea, contiguous zone, EEZ and continental shelf)³ adjacent to the Australian mainland, and around Australia's island territories and the AAT. Collectively these zones are referred to as *Australia's marine jurisdictions*⁴. Australia also has jurisdiction on the high seas in respect of Australian-flag vessels, piracy, and drug trafficking and fishing in particular circumstances.

In addition to the surveillance and enforcement task, Australia has accepted responsibility for a very large search and rescue area (SAR) stretching from about half way across the Indian Ocean to the Coral and Tasman Seas and South to Antarctica. This area is equivalent to about one-ninth of the earth's surface. Like surveillance, maritime SAR missions usually involve a search by aircraft and a response by surface ship (or helicopter). Because of the similarity of the capabilities involved, maritime SAR is a task closely related to coastal surveillance.

The extent of maritime activity in Australia's marine jurisdictions continues to grow with increased shipping traffic and a higher level of exploitation of offshore hydrocarbons. The number of offshore oil and gas installations in Australia has increased in recent years, particularly in waters off northern Australia, including in the Timor Gap Joint Development Area.

It is striking how the focus of coastal surveillance in Australia has varied over the years. Initially on illegal fishing (in the late 1960s and early 1970s), the focus shifted to illegal migration (with the Vietnamese "boat people") in the mid- and late 1970s, and then the emerging drug problem in the late 1980s before returning in the late 1990s to "boat people". This changing focus has led to an excessively reactive approach to maritime surveillance and enforcement in Australia that is evident in the successive reviews of coastal surveillance (even *littoral* surveillance for a period), and has distorted their recommendations towards one threat or another. We believe that it is necessary to stand back and take a holistic view of Australia's requirement for maritime surveillance and enforcement as part of our general responsibility to look after and manage the very large maritime area over which Australia now has jurisdiction. A piecemeal and sectoral approach is no longer adequate and has been described as "hardly worthy of a sophisticated and wealthy nation"⁵.

Our ability to deal effectively with threats such as illegal migration, drugs, illegal fishing and marine pollution are as much part of preserving national security as is the maintenance of military forces to protect against conventional military threats. Yet no single agency in Australia accepts a responsibility for ensuring maritime security *in toto*.

³ For a succinct description of the legal and constitutional framework of Australia's marine areas, refer to Government of Australia, *Australia's Oceans Policy, 1*, Environment Australia, Canberra, 1998, Appendix 2, pp.41-42.

⁴ *Australia's Oceans Policy*, 1, p.7.

⁵ Michael O'Connor, "A Coastguard for Australia?" in MacKinnon and Sherwood, *op.cit.*, p.270.

Australia's Oceans Policy

Australia now has in place a framework for integrated planning and management for all of Australia's marine jurisdictions. This framework is provided by *Australia's Oceans Policy* released by the Federal Government in December 1998. This provides an overall policy context in which coastal surveillance and response must be considered. The first goal of *Australia's Oceans Policy* is "To exercise and protect Australia's rights and jurisdiction over offshore areas, including offshore resources."⁶

Australia's Oceans Policy takes a holistic view of Australia's maritime interests, including ways and means of protecting our national interests at sea. In a section on Surveillance and Enforcement, the policy notes that the challenges are:

- to ensure that there is an effective and efficient surveillance capacity for Australia's marine jurisdictions; and
- to ensure effective enforcement of national legislation throughout Australia's marine jurisdictions.⁷

We believe that the principles of integrated oceans management incorporated in *Australia's Oceans Policy* should now be reflected also in our national arrangements for maritime surveillance and response. Essentially, the current arrangements with Coastwatch, and its relationships with its client agencies, reflect an outmoded and discredited sectoral approach to oceans management.

Response of Other Nations

An independent coastguard service is the preferred option of most maritime nations. The ANAO's performance audit of Coastwatch refers to the US, UK and Canada. While these are important archetypical nations for Australia, we believe that other important examples are available in the Asia Pacific region, particularly the Indian Coastguard⁸ and the Japanese Maritime Safety Agency⁹ (which we understand was recently re-designated as the Japanese Coastguard). In the early 1990s, many commentators thought that increased national jurisdiction at sea would lead to navies placing a greater emphasis on their policing role rather than war-fighting *per se*. In fact this trend has not emerged. Rather navies are focusing more on their primary role, even with some shedding their policing duties, and countries are tending more to build up coastguard services. Some countries, such as the Malaysia, Philippines and Vietnam, which did not previously have Coastguards, are now establishing them.

The Public Interest

Recent incidents involving drug smuggling and the entry of illegal "boat people" have attracted considerable media and public interest. There would seem to be a clear

⁶ *Australia's Oceans Policy*, 1, p.4.

⁷ Government of Australia, *Australia's Oceans Policy, 2: Specific Sectoral Measures*, Environment Australia, Canberra, 1998, p.40.

⁸ See CAPT Vijai Singh Chaudhari, "India" in MacKinnon and Sherwood, *op.cit.*, pp.187-192.

⁹ See CDR Tomohiro Inami, "Japan", in MacKinnon and Sherwood, *op.cit.*, pp. 193-199.

community desire for more effective coastal and maritime surveillance and response arrangements in Australia. The community's performance criteria is that illegal activity in Australia's marine jurisdictions should be detected and drugs and "boat people" intercepted as early as possible. Meeting this requirement has implications both for the level of surveillance and response capabilities available and their deployment. Similar considerations apply to our ability to deal with SAR incidents.

Performance Audit by ANAO

The following are comments on some issues raised by the performance audit of Coastwatch by the ANAO.

Legislation

Paragraph 3 of the Summary to the Audit Report notes that Coastwatch is not established "under specific surveillance and response legislation" and that "Coastwatch undertakes its responsibilities pursuant to legislation governing immigration, fisheries, quarantine, environmental protection and customs". It seems curious that this matter was not pursued elsewhere in the performance audit as we believe that the current situation with legislative arrangements is unsatisfactory and does not lend itself to an effective surveillance and enforcement regime for *Australia's marine jurisdictions*.

We believe that it would be timely now to consider the introduction of integrated surveillance and response legislation to provide the legal framework for regulation and enforcement in *Australia's marine jurisdictions*. This would ensure that there was no ambiguity or inconsistency in the way in which surveillance and response operations are conducted. The issues to be covered in such legislation include:

- administrative arrangements;
- powers of enforcement;
- use of force;
- relationship with other legislation (eg, *Crimes at Sea Act*);
- Federal-State issues (including the employment and powers of State water police officers);
- rules of evidence; and
- cooperation with regional bodies (eg, Forum Fisheries Agency), and implications of regional treaties (eg, Treaty of Niue).

Marine Pollution

The Audit Report indicates in paragraph 1.12 that the types of services regularly requested by Coastwatch key clients include *inter alia* "monitoring of pollution damage to the environment". In view of Australia's fundamental obligation in LOSC Article 192 "to preserve and protect the marine environment" and the enforcement powers available to Australia under LOSC Article 220, we are surprised that the services requested of Coastwatch do not include "detection and prevention of marine pollution" rather than just the monitoring of pollution damage. This would seem to be an example both of the deficiencies of the existing arrangements and of Australia's failure to put in place

effective arrangements for the surveillance and enforcement of Australia's laws in offshore areas under national jurisdiction.

Law of the Sea

Footnote 55 on page 57 of the Audit Report should refer to the UN *Convention* on the Law of the Sea rather than to a *conference*. There have been three UN conferences on the Law of the Sea since the 1950s, the third of which produced the convention which is now the basis of international law covering *inter alia* the rights and obligations of coastal States over adjacent maritime areas.

Need for Integration

The Audit Report frequently makes comments that suggest a clear need for a higher level of integration of surveillance and response activities although it does not make any recommendations in this regard. For example, the ANAO “found no evidence of a common risk assessment process to rank various client taskings against one another” (Paragraph 2.25) and noted that “there are occasions when client taskings conflict” (Paragraph 2.29). The need for a more integrated approach to surveillance and response is also suggested by DIMA's response to a recommendation in an earlier Audit Report (Paragraph 2.8) and the problem with marine pollution noted above.

Attributed Funding Approach

While not making a specific recommendation on this issue, the Audit Report indicates that the ANAO sees merit in the ACS trialing a model involving costs being allocated to the relevant clients on a user-pays basis (Paragraph 2.45), and that “In the longer term, Coastwatch could assign actual mission costs on a percentage basis to clients” (Paragraph 2.43). We share both the concerns of the Hudson Report that this approach would conflict with the notion of a public good and the views of the ACS that “an attributed funding approach is likely to prove administratively unwieldy and may reduce operational responsiveness and flexibility to constantly changing threat parameters” (Paragraph 2.47). Surveillance and response in our offshore zones is a vital element of our national security, and, like the Defence Force, should be seen as a public good. The attributed funding approach would also seem to conflict with the objective of greater integration of surveillance and response that has been supported implicitly in other parts of the Audit Report.

Black Flights

The Audit Report identifies numerous problems with monitoring and identifying suspect illegal (black) flights into Australian airspace and notes in Paragraph 2.74 that “Previous reports on Australia's civil surveillance and response service have not addressed which government agency should manage the issues related to black flights”. While the involvement of Coastwatch staff in the Integrated Surveillance System Development (Report Paragraph 2.76) will help, the incidence of black flights is another problem that suggests a need to elevate the status of Coastwatch with lead responsibility for dealing with this problem.

Training of Coastwatch Personnel

We share the views in the Audit Report about the significance of the technical skills of Coastwatch operations staff, aircrews and patrol vessel crews. The Report notes the concern of Coastwatch clients about the training of ACS seagoing personnel (Paragraph 3.32). These comments suggest that the education and training of personnel involved in coastal surveillance and response operations, particularly ACS and Coastwatch personnel, require investigation. If the ACS vessels and their crews are to be armed then good training and discipline will be even more essential.

Effective surveillance and response requires that people in operational positions have good knowledge of the maritime environment, encompassing for example, ship recognition, meteorology, different types of fishing, fishing patterns, marine jurisdictional zones, national legislation, international legal regimes, national oil spill response arrangements, capabilities of surveillance response assets, marine communications systems, SAR services, etc. The necessary standards will not be achieved while there is high contractor staff turnover (Paragraph 3.16) and Coastwatch does not have direct managerial control of many of those responsible for providing services to Coastwatch clients. They are the standards that will only be achieved by a fully professional and committed organisation.

Patrol Boat Capabilities

We share the concerns of Coastwatch clients noted in Paragraph 3.32 of the Audit Report regarding the capabilities of the ACS Bay Class vessels. The later comment in Paragraph 3.36 of the report that “the FCPBs have few comparative advantages over the BCVs” is misleading. Apart from the significant differences already noted in that paragraph, the FCPBs are larger and faster with significantly longer range and better seakeeping qualities than the BCVs. ACS press releases have stated that the BCVs have a range of 1,000 nautical miles and a maximum speed of only 20 knots. These figures are well below equivalent ones for the FCPBs.

Intelligence

We are concerned about a possible tendency in the Audit Report to over emphasise the importance of intelligence. Good intelligence is clearly essential and the lack of intelligence and poor coordination of intelligence have been significant problems in the past but we need to be cautious about placing too much reliance on intelligence. To use a policing analogy, deterrence of crime requires police “on the beat” rather than sitting back in the station awaiting intelligence or reports of crime.

Conclusions

Australia faces a law enforcement challenge with maritime surveillance and response but our present system is an unsatisfactory answer to that challenge. We believe that it is inevitable that Australia will eventually move to an autonomous, professional, paramilitary organisation with responsibility for coordinating maritime surveillance and response operations in our offshore areas. It will be established by its own legislation and the personnel staffing shore headquarters, flying in its aircraft, and manning its

patrol vessels will be members of a properly trained and disciplined force. We may not in the first instance call this organisation a Coastguard but that is what it will be. It would also make sense if this service assumed responsibility for maritime SAR, as well as certain of the responsibilities for marine environmental protection that currently sit with either AMSA or Environment Australia, often somewhat unclearly.

We submit that the current national arrangements for regulation and enforcement of Australia's laws in offshore zones fall short of being an efficient system. The current system of "partnership and shared responsibility" has passed its "use-by date". The current system also suffers "because of its private enterprise operation and civilian status"¹⁰. Coastal surveillance is a vital national task that requires a para-military, or even a military organisation with proper equipment and appropriately trained and disciplined personnel. However, under current arrangements, Coastwatch operational staff are civilians recruited "off the street", receive little formal training and may lack adequate ship skills and marine environmental awareness. Similarly the crews of ACS vessels are civilians. The ACS is understood to be seeking amendments to its legislation to allow the ACS vessels and their crews to be armed but it is not on the public record how this will be achieved.

The maritime surveillance and enforcement task in Australia involves a multitude of agencies with overlapping responsibilities and powers. Continuing to draw a distinction between civil surveillance and military surveillance may well be a luxury that Australia cannot afford. This distinction may have made sense when the civil area of interest was mainly along the littoral. It may make less sense now that the civil surveillance area is much larger and the surveillance systems required are more technologically advanced and expensive. Coastal and offshore surveillance and response are vital elements of national security.

None of the recent reviews of the maritime surveillance and response arrangements have taken a comprehensive view of the policing tasks in our offshore areas. They have tended to emphasise *means* (i.e. the organisational arrangements and operational capabilities) rather than *ends* (i.e. the protection of our national maritime security, the enforcement of the full range of our national maritime laws, and the discharge of Australia's obligations as a party to the LOSC and other international treaties).

Who prepared this submission

This submission was prepared by the following CMP staff members:

- **Professor Martin Tsamenyi** is the Director of CMP and a Professor of Law at the University of Wollongong. He was previously at the University of Tasmania, University of Papua New Guinea and Australian National University. His special areas of expertise and interest include the law of the sea, fisheries and marine environmental law. He convenes and lectures in the short courses in Law of the Sea and Maritime Regulation and Enforcement conducted by CMP. Between 1997 and 1999, Professor Tsamenyi was attached to the Forum Fisheries Agency in Honiara as

¹⁰ *The Weekend Australian's* editorial of 20-21 March 1999.

specialist legal adviser on the introduction of vessel monitoring systems (VMS) in the South Pacific. Most recently, he has conducted a review for Environment Australia of Commonwealth and State legislation relevant to the implementation of Australia's Oceans Policy.

- **Associate Professor Sam Bateman** retired from the Royal Australian Navy in 1993 with the rank of Commodore and took up a position at CMP where he is now a Principal Research Fellow. His naval service included four ship commands and several postings in the strategic and force development policy areas of the Department of Defence in Canberra. He has written extensively on defence and maritime issues in Asia Pacific and the Indian Ocean. He is a member of the National Oceans Advisory Group in Australia and Joint Chairman of the Council for Security Cooperation in Asia Pacific (CSCAP) Working Group on Maritime Cooperation.

We would be pleased, if required, to give oral evidence at a public hearing of the JCPAA. The issues being addressed by the JCPAA's review of Coastwatch are of great national importance. They are fundamental both to Australia's security and the exercise of our rights and obligations in the very large maritime area over which Australia has accepted some form of jurisdiction.