



## DEPARTMENT OF DEFENCE

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SP 279/00

10 November 2000

Dr John Carter  
Secretary Coastwatch Inquiry  
Joint Committee of Public Accounts and Audit  
Parliament House  
CANBERRA ACT 2600

### JCPAA INQUIRY INTO COASTWATCH – SUPPLEMENTARY QUESTIONS FOR DEFENCE

Dear Dr Carter

Thank you for your letter of 5 September 2000 inviting Defence to provide further information following the appearance of Defence witnesses before the Committee on 18 August.

Enclosed are the answers to the supplementary questions from the Committee, as approved by the leader of the Defence witnesses, Mr Allan Behm. I regret the late response.

In relation to the first question, on 'Black Flights,' I am enclosing separately a classified report by Northern Command on 'Black Flights in the NORCOM Area of Operations' dated 7 September 2000. This report supersedes the report done on the same subject in March 1999. Defence considers it more informative and reliable than the earlier report.

The NORCOM report is provided subject to handling according to the provisions for storing information with a national security classification and cannot be published in any form.

Yours sincerely

Murray Perks  
A/Director General  
Strategic Policy Branch

## JCPAA REVIEW OF COASTWATCH

### ISSUES ARISING FROM DEFENCE EVIDENCE

*1. The Committee understands that on 22 March 1999, Lieutenant Colonel Patrick Gallagher, NorCom, gave a presentation to officers from ANAO and ACS, on the 'Black Flights' issue. The ANAO subsequently requested a copy of this presentation from Admiral Barrie, via Major General Connolly and Commander Ingram. The Committee requests that you provide:  
a copy of this presentation; copies of any reports or work subsequently done on this issue; and any commentary you may care to make.*

The presentation given by LTCOL Gallagher on 'Black Flights' was in March 1999. The most recent NORCOM presentation on the subject is dated 7 September 2000. A copy has been separately made available to the Committee.

The first NORCOM presentation in 1999 was an initial analysis only, simply assessing the potential number of Unidentified Air Movements, and establishing a baseline for analysis. It was unable to come to any conclusions about the proportion of these movements that could be classified as suspicious (or 'black') flights. The recent study is more rigorous, although it notes that the data are still incomplete and inconclusive. With this caveat in mind, it represents the best guess assessment of the 'black flights' problem. The subject will remain a continuing interest for Defence and the surveillance community.

*2. On page 2 of your submission you commented that "the role of Coastwatch in coordinating both civil and military assets in support of the Civil Surveillance Program is not well understood in the wider community."*

*Would you elaborate?*

*How should Coastwatch or any other agency address this issue?*

This comment reflects the complex nature, levels of control, and degrees of accountability that are necessary when one agency coordinates assets from different organisations to perform a multitude of tasks for many clients. Each service provider has responsibility for the provision of effective and efficient assets that can provide the required service. Each asset must comply with appropriate aspects of laws both domestic (Border Protection Act, Immigration Act, Fisheries Act etc) and international (Law of the Sea). Each organisation has responsibility to different Federal Ministers for compliance with these laws and, similarly, each 'client agency' has objectives and requirements to uphold under domestic and international law, together with their own individual chains of accountability.

Coastwatch does not 'own' assets (although it leases several), but is responsible for meeting the objectives of its clients (in much the same way that a contractor or a producer fulfills an accepted task). Command and control is therefore a complex matter.

The role of Coastwatch does not then fit the more general practices of Government management whereby responsibilities are defined, authority articulated and assets, including financial assets, are allocated by a single agency. This leads to some misunderstanding of Coastwatch's role. In the public perception there is difficulty, for example, in associating images on television of the Navy detaining suspected illegal immigrants and fishermen with the overall responsibilities of Coastwatch for conducting the civil surveillance program.

A public information campaign by Coastwatch might usefully address this issue.

*3. On page 8 you stated that 'In the Southern Ocean and elsewhere beyond the EEZ, the adequacy of both civil and military assets to meet existing and future tasking requirements - in particular with regard to fisheries issues - is of national concern.' What sort of vessels would be required for southern Ocean patrols? What would they cost?*

The sub-Antarctic Southern Ocean is a stormy region with wind and wave conditions throughout the year that are similar to those in the North Atlantic in winter. This makes it a challenge to carry out safe and effective operations. Any vessel required to operate throughout the year in this region would need to be particularly robust to handle winter weather conditions. During the relatively benign summer period of October – March, operating conditions are more acceptable for both vessels and crew. But even during the October – March window, smaller vessels are unable to sustain operations for extended periods due to the underlying swell.

The 70-metre civil charter vessel which has undertaken four AFMA patrols in the region during the October – March window has proved adequate for the task of providing a deterrent presence, but could experience difficulties were it necessary to transfer personnel by boat to another vessel in typical sub-Antarctic conditions.

A larger vessel with a helicopter capability would be required to effectively operate in the region with a capacity to safely board other ships. Such a vessel should be in excess of 100 metres, have a deep draft, be designed for the purpose and built to an ice-strengthened classification. The cost of such a vessel is estimated to be \$25–30m (without embarked helicopter).

*4. The AFMA submission page 3 raises the use of contracted civilian vessels for southern Ocean patrols and comments its foreign fishing compliance program requires an armed vessel with armed crew.*

*If civilian vessels were contracted to undertake Southern Ocean surveillance, should they have armaments? If so what type of weaponry?*

*If civilian vessels were armed, what are the implications?*

There are a number of aspects to this issue.

A civilian charter vessel (CCV) has been contracted by AFMA to undertake Southern Ocean surveillance patrols in the Heard Is and Macdonald Is (HIMI) EEZ since October 1998, and other patrols in the region are planned. HIMI surveillance and

deterrence patrols using a civil charter vessel have been most successful to date, and there has been no evidence of the resumption of illegal, unlawful or unregulated fishing activity inside the HIMI EEZ since February 1998.

The vessel conducting these patrols has not been armed and has not carried armed boarding parties. Defence does not consider that armed civil vessels are necessary for Southern Ocean patrols. Illegal operations appear to have been deterred by Government decisions in December 1997 to:

- upgrade surveillance, monitoring and appropriate enforcement measures using CCV; and
- conduct ADF deployments in appropriate circumstances to deter and apprehend illegal Foreign Fishing Vessels.

**Vessels on government non-commercial service (GNCS).** The Law of the Sea recognises vessels on non-commercial government service, as opposed to warships. Such vessels are accorded essentially the same immunities as warships (Arts 29-32, 95-96 LOSC). The fact that the vessel might be contracted rather than owned by the government would not appear to affect the non-commercial government service status of the vessel.

**Use of GNCS vessels in maritime law enforcement.** The Law of the Sea recognises the use of GNCS vessels in maritime law enforcement in Art 111 – the Right of Hot Pursuit. This article allows for the pursuit of vessels where there is “good reason to believe that the ship has violated the laws and regulations of [the coastal] State”. The right of hot pursuit may be exercised by GNCS vessels “clearly marked and identifiable as being on government service and authorized to that effect.” By way of example, Australian Customs Service vessels fly an Australian Flag with the words “CUSTOMS” written on it in large white letters, in addition to other markings on the vessel. The Law of the Sea also recognises the use of GNCS vessels under Article 110 – Right of Visit on the High Seas. This provision allows for investigation of vessels on the high seas on suspicion of engagement in piracy, slaving, unauthorised broadcasting, flying a false flag or being without nationality.

**Contracting.** Commercial shipping law is not an area of Defence legal expertise. It would be important, however, to ensure that any civil contract provided for appropriate control over the vessel to allow it to perform its tasks. Some areas that would require investigation include whether the vessel’s insurer accepted law enforcement tasking, or whether there was any dispute or encumbrance over the vessel that could lead to it being arrested or diverted. Significant issues also arise from the status of the crew. There would need to be authorised officers able to exercise powers on behalf of the Commonwealth. Arrangements for contracted crew would also need to ensure that they could fulfil their tasks. Examples of potential problems include disputes with third party employment agencies over pay, or the extent to which contracted personnel could be required to perform incidental law enforcement tasks.

**Arming of contracted civilian vessels and personnel.** It would appear to be legally possible to arm GNCS vessels. It could also be possible to swear civilians who are not already members of the ADF, Police or Customs as special members of the Australian Federal Police for the purpose in question. There are, however, significant issues to take into account. The first is the competence of civilian personnel on a civilian vessel to apply force lawfully or effectively. The law relating to the use of force in normal community policing is complex, and the consequences of the misapplication of force are obviously grave. The use of force in maritime law enforcement is further complicated by the greater complexity of the law as well as sea conditions, confined spaces and cross-cultural issues. Customs and Navy personnel receive training to enable them to undertake their tasks. A great deal of consideration would have to be given to ways in which contracted civilian personnel could undertake similar tasks lawfully, safely and effectively. The Australian Federal Police would be best placed to advise on this.

The question of competence extends to the issue of vessel armaments. It would be necessary to train a civilian crew to the same standards that apply to the control of applications of force by the military. There is a further question of having weapon systems that only inflict a lawful and appropriate amount of damage. Such damage might be technically difficult to achieve in the challenging Southern Ocean environment. In this respect it is useful to note that the Australian Customs Service chose not to arm its vessels with mounted weapons because of concerns about their accurate use, preferring to arm only its crews for the purpose of self-defence.

**Armed civilian vessels in time of armed conflict.** The San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994) is accepted as the best statement on the current law in its subject area. Paragraph 60(f) states that enemy merchant vessels, which may be taken to include GNCS vessels, may be attacked as military objectives if they are, "armed to an extent that they could inflict damage to a warship. This excludes light individual weapons for the defence of personnel...". Such a definition would most likely render armed GNCS vessels liable to attack in time of armed conflict.

*5. What is the estimated leadtime for the replacement of the RAN Fremantle vessels from contract to water?*

*Given that a large proportion of their time is likely to be spent on Coastwatch tasks, how extensively have you consulted with Coastwatch or its clients? Would you provide some detail.*

The lead-time from contract to water depends on the shipyard. The best case would be about 12 months, the average 18 months.

Relevant areas of the Department of Defence and the ADF, such as Capability Systems Division, Navy Headquarters, the various Force Element Groups and Headquarters Australian Theatre maintain a close working relationship with Coastwatch and its client agencies, particularly AFMA. There has been a range of ongoing discussions with Coastwatch on the issue of replacement of the patrol boats. The Head of Capability Systems Division in the Department of Defence is currently

sponsoring a study into patrol boat operations and the required numbers of replacement vessels. Both Coastwatch and AFMA, along with the Defence Science & Technology Organisation and other agencies, are involved in this study.

*6. At the public hearing, the Committee noted your response (Transcript p. 41) in relation to Defence taking over the coordinated function of Coastwatch. Would you expand on your comment?*

Defence believes that it is inappropriate to take responsibility for coordination of all the functions of Coastwatch. Defence is primarily responsible for the defence of Australia, and available resources must be directed first and foremost to that purpose. In the final analysis this involves the concerted use of high levels of violence, under the authority of the Government, to destroy an enemy. Coastwatch involves, by contrast, the use of policing powers with minimal use of force.

While ADF assistance to Coastwatch has been authorised by government as an appropriate additional use of ADF assets, Defence believes that it is important to maintain this fundamental distinction in philosophy and functions.