The evolution of the role of Australian customs in maritime surveillance and border protection.

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THE EVOLUTION OF THE ROLE OF AUSTRALIAN CUSTOMS

IN MARITIME SURVEILLANCE AND BORDER PROTECTION

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requirements for the award of the degree**

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CERTIFICATION

I, Matthew James Bannon, declare that this thesis, submitted in partial fulfilment of the requirements for the award of Master of Maritime Studies, in the Faculty of Law, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualification at any other academic institution.

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DISCLAIMER

This thesis is presented in accordance with the assessment requirements of THES 912.

The views expressed are entirely the author's own and do not reflect those of the Australian Customs Service or the government.

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TABLES, DIAGRAMS AND IMAGES

ABBREVIATIONS

ACV	Australian Customs Vessel
ADF	Australian Defence Forces
AFMA	Australian Fisheries Management Authority
AFP	Australian Federal Police
AMIS	Australian Maritime Information System
AMSA	Australian Maritime Safety Authority
AQIS	Australian Quarantine and Inspection Service
DFAT	Department of Foreign Affairs and Trade
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs (now the Department of Immigration and Citizenship)
DITR	Department of Industry, Tourism and Resources
DOD	Department of Defence
DOTARS	Department of Transport and Regional Services
EEZ	Exclusive Economic Zone
Fixed Platform Protocol-	Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988
GBRMPA	Great Barrier Reef Marine Park Authority
GEOSS	Global Earth Observation System of Surveillance
JPDA	Joint Petroleum Development Area
JOPC	Joint Offshore Protection Command (now Border Protection Command, as at 23 October 2006)
LOSC	United Nations Convention Law of the Sea
MOU	Memorandum of Understanding
NMU	National Marine Unit
OCS	Offshore Constitutional Settlement
PM&C	Department of Prime Minister and Cabinet
PSI	Proliferation Security Institutive
RAAF	Royal Australian Air Force
RACS	Review into the Australian Customs Service
RAN	Royal Australian Navy
SOPs	Standard Operating Procedures
SUA	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988
UAV	Unmanned Aerial Vehicle
WMD	Weapons of Mass Destruction

ABSTRACT

Customs maritime surveillance history has been influenced by numerous reports that often identified the need for management changes or infrastructure changes. This thesis analyses the evolution of the Australian Customs Services' role in Australia's maritime surveillance and border protection. The analysis framework is built around policy, financial and legal influences and developments.

The thesis recommends implementing a comprehensive harmonized strategy for early detection and effective responses.

This thesis argues that there are only two organisations capable of sustaining an effective maritime surveillance and enforcement capacity and they are the Australian Customs Service (Customs) and the Australian Defence Force (ADF). The suggestion that a single Australian coastguard organisation is another option is analysed in this thesis and discounted. The thesis looks at Customs evolution in maritime surveillance and border protection from pre-Federation to mid 2005 and forecasts some alternatives that could advance maritime surveillance and protection policy.

This thesis is important because competing world priorities, including terrorism *versus* trade, in turn, can lead to rapid policy competition for government funding, which can lead to poor policy choices.

Acknowledgements

Chapter One

Early Constabulary Maritime Evolution

Introduction

Australian maritime surveillance policy is at a crucial point. There are only two

organisations capable of sustaining an effective maritime surveillance and

enforcement capacity and they are the Australian Customs Service (Customs) and the

Australian Defence Force (ADF). The suggestion that a single Australian coastguard

organisation is another option is analysed in this thesis and discounted. The recently

formed Joint Offshore Protection Command (JOPC) is a better outcome for Australia

than the concept of a 'coastguard' for both the two primary organisations and for the

detection and protection of Australia's marine environment[1]. This thesis will look at

Customs evolution in maritime surveillance and border protection to mid 2005 and

forecast some alternatives that could advance surveillance and protection policy.

Customs maritime surveillance history has been influenced by numerous reports that

often identified the need for management changes or infrastructure changes. The

reports from the *Prime Minister's Coastal Surveillance Task Force* and *Prime*

Minister's Task Force on Offshore Maritime Security, highlight current maritime

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[1] Since preparing this thesis the Joint Offshore Protection Command (JOPC) has been renamed the
Border Protection Command (BPC), although the structure and responsibilities are largely unchanged.
References to JOPC can be read as a reference to BPC.

surveillance threats albeit with a focus on people smuggling and counter-terrorism[2].

This thesis analyses the evolution of Australian Customs role in Australia's maritime surveillance and border protection in response to the ever changing horizon of threats. The analysis is against the policy influences of politics, finance and law.

The main outcome of this thesis is the recommendation to implement a comprehensive harmonized strategy for early detection and effective responses across Australia's maritime boundaries. The recommendation includes a new approach consistent with international law and in an environment of multi-State cooperation. This thesis is important because competing world priorities, including counter-terrorism versus trade, which in turn, leads to rapid policy competition for government funding, can lead to poor legislative, operational and infrastructure policy choices.

The theoretical model used for the thesis is loosely based on the 'four frames' for studying organisations[3]. The analytical theme of the thesis will follow the political, financial and legal policy influences on Australian maritime policy over the recent past. The primary sources of information will be the numerous Parliamentary reviews and reports conducted into civil coastal surveillance during the period 1981 to 2004.

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[2] Department of Prime Minister and Cabinet, *Report of the Prime Minister's Coastal Surveillance Task Force*, July 1999; and Department of Prime Minister and Cabinet, *Taskforce on Offshore Maritime Security* report, November 2004.

[3] Bolman Lee & Deal Terrence, *Reframing Organizations*, Jossey-Bass Inc: San Francisco, 1991. The authors evaluate various organisations in their book against *structural*, *political*, *technological* and *cultural* comparisons.

The thesis will illustrate the difference between the original impetus for Customs maritime involvement and the impetus driving contemporary Customs maritime functions. These differences provide stimulus and the policy consideration framework for enhancing Australia's maritime surveillance strategy.

Sources of Analysis

An example of what the thesis regards as the more significant papers, reviews and framework begins with the policy impact of the 1982 United Nations Convention on the Law of the Sea (LOSC)[4]. Australia ratified LOSC in 1994 and this was incorporated into domestic legislation by way of the *Maritime Legislation Amendment Act 1994*. Other international influences are acknowledged throughout the thesis including the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (1988 Vienna Convention)[5] and international case law.

The thesis will focus on considering the many domestic reports and reviews into coastal surveillance and protection[6]. A brief comment linking Customs early maritime role with the present provides the operational context. The main body and focus of the thesis is from 1980 to July 2005. The various reviews were brought about in response to concerns over quarantine and illegal fishing, then later in

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[4] United Nations Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, *The Law of the Sea: United Nations Convention on the Law of the Sea,* United Nations, New York, 2001; also at http://www.info.dfat.gov.au/treaties/.

[5] United Nations, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, United Nations, New York, 1988; also at http://www.info.dfat.gov.au/treaties/.

[6] Reviews and reports to be used in the thesis are listed in the bibliography.

response to illegal immigration arrivals and later again, in response to narcotic arrivals. An initial view is that the pattern of maritime policy setting in Australia has been to respond to incidents by having a review rather than by dedicating attention or efforts to any strategic sense of surveillance and holistic maritime border protection.

The analysis takes the more recent and influential reviews and dissects key findings against the major issues of policy development. That is, recommendations accepted by the government are viewed from the perspective of political issues, financial issues and legal issues. These chapters will identify what has been constant and query whether this is meaningful in strategic planning. Whether existing reviews, current drivers and practices are still relevant and consistent against the analytical theme is also explored.

The chapter on *Maritime Policymaking Beyond 2006* looks at the data presented with a view to developing new insights for future maritime surveillance policy. The chapter will seek to suggest further work or paths for analysis and development. An analytical example is introducing the concept of *Policy Blueprints* versus *Policy Engineering*. This approach is designed to separate Government policy development such as white papers (Defence 2000) and publications (Australia's Ocean Policy), away from departmental policies such as organisational output and outcome planning[7]. Another aim of this chapter will be to predict some practical applications of the thesis and possible policy direction.

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[7] Commonwealth of Australia, *Australia's Ocean Policy*, Environment Australia, Canberra, 1999 and Defence White Paper, *Defence 2000: Our Future Defence Force*, 6 December 2000.

The maritime powers in the *Customs Act 1901* have undergone significant change in recent times. The underlying reasons for these changes have been the changing threats to Australia's border integrity and corresponding resources required to respond effectively. The demands for such changes have been brought about by the rising occurrences of border offences – primarily customs, immigration and fishing offences.

In applying the analytical theme, the thesis looks at why the responsibility for managing and coordinating civil coastal surveillance in the 1970s was transferred to the Australian Federal Police (AFP), who staffed a central Coastal Protection Unit (CPU) and Regional Co-ordination Centres in northern Australia. The analysis finds, in part, that the financial implications of this change were indicative of the non-harmonized approach to maritime funding. For example, there was no corresponding change in the source of funds for AFP while the Australian Quarantine and Inspection Service (AQIS) continued to fund certain coastal surveillance operations of their own[8]. The thesis will also provide insights into the political decisions that resulted in structural changes that saw maritime surveillance return to Customs.

The most important recent domestic report that has impacted on Customs maritime policy was the 1999 *Report From The Prime Minister's Coastal Surveillance Task Force*[9] (the Coastal Surveillance report) in response to a number of incursions by vessels carrying illegal immigrants. The report made recommendations similar to the

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[8] AQIS funded the introduction of inshore 'littoral' air surveillance using chartered civilian aircraft in support of marine assets. Littoral was defined as being between 1 mile inland and 3 miles offshore (between 1.6 km and 4.8 km).
[9] Department of Prime Minister and Cabinet, *Report of the Prime Minister's Coastal Surveillance Task Force*, July 1999.

models of Article 118 of LOSC[10] and the Niue Treaty[11]. The Coastal Surveillance report includes recommendations that emphasise cooperative maritime surveillance and enforcement[12]. In summary, the reports is premised on the assessment and distribution of intelligence, multilateral cooperation in intelligence and information gathering with other countries, and that good information and intelligence is the most effective means of preventing illegal boat arrivals[13]. The policy outcomes for marine surveillance were increased funding (a $124m four year program[14]) and another shift in priority "to strengthen Australia's capacity to detect and deter illegal arrivals"[15].

Some discussion around the *Prime Ministers Task Force on Offshore Maritime Security* report (Offshore Maritime Security report) is also included in this thesis. The Offshore Maritime Security report reflects the latest shift in the Australian Government's priorities and that is toward security and counter-terrorism. The discussion is necessarily limited as this report has not been made public, however, some comments are made on the impact it has had on maritime policy, which are based on media reports.

Key view points and recommendations are drawn from the thesis to summarise a strategic legal and structural framework that will enhance Australia's ability to develop effective surveillance policy and protect its border. The term 'border' can have different meanings to different people or organizations. For example, in law

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[10] United Nations Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, *The Law of the Sea: United Nations Convention on the Law of the Sea.*
[11] *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region 1992* @ http://www.info.dfat.gov.au/treaties/.
[12] *Report of the Prime Minister's Coastal Surveillance Task Force*, July 1999
[13] Ibid., pp.1-4.
[14] The Prime Minister, the Hon John Howard MP, *$124 Million Boost for the Fight Against Illegal Immigration*, Media Release, 27 June 1999, p. 1.
[15] *Report of the Prime Minister's Coastal Surveillance Task Force*, July 1999, p.1.

enforcement the border can mean the passport desks at the airport to the Department of Immigration and Citizen Affairs or a computer server in another country to an agency that investigates cyber-crime. A definition of 'the border' in the context of this thesis is "enforcement of Australia's immigration, customs and quarantine law"[16]. This definition is sufficiently broad to capture people-related law enforcement, control over goods (including narcotics, weapons, etc.) and bio-security.

A comparison between the first maritime functions performed by Customs and current Customs functions highlights several common influences, for example, assets, funding, staffing resources and politics. The theme throughout the evolution of maritime surveillance and enforcement underlying these influences is the shifting priorities of Customs. Revenue was the initial priority of the colonies and this moved to illegal immigration, to drugs, to quarantine and this cycle has sometimes been repeated. Currently, information gathering for counter-terrorism and distant exclusive economic zone (EEZ) protection are equal priorities.

The Origins of Australian Maritime Policymaking

Customs maritime responsibility is implicit in the *Customs Act 1901* (the Act) and it will be shown that Australian Customs maritime functions were exercised even prior to 1901. The Act is concerned with the entry of goods into Australia and the

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[16] Gately, W. and Moore, C., 'Protecting Australia's maritime borders: The operational aspects' in Tsamenyi, M. & Rahman, C., (Eds.), *Protecting Australia's Maritime Borders: The MV Tampa and Beyond*, Centre for Maritime Policy, University of Wollongong, Wollongong, 2002, p.37.

expression 'goods' is defined in the broadest sense to capture any moveable thing[17].
In support of this objective the Act contains certain powers related to the patrol of the coastline, boarding of vessels at sea, being able to do certain things once a vessel has been boarded and control over those goods intended to be landed in Australia.

While Australian Customs has had maritime powers since settlement, their use has been limited by the available marine-related resources, which until recent times, were of very limited capability. Smuggling and importation of prohibited imports may have occurred since settlement; however, these incidents did not warrant the expenditure on resources that attract the consideration of governments today.

New South Wales (NSW) Governor Philip King wrote in October 1800 that there was "much reason to suppose spirits have been improperly landed and concealed at Farm Cove and other parts of the harbour"[18]. Control over ports and harbours in England were managed through the appointment of a 'Naval Officer'[19]. Governor King adopted the same management approach by appointing Dr. William Balmain as Naval Officer of the Port of Sydney Cove[20]. King tasked Balmain with collecting duty on spirits, wine and beer[21].

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[17] *Customs Act 1901*, section 4.
[18] Day, D., *Smugglers and Sailors: The Customs History of Australia, 1788-1901*, Australia Government Publishing Service, Canberra, 1992, p47.
[19] The Naval Office duties also included Customs control, although this mainly referred to the role currently attributed to the 'harbour master' and was not a term associated with the then King's Royal Navy.
[20] Smales, A., *The Australian Customs Story*, Australian Customs Service, Sydney, 1986, p.4.
[21] Day, D., *The Prince of Australia, The Emperor of Wahgunyah and the Lord of Somerset*, Pirie Printers Pty Ltd, Fyshwick, 1989, p.3.

An indication of how seriously the matter of revenue was taken is that in January 1801, NSW Governor King ordered that "naval ships and harbour sentinels fire upon any boats from a merchant ship that refused to answer when challenged"[22]. Harbour sentinels were most often placed at tactical points around the wharves rather than on armed Customs vessels. The early efforts of the first Customs officer – Naval Officer Balmain – must not have been very successful. Two reasons for this observation are firstly, the extreme measure noted above by Governor King and secondly, Balmain's status on departure.

On the first point, the implication is that voluntary compliance with Customs requirements were being completely ignored, frustrating the then Governor to order lethal action. For any number of reasons, including resources, Naval Officer Balmain had not developed an effective import control regime. The second reason for suggesting he was not very successful is based on the report that he left the colony "little richer than when he had arrived"[23]. At the time of Balmain's appointment, he would have been entitled to a share of duties collected. That he left poor implies he either did not have sufficient control over his staff and vessels to ensure they engaged in exercising Customs compliance or that if duty was being collected, it was being deposited into government coffers (or both).

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[22] *Government and General Order*, 17 January 1801, HRNSW, Series 1, Volume 3, in Day, D., *Smugglers and Sailors: The Customs History of Australia, 1788-1901*, Australia Government Publishing Service, Canberra, 1992, p.47.
[23] Day, D., *The Prince of Australia, The Emperor of Wahgunyah and the Lord of Somerset,* pp.3-4.

The main resource to combat smuggling was the Sydney based Customs cutter *Letitia Bingham,* until 1828 when it was smashed against an arriving vessel while taking delivery of mail[24]. This vessel was not replaced until 1833 by the *Prince George,* and then only after convincing the Customs Board, based in London, of the amount of missed revenue due to lack of maritime presence[25].

Numerous other vessels came into Customs service throughout the colonies and their primary task was detecting smuggling of spirits and tobacco, together with acquitting cargo and collecting duty. Perhaps the first immigration task performed by Customs maritime officers circa 1880, was checking credentials along the Murray River where mainly Chinese workers operated as timber cutters for river steamers and fencers and graziers, passing back and forth across the river border[26].

The problems of Governor King continued in later years for Governor Darling and for Governor Arthur. The latter, in June 1834, appointed a board of inquiry to "consider the measures which should be adopted for the prevention of the Seizure of Vessels, Escape of Convicts and Smuggling …"[27]. In their report the board recommended, *inter alia*, that "a fast sailing cruiser with a sufficient complement of Boats should be provided to board and search departing vessels and thereby prevent the escape of convicts…[and on return] prevent smuggling of spirits"[28].

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[24] Day, D., *Smugglers and Sailors*, pp.180-182.
[25] Ibid.
[26] Ibid., p.304.
[27] Ibid., p.238.
[28] Ibid.

The cruiser was to be crewed by a master, three mates, three petty officers, one convict cook and two convict boys, with the officers having authority to enforce Customs regulations[29]. In addition, the board recommended four sailors to be attached to Customs depots and employed by the Collector at his discretion to protect the revenue[30]. The ship was built but was often commandeered from Customs to run merchant supplies, leaving only open boats for officers to board and search along the river with no ocean-going capability[31].

Australia's Customs system of administration or establishment, continued to develop and raising revenue was the main policy influence. A significant turning point, according to a report to the then Governor Darling dated 2 April 1827[32], stated smuggling and corruption was rampant and "the enquiry report called for the establishment of a regular Customs House"[33]. A formal Customs Service was established in both Sydney and Hobart in 1827[34]. Perth followed in 1832, Melbourne in 1836, then finally Brisbane and Adelaide in 1846[35]. But it was in Sydney under Darling and his new 'Collector of Customs' that maritime surveillance and enforcement had begun.

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[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Report, Board of Enquiry to Governor Darling, AJCP PRO 6584, CUST34/614/2-35, Customs Library, Canberra, 2 April 1827.
[33] Day, D., *The Prince of Australia, The Emperor of Wahgunyah and the Lord of Somerset,* p.9.
[34] Smales, A., *The Australian Customs Story*, pp.2-19.
[35] Ibid.

The Department of Trade and Customs was established at Federation in 1901 and with it, the *Customs Act 1901*. The organisation restructured in 1958 when it became the Department of Customs and Excise until 1975, when it briefly became the Department of Police and Customs until settling on the Bureau of Customs in the same year. From 1984 to 2005, it has been known as the Australian Customs Service, although the organisation has changed portfolios several times during this period[36].

Image 1: *HM Customs No.1*, Sydney Harbour circa 1909

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[36] Currently it is within the Attorney General's portfolio, previously it was under the Department of Industry, Trade and Resources and prior to that, the Department of Science, Customs and Small Business, also the Department of Business and Consumer Affairs and in 1984, the Department of Industry, Technology and Commerce.
[37] Australian Customs Service, National Marine Unit image library.

Chapter Two

Politics and Contemporary Policy-Setting

Introduction

As Customs as an organisation changed so too did the priorities set to it by the Commonwealth Government. Revenue collection is a constant policy responsibility throughout Customs history, however, other Government priorities have influenced the degree of efforts to protect the revenue. At the turn of the 20th century illegal immigration was a priority, which was replaced by narcotics detection as the main priority in the 1930s, which was replaced by World War II priorities and then to revenue after the war. Australia began showing a greater interest in its offshore estate in the 1950s, particularly in relation to fishing and petroleum exploration. In the case of the latter, the appearance of offshore oil and gas installations introduced a new dimension in relation to the Customs border. Revenue remained a Government priority through the 1950s before narcotics detection became the major focus again in the 1960s (which included the introduction of drug detector dogs in 1969)[38].

The Government's maritime priority in the early 1970s was responding to incursions of Indonesian fishing boats looking for trochus shellfish[39]. These fishermen would often land on the Western Australian coast or Australia's north-west islands and

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[38] Day, D., *Contraband and Controversy: The Customs History of Australia from 1901*, Australia Government Publishing Service, Canberra, 1996, pp141-331.
[39] Australian National Audit Office, *Report No. 384*, *Review of Coastwatch, Joint Committee of Public Accounts and Audit*, Australian Government Publishing Service, Canberra, August 2001, p.4.

islets prompting a priority response, including for quarantine risks[40]. Concentrated efforts in 1975 and 1976 saw illegal trochus harvesting decline only to be replaced by the first arrival of Vietnamese 'boat people' in 1976[41]. The Bureau of Customs' (as it was then known) maritime role at this time was to establish the Coastal Air Sea Operations Support Group (CASOS)[42]. CASOS developed Customs' detection and response capability to counter threats by small craft and light aircraft, mainly in northern Australia[43].

In between 1987 and 1999, Government priorities shifted from intercepting prohibited goods back to responding to trochus fishers, then back to narcotics. In 1987, the manual for the Customs Marine Unit (as it was titled then), declared that the primary function of Australian Customs Vessels (ACVs) was "reaction to specific indicators of breaches of laws administered by the Australian Customs Service [and] Search and Rescue"[44]. A secondary function was routine patrols and a final "supplementary" function was operational transport of officers and liaison with other enforcement agencies[45].

A specific example of politics setting the maritime agenda can be traced to the 2nd of November 1997, when the Prime Minister announced the Government's "Tough on Drugs" strategy (also known as the National Illicit Drug Strategy)[46]. This followed a 1996 election promise in response to public and political perceptions and

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[40] Ibid.
[41] The House of Representatives Standing Committee on Expenditure, *Report—Footprints in the Sand*, 1986, pp.3-4 and Day, D., *Contraband and Controversy*, p423.
[42] *Footprints in the Sand*, p.6
[43] Ibid.
[44] Australian Customs Service, *ACS Marine Operations Manual*, Barrier Control, Canberra, 1987, p.40.
[45] Ibid.
[46] Liberal Party Policy paper, '*Tough on Drugs – Strengthening the Fight*', November 1997.

is symptomatic of maritime policy development. The public and political pressures included media reports over the debate around injecting rooms, the overdose deaths of young middle-class Australians and reports that the Torres Strait was an unprotected drug trade route. One observer notes that "most changes to maritime border protection have been made in reaction to the political outcry"[47].

The *Tough on Drugs* response bears remarkable similarities to the "drug free America by 1995" strategy announced by US President George H W Bush in 1989[48]. This in turn, was a re-naming of US President Ronald Reagan's "war on drugs" strategy[49]. The US drug strategy and Australian *Tough on Drugs* response seems to have influenced British Prime Minister Tony Blair's declaration and call for "war on drugs" in 2000[50]. So it is likely that it was for a combination of public, political and historical reasons that *Tough on Drugs* was announced and the Coalition government allocated $87.5m to the strategy[51]. The Government committed $18.4m over four years for Customs to purchase mobile x-ray vans for examining cargo, $9.5m over four years to recruit and train ship and aircraft search teams and most relevant to this thesis, $3.75m over three years to crew an additional vessel to patrol the Torres Strait[52].

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[47] Woolner, D., 'Australia's maritime border protection regime' in Tsamenyi, M. & Rahman, C., (eds.), *Protecting Australia's Maritime Borders: The MV Tampa and Beyond*, Centre for Maritime Policy, University of Wollongong, Wollongong, 2002, p.31.

[48] Westmore, A., 'A new president, a new strategy – Tough on drugs?' in *Search*, Vol.28, No. 10, November/December 1997, pp.305-306.

[49] Ibid.

[50] Stimson, G.V., 'Blair declares war: the unhealthy state of British drug policy' in *International Journal of Drug Policy*, Vol. 11, 2000, pp.259-264.

[51] The Prime Minister of Australia, the Hon John Howard MP, '*Tough on Drugs – Launch of the National Illicit Drugs Strategy*', speech on 2 November 1997 at http://www.pm.gov.au/media/Speech/1997/drugspe.cfm.

[52] Ibid.

At the turn of the 21st century, the priorities for the Customs marine program include

fisheries protection and intelligence gathering within a counter-terrorism

environment. These priorities do not replace, but rather are in addition to, traditional

priorities such as quarantine standards, control over imported and exported goods

and apprehending attempted people-smuggling operations. Customs possesses a

significant and integral role in the Australian counter-terrorism environment through

its regulation of the movement of people, goods, vessels and aircraft into and out of

Australia.

Implementing Maritime Protection Policies

Customs works on behalf of other agencies at the border such as the primary

immigration function at international points of entry and departure in cooperation

with the Department of Immigration & Multicultural & Indigenous Affairs (DIMIA),

quarantine issues with the Australian Quarantine & Inspection Service (AQIS),

particular criminal activity of interest to the Australian Federal Police (AFP) and

there are others[53]. Its capability to monitor movement across the border, to identify

people of interest and to intercept prohibited and restricted goods contributes to

security and the Customs National Marine Unit (NMU) is the only national civilian

enforcement group able to respond in the maritime environment.

That the Customs NMU is the only national civilian enforcement group able to

respond is premised on two key elements. The first is that the Federal Government

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[53] The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) was renamed
the Department of Immigration and Citizenship (DIAC) since first preparing this thesis. Examples of
other border work include permit management for the Department of Defence and State and Territory
Police Forces and detection and controls over prescription drugs for the Department of Health.

has the greatest capacity to fund a program required to oversee and protect Australia's entire maritime jurisdiction, which includes operational and support resources. The second element is the Federal Government has the constitutional authority to pass legislation to allow for the surveillance and protection of the maritime jurisdictions in a holistic sense. Could this equally apply to the Royal Australian Navy? Theoretically, the answer is "yes", however, this thesis argues that primary civil maritime law enforcement is not and should not be the responsibility of the Department of Defence.

State and Territory police forces are discounted as a possible primary civil maritime law enforcement body. The fundamental reason for this is premised on the argument made for a single offshore federal law enforcement statute. It can be contemplated that police forces could be one of the 'classes' of officers empowered under the proposed statute (this is discussed in Chapter 5), however, the police role is seen as conditional on being a support role in their region where they have capability. The possibility of seven disparate marine organisations undertaking surveillance and enforcement for Australia's maritime zones also contradicts the efficiencies sought in the thesis.

The importance of the formation of the Joint Offshore Protection Command (JOPC), involving co-operative arrangements between Defence and Customs is fundamental to security policy and a separate analysis is dedicated to this subject later in the thesis. As a brief introduction, the JOPC will be responsible for counter-terrorism prevention, interdiction and response in all offshore areas of Australia. This includes

security for Australia's offshore oil and gas installations.   JOPC has access to air and

sea assets from Defence and Customs to conduct its operations.

While counter-terrorism continues to represent the Government's maritime policy

focus and to absorb resources in response policy and legislative developments

following the terrorist attacks of 11 September 2001, patrol and protection of the

Southern Ocean fisheries is another Government priority that must be met.

Table 1 summarises Customs' organisational priorities as published in selected

annual reports since 1978. These priorities have shaped Custom's efforts and their

effects have impacted on recruitment, on budget appropriation, which in turn has

impacted on technology investment, which has had an impact on the legislation

program, and so on as the cycle of organisational impacts continues.

Table 1: Select Comparison of Customs Priorities

	1978[54]	1981[55]	1987[56]	1999[57]	2001[58]	2004[59]
Priorities	Not clearly articulated. While Customs was under Department of Business and Consumer Affairs, main focus seemed to be to progress "automatic data processing", valuation, classification and revenue issues, and the Drug Detector Dog program.	Not clearly articulated. Customs now under Department of Industry and Commerce. Priority was tariff, revenue and industry-related matters surrounding cargo.	1. Improve interception of prohibited goods, including narcotics (interception).	1. Implementing tax reform (revenue)	1. Cargo Management Re-engineering. An industry-focussed program to improve cargo control and revenue collection. (revenue)	1. Focus on Community Protection – counter terrorism, border health and quarantine, prohibited goods, unauthorised movement of people, international cooperation.
			2. Ensure border and "underbond" controls do not unduly hinder commerce or overseas travellers (facilitation).	2. Facilitating Sydney 2000 Olympic and Paralympic Games; and Protecting Australia from foot and mouth disease (border)	2. Protecting the border, including people smuggling, counter terrorism and implementing the National Illicit Drugs Strategy.	2. Maritime operations – prevent illegal activity, protect Australia's natural marine resources and environment.
			3. Collect correct amount of duty, excise and other revenues (revenue).	3. Cargo Management Re-engineering (CMR) (industry)	3. International activity, including World Customs Organisation and APEC	3. Industry Support, including CMR.
			4. Deliver industry assistance (industry).	4. Better use of intelligence information and technology; and improve inter-agency cooperation.	4. Improved inter-agency cooperation.	

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[54] Department of Business and Consumer Affairs, *Annual Report 1979-80*, Australian Government Publishing Service, Canberra, pp.38-83.

[55] Department of Industry and Commerce, *Annual Report 1982-83*, Australian Government Publishing Service, Canberra, pp.12-17.

[56] Australian Customs Service, *Annual Report 1998-99*, Australian Government Publishing Service, Canberra.

[57] Australian Customs Service, *Annual Report 2000-01*, Australian Government Publishing Service, Canberra, pp.24, 27, 31, 32 and 34.

[58] Australian Customs Service, *Annual Report 2001-02*, Australian Government Publishing Service, Canberra, pp.16, 20, 22, 25.

[59] Australian Customs Service, *Annual Report 2004-05*, Australian Government Publishing Service, Canberra, pp.16, 20, 22, 25

To briefly expand on priority one in the final column on the previous page titled '2004', Customs has a pivotal role in counter-terrorism response and together with multi-agency operational preparedness, views the organisation's specific responsibilities across three spectrums. The agency's focus is to contribute towards the prevention of terrorism through ensuring a strong and appropriately regulated border and balancing legitimate movement and activity with protecting the community. This focus extends to securing travel, trade and the coastline.

In improving security around entry and exit points for travellers, Customs is directly involved in the development of biometric systems for passenger identification, the provision of advance passenger information for alert purposes, improving identity and document security arrangements and enhancing profiling and targeting arrangements for law enforcement purposes[60].

The securing of trade includes Customs' involvement in port and maritime security, international supply chain security, waterfront- closed circuit television (CCTV), the development and extension of container X-ray facilities, international mail examination, advance cargo reporting, maritime interdiction, the development of sea crew policies and other activities.

To secure the coastline Customs works in association with the Department of Defence and provides an offshore Coastwatch surveillance function, an armed

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[60] Minister for Justice and Customs, Senator Chris Ellison, 'New Customs resources to back up tough border protection policy', Media Release, 11 May 2004

national marine response, patrols in the Southern Ocean and technological advances in satellite, radio and radar systems.

Maritime Policy Responsibility

Now expanding on the second priority of Table 1, column titled '2004', hand-in-hand with Customs' maritime evolution is its relationship with the Australian Defence Force's (ADF) surface resources. These surface resources are primarily drawn from the Royal Australian Navy (RAN), but also include resources from the Royal Australian Air Force (RAAF) and Australian Regular Army (Army) in lesser *ad hoc* roles.

Customs has not and does not budget for assets or a workforce size to conduct surveillance and responses across or for Australia's entire maritime jurisdiction. An important reason why, is that Customs does not enjoy the widest political support or the drive necessary to build a wide-arching maritime responsibility. The RAN has the capacity to respond in any of Australia's maritime jurisdictions but based on its maritime doctrine, does not have civil surveillance or constabulary functions as a principal priority[61].

Cooperation between the RAN and Customs at an operational level is very effective, involving both the Customs NMU and Coastwatch. At the operational planning level, monthly meetings ensure operational leaders are familiar with the status of assets and priorities to meet the various clients' needs.

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[61] Commonwealth of Australia, *Australian Maritime Doctrine*, RAN Doctrine 1, Department of Defence, Canberra, 2000.

At the operator or tactical level, efforts are undertaken to ensure unit leaders are familiar with each other's procedures and capacity. This is done through shared Customs and RAN workshops or training, which tend to have a law enforcement focus. However, at a strategic level there are inherent difficulties. This is recognised in a 2004 research paper developed by the Department of Parliamentary Services which acknowledges that the "blurring between civil security and national defence has increased the importance for Australia to develop a national maritime strategy"[62].

In the strategic context, Customs is an important deliverer of the Government's broader Ocean Policy and plays a significant part in implementing aspects of that policy[63]. For example, the government has committed to "increase surveillance and enforcement measures in the Great Barrier Reef"[64]. This is achieved through the Great Barrier Reef Marine Park Authority (GBRMPA) 'tasking' Customs NMU to patrol on their behalf and respond to breaches of their legislation.

Similarly, there are a number of other federal and state agencies that task Customs NMU to act on their behalf. These federal and state agencies include:

- AFP:
- AQIS;

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[62] Tewes, A., Rayner, L. & Kavanagh, K., *Australia's Maritime Strategy in the 21st Century*, Research Brief, Department of Parliamentary Services, Parliament of Australia, 29 November 2004, p.39.
[63] Commonwealth of Australia, *Australia's Ocean Policy*, Environment Australia, Canberra, 1999, p.23.
[64] Ibid.

- Australian Fisheries Management Authority (AFMA);

- Australian Maritime Safety Authority (AMSA);

- Department of Defence;

- Department of Environment and Heritage (Environment Australia);

- Department of Foreign Affairs and Trade (DFAT);

- Department of Industry, Tourism and Resources;

- Department of Transport and Regional Services;

- DIMIA;

- GBRMPA; and

- National Parks and Wildlife Service, Western Australia and Queensland.

Customs' Investigation Branch and the Border Enforcement operational sections, for example, are also regarded as clients and need to compete for Coastwatch and NMU services and resources in exactly the same way as those listed above.

Table 2 summarises the number of agencies, the types of tasks and service delivery output of the NMU. Of note is the number of taskings requested by the various agencies. The types of agency tasking requests are categorised as either "tactical" or "strategic" by the NMU. The way they are distinguished is that a tactical tasking for example, is when a Coastwatch flight locates possible illegal activity and the closest Customs vessel to the target responds. An example of a strategic tasking, is the long-term monitoring of marine national park areas, including assisting researchers and questioning or apprehending non-licensed vessels in the marine park area.

For the purpose of comparison and illustration, the 2003/04 year and 2004/05 year have also been transcribed into taskings by quarter. This displays a recognisable trend in the degree of increased illegal activity in the offshore maritime area, which in itself is a major concern. The illegal activity is mainly fisheries related and another illustration of the number of targets and a snapshot of the location of the responses for each year are at Diagrams 1, 2, 3 and 4.

These Diagrams illustrate suspected illegal foreign fishing vessel sightings for the reciprocal periods in Table 2. The area is across Australia's northern exclusive economic zone (EEZ) jurisdiction from Arnhem Bay across to the Torres Strait. This means that the diagrams do not represent all of the figures in Table 2, however, it is chosen as the area that best illustrates the trends.

Table 2: Government agencies use of Customs vessels[65]

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[65] Australian Customs Service, *Customs Figures*, Quarterly Statistics, Issue 39, June Quarter 2005, pp.67-71.

Diagram 1: Suspected illegal foreign fishing vessel sightings for 2001-02[66]

Diagram 2: Suspected illegal foreign fishing vessel sightings for 2002-03[67]

[66] Australian Customs Service, National Marine Unit, Annual Operational Sightings & Response Statistics, 2001-02.
[67] Australian Customs Service, National Marine Unit, Annual Operational Sightings & Response Statistics, 2002-03.

Diagram 3: Suspected illegal foreign fishing vessel sightings for 2003-04[68]

Diagram 4: Suspected illegal foreign fishing vessel sightings for 2004-05[69]

From a policy perspective, Table 2, 2004-2005 figures and Diagram 4, expose a

situation where the increase in taskings and increase in illegal activity needs to be

met by a fleet that is not growing at the same rate as incursions. There are likely

to be a range of reasons for the drop in proportionality of meeting taskings in

2004-2005 and while only the NMU management and its Executive are qualified

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[68] Australian Customs Service, National Marine Unit, Annual Operational Sightings & Response
Statistics, 2003-04.
[69] Australian Customs Service, National Marine Unit, Annual Operational Sightings & Response
Statistics, 2004-05.

to comment, some speculation is possible. To do so, both the Table 2 2004-2005
figures need to be read in conjunction with Diagram 4. As identified previously, a
'tactical' tasking can be one where the NMU responds to a reported sighting of
illegal fishing activity by Coastwatch.

Taking the figures of Table 2 then, one obvious nexus is between tactical tasking
requests and tactical taskings completed. Going to Diagram 4 of suspected illegal
foreign fishing vessel sightings, if tactical requests mean responding to these
sightings then clearly the NMU fleet cannot physically meet the demand. Based
on the threats of 1997, the fleet of eight Bay-class vessels began service in 1999 to
combat the growing threats and did so from this point in time, showing signs of
pressure only in this financial year. This observation relies on comparing the
taskings, to the sightings, to the number of taskings completed (and apprehensions
at Table 3, Chapter 4). Even accepting that many of the shaded dots may be more
than one sighting of the same vessel, the 2004-2005 figures in Table 2 show a
decrease to below 80% of service delivery after three previous consecutive years
of meeting over 90% of taskings.

The tasks assigned to Customs NMU are often also passed to the RAN in
circumstances where the RAN has surface assets in areas of interest. Therefore,
although the NMU capacity to respond to increases in illegal fishing tactical
taskings has dropped, the RAN is able to bridge some of that gap. This is
consistent with *Australia's Oceans Policy*, which identifies the ADF as the agency
responsible for preparedness and contingency planning, maritime surveillance

response, fisheries law enforcement, search and rescue, hydrographical services and the Australian Oceanographic Data Centre[70].

These tasks are important civil tasks assigned to an organisation, that is the ADF, which is fundamentally skilled in military preparedness and response. An example of competing priorities is at the time of preparing this thesis, the ADF is also required to continue to support 13 major international operations, together with a recent commitment to the Solomon Islands[71].

Custom's Maritime Policy and Operations

Like Customs, the ADF is required to meet this Government policy 'blueprint' of what the nation's priorities are and who will be responsible. Customs and the ADF then formulate policy on how these requirements can be met by developing organisational policy or 'policy engineering' their respective structures, procedures, finances and proposing legislation to the Parliament to support it.

This policy engineering of task delegation can be further broken down into three functions, generally attributed to the ADF but entirely appropriate for maritime surveillance and protection policy development: "diplomatic, military and constabulary"[72]. Diagram 5[73] illustrates this trinity of maritime operations. An

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[70] *Australia's Oceans Policy*, p.37.
[71] Australian Defence Force, *Australia's National Security: A Defence Update 2003*, Commonwealth of Australia
[72] Gately, W. and Moore, C., 'Protecting Australia's maritime borders: The operational aspects' in Tsamenyi, M. & Rahman, C., (Eds.), *Protecting Australia's Maritime Borders: The MV Tampa and Beyond*, Centre for Maritime Policy, University of Wollongong, Wollongong, 2002, pp.37-57, p.41, and Commonwealth of Australia, *Australian Maritime Doctrine*, RAN Doctrine 1, Department of Defence, Canberra, 2000, p.57.

attempt has been made to list examples of activities undertaken by both Customs and RAN under the diplomatic and constabulary functions.

The list of activities is also intended to show the relative soft tasks at the start of the triangle, through to the harder or high-risk tasks toward the base of the triangle. No expansion on the military function is made as this is viewed as solely the charter of the ADF and will never involve Customs, nor is this relevant to the arguments presented in this thesis. Examples of military functions or tasks are those major international operations mentioned above.

Diagram 5: Trinity of Maritime Operations
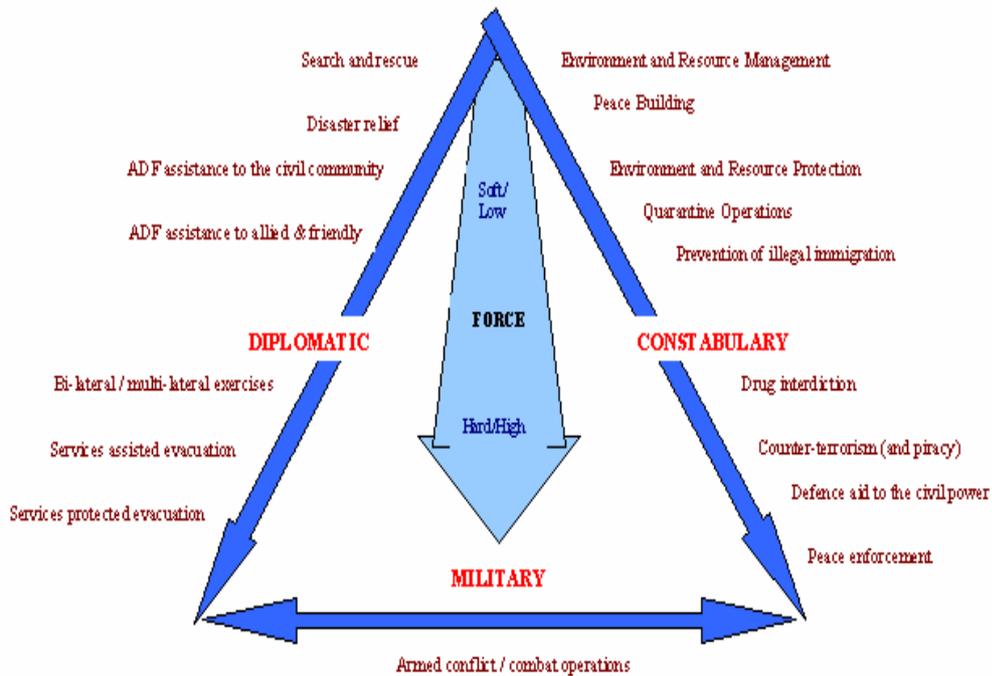
[73] Based on Commonwealth of Australia, *Australian Maritime Doctrine*, RAN Doctrine 1, Department of Defence, Canberra, 2000, p.57.

Only the RAN has the capacity to undertake all of the activities around the triangle that is Diagram 5. Customs currently undertakes almost all of the constabulary functions and some of the diplomatic functions. The view formed at this time in this thesis, that Customs has the capacity to develop skills and acquire the equipment necessary to undertake all of the activities on both the diplomatic and constabulary sides of the triangle. The purpose of using the trinity diagram is to compare Customs and RAN roles. Customs has traditionally only been concerned with the top of the arrow moving down the centre and indeed the top of the trinity.

What the diagram and this discussion shows is how Customs is evolving from the peak of the triangle and how far toward the base of the triangle the organisation has moved and is moving. The arrow starting at the peak of the inner part of the triangle showing direction downward, represents the degree of force that may be necessary in undertaking the activity. At the low or soft end of the spectrum are activities such as disaster relief (or community assistance), or environment and resource management where use of force is unlikely. Moving down each side of the triangle toward the base, the likelihood of relying on force in certain circumstances increases, for example a counter-drug operation. As stated, the likelihood of Customs involving itself in military matters is not explored.

Customs' diplomatic or foreign policy function is established through demonstrating national influence through various means, including passive presence, regional engagement (typically under the auspices of the World

Customs Organization and Customs agencies in the region) or less likely through coercion. An example of the most passive NMU diplomatic function is the search and rescue activity on the left-hand side of the diagram. An example of regional engagement is under the category 'bi-lateral / multi-lateral exercises' also on the left-hand side of the diagram. Two activities already undertaken by Customs under this activity are cross-border patrols with Papua New Guinea (PNG) and involvement in proliferation security initiative (PSI) exercises.

Cross-border patrols with PNG achieve several outcomes with the main focus being regional capacity building, community liaison and infrastructure support. The NMU role in these cross-border patrols combines providing the platform, i.e. a Bay-Class Australian Customs Vessel, with undertaking Australian taskings for client agencies while en route to locations identified by PNG authorities. Other functions undertaken by the NMU include maintaining intelligence production in the region and undertaking limited law enforcement assistance.

Customs' Role in Maritime Security Policy Evolution

PSI involvement is a more significant diplomatic function and is indicative of Customs' increased role in the security-conscious environment post-September 11. The main objective of the PSI is to develop practical ways to strengthen international efforts to constrain trade in weapons of mass destruction (WMD), including dual-use goods and pre-cursors. Australia, France, Germany, Italy, Japan, the Netherlands, Portugal, Poland, Spain, the United Kingdom and the United States of America joined together in May 2003 under the auspices of the

PSI. Since this time New Zealand, Norway, Denmark, Thailand, Turkey, Singapore and Canada have joined as participants. There are also some 60 observer countries, some of whom have indicated their support for PSI and its principles.

The PSI is not a formal institution nor is it a treaty or convention-based organisation. Participating countries describe it as an 'activity' supplementing the various formal international regimes currently in place for preventing the proliferation of WMD. A *Statement of Interdiction Principles* to guide the PSI was agreed to at the third plenary session in Paris in September 2003 and asserts that States will:

- take steps to interdict the transfer or transport of WMD, their delivery systems, and related systems to and from States and non-State actors of "proliferation concern";

- adopt streamlined procedures for rapid exchange of information regarding suspected proliferation activity;

- strengthen both national legal authorities and relevant international law to support PSI commitments; and

- take specific action to support interdiction of cargoes of WMD, delivery systems and related materials consistent with national and international law, including boarding and searching vessels in international waters[74].

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[74] Department of Foreign Affairs and Trade, *Proliferation Security Initiative*, at http://www.dfat.gov.au/globalissues/psi/psi_statement.html.

While the plenary sessions are for planning and organising the PSI, participating States have undertaken a series of training exercises and simulated interdiction operations. These exercises are designed to test respective national legislation and capacity as well as to demonstrate that the PSI is not merely a series of meetings but has concrete actions flowing from the meetings. Importantly for the context of this thesis is that Australian Customs has been involved in plenary sessions and exercises since September 2003.

Australian Customs Vessels and NMU crew have been used in the maritime exercises Exercise Pacific Protector in 2003 and in Singapore for Operation Deep Sabre in 2005. UK Customs led the PSI-related maritime exercise Sea Mist in 2004. German Customs ran an exercise named Hawkeye, involving the interdiction of dual use material at Frankfurt Airport in Germany on 31 March 2004. It is a combination of technical skills and access to data for intelligence purposes that sees customs organisations take such a prominent role. The concept being that closer integration between Customs' enforcement activities and the defence and intelligence communities will reduce likely weapons of mass destruction proliferation incidents through tighter Customs export and import controls, as well as enhancing operational interoperability between Customs (or Coastguards) and Defence.

With such influential involvement it could be argued that if PSI activity moved from planning and exercises to an actual response, that is, using Diagram 5 Customs would be performing a constabulary activity not a diplomatic one, then

Customs would be expected to have a key role. This constabulary or policing role has particular relevance to the role of Customs in the evolution of maritime enforcement. The constabulary function can be defined as demonstrating a commitment to national sovereignty and ocean resource governance through deployment of civil assets, legislating consistently with international law and taking enforcement action over people breaching Australian laws.

Briefly focussing on the central 'arrow' in diagram 5 now, the question of whether Customs does or does not have a role toward the *hard* or *wide* direction down the arrow on the constabulary side of the triangle is a notable phase in evolution of Customs' maritime role. Customs NMU now undertakes activity up to and including drug operations and counter-terrorism support. This is the most notable shift in the evolution of Customs' maritime role. Where once Customs' maritime assets undertook boarding by consent and only operated as a transport platform or logistical support, the NMU now undertake hot pursuits and higher risk boardings almost weekly[75].

There is no specific announcement or policy document that triggered this position. Rather, it has evolved along with the environment of shifting Government priorities and expectations. Taking the fisheries examples in Diagrams 1 through to 4, there are many anecdotes from ACV commanding officers who relate the difference between boarding operations in 2001-2002 and 2004-2005. Where previously foreign fishers were cooperative and compliant when detected inside

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[75] For a fuller discussion on why this is occurring see Smith, R. & Anderson, K., 'Understanding Non-Compliance in the Marine Environment' in *Trends & Issues in Crime and Criminal Justice*, No. 275, Australian Institute of Criminology, May 2004.

Australia's EEZ, it is not uncommon now to have projectiles thrown at boarding

parties, poles placed horizontally from the foreign ship side and for foreign

fishing boat crews to be uncooperative upon boarding[76].

Another useful example of the constabulary function and evolution of a more

robust Customs maritime law enforcement policy role is the method of patrolling

the Heard and McDonald Islands Southern Ocean EEZ. This particular example

also illustrates elements of diplomatic functioning. Customs participates with the

Australian Fisheries Management Authority (AFMA) in a multi-lateral and bi-

lateral arrangement for "full-time armed patrols for the Southern Ocean"[77].

Customs exercises Customs and AFMA powers in the patrol area from the armed

vessel *Oceanic Viking*. The *Oceanic Viking* is a chartered vessel, sailed and

serviced under a contract administered by Customs. The Customs boarding teams

take operational responsibility when targets are established, while the contract

crew take responsibility for navigation, safety, maintenance, etc. The *Oceanic*

Viking can be likened to a 'platform' from which the enforcement activity takes

place. These southern ocean patrols see armed Customs boarding officers

partaking in the protection of Australia's sovereign rights as much as an exercise

in protecting the valuable Patagonian toothfish fisheries.

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[76] Australian Customs Service, National Marine Unit images and video footage provided to author in capacity of employment (Manager Enforcement Legal Policy, Canberra 2002-2005).
[77] *Australian Maritime Digest*, 'Border Protection: Full-Time Armed Patrols for Southern Ocean', 1 February 2004, p.3.

These arrangements in the Heard Island and MacDonald Islands area include cooperation with the French and South African governments[78]. Cooperation with France is at treaty-level and follows a principle that sees an Australian law enforcement presence on a French government flagged patrol vessel when in the southern ocean patrol area and French law enforcement presence on the *Oceanic Viking[79]*. One reason for this is to allow for jurisdictional clarity when sharing information, investigating fishing activity in respective maritime zones or conducting hot pursuit[80].

Annex III of the Treaty provides for Australia and France to expand surveillance to whether the patrols can contain officials of both Parties and, if so, under what conditions, including additional powers, if any, to be granted officers and conclude further agreements on cooperative surveillance and enforcement operations[81]. At the time of writing, Australia and France commenced negotiating a treaty that would provide for law enforcement cooperation[82]. Similar close maritime jurisdiction arrangements have been negotiated with Papua New Guinea and Timor Leste, with the difference being that these arrangements reflect

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[78] Australian Customs Service and Australian Fisheries and Management Authority, Enforcement Operations in the Southern Ocean, Fact Sheet, at: http://www.customs.gov.au/webdata/resources/files/FS_Enforcement_Operations_in_the_SO1.pdf

[79] Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories (TAAF),Heard Island and the McDonald Islands, Canberra, 24 November 2003, Entry into force 1 February 2005.

[80] Ibid., articles 3, 4 and 5.

[81] Ibid., articles 1 and 2.

[82] A second treaty has been agreed but not entered in force that provides for enforcement operations where Australian vessels conduct enforcement operations against illegal vessels within the French zone, and French vessels within the Australian zone: *Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands*, Paris, 8 January 2007.

unarmed bi-lateral cooperation. The principle of taking an official who is able to

exercise their national enforcement authority on board an ACV is similar to the

Southern Ocean arrangements.

Maritime Operation Delineation

In practice, RAN and Customs work closely together meeting each aspect of the

Oceans Policy tasks except for two activities in the list. The two activities that

Customs is not involved in are hydrographical services and the Australian

Oceanographic Data Centre. For the other functions, Customs is the key national

civil organisation skilled in constabulary maritime detection and response. Noting

the comments supporting Diagram 5 on the span of maritime operations, Customs

NMU undertakes many aspects of the *Ocean Policy* tasks. Both Customs and the

RAN can assist in search and rescue, for example, but neither is fundamentally

focussed on it as core business.

Diagram 6 below illustrates the jurisdictional lines of Australian surveillance

responsibility. In an attempt to bring together the analysis of Customs' maritime

role and recognize the ADF civil maritime role, Diagram 7 incorporates the

taskings Customs NMU receives with the RAN maritime doctrine and overlays

these against Diagram 6. The ellipse at the north-west area in Diagram 7

represents the patrol area for likely approaches by illegal people smugglers. A

final observation relates to the odd shape at the north-west part of the chart below

in the EEZ. This area is the Australia-Indonesia memorandum of understanding

traditional fishing area (MOU Area). The blue shape just west of the Australia-Indonesia MOU Area is the Joint Petroleum Development Area (JPDA).

The evolution of Customs' involvement in these maritime zones now sees the ACVs patrolling, or potentially responding, to all areas illustrated on Diagram 7. Added to these areas are the patrol areas of the Southern Ocean, which include the CCAMLR area of Antarctica[83]. This is not to say a Bay-Class ACV will respond in all instances, however, it is NMU trained crew who must be able to operate in all the areas regardless of the platform or surface asset able to respond because the Customs Act is the relevant over-arching statute that provides powers to ensure compliance in these zones. The Customs Act provides the authority to board certain vessels, in certain circumstances, to varying degrees within Australia's maritime zones, while the offences and some other specific response powers, are contained within other statutes. This legal construction is examined in more detail in Chapter 5.

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[83] *Convention on the Conservation of Antarctic Marine Living Resources*, entry into force for Australia 1982, at http://www.ccamlr.org/pu/e/e_pubs/bd/pt1.pdf

Diagram 6: Australian Maritime Jurisdictions[84]

Diagram 7: Australian Civil Maritime Surveillance Zones[85]

[84] Part of chart found at http://www.ga.gov.au/image_cache/GA8896.pdf.
[85] Part of Coastwatch presentation provided on University of Wollongong 'Maritime Regulation' course compact disc material, 2004.

The first observation to note is the absence of the Southern Ocean region from the Diagrams. The reason for this is that the areas depicted in Diagram 7 are the surveillance and response areas covered daily. The Southern Ocean region is more an *ad hoc* response area rather than an area where routine surveillance and patrolling takes place. Other markings on Diagram 7 that need explanation are the segmented areas within the EEZ. These reflect areas of operations for planning and interoperability purposes. Such a chart is necessary for coordinating Customs, ADF and police assets in response to border breaches, for example. Overlaying all of this area (and beyond) is also the Australian Maritime Safety Authority (AMSA) safety of life at sea response and coordination area. Customs and RAN vessels come under AMSA control for search and rescue obligations and such responses take precedence over other priorities.

This is a very neat point to begin considering maritime policy comparison with other nations which have consolidated maritime functions under a coastguard. A number of Coastguard organisations of other countries do have a search and rescue role as well as the diplomatic and constabulary role[86]. In the United States (US) Coastguard, there is also the capacity for the US Navy to call Coastguard assets into service in certain circumstances, that is, to undertake activity under the military role. Whether Australia takes the path of establishing its own Coastguard will require a Government decision or government blueprint policy. How the subsequent Coastguard is structured to deliver the various responsibilities will be the policy engineering phase for the new organisation. Customs is well-placed

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[86] For example, Japan, the United Kingdom and the United States of America.

and experienced to contribute to strategic maritime policy development having taken a lead implementing role in the evolution of maritime policy to date.

To the first question of whether Australia establishes its own Coastguard organisation, the view that crystallises in this thesis is that merely packaging the various civil maritime tasks within a single civil maritime organisation will not exponentially (or even significantly) improve maritime surveillance and enforcement. Before commencing this analysis however, some analysis of several relevant reviews and reports into maritime surveillance issues is useful.

Image 2: Customs Launch *Vigilant*, Sydney Harbour circa 1938[87]

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[87] Australian Customs Service, National Marine Unit image library.

Chapter Three

Reviews into Maritime / Coastal Surveillance

Introduction

A key turning point that necessitated a shift in focus of Australia's maritime surveillance policy was the declaration of the 12 nautical mile (nm) fishing zone in 1967[88]. This led to the first aerial and marine patrols conducted by the ADF[89]. During the early 1970s, these surveillance operations were responding to Indonesian fishing boats looking for trochus shellfish. Many of these boats landed on the Kimberley coast creating a quarantine risk. There remained a continued focus on illegal fishing until 1976 when the focus of surveillance shifted again, this time in response to the arrival of the first Vietnamese 'boat people'[90].

There have been many reviews into Australian coastal surveillance and protection[91]. An early 1978 government review was conducted because of the impending declaration of the 200nm Australian fishing zone[92]. Marine surveillance was to look markedly different with responsibility over such a vast area. The obvious challenge was how to patrol Australia's 40 million square

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[88] Department of Transport and Communications, *Northern Approaches: A report on the Administration of Civil Coastal Surveillance in Northern Australia*, Hugh Hudson, AGPS, April 1988, pp.1-8.
[89] *Report No. 384*, *Review of Coastwatch*, p.4.
[90] Ibid.
[91] Reviews used in the thesis are listed in the bibliography. Only some have been introduced and analysed in this paper.
[92] *Report No. 384*, *Review of Coastwatch*, p.4.

nautical miles of maritime jurisdiction. Issues struggled with included resources, assets, costs, legislation and most importantly – who was going to be responsible. The initial response was for the RAAF to start flying offshore Australian fisheries patrols and for the introduction of inshore 'littoral' air surveillance using chartered civilian aircraft[93] in support of marine assets. The profile of the surveillance program changed in 1981, with the creation of 'Coastwatch' and its distinctive livery for the contracted civil aircraft[94]. ADF resources and assets were relieved of much of their primary civil maritime responsibilities while still supporting response operations.

Image 3: HM Customs vessel *Killara*, circa 1961[95]

1981 is the point from which most attention is paid to the development of constabulary maritime policy development in Australia's offshore zones. In 1981 Coastwatch was established and a number of further reviews into offshore

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[93] Littoral was defined as being between 1 mile inland and 3 miles offshore (between 1.6 km and 4.8 km), *Report No. 384, Review of Coastwatch*, p.4.
[94] Ibid.
[95] Australian Customs Service, National Marine Unit image library.

surveillance would follow. This thesis looks at seven of the major reviews. These are:

1. 1984 - Review of Australia's Peacetime Coastal Surveillance and Protection   Arrangements[96];

2. 1986 - Footprints in the Sand report[97];

3. 1988 - Northern Approaches, a report on the Administration of Civil Coastal Surveillance in Northern Australia[98];

4. 1993 - Review into the Australian Customs Service: The Turning Point[99];

5. 1999 - Prime Minister's Coastal Surveillance Task Force report[100];

6. 2001 – Review of Coastwatch[101]; and finally,

7. 2004 - Prime Minister's Task Force on Offshore Maritime Security report[102].

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[96] Beazley. K., *Review of Australia's Peacetime Coastal Surveillance and Protection Arrangements*, Department of Defence, Canberra, 1984.

[97] The House of Representatives Standing Committee on Expenditure, *Report—Footprints in the Sand*, 1986.

[98] Hudson, H., *Northern Approaches, A report on the Administration of Civil Coastal Surveillance in Northern Australia*, Department of Transport and Communication, AGPS, April 1988, p.57.

[99] Australian Customs Service, *The Turning Point: Review Into The Australian Customs Service*, Conroy, F., Australian Government Publishing Service, Canberra, December 1993, pp.187 and 191.

[100] Department of Prime Minister and Cabinet, *Report of the Prime Minister's Coastal Surveillance Task Force*, July 1999.

[101] *Report No. 384*, *Review of Coastwatch*.

[102] Department of Prime Minister and Cabinet, *Taskforce on Offshore Maritime Security* report, November 2004. At the time of writing, this report had not been made public, however, some responses to the report have been announced.

1984 Review of Australia's Peacetime Coastal Surveillance and Protection

Arrangements

The 1984 *Review of Australia's Peacetime Coastal Surveillance and Protection Arrangements* (Beazley review) saw a policy change resulting in more attention to the interdiction of the illegal entry of drugs while simultaneously retaining the existing fisheries and quarantine priorities[103]. This recommendation is at clause four of the Beazley review and the shift to drugs importations and the then Government's acceptance as this being the primary threat, saw the responsibility for managing and coordinating civil coastal surveillance being transferred to the Australian Federal Police (AFP)[104].

The AFP management response was to staff a central Coastal Protection Unit (CPU) based in Canberra with Regional Co-ordination Centres across northern Australia. This was a significant management commitment by the AFP. A major issue for AFP management was that there was no corresponding change in the source of funds for the littoral air surveillance patrols, which remained "user pays" funded[105]. The Beazley review proposed extending this principle to 'users paying' for certain Department of Defence assets[106]. The recommendation to extend the 'user pays' principle to Department of Defence assets was not implemented[107].

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[103] Beazley, K., *Review of Australia's Peacetime Coastal Surveillance and Protection Arrangements*, Department of Defence, Canberra, 1984, p.1, clause 4, of Recommendation By The Minister section following Chapter 7 of the review.
[104] Ibid. p.3, clause 12.
[105] Ibid., p.5, clause 16.
[106] Ibid., p.5, clause 17,second recommendation in clause 17 and p.8, clause 27.
[107] *Footprints in the Sand*, p.13.

So while the AFP responded to their new role and came to terms with additional priorities and assets, the capacity to efficiently deliver maritime surveillance and law enforcement in addition to their existing priorities was in a vulnerable position. The AFP on one side took managerial responsibility and on the other side, AQIS retained operational responsibility[108].

The Beazley review comprises 17 specific recommendations[109]. In addition to most relevant recommendations discussed, others identifiable with current arrangements included "use of a standing interdepartmental committee" for management coordination[110], "a Standing Advisory Committee of Coastal Protection and Surveillance (SAC-CPS) be established" for operational coordination[111], "appropriate working groups of the SAC-CPS should [examine] the lack of uniformity in existing Commonwealth and State legislation"[112] and "that the Tracker aircraft not be retained for RAN operations in support of civil coastal surveillance"[113]. A curious finding by the SAC-CPS in October 1985 was that there "was no knowledge of any differences or abnormalities between Commonwealth and State legislation[114].

An indication that the Beazley review was arguably ineffective is that, because of the lack of AFP funding, littoral surveillance priorities were still determined by

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[108] Beazley review, pp3-7.
[109] Ibid., pp1-10.
[110] Ibid., p.4, clause 15.
[111] Ibid., p.5, clause 19.
[112] Ibid., p.6, clause 21.
[113] Ibid., p10, clause 33.
[114] *Footprints in the Sand*, p. 15.

AQIS and other agencies with sufficient funding (i.e. the 'user pays' clients). As will be seen as a general theme throughout this analysis, the absence of a single executive authority for offshore surveillance and response undermines the attempts of various reviews to use maritime assets in the most effective manner. In the case of the Beazley review, a likely situation was continued competition between quarantine concerns and AFP illegal drugs concerns. This uncoordinated managerial, financial and operational arrangement was not going to last.

1986 Footprints in the Sand

The 1986 *Footprints in the Sand* report was in response to a decision on 20 March 1985 by the then House of Representatives Standing Committee on Expenditure to analyse the recommendations of the Beazley review[115]. The report comments on each of the 17 recommendations of the Beazley review as well as reports on the efficiency and effectiveness of civil coastal surveillance coordination, the appropriateness of costing arrangements and effectiveness of the geographical focus[116]. The report found a number of recommendations had been implemented, a number had been partially implemented and a small number had not been implemented[117].

A major finding of the 1986 *Footprints in the Sand* report found that little had been done in civil coastal surveillance to increase efforts to counter drug

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[115] *Footprints in the Sand*, pp. (v) and 1.
[116] Ibid.
[117] Ibid., pp. 9-17.

smuggling[118]. The Beazley review recommendation that the Minister for Defence be invited provide 1500 hours per year of Australian Fishing Zone (AFZ) surveillance was found not to have been implemented[119]. The reason for not implementing this recommendation was based on Department of Defence advice that "it would detriment other priority defence tasks"[120].

The *Footprints in the Sand* report made nine recommendations of its own, firstly that coastal surveillance be transferred back to the then Department of Transport from the AFP[121]. The remaining eight recommendations were essentially operational and included *inter alia*, attaching AFP and Customs officers to the Department of Transport for maritime response purposes, retaining the 'user pays' principle, nominating an Operations Programme Committee chaired by the Department of Transport and a feasibility study into the appropriateness of the "Airship craft"[122].

In a further illustration of shifting priorities and the evolution of maritime law enforcement, the report states the main role of coastal surveillance "is for quarantine and fisheries purposes" and only provides some benefit to the interdiction of drugs[123]. The findings and recommendations in *Footprints in the Sand* were largely ignored and no new initiatives relevant to the evolution of Customs NMU were implemented. The then government decided that the recommended changes were premature and that any decisions should await a

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[118] Ibid., p.9.
[119] Beazley review, p.8, clause 27 and *Footprints in the Sand*, p.16.
[120] *Footprints in the Sand*, p.16.
[121] Ibid., p. (ix).
[122] Ibid., pp. (ix)-(x).
[123] Ibid., p.38.

further review underway and due in 1988. The 1988 review was pivotal in the context of the evolution of maritime surveillance and enforcement.

1988 Northern Approaches, A report on the Administration of Civil Coastal Surveillance in Northern Australia

The 1988 report '*Northern Approaches, A report on the Administration of Civil Coastal Surveillance in Northern Australia*' (the Hudson Report) concluded that aerial surveillance of the EEZ did not "fulfil Australia's obligation to manage the resources of the 200 nautical mile zone"[124]. The Hudson Report recommended that coastal and offshore surveillance be coordinated by a newly created independent agency, the Australian Maritime Safety and Coastwatch Agency[125].

The Hudson Report recommendations, but for one major exception, were accepted by the then government. The major exception was that in 1988 the government decided against creating an independent agency[126]. The Hudson Report recommended that coastal and offshore surveillance be coordinated by a newly created independent agency, the Australian Maritime Safety and Coastwatch Agency. This agency would be serviced but not administered by the Department of Transport and Communications except in maritime safety matters.

The Hudson Report provides the basis for the present Coastwatch organisation and operations. However, rather than start a new and independent agency, the

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[124] *Northern Approaches, A report on the Administration of Civil Coastal Surveillance in Northern Australia*, p.57.
[125] Ibid., Recommendation 18, pp. 63-64.
[126] Ibid. p.58.

Coastwatch function was placed within Customs, where it remains[127]. This is one reason of why the Hudson Report is pivotal in maritime surveillance and enforcement development.

A personal observation on the impact of the decision to place Coastwatch within Customs is drawn from the author's time as a Coastwatch observer during this period. Customs assigned officers as observers in both *Nomad* aircraft (radar) and *Shrike* aircraft (visual). *Nomad* livery clearly identified aircraft as Australian Customs Service assets. During the changeover, *Shrike* livery was either the original green and gold Coastwatch markings or identifiable in the then blues of the Australian Customs Service.

In radio communication from the green and gold aircraft with contact vessels, on more than one occasion responses were along the lines of "No worries letting you know what we're doing – just don't tell Customs" or "Happy to tell you who else / what else we've seen, but wouldn't tell Customs". Fortunately for us the master of the vessels couldn't see we wore the same uniform regardless of the aircraft livery and that we didn't take these remarks personally!

The observation is raised as an indication of the wider cultural reaction to Coastwatch. By about 1991 all Customs aircraft were the same red and white livery with the Customs crest and word "Customs" on the side. ACVs also have the red band with the Customs crest and word "Customs" painted on them. Aircraft observers were mostly contract staff by this time and it is understood

[127] Minister for Science, Customs and Small Business, *Coastal Surveillance to Customs,* Media Release, 12 July 1988.

relationships with vessels and communities were very positive. In terms of whether Australian civil maritime assets are re-branded as 'coastguard', similar cultural questions are likely to be raised. For example, would the expectation be that an Australian Coastguard would be an inoffensive surveillance organisation or a para-military organisation? The view proposed in Chapter 7 is that it is likely to be somewhere in between.

A second reason why the Hudson Report is pivotal was a major lesson learned from the Beazley review regarding funding. The Hudson Report recommended that financial management shift to central funding rather than portfolio user-pays funding[128]. These two threads, centralised funding and centralised coordination, are elements relevant to the proposed future direction in this thesis. The creation of Coastwatch as a Division within Customs but with a military officer as its head, progressed a degree of independence or neutrality to resource allocation (or prioritising) that was absent in the 1980s. It was an important step at the time and effective. The view formed here is that the approach served its purpose through the 1990s but a more strategic and holistic organisation is needed beyond 2010.

As Coastwatch was maturing, a major internal review began into Customs' maritime management and operations to augment the Hudson report. An Australian National Audit Office (ANAO) report, not expanded on nor analysed in this thesis, criticised strategies put in place by Customs in 1991 and made a

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[128] *Northern Approaches, A report on the Administration of Civil Coastal Surveillance in Northern Australia*, pp.57-58.

range of structural recommendations[129]. Around this time the then Minister for Customs, Senator, the Honourable Chris Schacht, was contemplating a wider review of Customs and therefore the ANAO report recommendations were not able to be fully implemented.

1993 Review into the Australian Customs Service

The next report to have major ramifications for Customs was the 1993 *Review into the Australian Customs Service: The Turning Point* (RACS) [130]. RACS was largely motivated in response to Customs' search and seizure provisions and practices. However, the terms of reference encompassed a whole of Customs review, giving the committee a wide scope to comment on. Within the report, RACS recommended, *inter alia* "that the sea going portion of the Customs Maritime Fleet be integrated into Coastwatch to provide a more effective overall service"[131].

The general theme of the RACS recommendations relating to Coastwatch and the Customs marine fleet is one of centralisation. It is suggested here that this is a point where the Australian Labor Party (ALP) developed its offshore policies. Evidence of this supposition can be found in the proposed *Australian Coastguard Bill 2001* put forward by the Honourable Kim Beazley, MP, in response to the 11

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[129] Auditor General, Audit Report No. 3 1992-93, *Efficiency Audit Australian Customs Service: Management of the Marine Fleet*, Australian Government Publishing Service, Canberra, 1992.
[130] Australian Customs Service, *The Turning Point: Review Into The Australian Customs Service*, Conroy, F., Australian Government Publishing Service, Canberra, December 1993, pp.187 and 191.
[131] Ibid.

September 2001 terrorist attacks. This *Bill* is discussed in Chapter 6. The ALP proposed a single agency "with core role of law enforcement and border protection" and described the single agency as a "maritime police force"[132].

RACS stated that coordination, management and service to clients would be improved for all agencies with offshore interests if Coastwatch controlled the existing Customs sea going fleet[133]. The RACS committee argued for the "coordination and development of combined air and sea surveillance capabilities to form a strategic national civil surveillance program…"[134].

The difficulty a public organisation has with such a notion is that the focus of the report and recommendation is one of operational planning rather than strategic management. It does not articulate a strategic role and therefore makes legislating and resource support planning more difficult. A strategic role stipulates who is responsible for specific government policy and includes what areas of responsibility are beyond that role. These boundaries then make it possible to plan. No Australian government has clearly articulated Customs' role in maritime enforcement. These views are developed further in Chapter 6.

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[132] Beazley, K, '*Labor's Coastguard Proposal'*, Media Release, 24 September 2001.
[133] Australian Customs Service, *The Turning Point: Review Into The Australian Customs Service*, p.187.
[134] Ibid.

1999 Report of the Prime Minister's Coastal Surveillance Task Force

Most relevant to the current programming of offshore resources was the *Report of the Prime Minister's Coastal Surveillance Task Force* (1999 Coastal Surveillance Report) in response to a number of incursions by vessels carrying illegal immigrants[135]. The report made recommendations similar to the elements of those within Article 118 of the LOSC[136] and in the Niue Treaty[137], which includes the assessment and distribution of intelligence, multilateral cooperation in intelligence and information gathering with other countries, and finally, that good information and intelligence is the most effective means of preventing illegal boat arrivals[138]. The policy outcomes of this report for marine surveillance were financial (a $124m four year program[139]) and a shift in priority "to strengthen Australia's capacity to detect and deter illegal arrivals"[140].

The 1999 Coastal Surveillance Report considered that intelligence was the most effective means of preventing illegal boat arrivals[141]. The report also suggested that Australia should seek to promote specific initiatives for "multilateral cooperation in intelligence and information gathering with other countries" (that

[135] Department of Prime Minister and Cabinet, *Report of the Prime Minister's Coastal Surveillance Task Force*, July 1999.
[136] United Nations Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, *The Law of the Sea: United Nations Convention on the Law of the Sea, United Nations*, New York, 2001, article 118 provides for cooperation between States in the conservation and management of living resources in the areas of the high seas and includes allowing the establishment of sub-regional organisations to do so.
[137] *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region*, (Honiara, 9 July 1992), Entry into force for Australia 3 September 1993.
[138] *Report on Coastal Surveillance Task Force*, pp.1-4.
[139] The Prime Minister, the Hon John Howard MP, '*$124 Million Boost for the Fight Against Illegal Immigration*', Media Release, 27 June 1999, p. 1.
[140] *Report on Coastal Surveillance Task Force*, p.1.
[141] Ibid. pp.1-4.

are confronted by people smuggling)[142]. The concept of intelligence based coastal

surveillance and multilateral cooperation echoes the RACS sentiments and is

repeated a number of times. It does beg the question, why does each review

restate it? One answer is that these are blueprint policy statements of Government

aspirations and are much easier to make than actually implementing the policy.

Three significant structural aspects of the 1999 Coastal Surveillance Report are to

first, create the new position of Director General Coastwatch and second, to fill

the position from the ADF and third, to have the position report to the Chief

Executive Officer (CEO) of Customs. The effect was a deliberate effort to

distance Coastwatch from Customs by engaging a senior ADF commissioned

officer and removing Coastwatch from the control of the Customs general Border

Division operations executive.

Customs' Coastwatch staff at the time speculated (internally) that the decision

reflected a lack of confidence in the Customs management of the program.

However, it is more true that there was a perception that because Coastwatch was

physically located in Customs, then Customs were able to prioritise their own air

and sea taskings. An ADF placement as the Director would possibly mitigate that

perception. As a Customs land-based operational supervisor at the time, I can say

that the opposite was true. That is, my taskings were often pushed down the list to

assure and reassure regional operational planning committee members (for

example Fisheries) that Customs did not take priority over requested taskings.

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[142] Ibid., p.1.

While Coastwatch was the subject of the Federal Parliament's Joint Committee on Public Accounts and Audit Report, the *Review of Coastwatch* Report 384 (Report 384), Chapter 5 of the report contains the committee's observations on the Coastwatch and NMU relationship[143]. The report also deliberated on the question of an Australian coastguard under the committee's terms of reference[144]. Both the Hudson Report and Report 384 identified the problem associated with a "new agency being placed within the AFP, Customs or Defence"[145]. The problem was defined by the joint committee as "[the controlling agency] would naturally tend to give it the special slant characterised by the perceived priorities of the home department"[146]. This is the fundamental organisational issue that has not been successfully addressed in the evolution of Australia's maritime surveillance and enforcement.

The joint committee contemplated whether the Department of Defence should absorb the Coastwatch function[147]. That the committee paid particular attention to moving Coastwatch to the ADF could have been for operational reasons as much as managerial. From the operational perspective, some of the joint committee commentary implies that Customs vessels cannot operate effectively without Coastwatch positioning a Defence asset, that is an RAN vessel, near by[148]. There

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[143] Joint Committee of Public Accounts and Audit, *Report No. 384, Review of Coastwatch*, Commonwealth of Australia, Canberra, August 2001, pp. 65-66.
[144] Ibid., p.xv.
[145] *Northern Approaches, A report on the Administration of Civil Coastal Surveillance in Northern Australia*, pp. 58-59; *Report No. 384, Review of Coastwatch*, p.17.
[146] *Report No. 384, Review of Coastwatch*, p.17.
[147] Ibid. pp. 128-132.
[148] Ibid., p.66.

are two main flaws with the joint committee's understanding and these are identified shortly. However, fortunately and consistently with the view formed in this thesis, the committee concluded that it would be inappropriate for the ADF to move to law enforcement as core business[149].

The first flaw or problem with Report 384 forming the view that Customs vessels cannot operate without Coastwatch positioning a naval vessel near by is that it does not explain how Customs vessels have operated and do operate, without naval vessels in attendance. The second problem is that only the RAN can position their own vessels. It appears throughout Report 384 that Coastwatch overstates their role. For the purpose of this thesis, the relationship between Coastwatch and the NMU should be clarified. Coastwatch have a coordinating role on behalf of the Commonwealth for air surveillance assets. They are also the communications centre for coordinating other Commonwealth assets, even currently, following decisions made through the Joint Offshore Protection Command (JOPC). The operational responsibility, including task assignment, for Customs vessels is with the NMU. This is also how the relationship works between Coastwatch and the RAN.

Together with contemplating whether the ADF should absorb Coastwatch, the joint committee also received evidence on two other models for the management of Coastwatch assets. Interestingly, both models were premised on there being "an independent stand-alone agency" to deal with civil maritime surveillance[150]. One model proposed that the stand-alone agency would be responsible to a

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[149] Ibid., pp. 131-132.
[150] Ibid., pp. 132-149.

Minister[151]. The second model proposed establishing a "fully paramilitary coastguard"[152].

There were 14 recommendations of Report 384 that dealt with mainly aviation issues, as one would expect in a Review of Coastwatch[153]. However, recommendations four, five, seven and eight are the most relevant to the evolution of Customs' maritime policy. Recommendation four reinforces the 1999 recommendation and confirms the decision taken to retain a uniformed Australian Defence Force officer to the position of Director General Coastwatch. Recommendation five identified Coastwatch as the appropriate agency to access vessel monitoring system data. This was an early recognition of the need for a snapshot of maritime activity that is paramount for effective intelligence scrutiny, which can be related to the Australian Maritime Information System discussed shortly.

Recommendation seven is seen as the trigger for the reactive priority setting that placed illegal fishing as the major threat. It proposed Customs, Defence and Coastwatch, work with advice provided by the Australian Fisheries Management Authority (AFMA), on measures to increase Australia's ability to respond to illegal fishing in northern waters. Recommendation eight reported to Government that the ADF should investigate, with subsequent advice to the Government, the cost of acquiring and outfitting a vessel to patrol the Southern Ocean and other remote areas, and the feasibility of mounting joint patrols of the Southern Ocean

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[151] Ibid., pp. 132-133.
[152] Ibid.
[153] Ibid., http://www.aph.gov.au/house/committee/jpaa/Coastwatch/execsum.htm#top is internet link/reference to recommendations page.

with other countries with an interest in the region. While this recommendation pointed to the ADF, it was Customs which responded and reported to Government and indeed, through Coastwatch implemented the recommendation.

The recommendations as a whole, were aviation and operationally focussed. Like reports prior to Report 384, they are lacking in strategic decisions or directions on who, where and how the stand-alone agency discussed in the report, would function. More important than the question of which assets would best suit the stand-alone agency, is that of within which jurisdictions would it operate? The outer limits of the mainland EEZ? Australia's search and rescue area? And then, what functions within those jurisdictions would it be responsible for? These are some of the issues introduced in Chapter 3 and confronted in Chapter 6 of this thesis.

2004 Prime Minister's Taskforce on Offshore Maritime Security

On 20 July 2004, the Prime Minister established the *Taskforce on Offshore Maritime Security* (the Taskforce) led by the Department of the Prime Minister and Cabinet. It comprised members of that department, as well as officers from Customs and the RAN. The Taskforce report was submitted to the Prime Minister in November 2004[154]. This followed wide consultation with government agencies and various industry representatives in both Australia and overseas. Two key and

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[154] Department of Prime Minister and Cabinet, *Taskforce on Offshore Maritime Security* report, November 2004. The full text of this report is classified, so comments are based on public statements, reports and observing structural changes at the time.

relevant aspects of this report were the establishment of the Joint Offshore Protection Command and the concept of an Australian Maritime Information System.

The Joint Offshore Protection Command

On 15 December 2004, the Prime Minister announced that the Australian Government would assume direct responsibility for counter-terrorism prevention, interdiction and response in all offshore areas of Australia[155]. A key outcome of the Report was the establishment of the Joint Offshore Protection Command (JOPC) to provide a whole of government approach to maritime security. JOPC is responsible for the implementation, coordination and management of offshore maritime security. In particular, JOPC was designed to focus on the protection of Australia's offshore oil and gas installations and to ensure that any terrorist threat to Australia's maritime assets or coastline can be quickly detected and defeated.

JOPC was established on 30 March 2005 and links the ADF responsibility for counter-terrorism prevention and response with the existing civil maritime surveillance and law enforcement roles that are undertaken by Customs. Reinforcing the ADF position in the 1999 Coastal Surveillance Report, the RAN took the lead operational role for JOPC under a Navy Rear-Admiral. The Headquarters of JOPC is co-located with the Coastwatch Division of Customs in Canberra. The Commander of the JOPC also has the role of Director-General of

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[155] http://www.pm.gov.au/media/Release/2004/media_Release1173.cfm, 'Strengthening Australia's Offshore Security', 15 December 2004.

Coastwatch. The Command will have a joint accountability structure, being

responsible to:

- The Chief of the ADF for military offshore protection functions, including

  the conduct of ADF offshore patrol, prevention and response capabilities in

  relation to counter-terrorism, the protection of offshore oil and gas

  platforms and the interdiction of ships within Australia's maritime zones;

  and

- The Chief Executive Officer of Customs for the conduct of civil maritime

  surveillance, the coordination of maritime regulatory and law enforcement

  functions and support activities such as border protection and control,

  quarantine and fisheries protection.

The creation of JOPC aims to simplify and strengthen planning, as well as

command and control arrangements for offshore counter-terrorism prevention and

response. The Command will be able to draw on the full range of ADF and

Customs capabilities and make the best use of available resources to achieve the

implementation, coordination and management of offshore maritime security.

In order to ensure that any terrorist threat to Australia's maritime assets and our

coastline can be detected and defeated, JOPC has two important tasks, namely to

program security patrols of Australia's offshore oil and gas installations and to

maintain an awareness of all relevant vessels within Australia's maritime domain.

The security patrols will use both Customs and ADF assets and patrol Australia's oil and gas fields in the Timor Sea, North West Shelf and Bass Strait. However, the direct protection of each offshore platform through the provision of on-site security measures remains an industry responsibility.

Australian Maritime Information System

To maintain Australia's maritime domain awareness JOPC will establish the Australian Maritime Identification System (AMIS)[156]. AMIS is an attempt to build a comprehensive real-time picture of maritime activity in Australia's sphere of interest. This area will extend up to 1,000 nautical miles from Australia's coastline. Vessels proposing to enter Australian ports will be encouraged to provide information such as ship identity, crew, cargo, location, course, speed and intended port of arrival. This is an ambitious information technology project that would capture data currently collected by several government agencies. For example, it would require harmonising systems including search and rescue monitoring, navigation and Customs and immigration reporting.

This is a short summary of an aspect of policy development that can be described as 'clumsy'. The concept of ships reporting beyond the 200nm EEZ limit was based on air-navigation reporting. Subsequently, the concept was originally coined the Australian Maritime Information Zone (AMIZ). In the maritime environment, a maritime zone extending some 1,000nm from Australia's baselines had an overlapping sea-jurisdiction effect on many countries. And

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[156] Australian Maritime Identification System at http://www.customs.gov.au/site/page.cfm?u=5644

many of these countries pointed it out! Together with explaining the voluntary

nature of this reporting regime, the reference to it being a "zone" was then

dropped and there has been very little reported on neighbouring views since the

initial announcements.

This concludes discussion on reports and the subsequent establishment of JOPC.

This is because the detail associated with the structure and role of the JOPC is

directly relevant to the debate on strategic maritime surveillance. It is the view

formed in this thesis that Australia need not go much further when contemplating

a single agency or even Coastguard. The JOPC covers essential elements raised

by a number of supporters for a Coastguard, including the coordination of

maritime assets and the sharing of information. Chapter 7 makes a number of

recommendations on aspects where the JOPC model could be enhanced.

Chapter Four

Establishment Structure and Fiscal Considerations

Introduction

As noted in the previous chapter, Australia has shown greater interest in relation to fishing and petroleum exploration since the 1950s. It has also been noted that coastal surveillance became imperative with the declaration in 1967 of Australia's 12 nm fishing zone. Shortly after the declaration, at the request from the then Department of Primary Industries, distant surveillance commenced in 1968 using Defence P3-C Orion and Grumman S-2E Tracker aircraft supported by Royal Australian Navy (RAN) patrol boats[157]. A corresponding Customs fleet began to form in the 1970s. A number of vessels were purchased to provide a greater Customs presence in a variety of ports to combat illegal importations of narcotics. While not a designated class of Australian Customs Vessel (ACV), the purchase of these vessels was the first real attempt at building a national fleet.

In early 1978, a government review was conducted in part because of the impending declaration of the 200nm Australian Fishing Zone. The Minister for Transport was designated as the minister responsible for coastal surveillance with his department's Marine Operations Centre being responsible for coordinating

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[157] Department of Transport and Communications, *Northern Approaches: A report on the Administration of Civil Coastal Surveillance in Northern Australia*, Hugh Hudson, AGPS, April 1988, pp. 1–8.

operations[158]. However, with no assets the Royal Australian Air Force (RAAF) was tasked with offshore fishing zone surveillance. A more confusing aspect of the arrangements was that the flying tasked by the Department of Transport, undertaken by the RAAF, being conducted on behalf of fisheries (as well as the Australian Quarantine Inspection Service (AQIS) littoral patrols) were funded by AQIS[159].

The Customs maritime role during this period was primarily restricted to port approaches and close coastal Customs-specific operations. The type of vessel used by Customs for this purpose was the Customs-designed *Collector* class. These were seven metres in length and primarily provided a platform for port-based Customs officers to conduct boardings and clearances.

Building the Fleet – 1970s and 1980s

During the early 1970s Customs had started modernising its sea-going capabilities anticipating the requirement to support the Department of Transport and ADF. Adding to Customs' existing *Collector* class vessels for sheltered waters work, vessels in the next purchase program were named the *J-Class* boats. These vessels were 13 metres long, had a range of 500 nautical miles and had a crew of six. Three were initially purchased in 1974 at a cost of $660,000.00. There is a nexus between what happened during the 1970s and today. That nexus is that the type of vessel sourced for 1970s threats was in response to the priorities of that

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[158] Joint Committee of Public Accounts and Audit, *Report No. 384, Review of Coastwatch*, Commonwealth of Australia, Canberra, August 2001, p.4.
[159] Ibid.

time and similarly today, the merits of a vessel are measured in terms of its ability to meet the current threat to Australian fisheries.

From a policy and regulation point of view, the type of vessel is less important than clearly articulating what outcomes the marine fleet is expected to deliver. The coastguard debate, and indeed measuring the effectiveness of the current Customs National Marine Unit (NMU) and equally Coastwatch, would benefit from understanding where the boundaries of responsibility lie. These boundaries include the geographic as well as policy jurisdiction, priority responsibility and operational coordination.

As noted previously, in 1984 the responsibility for managing and coordinating civil coastal surveillance was transferred to the AFP. In 1987, Professor David Lindsay was appointed to conduct a review into quarantine, with one finding "that quarantine was only a minor beneficiary of the littoral aerial surveillance program" and that funding could be better directed[160].

AQIS funding was consequently redirected and the littoral surveillance program ceased[161]. Also in 1987, Customs stated that it intended to rationalise the marine fleet to as few types of vessels as practicable but qualifying the intention by saying that "it is neither technically possible nor cost effective to have only one type of vessel for Customs needs" [162]. The view of rationalisation at the time was that Customs needs "can be met by four standard types/sizes of vessels: open

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[160] Ibid.
[161] Ibid.
[162] Australian Customs Service, *ACS Marine Operations Manual*, Barrier Control, Canberra, 1987, p. 11.

boats, *Collector* class, *Comptroller-General* class, and *Minister* class"[163]. Note

that the then existing *J-Class* boats were not considered suitable for the new fleet.

This variety of vessels is not such a contrast to how the fleet is managed today.

For example, Customs has chartered a vessel for Southern Ocean patrols, regional

ports have twin-hulled coastal vessels and the main fleet are the *Bay* class with

their two tender vessels that can be launched while underway.

Image 4: Customs vessel *X-Ray*, circa 1971[164]

It was at the start of the 1980s that Customs took steps in building the

aforementioned fleet. Six 12-metre "Comptroller-General" Class vessels were

acquired for harbour and close coastal work. While the original intention was to

build a fleet by adding to these twelve vessels, they were actually replaced in the

late 1980s by four *Minister* class vessels. *Minister* class vessels were 20 metres in

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[163] Ibid., p. 12.
[164] Australian Customs Service, National Marine Unit image library.

length, had a range of 900 nautical miles at 12 knots and had a crew of six. This
fleet was still not able to keep up with the demands of all offshore operations
(particularly long distance operations).

To supplement operations in maritime areas such as Ashmore and Cartier Islands,
the Keating Labor Government approved RAN support to Coastwatch at a rate of
1,800 patrol boat days per annum. By the late 1980s, "the RAN was providing the
primary offshore surface surveillance and response capability for the
Commonwealth civil surveillance program"[165].

The service delivery and capability of the NMU often comes under scrutiny,
including being compared to the civil aviation surveillance program. This
scrutiny is more often financial rather than output or delivery centred. An
example is in the 1988 Hudson Report which recommended that "Police, ADF
and Customs equipment which might be subject to joint use should be core funded
through relevant portfolio budgets"[166]. Since commencing operations in August
1988, Coastwatch had developed and consolidated its role as an independent
program within Customs, coordinating a sound surveillance capability on behalf
of client agencies.

Surveillance coverage included all of Australia's 37,000 kilometre coastline "with
all operating funds directly budgeted for, allocated to and managed by

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[165] Australian Customs Service, *The Turning Point: Review Into The Australian Customs
Service*, Conroy, F., Australian Government Publishing Service, Canberra, December 1993, p.186.
[166] *Northern Approaches, A report on the Administration of Civil Coastal Surveillance in Northern
Australia*, pp.57-58.

Customs"[167]. Learning from the Coastwatch experience, the NMU pre-empted the

direct budget and independent coordination approach by rationalising its own

structure. The reasons for rationalisation were to create a more flexibly

deployable fleet; a national crew capable of operating on each vessel; and a more

cost effective maintenance and procurement leverage[168].

Building the Fleet – 1990s

The rationalisation and the NMU assets and resources of the 1980s remained

largely unchanged until 1993. In 1993, the Customs maritime fleet was

comprised of fourteen vessels costing approximately $9.4 million with total

annual running costs of $4.6 million[169]. These fourteen vessels were deployed in

thirteen locations across Australia and included a mixture of the *J-Class* vessels,

Comptroller-General class and *Minister* class[170]. The concept of a national crew

capable of operating on each vessel proved difficult for regional Customs

managers.

The marine units then fell under the responsibility of Customs' Border

Management Division in each state and territory. These managers also had

responsibilities that included wharf security, cargo control and search,

international mail, etc. Very few of these managers had the necessary

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[167] Australian Customs Service, *The Turning Point: Review Into The Australian Customs Service*, p.186.
[168] Australian Customs Service, *ACS Marine Operations Manual, Barrier Control*, Canberra, 1987, pp12-13.
[169] Australian Customs Service, *The Turning Point: Review Into The Australian Customs Service*, p.189.
[170] Ibid.

understanding of marine skills and qualifications when assigning Customs officer

resources. My personal experience was that crewing Collector class, J-Class and

Minister class vessels on tasks and patrols required no more than a coxswain

certificate and on-board safety training. There are qualifications determined by the

Australian Maritime Safety Authority (AMSA) based on the type and class of the

vessel, which ACV Commanders have always met and currently all crew below

them are far more (appropriately) qualified[171]. Maritime policy decision-makers

need to take account of the subsequent costs associated with the requirements to

appropriately qualify Customs (or a Coastguard) crew. The more diverse the

fleet, the likelihood is that training costs will be higher.

Image 5: Customs' J-Class vessel *Jacana*, circa 1997**[172]**

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[171] Australian National Audit Office, *ANAO Performance Audit no. 37, 2003-2004, National Marine Unit – Australian Customs Service*, ANAO, Canberra, p. 88.
[172] Australian Customs Service, National Marine Unit image library.

In the 1997 budget the Government provided for the replacement of all Customs vessels with eight new 30-35 metre vessels with a range in excess of 1,000 nautical miles at 20 knots with a crew of nine. These vessels came into service at the start of 1999. The financial dimension to the Government's decision was an injection of $124 million over four years "to strengthen Australia's capacity to detect and deter illegal arrivals"[173].

Further to the observation above regarding AMSA requirements, if the Government decides to increase the size of Customs vessels by as much as 51mm, it will put a new fleet into a different class, which is over 35m but less than 80m. This means the Customs NMU crews will require additional qualifications and significant costs have been attributed to such an upgrade of qualifications[174]. For example, upgrading existing engineering qualifications includes 305 days of study at $63, 210 per engineer, nine months on a class of vessel, nine months in charge of a watch and fifteen months as a second-class engineer[175].

Customs' Current Fleet

As at 2005, the eight ACVs are supplemented by a modified long-distance charter vessel named *Oceanic Viking* for the surveillance and enforcement response patrols in Australia's Antarctic area, Heard and McDonald Islands EEZ and the

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[173] *Report on Coastal Surveillance Task Force*, p.1.
[174] Australian National Audit Office, *ANAO Performance Audit no. 37, 2003-2004, National Marine Unit – Australian Customs Service*, p.89, see Table 5.1.
[175] Ibid.

French Kerguelen Island EEZ[176]. At this stage the charter vessel is armed with a deck-mounted machine gun but the ACVs are not. However, this circumstance is to change over the 2005-2006 financial year and ACVs will be similarly armed[177]. Like the acknowledgement above concerning AMSA qualifications and associated costs, there are training, re-certification, legislative and operation procedural implications that all increase the training costs associated with arming ACVs.

The management of the Customs fleet is depicted in organisational Diagram 8 below. The NMU sits within Customs Border Compliance and Enforcement Division, which is headed by a senior executive service (SES) level 2 public servant. The two arms of Border, Compliance and Enforcement, are headed by SES level 1 public servants and the NMU is attached to the Border Enforcement Branch. However, the Superintendent NMU, and indeed the NMU itself, operates largely autonomously within Border Enforcement. The Customs NMU is for comparative purposes, a Border Branch of their own within the Border Enforcement Division of Customs.

Diagram 8: Customs NMU Structure

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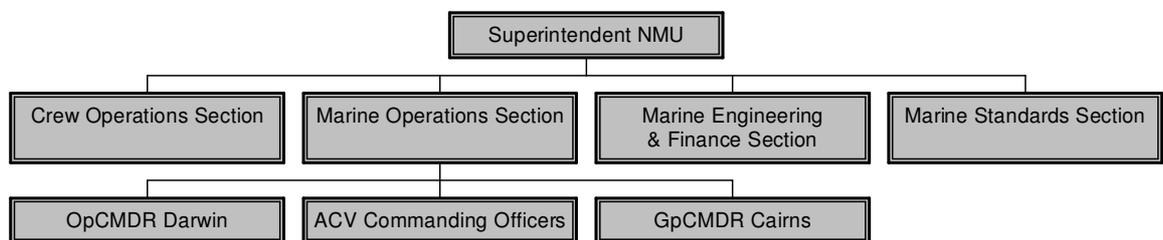
[176] The chartered vessel is modified in that it has a detachable deck-mounted machine gun. The patrol is under a formal agreement between the Australian and French governments.
[177] 'Customs and the 2005-06 Budget', http://cww.customs.gov.au/corporate_info/ASM/Index.htm, accessed 10 May 2005

The distribution of functional responsibility within NMU Central Office is based on the principle that the Marine Operations Section is responsible for centralised planning and tasking of the sea-going fleet to meet operational results. The other NMU Central Office Sections, Crew Operations, Marine Standards and Engineering support the Marine Operations Section in meeting operational requirements.

Table 3 illustrates the NMU's current operational deployment capability and can be read in conjunction with Table 2, which summarised agency taskings.

Table 3: Sea days and response activity for Customs vessels[178]

^ Foreign Fishing Vessel
+ Suspected Illegal Entrant Vessel
~ Includes Merchant Ships, Australian Fishing Vessels and Other Small Craft

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[178] Australian Customs Service, *Customs Figures*, Quarterly Statistical Bulletin, Issue 36, September Quarter 2004, pp. 66-69.

As outlined previously in Table 2 (taskings) together with the figures in Table 3 (sea days), the Customs NMU undertakes activity in a whole-of-government service. The list of ten Federal and two State departments are the relevant client agencies[179].

Two other major federal maritime stakeholders since 11 September 2001 are the Department of Prime Minister and Cabinet (PM&C) and the Department of Transport and Regional Services (DOTARS). Both these agencies have taken considerable responsibility and interest in offshore security and agencies with maritime interests need to include them for policy success[180]. DOTARS involvement stems from the navigation, safety and port-state controls being implemented globally and domestically. PM&C has an increased role to ensure relevant agencies are being responsive, not duplicating Government policy and not unduly inhibiting legitimate trade.

Funding Maritime Surveillance and Enforcement

As noted by at least one commentator, maritime border activity costing is not something that has been comprehensively conducted, or if it has, it has not been released[181]. Nonetheless and somewhat dated, based on the surveillance component of 'border costs' by the same commentator, an attempt was made to attribute costs as shown at table 4[182].

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[179] Woolner, D., 'Australia's maritime border protection regime' in Tsamenyi, M. & Rahman, C., (Eds.), *Protecting Australia's Maritime Borders: The MV Tampa and Beyond*, Centre for Maritime Policy, University of Wollongong, Wollongong, 2002.

[180] The Attorney General's Department is not listed, however, all Commonwealth legislative policy development relies on consulting with them – particularly Customs as the junior agency within the portfolio.

[181] Woolner, 'Australia's maritime border protection regime', p.21.

[182] Ibid., p.24.

Table 4: Government Maritime 'Border' Protection Spending 2001[183]

There are several further costs that can be added to this account. For the purpose of this thesis, these costs are separated between direct surveillance and response and indirect surveillance and response. Direct surveillance costs include actual appropriation allocations for the running of maritime surveillance and enforcement. Indirect surveillance costs are those that agencies such as Customs and the AFP are liable for, subsequent to surveillance and enforcement outcomes. These costs are incurred for things such as interpreters, resource material for compliance education programs, or prosecutions or additional equipment for operators.

The first direct associated cost to add is the southern Indian Ocean and Antarctic patrol. In the 2005 Budget, a further $217.2m to extend armed southern ocean patrols over five years was allocated to Customs[184]. A further direct cost from the budget was $25.2m to arm ACVs over the next four years[185].

Two further direct costs have been attributed to the ADF and are useful in analysing maritime surveillance costs. One is the $60m three-week deployment of the ADF to

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[183] Ibid.
[184] Minister for Justice and Customs, *'Customs and the 2005-06 Budget'*, http://cww.customs.gov.au/corporate_info/ASM/Index.htm, accessed 10 May 2005 and Joint Media Release, Minister for Justice and Customs and Minister for Fisheries, Forestry and Conservation, *'Long term commitment to Southern Ocean patrols'* at http://cww.customs.gov.au/internet/site/content5542.htm, accessed 11 May 2005.
[185] Ibid.

respond to the *MV Tampa* incident and the northern Indian Ocean blockade that followed[186]. The other exercise worth noting is ADF Operation Relex II, which has been estimated to cost $150m per year. One direct cost to attribute to Coastwatch as part of this exercise, is the "CMS04" contract tender process to replace the existing 17 fixed wing and helicopter assets[187]. The CMS04 contract has been estimated as "approaching $1 billion over the next 12 years"[188]. Direct costs unable to be attributed so far are RAAF civil surveillance and ADF ground and water response support.

Indirect costs that can be added include interpreter fees, legal representation and associated expenditure administered as part of preparing a prosecution brief. As these costs vary from State to State and departmental costs vary between Customs, AFMA, AQIS, the AFP, etc., no attempt is made to estimate such costs. Indirect costs such as immigration detention have been attempted though. The so called 'Pacific Solution' or third-country processing for detainees has had costs attributed to it of $500m over a five year period and the building of a detention centre on Christmas Island has been estimated at $219m[189].

Some further indirect costs introduced for the purpose of this thesis are future surveillance expenses. One is the use of radar, both over-the-horizon (OTH) and

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[186] Woolner, 'Australia's maritime border protection regime', p.24 and Stevens, D.M., "To disrupt, deter and deny: Sealing Australia's Maritime Borders", in *Naval Blockades and Sea Power*, B. Elleman and S.C.M. Paine (eds), Routledge, Oxon, 2006.

[187] Delivery under the new arrangements is scheduled to commence in July 2007. Minister for Justice and Customs, Senator Chris Ellison, 'New border protection contracts sought to bolster maritime surveillance' media release, http://cww.customs.gov.au/internet/site/content4016.htm, 30 July 2004.

[188] Ibid.

[189] Australian Parliament House, *A Certain Maritime Incident*, report from Select Committee, 23 October 2002, Chapter 11; at http://www.aph.gov.au/senate/committee/maritime_incident_ctte/report/c11.htm and Woolner, p.24.

surface wave. A figure of $275m has been attributed to the Jindalee OTH capability and although difficult to cost annually against maritime surveillance, this technology will be expensive in agency appropriation terms[190]. Similarly, Coastwatch is testing unmanned-aerial-vehicles (UAV), for which $160m has been set aside[191].

In addition to these approaches, it is foreseeable that Australia would use Global Earth Observation System of Systems (GEOSS), that is various satellite technology, to conduct maritime surveillance[192]. A final area that could be costed as an indirect expense is a figure attributed to the many volunteer coastal rescue organisations and their assets.

Comparative Funding for a Coastguard

These samples of direct and indirect costs have been introduced as part of consideration toward whether Australia would benefit more from a single coastguard organisation or from managing existing maritime resources better. As part of that consideration, table 4 has been expanded at table 5 below, to include actual costs reported by Customs (for the NMU and Coastwatch) plus the above direct costs roughly annualised[193].

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[190] Bergin, A., Tsamenyi, M. and Rahman, C., 'Conclusion: Maritime Border Protection after the Tampa and 9/11', in Tsamenyi, M. & Rahman, C., (Eds.), *Protecting Australia's Maritime Borders: The MV Tampa and Beyond*, Centre for Maritime Policy, University of Wollongong, Wollongong, 2002. p.46.
[191] Ibid.
[192] United Nations ESCO, '*New Space Services for Maritime users: The Impact of Satellite Technology on Maritime Legislation*', Symposium held in Paris, France, 21-23 February 2005.
[193] Indirect costs were not attributed due to accuracy concerns and that some could potentially be shared with State and Territory governments.

Table 5: Estimated Annual Government Maritime 'Border' Protection Spending Beyond 2005

Agency	$m
Customs	127[194]
Coastwatch CMS04 contract	8
ADF	144
Agency tasking Customs/ADF	29
Southern Ocean patrols	43
Arming ACVs	5
Operation Relex	150
Indirect Costs	not known
Total	**506**

For the purpose of this thesis, a total amount of $506m per annum is taken to include expenses such as employee and supplier costs. As an evaluation starting point, let us presume that existing employees and assets that are capable of patrolling and responding to the various border issues are diverted to a new coastguard organisation. If that were to be the case, the larger RAN craft would have to be replenished. That is, either a decision is made that a coastguard would receive a number of Armidale- class vessels from the RAN or it would get new vessels with that capability. The result of the decision is that either the RAN keeps the Armidale class vessels or those handed to the new coastguard are replaced. This could also be considered for other RAN vessels used in civil matters such as HMAS Canberra[195].

Leading from the presumption that a new coastguard will now have three different classes of vessels, the new organisation will also then need three different types of crew skills. The additional recruitment, training, conditions and legislation to

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[194] Australian Customs Service, *Annual Report 2003-04*, Australian Government Publishing Service, Canberra, p.64.
[195] Transport of 51 unauthorised arrivals from Port Hedland to Christmas Island, SIEV XIII, 1 July 2003

support the new 'blueprint' policy, etc, are not insurmountable. The view is that were such a rationalisation to go ahead, it is hard to visualise any economies of scale.

Moving assets to a new organisation and recruiting and training crews, for example, is merely shifting existing costs and methods to another chart of accounts. The requirement to ensure that both the RAN and a coastguard are able to dedicate their respective resources to their own missions still risks a duplication of investment. It would almost certainly require two distinct information technology (IT) financial systems. Therefore on a simple fiscal level, the case for a new coastguard organisation would need to be more compelling, including how actual (or accrued) savings could be made.

The responsibilities for maritime surveillance and response are a constant and the costs need to be borne by Government against some chart of accounts. It is suggested here that only the Federal Government has the resources to fund an offshore surveillance and response program, in any form. That the Federal Government is the only institution able to fund offshore surveillance and response is stronger if a coastguard organisation was to pick up search and rescue, navigation authority or other roles. Following this line of thought, finance controllers would then also need to look at costs associated with the running of the Australian Maritime Safety Authority.

It is not debated that an offshore surveillance and law enforcement capability is necessary. A brief look at the consequences of a vulnerable maritime domain is testimony to this. Taking the figure of $506m again, the outcome for the government

is protection of over $130bn imports and $109bn exports each year (of which approximately $24bn is in energy export revenues)[196]. These figures reflect the goods or commodities traded only. In real terms, one must also add the material goods including the ships, containers, installations and pipelines providing the infrastructure.

Costing of the consequences of non-tangible losses is not attempted here although some formula may be possible by economic experts. For example, the benefits of secure shipping lanes, safe navigation and uninterrupted supply of oil or gas from offshore platforms. Obviously there is no figure that can be placed over human life in trade figures.

There have been other arguments in favour of a Coastguard in addition to those based on cost-benefit analysis. For example, one view is that there are issues that "transcend issues of finance or bureaucratic interest"[197]. These non-financial issues are explored in the analysis and recommendations at Chapter 6. To conclude this chapter, the financial considerations do not give rise to supporting an argument that a coastguard is the next worthwhile evolution of maritime policy. Putting fiscal considerations behind now, the thesis next looks at the statutory policy evolution and future options.

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[196] Australian Customs Service, *Customs Figures*, Quarterly Statistical Bulletin, Issue 38, March Quarter 2005, p.15, reflecting consumption, capital, intermediate and other imported goods, agricultural, forestry, fishing, hunting, mining, manufacturing and other exported goods, over the 2003-2004 financial year; and Bergin, A. & Bateman, S., *Future Unknown: The terrorist threat to Australian maritime security*, Australian Strategic Policy Institute, Barton, April 2005, p.33.
[197] O'Connor, M., 'Future organisational directions for maritime border protection: The case for an Australian Coastguard' in Tsamenyi, M. & Rahman, C., (Eds.), *Protecting Australia's Maritime Borders: The MV Tampa and Beyond*, Centre for Maritime Policy, University of Wollongong, Wollongong, 2002, p.93.

Chapter Five

Maritime Surveillance and Enforcement Legal Policy

Introduction

The Australian Customs Service (Customs) is a Federal government regulator and as such, needs specific authority to act coercively, intrusively and punitively, for example. In Australia, this authority stems from the Federal Parliament passing legislation that both allows Customs to regulate and that protects the public from arbitrary use of power. As regulatory activity has evolved and been tested, Customs has also gained direction from Courts of competent jurisdiction.

This chapter is primarily concerned with the evolution of maritime laws passed by the Australian Federal Parliament and discusses possible enhancements for maritime surveillance and enforcement legislation. The general premise made here is that the myriad of offshore enforcement powers should be consolidated and rationalised to enable Customs and relevant ADF personnel to better understand the extent and limitations of their powers. It is also argued that other benefits will flow from a strategic legislative framework. Such benefits include more cohesive organisational policies and procedures, better inter-operability between Customs and ADF, which in turn, would lead to more effective enforcement. From these benefits, it is also argued that the potential for political embarrassment is then minimised.

International Framework and Application

The most significant contemporary international legal impact for Australian maritime policy occurred when the 1982 *United Nations Convention on the Law of the Sea* (LOSC) came into force in 1994[198]. The LOSC deals with the codification of customary and also the progressive development of international law and the governance of the sea. The LOSC divides the ocean into jurisdictional zones and when implemented into domestic legislation, provides a legal basis for the enforcement of national maritime jurisdiction within the relevant zones. Australia ratified the LOSC on 5 October 1994 and it was incorporated into domestic legislation by way of the *Maritime Legislation Amendment Act 1994*. This legislation, by effect, amended several other Commonwealth statutes relating to Australia's maritime zones.

Australia's maritime zones are reflected in domestic legislation as derived from the provisions of the LOSC[199]. For the purpose of discussing maritime enforcement jurisdiction there are three zones that are measured from the territorial sea baselines of mainland Australia, noting that mainland Australia includes the islands and island territories of Australia. Customs exercises powers in Australia's internal waters under the *Customs Act 1901* using both the Bay Class Australian Customs Vessels (ACVs) and smaller Customs-flagged harbour vessels. These internal water areas are the waters on the landward side of baselines[200]. For *Customs Act 1901* purposes,

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[198] United Nations Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, *The Law of the Sea: United Nations Convention on the Law of the Sea,* United Nations, New York, 2001, (LOSC); also at http://www.info.dfat.gov.au/treaties/.
[199] *Seas and Submerged Lands Act 1973.*
[200] LOSC, Article 8.

which includes controls over Australian and foreign ships and <u>all</u> goods on board, jurisdiction also covers bays, ports and roadsteads[201]. As this thesis explores some enforcement and surveillance inter-operability issues between Customs and the Royal Australian Navy (RAN), it is considered prudent in the context of this thesis to define Australia's maritime border as beginning from the baselines.

Briefly, Australia has sovereignty over a belt of sea to 12 nautical miles from the baselines known as the territorial sea[202]. Beyond the territorial sea to a distance not exceeding 24 nautical miles from its baselines, in a 12 nautical mile belt of sea known as the contiguous zone, Australia can take limited enforcement action to prevent or punish contraventions in relation to Customs, fiscal, sanitary and immigration matters in the territorial sea[203]. Separate to the contiguous zone is a belt of sea measured seaward from the outer limit of the territorial sea to a distance not beyond 200 nautical miles from the baselines known as the exclusive economic zone (EEZ)[204].

Australia has rights to explore and exploit living and non-living resources in its EEZ, as well as having certain environmental obligations[205]. The *Customs Act 1901* provides Customs, police and Defence Force personnel with powers in these zones, to varying degrees, consistently with the LOSC. More discussion follows shortly, however, it suffices to say that Customs' powers are clearer and stronger closer to the mainland baselines and become more qualified the further from the baselines one goes.

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[201] *Customs Act 1901* and LOSC Articles 10, 11 and 12.
[202] LOSC, articles 2 – 16.
[203] LOSC, article 33.
[204] LOSC, article 55.
[205] LOSC, see articles 192-196.

A second important international policy impact for Customs was the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (1988 Vienna Convention)[206]. This convention was developed as a result of a number of States' concerns about the growing problem of illicit drug trafficking. The 1988 Vienna Convention deals with the production and control of narcotics and psychotropic substances and the suppression of their illegal production and movement.

Of particular importance to the evolution of Customs' maritime policy is Article 17 of the 1988 Vienna Convention. This article gives jurisdiction to a State on the high seas to exercise powers under certain conditions against ships suspected of being involved in illicit trafficking in narcotics and psychotropic substances. The 1988 Vienna Convention is consistent with Article 108 of LOSC with Article 17 dealing more specifically with States cooperation in the suppression of illicit traffic in narcotic drugs or psychotropic substances[207]. From a policy development perspective, Article 17 of the 1988 Vienna Convention provides further insight into how Article 108 may be applied by States Parties. Article 17 is reproduced below:

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[206] United Nations, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, United Nations, New York, 1988; also at http://www.info.dfat.gov.au/treaties/.
[207] LOSC, Article 108 provides in part that "States shall cooperate in the suppression of illicit traffic in narcotic and psychotropic substances engaged in by ships on the high seas…"

[208] *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* at http://www.austlii.edu.au/au/other/dfat/treaties/1993/4.html.

As part of the Australian Government's strategy to strengthen Customs' powers to deal with the illegal importation of illicit drugs and people smuggling, relevant aspects of the LOSC and 1988 Vienna Convention were confirmed in domestic legislation[209]. As introduced at the start of this chapter, the *Maritime Legislation Amendment Act 1994* gave effect to LOSC, specifically to Parts 2, 5 and 6 of LOSC and amended eleven Commonwealth statutes[210].

Domestic Maritime Enforcement Legislation Framework

This discussion pays particular attention to the Customs Act and its relationship to key relevant Commonwealth statutes. As previously stated, the Customs Act is concerned with the control over goods into and out of Australia. To put in place controls over the management of the movement of legitimate and prohibited goods entering Australia, Customs needs to know about the arrival of vessels and aircraft in Australia. To achieve this objective, vessels and aircraft arriving in Australia must, in accordance with the *Customs Act 1901*, report at appointed ports where they are required to account for the cargo and passengers which are to be landed at that port.

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[209] The strategy refers to the previous discussion in Chapter Four, specifically the Prime Minister's Task Force on Coastal Surveillance. The United Nations Convention Against Translational Organized Crime, Annex III, Protocol Against The Smuggling Of Migrants By Land, Air And Sea (People Smuggling Convention), did not enter into force until 29 September 2003 and was not ratified by Australia until 27 May 2004 – Customs policies were already being adjusted before this time in response to people smuggling; Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990, Extradition (Traffic in Narcotic Drugs and Psychotropic Substances) Regulations 1992 and Mutual Assistance in Criminal Matters (Traffic in Narcotic Drugs and Psychotropic Substances) Regulations 1992.

[210] The eleven Commonwealth statutes were the Admiralty Act 1988, Customs Act 1901, Designs Act 1906, Fisheries Management Act 1991, Migration Act 1958, Minerals (Submerged Lands) Act 1981, National Museum of Australia Act 1980, Petroleum (Submerged Lands) Act 1967, Pipeline Authority Act 1973, Quarantine Act 1908 and Sea Installations Act 1987.

Information is required about goods to ensure the correct customs duty and goods and services tax is paid on them and to ensure that any restrictions on their importation have been complied with. The *Customs (Prohibited Imports) Regulations 1926* set out goods that are prohibited outright and those subject to conditional importation. It should be noted that there are other more specific pieces of legislation placing restrictions on the importation of goods, which Customs administers on behalf of the agency which has responsibility for the relevant permits or certification[211]. Examples of these importations include goods subject to quarantine and pharmaceutical goods.

While Customs' core responsibility is one of 'control over goods' it remains true that the expertise applied to control over goods has been expected to be converted to the shifting priorities of Customs, for example, people smuggling or counter-terrorism. When tasked with responsibility to meet the Government's shifting priorities, a constabulary organisation such as Customs is not able to simply amend the *Customs Act 1901* as the primary purpose for the Customs Act is control over goods. Access to other statutes with relevant offshore powers and offences can provide the same outcomes, albeit with the permission of the relevant portfolio Minister responsible for the statute and Prime Minister (or the Cabinet/Caucus depending on the Government of the day).

These amendments to various statutes as well as changing the nature of the Customs Act in some cases discussed shortly, in order to meet Government objectives reflects

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[211] Legislation such as the Quarantine Act 1908 prescribes powers for Customs officers as well as controls over restricted or prohibited goods; Customs also administers forms or seizure action under the Therapeutic Goods Act for medicines and States' Crimes Act's for firearm controls, for example.

the evolution of the Customs' whole-of-government role and its responsiveness to government policy.

The first amendments to the *Customs Act 1901* relating to offshore matters and maritime powers was the *Customs Legislation Amendment Act (No.1) 1999*. This Act extended the application of boarding, searching and seizing powers under sections 59, 184 and 185 of the *Customs Act 1901* to the contiguous zone. The contiguous zone of Australia was proclaimed on 31 March 1999 in anticipation of these amendments[212]. The *Customs Legislation Amendment Act (No.1) 1999* also provided Customs with express offshore powers under several other federal Acts, which are highlighted below with other statutes authorising Customs to act on their behalf.

The Application of Domestic Legislation

The Royal Australian Navy (RAN) and the Customs National Marine Unit (NMU) carry out almost all federal civil maritime enforcement activity in and beyond the LOSC maritime zones under Commonwealth legislation. Officials from the Australian Fisheries Management Authority (AFMA) and Customs sometimes also conduct enforcement operations on civilian chartered vessels. Customs officers crewing ACVs and ADF personnel on military vessels hold delegations under the statutes (and Regulations under each Act) listed in Table 6[213].

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[212] The *Customs Act* was also amended to apply to internal waters, ie waters to the landward side of the baseline from which the territorial sea is measured. This area comprises a significant stretch of Australia's coastline, including the Great Barrier Reef and the Kimberly coastline.

[213] Relevant too, are conventions such as the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* and the *United Nations Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988* and 2005 Protocols at

Table 6: Customs and ADF Maritime Enforcement Statutory Delegations

Frequently Exercised Delegations	Ad-hoc Delegations
Customs Act 1901	*Antarctic Marine Living Resources Conservation Act 1981*
Quarantine Act 1908	*Antarctic Treaty (Environment Protection) Act 1980*
Migration Act 1958	*Continental Shelf (Living Natural Resources) Act 1968*
Financial Transactions Reports Act 1988	*Crimes At Sea Act 2000*
National Parks and Wildlife Conservation Act 1975	*Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*
Commonwealth Crimes Act 1914	*Great Barrier Reef Marine Park Act 1975*
Fisheries Management Act 1991	*Minerals (Submerged Lands) Act 1981*
Torres Strait Fisheries Act 1984	*Protection of the Sea (Prevention of Pollution from Ships) Act 1983*
Environment Protection and Biodiversity Conservation Act 1999	*Sea and Submerged Lands Act 1973*

As can be seen from the Table above, there are a myriad of Commonwealth laws which make up the legal framework for protecting Australia's maritime borders. This framework further includes the *Australian Constitution Act 1901*, the decisions of the courts of competent jurisdiction and the political/legal developments around the Offshore Constitutional Settlement (OCS). The legal framework for protecting Australia's maritime borders is also implements the various international conventions and treaties mentioned.

The OCS agreement is an important element in defining the maritime boundary. The OCS is a policy framework for sharing of offshore resources supported by a legislation design where a number of statutes define offshore management responsibility between the Federal government and State and Territory governments.

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http://www.info.dfat.gov.au/treaties/, as Customs has direct or indirect responsibilities under implementing legislation such as the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990.*

The process to achieve this demarcation was for each State and Territory to pass legislation "requesting the Commonwealth Parliament to enact laws in agreed terms"[214]. The Commonwealth responded by enacting fourteen separate pieces of legislation that provided State and Territory jurisdiction to their respective coastal waters (3nm from baselines) while jurisdiction over ocean beyond these zones went to the Commonwealth.

Reframing the Legislative Framework

This array of Australian offshore legislation is complicated by having to ensure each piece of domestic legislation does not contradict the purpose of the others, as well as aligning these laws with international law. Though not expressly stated in *Australia's Oceans Policy*, implementing some of the 113 commitments related to the existing legal framework "will result in a need for some adjustment of the legal regime"[215]. It is considered here that this legislative adjustment is already overdue and yet at the time of writing, legislative amendments for offshore enforcement continue to be added to various statutes. Examples include the *Border Protection Legislation (Deterrence of illegal Foreign Fishing) Amendment Bill 2004, Law & Justice Legislation Amendment (Serious Drugs & Other Measures) Bill 2005* and *Customs Legislation Amendment (Border Compliance and Other Measures) Bill 2005*.

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[214] Rothwell, D. & Kaye, S., 'Australia's Legal Framework for Integrated Oceans and Coastal Management' in M. Hayward (Ed.), *Integrated Oceans Management: Issues in Implementing Australia's Ocean Policy*, Cooperative Research Centre for Antarctic and the Southern Ocean, Hobart Research Report, 26 May 2001, p.14.
[215] Ibid.

The outcome from the October 2005 diplomatic conference on the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* and its *Protocol For the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, 1988 (SUA Convention and Offshore Platform Protocol) will have implications for the domestic legislation agenda[216]. This International Maritime Organization (IMO) convention was originally initiated in response to the terrorist attack on the *MV Achille Lauro*[217]. The genesis for the protocols to the SUA Convention and Offshore Platform Protocol was a response to the increased threat to global security from terrorism in the post-September 11 environment just as the original SUA Convention was a response to the *MV Achille Lauro* incident.

The original SUA Convention provides a framework to take prosecution and/or extradition action (for States Parties) against any person ("whatever their nationality or citizenship") committing unlawful acts against the safety of navigation either in or "outside Australia"[218]. The types of offences include if the person seizes a ship, destroys or damages a ship, places a destructive device on a ship, destroys or damages navigational facilities or causes death or grievous bodily harm[219].

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[216] *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 –Protocol 2005* and *Protocol For the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf – Protocol 2005* at http://www.info.dfat.gov.au/treaties/.

[217] In October 1985 four members of the Palestine Liberation Organisation hijacked the Italian cruise ship *Achille Lauro* on the high seas off Egypt. After unresolved jurisdictional squabbling between various governments, the perpetrators were eventually released without being charged with any offences. IMO members negotiated the SUA Convention in response to the lack of clarity in dealing with the assault; see Royal Australian Navy, 'Maritime Security Regulation', *Semaphore*, Issue 3, February 2006, pp.1-2 at http://www.navy.gov.au/spc/semaphore/2006_3.pdf.

[218] *Crimes (Ships and Fixed Platforms) Act 1992*, section 2.

[219] Ibid., ss 8 – 17.

Should the Parliament choose to bring the provisions of the Protocols to the SUA Convention and Offshore Platform Protocol into force, a range of new offences and offshore boarding powers are expected to become available to maritime laws enforcement Parties authorities. These new offences include transporting a known or suspected terrorist and transporting parts for potential use in the manufacture of weapons of mass destruction, such as centrifuges, for example. Once the Protocols enter into force, further amendments to Australian domestic legislation will be necessary. The legislation that gives effect to the SUA Convention and Protocol is the *Crimes (Ships and Fixed Platforms) Act 1992* (the Crimes (Ships and Fixed Platforms) Act). This legislation creates offences that are provided under the original convention and original offshore protocol as mentioned briefly above.

The new protocols create further offences under the SUA Convention and importantly to the evolution of Customs' maritime enforcement role, the protocol to the SUA Convention also establishes new offshore powers. Operational-level practitioners might be justifiably concerned that these new powers will be placed in the *Crimes (Ships and Fixed Platforms) Act* or in a new statute, which would then introduce yet another variation of powers for boarding to add to the number of Commonwealth statutes that currently contain boarding provisions[220].

In either case, it would create another layer of complexity when the new offences could simply be added to statutes that Customs and the ADF can already use to deal with other offshore Commonwealth offences. That is, it would be sensible to prescribe the new offences under the Customs Act and in the *Customs Regulations*

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[220] Examples of maritime surveillance and enforcement Commonwealth boarding powers can be found in the Customs Act 1901, Fisheries Management Act 1991 and Migration Act 1954.

1926, as an interim measure before eventually consolidating offshore enforcement powers in a single statute.

A costly risk of this current assortment of different layers of offshore powers and offences is the potential difficulty in understanding and application for law enforcement officials. It is equally important to also think about how both civilian domestic and international mariners are able to interpret Australian legislative requirements.

Image 6: Customs Bay-Class vessel at Offshore Resource Installation[221].

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[221] Australian Customs Service, National Marine Unit image library.

A Single Offshore Enforcement Powers Statute

The legislative adjustment recommended here, is the rationalisation of a small number of common and select Commonwealth offshore enforcement powers. At this earliest point it is emphasised that the statute being proposed should only deal with powers and not offences. It is proposed here that a single statute would allow the RAN and the Customs NMU to develop consistent guidelines and standing operating procedures (SOPs) when operating in Australia's maritime jurisdictional zones for fisheries matters, counter-terrorism measures, unauthorised people movement and narcotics intervention, for example. The SOPs could be structured as a document that is transferable to officials on civilian chartered vessel operations to enable enforcement of a range of maritime regulatory powers.

One of the first references to the Federal Government contemplating the consolidation of federal and States' maritime legislation can be found in the Beazley review[222]. The Beazley review recommended examining uniformity including standardizing terminology, "a single set of regulations unifying several parent statutes" and "with the agreement of the States…regulating all activity in the coastal zone"[223].

The most relevant work to date on a single statute was mentioned at Chapter 4, in the form of the proposed *Australian Coast Guard Bill 2001* (the Australian Coast Guard Bill). This Bill was put forward by the Honourable Kim Beazley, MP, who had considered legislation shortfalls in his 1984 review and no doubt used this experience

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[222] Beazley review, 1984, pp. 6-4 to 6-5.
[223] Ibid.

as a measure of one of his responses to the 11 September 2001 terrorist attacks. The stated purpose of the Australian Coast Guard Bill was "to provide the framework for the establishment of an Australian Federal Coast Guard"[224]. It proposed a single agency with the "core role of law enforcement and border protection" and described the single agency as a "maritime police force"[225]. The implications of the Australian Labor Party proposal for the organisational structure are addressed in the next chapter. The following comments are from a comparative legislative perspective only, as the proposed Australian Coast Guard Bill is analogous to the composition of a single statute proposed in this thesis.

There are two observations concerning the Australian Coast Guard Bill to be made here. First, the model developed in this thesis is similar in some respects to the selection of specific powers conferred from a single statute. The next chapter illustrates one possible format for a single offshore statute and the powers that can be collapsed from existing Commonwealth legislation. If the government of the day decided that a single agency should be responsible for offshore enforcement, then either an additional statute creating such an agency could be proposed or possibly an additional division in the proposed single enforcement statute may achieve the same thing.

The second observation is that this thesis distances itself from clause 4 ("Establishment and Constitution") of the proposed Bill as this can be read as a permanent exercise of executive power. This clause is extracted and reads as follows:

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[224] Beazley, Australian Coast Guard Bill 2001.
[225] Beazley, K, '*Labor's Coast Guard Proposal*', Media Release, 24 September 2001.

"The functions of the Australian Coast Guard include:

The provision of border protection and police services upon Australia's coastal area, contiguous zone and exclusive economic zone in relation to:

- laws of the Commonwealth; and

- property of the Commonwealth (including Commonwealth places) and property of authorities of the Commonwealth; and

- the safeguarding of Commonwealth interests; and

- all of the functions previously undertaken by the Coastwatch arm of the Australian Customs Service, including surveillance of Australia's coastal area, contiguous zone and exclusive economic zone; and

- coordination of search and rescue operations in maritime zones which fall under the responsibility of Australia; and

- response to oil spills and other environmental incidents upon Australia's coastal area, contiguous zone and exclusive economic zone; and

- other functions as prescribed"[226].

It is curious that the proposed Bill does not confer high seas powers, for example, over piracy or those identified under Article 17 of the 1988 Vienna Convention in relation to cooperate for the purpose of intercepting narcotics and psychotropic substances[227]. The third dot point above that reads in part "provision of border protection and police services… in relation to the safeguarding of Commonwealth interests" attracts particular attention[228].

As iterated a number of times, the evolution of maritime policy and legislation has changed in response to a variety of priorities, such as in response to illegal fishing

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[226] Beazley, Australian Coast Guard Bill 2001.
[227] *United Nations Convention Against Illicit Drug Traffic in Narcotic Drugs and Psychotropic Substances, 1988*.
[228] See also Moore, C.A.T., "Legal Issues Surrounding an Australian Coastguard", in *Journal of the Australian Naval Institute*, Winter 2002.

and immigration. A head of power to 'safeguard Commonwealth interests' as proposed at dot point three in the ALP Bill above, would not be a provision sought in the proposed single statute discussed as an element to improve offshore surveillance and enforcement in this thesis.

A power such as this risks the broadest interpretation, which could result in arbitrary use. It contradicts the maxim that officials should only be permitted to exercise powers coercively, intrusively or punitively where the Parliament has granted express authority to do so. If "safeguarding Commonwealth interests" was to be a legislative provision passed by the Parliament then obviously it would be an express power. The point is that it would be insufficient to guide an enforcement agency to act either coercively, intrusively or punitively.

The proposed Bill introduces some new concepts but those do not necessarily deal with a number of problems with the current maritime legislation construction. One commentary on this aspect of the proposed ALP Bill summarises this view as "most of the significant legal issues would remain unaddressed"[229]. First among these issues, would be to include powers on the high seas. For example, powers that enable enforcement of risks, threats or offences on the high seas such as illicit traffic in narcotics and psychotropic substances, the protection of maritime navigation and offshore installations, and piracy. A second issue unaddressed are those dealing with the several differences or gaps between Acts that provide offshore powers. Examples of some of these differences are briefly discussed in the next two sections.

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[229] Moore, "Legal Issues Surrounding an Australian Coastguard", p.7.

Closing the Gap Between Existing Maritime Enforcement Powers

So how would a new statute, alternative to the ALP Coastguard Bill, deal with existing conflicting offshore powers? A good policy and legal example is the power to fire at or into a vessel[230]. A power to fire at or into a vessel is provided pursuant to section 184B(6)(b) of the Customs Act[231]. A "Commander of a Commonwealth vessel" can do so in express circumstances under express conditions, that includes situations such as when enforcing offences against a prescribed Act[232]. The *Migration Act 1958* (the Migration Act) is prescribed under regulation 167(1) of the *Customs Regulations 1926*[233].

If a ship does not comply with a request to board and the request is for a suspected offence under a prescribed Act, a hot pursuit may commence, including for an offence in the current discussion of the example using the Migration Act. Hot pursuit occurs when a vessel within a foreign States' relevant maritime zone or territory commits an infraction, the coastal state may commence and continue the pursuit of the suspected offender outside maritime zones over which the coastal state ordinarily has jurisdiction[234].

If the vessel suspected of the contravention continues to flee, firing at or into the chased ship can occur after firing a gun as a signal, where the master of the

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[230] Note that discussions around rules of engagement, self defence and Standing Operating Procedures are not entered into here.
[231] *Customs Act 1901*.
[232] *Customs Act 1901*.
[233] *Customs Regulations 1926*.
[234] Allen, C.H., 'Doctrine of hot pursuit: A functional interpretation adaptable to emerging maritime law enforcement technologies and practices', *Ocean Development and International Law*, Volume 20, pp. 309-341, 1989 and Chinamora, W.N., 'Hot pursuit and constructive presence on the high seas', *Sea Change*, Volume 16, pp.41-56, 1994.

Commonwealth ship deems it necessary and reasonable[235]. The Migration Act itself does not have a power to fire at or into a vessel. Although the Department of Immigration and Multicultural and Indigenous Affairs was not consulted at the time this thesis was drafted, it is speculated here that they are likely to be very uncomfortable about seeking a power in their legislation to fire into refugee boats, for example.

The operational reality is that Customs does need a power to fire at or into vessels because its maritime enforcement charter extends to narcotics trafficking, an increasingly hostile foreign fishing culture and potential terrorist threats, as examples. The development of existing powers and procedures to fire a signal at or into a vessel are consistent with the concepts of 'proportionality' and law enforcement 'reasonableness' and it is not foreseen that proposed future rationalisation of legislation would ignore these principles. Proportionality as a concept can be defined as "law cannot be excessive in the means it employs to achieve desired ends"[236].

The use of force in maritime surveillance and border enforcement would need to follow the lessons learned from *The I'm Alone* case. In 1929, the hot pursuit of the Canadian vessel *The I'm Alone*, suspected of attempting to smuggle liquor into the United States (US), ended when a US cutter sank it by gunfire[237]. A Mixed Committee of Arbitration found that the force used against *The I'm Alone* was

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[235] *Customs Act 1901*, section 184B.
[236] Loftus, P., 'The Rise and Fall of Proportionality in Public International Law' in *Southern Cross University Law Review*, Volume 1, September 1997.
[237] Allen, Doctrine of Hot Pursuit, pp.336-337.

unreasonable[238]. Under what conditions and what checks and balances are in place for Customs firing at vessels will also need to be based on the equivalent of Australian military rules of engagement. This statement is made because it is understood that rules of engagement dictate equally what is not to be done as much as what is to be done in a given circumstance.

So while the refugee boat in the example introduced in this discussion is regarded as safe from being fired upon in an operational environment, it is argued that legal protections for it and protections and guidance for the Commonwealth are still necessary. One mechanism by which these difficult legislative and policy realities could be dealt with (and by who) is outlined in the next chapter.

Other Reasons for a Single Offshore Statute

It is argued that a successful ocean surveillance coordination and interdiction response can be more effective where there is a clear and uncomplicated statutory structure. When both the RAN and Customs NMU operate in Australia's ocean jurisdictions they are required to interpret similar legislation, but not always to the same effect.

An illustration of this contradiction is that there are boarding powers under both the *Customs Act 1901* and *Fisheries Management Act 1991*. However, while it is mandatory to 'request to board' under the Customs Act there is no such requirement under the Fisheries Management Act. Even with existing sound training practices,

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[238] Poulantzas, N. M., *The Right of Hot Pursuit in International Law*, Second Edition, Martinus Nijhoff Publishers, The Hague, 2002, pp. 63-68, 202-203.

with any complex legal situation it is easy to make mistakes or overlook

idiosyncrasies that are potentially legally flawed and therefore a forlorn enforcement

investment as well as politically embarrassing.

Another example of the gap between the Customs Act and Fisheries Act is that the

latter contains a provision to lift fishing equipment from the sea, whereas the

Customs Act does not but the NMU more commonly exercise this power. Customs

NMU officers are empowered under the Fisheries Management Act, however, this is

another illustration that there are gaps between the myriad of maritime enforcement

statutes. An example that current security-related legislation is ineffective can be

found in the *Crimes At Sea Act 2000*, where the AFP are the primary agency

empowered to investigate offences and not have any corresponding maritime

capability. It is not clear why the Department of Defence and not Customs is the only

other body mentioned in this statute, particularly since Customs is certified in

investigations and use of force under the same terms as the AFP and very Defence

Force personnel would be qualified law enforcement investigators[239].

Further to the situation where several Acts have similar powers (for example,

boarding, search, seizure, detention), it is often the case that each separate Act is

amended separately and sometimes simultaneously as law and policy develops.

There are considerable efficiencies in having one Act to amend for the Departments

concerned, including reduced correspondence between respective Ministers and

reduced work for the Office of Parliamentary Counsel in drafting the Bills/Acts and

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[239] On this point, Customs often trains at the AFP College in Canberra, uses the AFP firing ranges and
Customs and AFP instructors are qualified to certify and re-certify both agency officers.

the Office of Legislative Drafting in drafting legislative instruments, including Regulations.

A flow-on advantage from a consistent law enforcement approach is that it would provide certainty and increased accuracy to prosecution briefs for actions brought against those who breach Australian laws. This in turn would provide a better understanding and clearer expectations for domestic and international users of Australia's maritime zones. The structure and application of a proposed single offshore statute is illustrated in the following chapter, together with the corresponding organisational, financial and policy elements. The policy elements are the next and final dimension discussed.

Chapter Six

Future Maritime Enforcement Policymaking

Introduction

The structure of this chapter follows the categories introduced in Chapter 1 which are policy, legal and financial elements. One criticism that can be made of the various reviews of maritime surveillance and enforcement that have taken place, is that they are all more responsive rather than strategic or proactive. For example, the 1986 Footprints in the Sand report was a response to suspect illegal immigration arrivals and the report from the Prime Minister's Task Force on Offshore Maritime Security 2004 was in response to potential terrorist threats.

Dealing with contemporary maritime border protection and security challenges in an *ad hoc* manner is reactive and has led to policy-on-the-run development. If there is anything to be learnt from the list of reports in this thesis it is that there is another report and, therefore, a policy priority shift in the not too distant future. Even though this uncertain element of predicting the next policy priority is ever present, there is still a need for strategic thinking. Strategic thinking for public policy differs from the concept of strategic thinking in the private sector. Before attempting to qualify this point, it is conceded that both private and public organisations undergo strategic planning phases in various forms[240].

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[240] Hughes, O., *Public Management and Administration: An Introduction*, 2nd edition, MacMillan Education, South Yarra, 1998. pp.154-157.

It is in their application of 'strategic management' concepts that public policy and the private sector differ the most[241]. The strategic management relationship in public policy is that governments give or set out for agencies an overview or 'blueprint' policy and the agency implements it. This is often a fluid and on-going process driven by the electorate and party politics and it is the party political arena that often constrains true strategic policy-making. There are also legal and political limits on those public organisations within which strategic planning and management takes place.

For Customs to exercise coercive or punitive action, for example, like the police and other enforcement bodies it needs specific authority from the Government. This typically stems from the Parliament (as the legislature) passing legislation and is part of the policy engineering process. The political influence is a critical limitation on strategic planning in the public sector, unlike in the private sector.

In the same way the evolution of Customs' maritime surveillance has been analysed from the legal, financial and political perspectives, the future for maritime surveillance policy analysis is categorised into three perspectives. The policy focus here attempts to define in some detail two policy development levels, the government policy blueprint level and the policy engineering level. The blueprint level turns attention to only the strategic context of maritime surveillance and enforcement issues. The policy engineering level should focus on the broader organisational management issues, such as operations, assets, conditions of service, resourcing, etc.

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[241] 'Strategic management' aims to integrate the planning functions with the overall management task, including the business environment – see Hughes, O. (ibid.), p.159 and McCaffry, J., 'Making the most of strategic planning and management', p.194, in Cleary, R. and Henry, N., *Managing Public Programs: Balancing Politics*, Administration and Public Needs, Jossey-Bass, San Francisco, 1989.

The discussion on strategic maritime policy thinking is divided into three dimensions, "policy strategy, organisational strategy and managerial strategy"[242]. Following the view that political influence is a critical limit to strategic planning, policy strategy is considered first. Policy strategy is what government wants to change or what government wants[243].

Customs Maritime Policy Strategy

In 1999 the government nominated the ADF to safeguard Australia's maritime jurisdictions "to protect Australia's sovereignty and sovereign rights"[244]. As well as those tasks set out previously under Diagram 5, another rationale for ADF safeguarding the maritime jurisdictions is to enable controls over shipping lanes. This in turn, enables the ADF to provide information on commercial and private ships and aircraft using maritime approaches. The strategic thinking component is that by providing security, the ADF role will enhance Australia's commercial/ economic trading position.

Surveillance, detection and response at the maritime border are important for many strategic reasons. An economic reason for maritime surveillance and response is to prevent the risk of plant and animal diseases. Introduction of foot and mouth disease for example, could lead to the crippling of both domestic supply and agricultural export markets. This is not to say protection of illegal movements of drugs, people, weapons (including proliferation goods), revenue, security issues and illegal fishing

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[242] Stewart, J., 'The meaning of strategy in the public sector', *Australian Journal of Public Administration*, Vol 63(4), December 2004, pp16-21, p.19.
[243] Ibid.
[244] Commonwealth of Australia, *Australia's Oceans Policy*, Environment Australia, Canberra, 1999.

are less important today than quarantine. The issues surrounding oil and gas

platforms are also examples of security and economic priorities. The implication is

that rather than reactive policy prioritising, these issues are constant and should be

addressed equally against an appropriate blueprint or master plan.

Another motivator for policy strategy development includes ensuring that there is

value for public spending. At the time of writing, it is estimated that there is an

annual cost of $506m to offshore surveillance and response to protect human life, the

marine environment and Australia's $239bn worth of trade[245]. Other motivators

include political elements such as electorate confidence, party platforms and meeting

international obligations (treaties, conventions and agreements). Signed and ratified

conventions and treaties provide two essential things for policy-makers. First, they

are a message to other States that announce what is important to Australia and what it

intends to do or support. Second, they often provide the head of power and the

policy strategy statement for the organisation charged with implementing the

agreement.

The blueprint policy strategy also expresses government or Ministerial priorities and

typically includes high-level statements such as designating the organisation

responsible for the various maritime roles and an appropriation brief for public

money. Another step in the policy strategy cycle is the methodology used to draft

the policy strategy. An obvious example is that the government will engage a

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[245] $130bn imports and $109bn export (of which approximately $24bn is in energy export revenues): Australian Customs Service, *Customs Figures*, Quarterly Statistical Bulletin, Issue 38, March Quarter 2005, p.15, reflecting consumption, capital, intermediate and other imported goods, agricultural, forestry, fishing, hunting, mining, manufacturing and other exported goods, over the 2003-2004 year; and, Bergin, A. & Bateman, S., *Future Unknown:The terrorist threat to Australian maritime security*, Australian Strategic Policy Institute, Canberra, April 2005, p.33.

committee to conduct an internal or external review to make recommendations before a policy strategy direction is articulated or changed. A preferred approach is now discussed.

While the ADF is nominated to safeguard Australia's jurisdictions, the reality is civilian surveillance and enforcement policy-makers take the lead role. In the same way the ADF took stock of its role in 1999, a preferred approach to civilian maritime surveillance and enforcement policy-making beyond 2006 should be based on a government white paper[246]. The group nominated to research and draft a white paper would be extremely important in relation to the other elements discussed in this chapter concerning organisation and management. The terms of reference envisaged for the white paper may include *inter alia*, single law enforcement agency, management structure, tasking structure, single legislation, scope of jurisdiction, assets and asset control and operational control.

The Customs maritime white paper terms of reference, having regard to existing and future operational safety needs, would cover issues across the outline in Table 7.

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[246] One discussion on the benefits of a white paper can be found at
http://topology.org/lang/wpdef.html

Table 7: Maritime Surveillance and Enforcement White Paper Terms of Reference

Investigation & Report On:	Context of Report	Recommendations That:
Potential threats	The diversity of maritime environments	Provide a policy for the protection of Australia's maritime zones
The likelihood and levels of these threats	The diversity of potential and historical border breaches	Address relevant legal contradictions and clarify responsibilities
The skills, education and training regimes required for personnel to meet the levels of threat	Relevant trends and developments in similar overseas maritime enforcement; trends in maritime criminal activity and behaviour in the region and globally	Outline implementation strategies that will deliver consistent application of surveillance and enforcement operational working practices, both organisationally and which are suitable for Australia's unique maritime profile
Operational practices necessary in response to the various levels of threat	Relevant powers, procedures and statutory accountability in responding to various levels of threat	Address the impact and implications for existing Customs, RAN / ADF and Coastwatch structures and governance arrangements.
The appropriate equipment needs to support personnel dealing with various levels of threat	Possible public responses, including from the community, government, employee associations, media, relevant government agencies and interest groups	
Whether the current infrastructure of the ADF and Customs can or should be enhanced	Any other relevant matter	

As can be seen, the first part of the chapter has described the blueprint or architecture of a policy. It is the first dimension and conveys what final product is being sought and is then handed to the next pool of expertise. The next phases for this new pool of expertise are to coordinate the resources and assets necessary and to add the second and third dimensions of strategic thinking. The discussion on policy strategy has been kept concise for three reasons. One reason is that the broad policy agenda is already in place if one looks at Government endorsed security policy, immigration policy and prohibited imports policy, for example.

A second reason is that the next step suggested is to develop a maritime surveillance and enforcement white paper as an approach to developing a strategic policy. That process may rationalise the various offshore policies, or create a new blueprint altogether or indeed recommend the *status quo*. To analyse these hypothetical policy predictions would occupy considerable space on outcomes that do not include any detail. This leads to the third reason, that this chapter is more concerned with the policy-making process than the contents of a white paper. Policy strategy is mainly blueprint policy, it requires that government must be able to communicate clear roles for Customs and Defence, and this in turn flows to the next element of strategic thinking, that of organisational strategy.

Customs Maritime Organisational Strategy

Organisational strategy "is what the organisation does to meet the needs and expectations of stakeholders…"[247]. The actual instructing the Office of Parliamentary Counsel to draft legislation, the recruitment, meeting with international organisation counterparts or domestic stakeholders and delivering stated government outcomes, falls to the organisation charged with policy strategy responsibility. Organisational strategy encompasses the policy engineering and is the way in which each organisation with offshore responsibilities articulates their business plan to government, each other, stakeholders and the public. An organisation's strategy is typically identified in mission statements or strategic plans, which are commonly developed from environmental scans or other such management planning exercises.

Organisation strategies are commonly expressed in statements of outputs and outcomes, largely to conform with Australian Budget requirements. Organisation strategies also commonly include service level agreements and memorandums of understanding. In the public service, an example of a service level agreement can be found where two agencies contract for one to perform to or in a specific capacity, so that they deliver stated outputs and outcomes funded by the other. Organisational strategy is an important and necessary element in applying strategic management to offshore maritime surveillance policy. It is the link between political influence and management direction.

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[247] Stewart, J., 'The meaning of strategy in the public sector' in *Australian Journal of Public Administration*, p.20.

Organisational and Management Structural Considerations

The concept of a coastguard model has been proposed as an organisation strategy solution to Australia's resource and coordination challenges by several commentators[248]. However, such an approach would require substantial capital investment for no substantial benefit. The fiscal elements of establishing a coastguard compared to managing maritime surveillance and enforcement with existing assets were introduced at Chapter 4.

Some organisational policy issues that are relevant now revolve around whether a coastguard organisation would be more effective than the present multi-departmental arrangements. Maritime services provided around Australia include navigation and navigational aids, hydrography, search and rescue, port controls, federal and state/territory fishing licensing and regulation, environment/pollution regulation and Admiralty Marshal functions. These services and enforcement obligations cover "over 11 million square kilometres of ocean"[249].

There should be an on-going evaluation to introduce any number of operational efficiencies and equally, there is more than one way to structure and run an organisation. One area of efficiency that can be considered for maritime offshore enforcement is the structure and control of the NMU and RAN surface assets. Only the ADF can control ADF assets but the ADF can also control civil assets through

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[248] Beazley, *'Labor's Coastguard Proposal';* O'Connor, *'Future organisational directions for maritime border protection: The case for an Australian Coastguard'* and Woolner, *'Australia's maritime border protection regime'*.
[249] Commonwealth of Australia, *Australia's Marine Science and Technology Plan*, Ausinfo, Canberra, 1999, pp. 1 & 29.

departmental secretary cooperation or perhaps the use of "executive power"[250].

From a public policy perspective, this is a rather sloppy and capricious arrangement. The main problem lies in operational agencies understanding where the authority ultimately rests. Notwithstanding debate on the Prime Minister's authority, the Customs NMU, SOMPRU and regional vessels are assigned to meet outputs and outcomes set by the Minister for Justice and Customs. There is potential for negative operational and legal results if, particularly at short notice, a Customs crew is required to respond and operate under ADF procedures. A sound blueprint policy would mitigate the need to rely on the executive power as a contingency planning option and allow operational planners to address all maritime threats in advance and in policy engineered plans.

Some discussion around the establishment of the Joint Offshore Protection Command (JOPC) follows shortly but by way of introduction, it is a command structure enlivened predominately to respond to an offshore terrorist threat. This is another multi-departmental approach to complement the rapid but *ad hoc* formation of major incident rooms (MIRs) for narcotic importation prevention operations and the People Smuggling Task Force High Level Group for illegal immigration prevention operations.

It is understood that when a surface asset or air asset detects a breach of the border, an MIR is established. The group involved in the MIR make decisions in relation to their portfolio responsibilities. The result is that depending on the circumstances of the day, the same operational circumstance in the view of the surface or air asset is

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[250] See Moore, "Legal Issues Surrounding an Australian Coastguard" and *Commonwealth of Australia Constitution Act*, Chapter II, The Executive Government, Section 61.

often handled differently. In addressing the decision-making demarcation more broadly and permanently, a suggested next step is a permanent peak committee over maritime assets.

Support for this view comes in the opinion that "inter-agency coordination is the critical point of the system"[251]. In addition to the legislation alternative proposed at Chapter 6, there may be potential to add to the new statute an 'express' power for the JOPC ADF commander to assume control over civil assets, including Customs' NMU, volunteer Coast Guard and ports' pilot boats. This would clarify control over ADF and civil assets, for civil matters, to JOPC operational control. Why JOPC is as far as an operational re-organisation probably needs to go is analysed based on the current structure at Diagram 9 below[252].

Diagram 9: JOPC Organisation Structure

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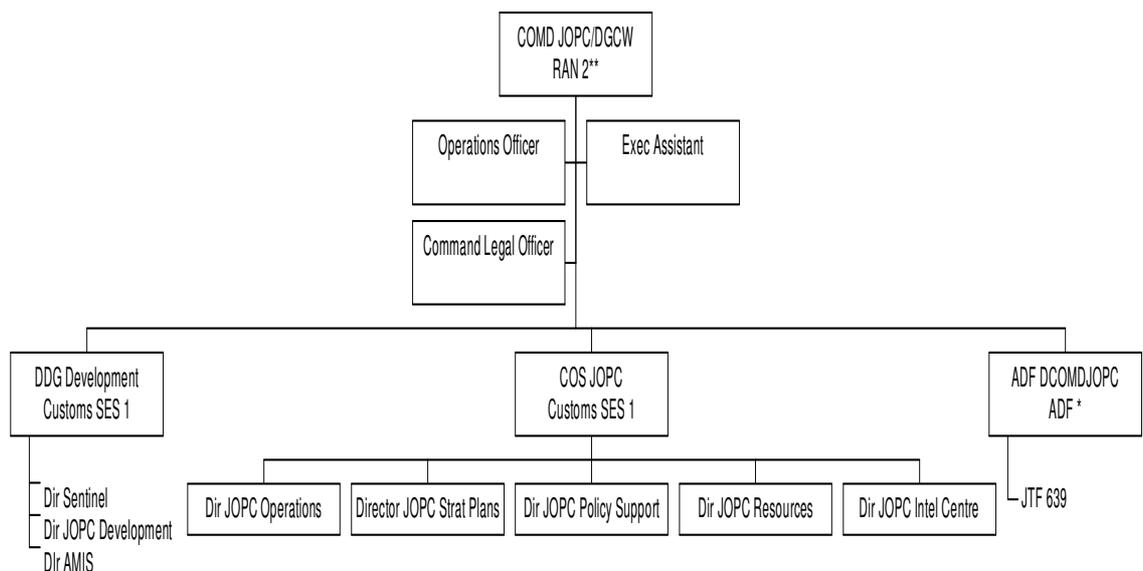
[251] Woolner, 'Australia's maritime border protection regime', p.27.
[252] In 2006, JOPC was renamed Border Protection Command (BPC).

Establishing JOPC is a step taken by the government to attempt to rationalise the use of military and civil maritime assets. It is responsible for all offshore maritime security coordination and management as it relates to a potential terrorist threat to Australia's maritime assets or coastline, but particularly offshore platform security. JOPC also manages Australia's Maritime Identification System (AMIS), whereby advanced vessel information is analysed to assist in maritime surveillance planning for Australia's jurisdictions.

Customs Maritime Organisational Structure

This may not resolve the argument that "the central problem is that no agency has the core role of, and thereby, the legislative authority for overall law enforcement in the nation's maritime jurisdiction"[253]. JOPC is not an 'agency' *per se*, nor can it be said that it has the same elevated status in Customs as it does in the ADF. This has resulted in a divide between Customs' efforts to prioritise JOPC development compared with that of the ADF, who have embraced the concept.

How the 'central problem' can be resolved , of nominating an agency, will probably be a lengthy debate across the government. An initial view is that the Minister for Justice and Customs must be considered. This is based on two premises. First, that the Customs NMU and Coastwatch are the only peak civil constabulary groups equipped to coordinate maritime surveillance and enforcement policies and operations for the Australian government. Second, only a civil agency should have

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[253] Woolner, 'Australia's maritime border protection regime', p.26

legal responsibility and authority over its own civilians and foreign civilians[254]. Put

another way, the ADF should not have legislation policy responsibility for civilian

law enforcement and this includes counter-terrorism security.

From a policy-delivery perspective, a key problem is separating the strategic

decision-making (and decision-makers) from the functional decision-making during

an incident or operation. In an attempt to separate the policy and strategic planning

elements from operational structure, it is proposed that a strategic maritime policy

committee be created.

Diagram 10: Proposed Maritime Policy Committee Organisation Structure
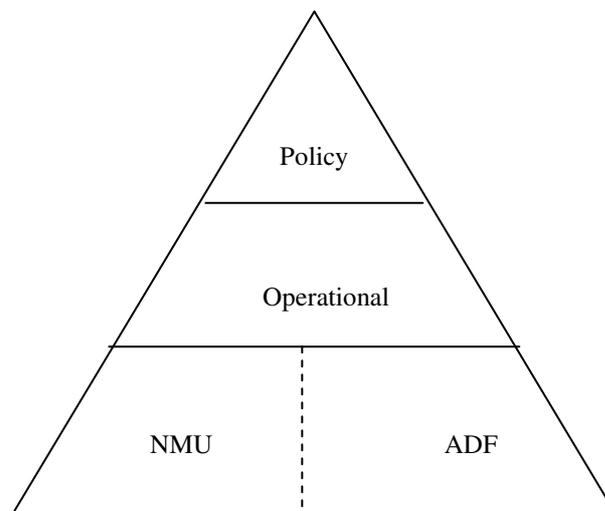
At the peak of the organisation chart is the strategic maritime policy committee made

up of the key Departments with responsibility for maritime surveillance and/or

border protection in their portfolios. The proposed make up of this group would be

the Attorney General's Department also with representation by Customs and the

AFP, Department of Defence represented by the ADF, DIMIA, DOTARS, the

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[254] Moore, "Legal Issues Surrounding an Australian Coastguard".

Department of Agriculture, Forestry and Fisheries, DFAT and PM&C. One way to manage this group could be to rotate the Chair position each year, for example, with PM&C maintaining the secretariat role as well as being eligible to share the Chair. The main tenet for this group is to set the priorities for the operational group below it (JOPC). There could easily be scope for non-decision making involvement at various times by other government departments (the Department for Industry, Tourism and Resources), State and Territory governments or public observers, for example.

Importantly, the strategic maritime policy committee would have no role to play when an operational incident occurs, such as an illegal landing. The test for the effectiveness of the committee is that the lower-level operational members can respond quickly and consistently with government policy without the need for the committee being involved. Because there is likely to be some overlap of agencies represented at the committee and operational levels (albeit at different seniority), analysis by the committee can occur prior to setting on-going priorities. Another reason the committee is not seen as an operational player is that their priority order or plan should require government endorsement.

Like the permanent membership of the strategic maritime policy committee, the JOPC planning body should include permanent membership. This should include ADF, Customs, AFP, DIMIA, DAFF (AFMA) and DOTARS. The reason for this proposed make-up is that these are the primary agencies with policy responsibility over the various threats in the maritime environment. One caveat over the operational group is that only ADF or Customs would ever take the role of Operation

Chief or Operation Commander. The origin of this view comes from the belief that only Customs and the ADF commanders are relevantly trained, experienced and should have express authority to deploy and task relevant resources and assets.

As for the committee, other representatives could be involved on an *ad hoc* basis. For example, DITR for an offshore platform operation. The operational role of agencies and personnel other than the ADF or Customs would be the provision of intelligence or nomination of the desired outcome of an operational situation. The client of the operation (and Government) would have to rely on the ADF or Customs expertise and experience to deliver those desired outcomes.

All Naval activity outside a military conflict must logically be either diplomatic or constabulary as illustrated at Diagram 5. An organisational strategy would see the constabulary functions at least, rest with a civil portfolio. This allows the ADF to focus on military strategy and the Minister for Justice and Customs to focus on civilian border protection. Offshore diplomatic activity crosses over military and civil in so far as many activities identified as diplomatic can be done by either or both the Customs NMU or the ADF.

There are also a number of activities not categorised in Diagram 5 that cannot be done by either Customs NMU or the ADF. The activities thought to be in this outside-category include sea boundary delimitation negotiations, extradition and treaty negotiations, for example, which are seen as the purview of the Department of Foreign and Trade and the Attorney General's Department.

From another perspective, a 'branding' of certain offshore law enforcement activity may bring some benefit. For example, re-packaging the Customs NMU and Coastwatch as a coastguard could have some superficial advantages. For example, at a recent regional forum of south-east Asian Coast Guard organisations (Japan, Philippines, Singapore, Indonesia and the United States Coast Guard (USCG) as observers), Australia was not invited because it did not have a "coastguard". It is understood this structural oversight has since been addressed through the Asia Pacific Economic Cooperation network and proliferation security initiative (PSI) activity[255].

One other observation of possible support for a coastguard has been mentioned earlier in this thesis in the discussion on the Hudson Report[256]. The anecdote related an instance during the period of change from the green and gold 'Coastwatch' aircraft livery to the Customs colours during the 1988 organisational restructure. Some aircraft during the two-to-three month changeover still had the old livery and were flying sorties over the same waypoints as the newly painted aircraft. The same pools of observers were flying in both aircraft during the period and continuing to communicate with cruising yachts and fishing vessels. The comments was made from one of these vessels that they were more inclined to talk to Coastwatch aircraft rather than Customs aircraft.

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[255] Personal communications held by author associated with official position within Customs.
[256] Refer to page 49.

Customs' Maritime Organisational Role

The proposed policy strategy / organisation strategy at Chapter 6 recommends consolidating existing offshore law enforcement powers into a single statute. There are a number of ways to structure the proposed rationalisation of offshore legislation. In 2001 a legislation proposal committed to a single organisation exercising offshore powers[257]. The proposal is a 'blueprint' policy that is more an authority to commence a single organisation responsible for maritime surveillance than it is a statute of powers and offences. An alternative blueprint for legislation is suggested at Table 8 below. The approach is to provide a single Commonwealth statute that would enable a class or classes of officials to exercise powers. As it envisages more than one class or range of officials, it follows that the preference is for multi-agency management of Australia's maritime surveillance and law enforcement.

Table 8: Summary of Proposed Maritime Enforcement Powers

Division	Example of Legislation / Offences
Administration	Definitions, Related Laws, Jurisdiction, Arrangements with States, Appointment of Officers, Vessel flags, etc.
Response & Investigation	Question (for identity, voyage), Pursuit, Order to bring to, Arrest, etc.
Search	Vessel, Goods, People
Detain	Vessel, People
Seizure Linkages	Customs (eg. narcotics, other prohibited goods), Fisheries (eg. equipment, prescribed fish), Quarantine (eg. proclaimed goods), Immigration (eg. vessel, documents).
Forfeiture	Storage, Disposal, Compensation, etc.
Protections	Master, crew, owner and officer obligations and indemnities, access to Safety zones
Penalties and Prosecutions	

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[257] Beazley, Australian Coast Guard Bill 2001.

Supporting a view that strategic management adds greater value than mere strategic planning, the third and final strategic thinking element of management strategy is now looked at in detail. Strategic management encompasses the legal, financial and technical perspectives. Managerial strategy is "the technical activities of budget-making and reporting… operational decision-making and deployment of resources"[258].

A proposal made now concerning law enforcement maritime resources, is for a budget that supports a single permanent fleet of two types of vessel. This is based around a range of business advantages such as staff recruitment, a cadetship program, leverage for purchase and maintenance contracts, aligning outputs and outcomes with fleet capacity, etc. The role recommended for the first type of fleet vessel is law enforcement and surveillance in all mainland maritime jurisdictions: that is, 200nm surveillance and response capability 365 days per year. The second type of fleet vessel would cover distant maritime zones such as the Antarctic region, Heard Island and MacDonald Island region, Indian Ocean Territories (Cocos (Keeling) Islands and Christmas Islands), and Norfolk Island.

This civilian fleet would be under the permanent operational control of the Customs CEO. The strategic priorities of the fleet would be overseen by a coordination group or committee or board arrangement, that is, the proposed governance group. This follows the principles being analysed for managerial policy where there is "… a more general shift in public administration away from a command and control mode of governance and towards governance through multiple stakeholders working

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[258] Stewart, J., *'The meaning of strategy in the public sector'* in Australian Journal of Public Administration, Vol 63(4), December 2004, p.20.

together to deliver integrated solutions…"[259]. The concept is quite different to the

Australian Coast Guard Bill proposal which states that "the Fremantle patrol boat

capability of the Royal Australian Navy will be transferred to the Australian Coast

Guard"[260]. In current context this could be read as the recent Armidale class fleet

would be transferred to the proposed Labor Party Australian Coast Guard. There is

no tangible transfer of assets proposed as part of the coordination group model in this

thesis, merely temporary operational and functional transfer for the duration

required.

Diagram 11 also introduces a suggested partition of NMU responsibilities and RAN /

Southern Ocean Patrol responsibilities. This is articulated in more detail at Chapter

5. Although to scale for illustrative purposes, the Joint Petroleum Development Area

(JPDA) and also the Australia-Indonesia Memorandum of Understanding (MOU)

traditional fishing area are included as part of the Customs NMU responsibility. The

JPDA is also included as part of the RAN area of responsibility because the NMU

may not be capable of managing a major security threat, such as a tanker intending to

ram or a siege of an offshore installation. As can be seen in Diagram 11, there are

shared responsibilities and unique responsibilities.

The suggested area of operational division is broadly north-south, represented by the

dotted lines in Diagram 11. One possible demarcation is for Customs to have the

lead role in all federal civil enforcement for the maritime areas within the 'box' at the

top of Diagram 11. As can be seen, this box includes the Australia-Indonesia MOU

area and the Joint Petroleum Development Area. The second element of Diagram 11

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[259] Homel, P., 'The Whole of Government Approach to Crime Prevention' in *Trends & Issues in Crime and Criminal Justice*, Australian Institute of Criminology, No. 287, November 2004, p.1-6. p.2.
[260] Beazley, Australian Coast Guard Bill 2001, under Financial Impact Statement heading.

is for Customs and the ADF to share long-range tasks, such as the Southern Ocean patrol program and people smuggling-related activity in the Christmas Island jurisdictions.

The types of issues explored in more detail at Chapter 4 were the types of assets required for the two broad areas and the strategic, operational and tactical controls in managing surveillance and enforcement of these zones. Consideration of the costs associated with a program structured between divisions of responsibility, which at present includes at least one long-range vessel for southern ocean patrols, was also analysed in Chapter 4.

A single multi-agency committee, replacing existing policy groups but not the operational response inter-departmental cooperation, would meet monthly in a governance capacity and sit above the relevant joint operation committees introduced above. It would have overarching responsibility to monitor communication and reporting between offshore surveillance stakeholders and the service delivery end. It would build on existing communication between Coastwatch and Defence, for example, and the new Joint Offshore Protection Command (JOPC) located within Coastwatch. Careful thought for the permanent membership of the group is necessary but some obvious seats would go to the Attorney General's Department (legislation), the ADF (surface and air assets), Customs (surface and air assets), DOTARS (AMSA and port State policy), DFAT and PM&C (policy). The real challenge…is to ensure the proper coordination and dissemination of the intelligence product"[261].

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[261] O'Connor, 'Future organisational directions for maritime border protection: The case for an Australian Coastguard', p.102.

Diagram 11: Proposed Customs NMU primary role and RAN civil role
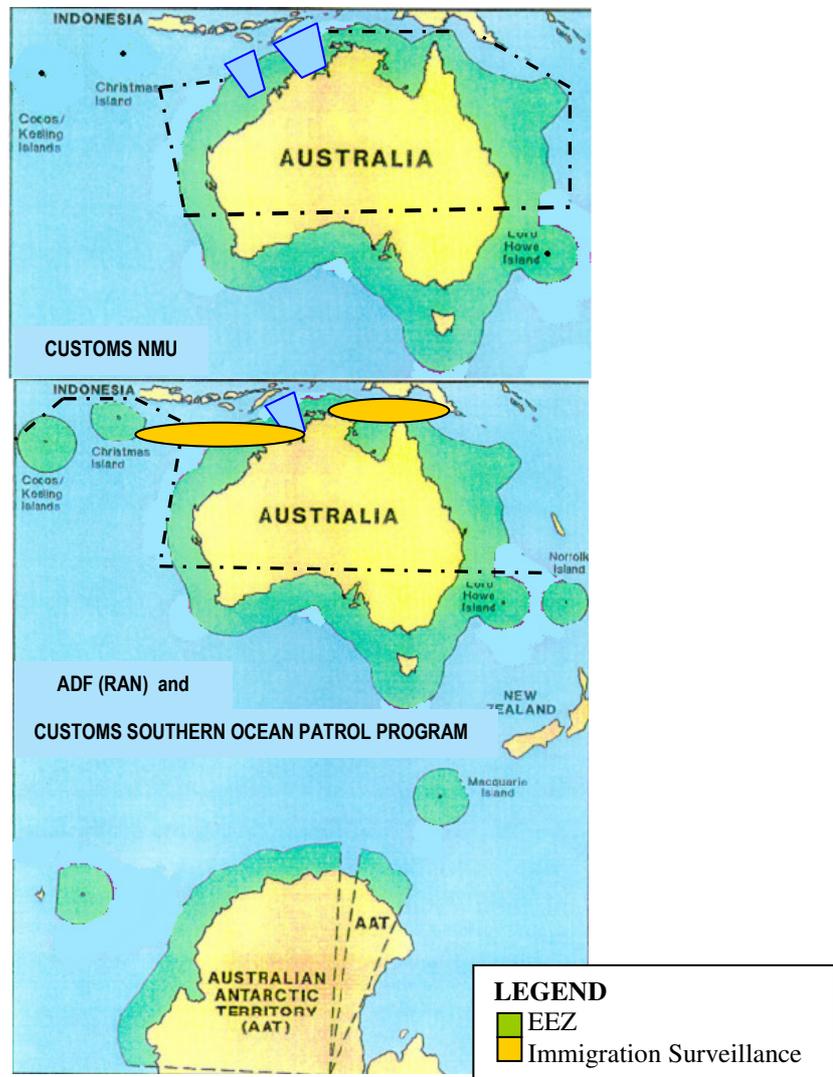
This strategic offshore surveillance and law enforcement governance group may also be a point of contact for private industry peak bodies to raise security issues. The peak bodies contemplated include port owners, ship owners, volunteer coastal groups and offshore oil and gas representatives. The group may also be the key contact point for negotiating shared arrangements between the Federal government and the States and Territories. Finally, the role of this group could also include being a point

of contact for international cooperation. Included in this international role are agreement negotiations to cooperate in boarding and search of vessels, proliferation security initiative (PSI) and joint or multi-State surveillance and law enforcement response within Australia's region. For example, with New Zealand in the Antarctic region, with Timor Leste in north Australia and Indonesia across the north-west shipping lanes and oil fields. It is for this role and reasoning that DFAT were included as a key permanent member of the governance group.

The governance challenge will be changing the many existing processes, including pooling budgets and partnership criteria when tendering, government and non-government partnerships (for example, *ad hoc* charter vessels and aircraft to support the permanent fleet and Coastwatch) and integrated planning recruitment, training, and career paths. The planning spectrum could cover a joint mission statement, joint management, joint databases and joint performance measures. A joint practice should lead to shared reporting, shared policies (such as media, information technology, information management) and shared client / stakeholder feedback[262].

As the focus in this part of the chapter is still on strategic management policy, it is worth noting how the effectiveness of maritime law enforcement can be measured. As a starting point for the governance group, mechanisms that go toward satisfying organisational accountability include articulation of objectives, purpose statement and roles, setting targets and outcomes, identifying owners of responsibility, establishing a reporting framework and setting performance indicators. It follows that the activity or service delivery would be assessed in the various financial,

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[262] Based on Homel, P., 'The Whole of Government Approach to Crime Prevention' in *Trends & Issues in Crime and Criminal Justice*, Australian Institute of Criminology, No. 287, November 2004, p.1-6.

environmental, legal and operational outputs and outcomes in public reports. These reports would, in turn, lead to reviewing relevant strategic policies and refining objectives where necessary.

Is this suggestion to leave existing structures (such as the NMU, SOMPRU and assigned ADF assets) under a multi-agency governance group merely a bureaucracy replacing the existing bureaucracy? One response to that is regardless of a multi-agency approach or as suggested, a single lead agency[263], or whether it is privately or publicly run, or if a coastguard Australia is established, the huge task of maritime surveillance will be run by a bureaucracy in its own form with its own culture.

An argument supporting a coastguard contends that Australia needs a professional statutory organisation, which a coastguard can provide[264]. The implication is that such an organisation does not exist. The NMU is a highly trained law enforcement unit. Customs and the RAN offer the same legislative training to operational patrol crews as other officers exercising Commonwealth compliance and enforcement powers. Their personnel are trained to the same high level as Customs counterparts at airports and as those who enter commercial premises. In addition, they qualify to the same level as AFP in the use of force and indeed, use AFP standard operating procedures.

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[263] Woolner, 'Australia's maritime border protection regime',pp.34-35.
[264] O'Connor, 'Future organisational directions for maritime border protection: The case for an Australian Coastguard', p.98.

Chapter Seven

Conclusion

The purpose of this thesis was to trace the Australian Customs Service's role in the evolution of maritime surveillance and enforcement and hypothesize as to how that links with future maritime border protection policies. The study has searched for answers to the following questions: Has it been done well, has it been comprehensive and is there a better way forward? It is hoped that the research and opinions are constructive contributions to this important subject and may even become useful in framing the scope of a white paper.

On the hypothesis, there are three periods that illustrate the differences in the evolution of the Customs role in maritime surveillance and protection. The first period is the historical beginning of Customs finding its identity and role from Australian settlement. The second period looked at briefly was the period 1950s to 1980. Australia became increasingly interested in its maritime jurisdictions as the economic profile of the marine environment heightened and there were various responses to issues such as narcotics and sovereign rights (fishing, illegal immigration arrivals). The third and more contemporary period has received most attention. Since the mid 1980s the Customs maritime function has been scrutinised by many reviews, which in turn, have been prompted by a range of international events as well as the domestic political agenda.

The theme throughout the evolution of maritime surveillance and enforcement underlying these influences is the shifting priorities of Customs. Revenue was the initial priority of the colonies, this then moved to illegal immigration, to drugs, to quarantine and this cycle has sometimes been repeated. Currently, information gathering for counter-terrorism and distant EEZ protection are now on par as priorities with efforts to prevent illegal drugs importation and other prohibited imports, mainland EEZ protection and deterrence of unauthorised immigration arrivals.

The analysis in this thesis shows a dynamic evolution, based on shifting political, financial, structural and legislative priorities. Customs maritime surveillance history has been influenced by numerous reports that often identified the need for management changes or infrastructure changes. This study has analysed the evolution of the Customs role in Australia's maritime surveillance and border protection in response to the changing horizon of threats and government policy decisions. One constant is that Customs has had the pivotal role across government. For that reason alone, Customs should feature significantly in future policy development as it can draw on its experience and provide a holistic approach (multi-agency coordination, infrastructure, resources, costs and law enforcement legislation) to responses to shifting Government priorities.

Hand in hand with Customs' maritime evolution is the relationship with ADF resources. The RAN in particular has a significant and crucial role, but so too do the RAAF and Australian Regular Army in lesser tactical support *ad hoc* roles. The

RAN has the capacity to respond to any incident in any of Australia's maritime jurisdictions. The conundrum is that the RAN has military functions as its primary role with civil surveillance and constabulary functions as a secondary or supporting role, albeit under increasing pressure to deliver on that supporting role. However, it was acknowledged in the analysis that for the RAN there is "blurring between civil security and national defence"[265]. This view has emerged as policy lines continue to be drawn in the global security (or counter-terrorism) environment.

On the question of whether Australia establishes its own Coastguard organisation or can achieve the same outputs and outcomes from a measure such as JOPC, the view that crystallised in this thesis was that Australia would not be better off, that is, merely packaging the various civil maritime tasks within a single civil maritime organisation which will not exponentially (or even significantly) improve maritime surveillance and enforcement.

There are potentially benefits in packaging or marketing the NMU and Coastwatch (and even the suggestion of Fremantle / Armadale class RAN vessels) as a Coastguard. However, simply re-structuring an organisation or organisations is costly, superficial and one-dimensional. It is the functions, management, resources, assets, legislation and the priorities they are designed to meet that define successful policy. They are also most effective when they remain constant. This is the view even if disaster relief assistance and search and rescue functions were to be incorporated in a maritime white paper.

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[265] Tewes, A., Rayner, L. & Kavanagh, K., *Australia's Maritime Strategy in the 21st Century*, Research Brief, Department of Parliamentary Services, Parliament of Australia, 29 November 2004, p.39.

It is the view in this thesis that Australia need not go much further when contemplating a Coastguard than an expanded role for a governance group modelled on the multi-agency operational groups such as JOPC and the People Smuggling Task Force High Level Group. JOPC covers essential operational elements raised by a number of supporters for a Coastguard, including the coordination of maritime assets and the sharing of information. What it lacks is the ability to develop priorities and strategic policy in a neutral environment. For this reason, a separate and clearly independent governance board or body with government authority should be established.

This permanent peak committee with control over maritime policy and assets would have regular contact with the senior operational group to ensure performance targets are met and are appropriately resourced. This approach is intended to address organisational and structural decision-making more broadly and permanently than JOPC, which should remain a purely operational body. Support for this view comes in the opinion that "inter-agency coordination is the critical point of the system"[266]. The suggested initial permanent membership of the governance group includes the Attorney General's Department, ADF, Customs, DoTARS, AMSA, DFAT and PM&C.

Together with being appropriately resourced, the operational program requires the rationalisation of Commonwealth offshore enforcement powers. It has been proposed here that a single statute would allow the RAN and the Customs NMU to develop

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[266] Woolner, 'Australia's maritime border protection regime', p.27.

consistent guidelines and standing operating procedures (SOPs) when operating in Australia's maritime jurisdiction zones for fisheries matters, counter-terrorism measures and unauthorised people movement and narcotics, for example.

There are a number of ways to structure the proposed rationalisation of offshore legislation. In 2001 a legislation proposal committed to a single organisation exercising offshore powers. This proposal could be classified as a 'blueprint' policy. The proposal recommended a structure akin to a 'federal water police' with commensurate powers. Such a statute would be useful in creating a separate statutory regime, however, more robust and considered thought needs to go to the authority or offshore powers exercised by law enforcement officials. The approach taken in this thesis or the preferred view is to provide a single Commonwealth statute that would enable a class or classes of officials to exercise offshore powers. There is a suggestion here for a class or classes of officials that would be delegated necessary powers to their functions in the various maritime jurisdictions. It follows that the preference is for multi-agency management of Australia's maritime surveillance and law enforcement.

In addition to the rationalisation of offshore enforcement powers legislation proposed in this thesis, consideration should be given to expanding the new statute to add an express power for the JOPC ADF commander to assume control over civil assets, including NMU, volunteer coastguard and pilot boats. This would clarify control over ADF and civil assets, for civil matters, to JOPC operational control.

Turning finally to the concept of a white paper, it may be useful to provide a simple overview to illustrate the idea. One approach would include a report that forms a Government statement of threats, skills, resources, trends in maritime criminal activity and behaviour, relevant powers, procedures and statutory accountability in responding to various levels of threat. It is envisaged that a reporting group would follow the three broad pillars similar to the structure of this thesis. That is, the white paper would address organisational, legal and financial directions. The document as a whole would reveal the political aspects and policy priorities. A white paper is seen as a key means to address future control over maritime surveillance and enforcement policy and resources.

At an organisational level, the expectation is that a white paper would clearly articulate distinctive roles for a policy body and an operational body. While there needs to be demarcation between the two bodies, especially at the operational level, some overlap can be foreseen in detailed legislation and financial development. For example, following a clear strategic statement by government, it is possible that certain maritime zones are prioritised. Depending on where these zones are and their sizes, the decision will influence the selection of assets that in turn, influences the qualifications of mariners, etc. Therefore while the direction and priorities are set, the government is likely to have to rely on the expertise of maritime planners and project managers.

The same situation is expected under a legal pillar. The framework and priorities set at a political level will need support from authority provided by the Parliament in the form of legislation. This determines who is empowered to do what and is likely to

drive any regulation development, the need for legislative instruments and standard operating procedures. The overlap occurs early in the process where the organisation drafts the various legal authorities for the Parliament to consider before implementation occurs at the technical level. It is during these stages of operational or legislative overlap that the white paper is most relevant. Organisational protectionism and shielding assets and resources should be minimised with a well constructed and understood master plan.

While Australian Customs has had maritime powers since settlement, enforcement has been limited by the available marine resources, which until recent times, were of very limited capability. The maritime powers in the *Customs Act* have undergone significant change in recent times and minor amendments continue to be made. The underlying reasons for these changes have been the changing threats to Australia's border integrity and corresponding resources required to respond effectively.

The same issues and arguments raised at Australia's settlement about maritime resourcing are repeated today. Such vessels (and now aircraft) are expensive to acquire and operate, their deterrent value and demonstrated results are often criticised, which impacts on commitment to such resources. Australia has a unique and extensive coastline and government must find the most efficient and effective way to address diverse maritime threats. A white paper on maritime surveillance and border protection addressing organisational, legal and financial issues would constitute a positive way forward.

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