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The Enforcement Aspects of Australia's Oceans Policy

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About the Author

Commander Barry Snushall joined the Navy in 1978, after seven and a half years of teaching science in NSW high schools. After initial training, he gained accreditation for lecturing at the University of New South Wales and joined the staff in the Chemistry Department of the Royal Australian Naval College (RANC). When RANC closed for academics at the end of 1985 with the advent of the Australian Defence Force Academy (ADFA), Barry was posted to sea in the then flagship HMAS *Stalwart*. This posting followed by management training and a posting to Navy Headquarters in the Education Directorate. After the three-year period in this job, Barry moved on to become Project Director for the expansion of the Navy's Fleet Base in Western Australia. On completion of this expansion, which totalled about 120 million dollars of construction, Barry took up an appointment as the Visiting Military Fellow to the School of Chemistry at ADFA. There he specialised in Marine Chemistry. After four years at ADFA, Barry moved back into Navy Headquarters in the personnel policy area and then as Officer in Charge of the Navy Personnel & Training Centre in Canberra. Barry joined the Centre for Maritime Policy as the Naval Research Fellow in January 2002. His current posting to the Centre for Maritime Policy results from the Memorandum of Understanding between the University and Navy which provides the Centre with funding for directed research and a Research Fellow to assist with the work. Barry is also involved with the provision of training in Maritime & Strategic Studies to junior officers at the RANC.

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Abstract

The enforcement framework discussed in Australia's Oceans Policy (AOP) and the South-East Region Assessment Papers is examined and the assessed threats for the South East Marine Region summarised. The current framework is also examined and compared with the requirements gleaned from the AOP documents. Generally, there is ample legislation and administration, but the capability to enforce the framework, particularly in waters away from the mainland, is deficient. Additionally, Australia's international obligations for enforcement are growing, particularly in the area of fisheries enforcement in cooperation with our neighbours within the South West Pacific Ocean. It is likely that, with these growing obligations and a recognised deficiency, the ADF, and particularly the RAN, will be called upon to take a greater role in enforcement in the marine domain. The recommendations are that enforcement capacity is enhanced and that the RAN reassesses its Mission.

Introduction

Australia has one of the most biologically diverse marine domains in the world. These areas are generally in good condition as they have been mostly geographically isolated, and to date there has been limited harvesting of the resources compared with other marine environments. *Australia's Oceans Policy* (AOP) intends to put into place an integrated, coordinated national approach to governance of the marine domain. This policy promotes the process of Regional Marine Planning as the way forward in achieving the goal of protecting and preserving one of Australia's core national assets, its marine domain.

During the preparation process for the AOP, a number of surveillance and enforcement issues were identified in a range of different documents. The *Oceans Policy Consultation Paper*[1] listed the following issues that needed to addressed in the AOP:

- An efficient and effective surveillance and enforcement regime.
- Deterrent effectiveness.
- Coordination between Commonwealth, State and Territory agencies.
- Security issues such as poaching pollution, piracy and unregulated population flow.
- The exercise and protection of Australian rights over offshore areas including resources.
- Options for international cooperative surveillance of fisheries.

The Commonwealth Government released the AOP in December 1998 with the publication of three documents: *Australia's Oceans Policy Volumes 1 & 2* in 1998 and the *Australia's Marine Science and Technology Plan* in 1999. The policies promulgated in these documents arose from a series of Oceans Forum reports, background discussion papers, and issues papers, together with information from other sources. Work on Phase One of the Regional Marine Plan for the South-East Region has been completed, with a series of Assessment Reports being released in April 2003. These documents are:

- *Resources – Using the Oceans*.
- *Impacts – Identifying Disturbances*.
- *Ecosystems - Nature's Diversity*.
- *Ocean Management - The Legal Framework*.
- *Sea Country - An Indigenous Perspective*.
- *Communities - Connecting With the Ocean*.
- *Resources - Macquarie Island's Picture*.
- A Discussion Paper and a Summary Paper.

One fundamental aspect of any governance policy is enforcement of the regulatory and management measures to be implemented. *Australia's Oceans Policy Volume 2*,[2] includes a section on 'Protecting the National Interests' which identifies the responsibilities of the Australian Defence Organisation and the surveillance and enforcement issues. More detailed discussions of defence and enforcement aspects have also been included in the South East Marine Region Assessment Papers *Ocean Management – the Legal Framework*[3] and *Resources – Using the Ocean*[4]. The requirement for a more holistic and integrated approach to maritime surveillance and enforcement was raised in *Background Paper 3*[5] for AOP. This requirement was also repeated in *Background Paper 4*[6], under 'Governance, Surveillance and Enforcement', where it was recommended that the civil surveillance and interception capabilities of agencies with enforcement responsibilities in coastal areas be increased and more coordinated.

This paper will examine the enforcement framework discussed in the AOP and the South East Regions Assessment Papers (SERAP) to determine whether the current enforcement framework meets these requirements and meets Australia's international obligations for enforcement in its marine domain. The question of whether the RAN's role will change as a result of the implementation of the AOP will also be examined.

The Enforcement Framework under the AOP - Protecting the National Interests.

Policy statements regarding the enforcement framework are included in AOP Volume 2 at page 37, under the heading 'Protecting the National Interests'. This chapter has three sections: Defence, International, and Surveillance and Enforcement. Each section

discusses the Challenge, the Background and the Response. In the Defence section, the Challenge for the Australian Defence Force (ADF) is to protect Australia's national interests and sovereign rights and to provide accurate, up-to-date hydrographic, oceanographic and navigation information within our marine jurisdictions.[7] The Background explains that *Australia's Strategic Policy* defines the defeat of attacks against Australia's territory as 'our core force structure priority'. The task for the ADF is to ensure that potential aggressors are not able to cross our marine jurisdictions, to safeguard these areas, to control our maritime approaches and to exercise and protect Australia's sovereignty and sovereign rights.

The Background goes on to list a range of tasks which 'the ADF undertakes or contributes to, which are directly relevant in implementing a national Oceans Policy.' The tasks broadly encompass components of the following:

- Preparedness and contingency planning.
- Maritime surveillance and response.
- Fisheries law enforcement.
- Search and rescue.
- Hydrographic services.
- The Australian Oceanographic Data Centre (AODC).

In the Response, a comprehensive list of activities that the ADF will continue to do are given. This list includes:

- Develop an integrated surveillance system to provide continuous, real-time, all-weather detection and identification of aircraft and ships in our maritime approaches.
- Contribute fully to the National Surveillance Program managed by Coastwatch.
- Contribute fully to fisheries law enforcement activities, particularly in Australia's north and north-west but also within Australia's offshore territories.

In the section on 'Surveillance and Enforcement'[8], the Challenges are defined as ensuring that there is an effective and efficient surveillance capacity for Australia's marine jurisdictions, and ensuring effective enforcement of national legislation throughout Australia's marine jurisdictions. In the Background the surveillance

and enforcement strategy is discussed. This includes an explanation of the present arrangements for policing Australian waters under Coastwatch management. Individual agencies are responsible for the assessment of risks and the achievement of their objectives, while Coastwatch manages and coordinates the civil and military coastal and offshore surveillance program.

The section notes that 'the ADF contributes to a number of other civil enforcement activities. These low intensity policing tasks include enforcement of exclusive economic zone arrangements and other maritime agreements, drug interdiction and anti-contraband operations, anti-piracy operations and maritime counter-terrorism.'[9] This is a further reference to the ADF's contribution to fisheries law enforcement. It is noted that these activities are in support of Australia's national interests, and to assist other Government agencies, but that they are not core Defence activities. However, 'the need to retain the skills and assets necessary for the task has been specifically stated in *Australia's Strategic Policy*.'[10] It should be noted that these policies were released before the influx of the 'boat people' on the north-west coast. The publicity surrounding these events did bring about changes to the system, and together with further instances of ADF involvement in arresting illegal fishing ships in the southern waters, did lead to a greater acceptance of the ADF's policing role.

The overall conclusion arising from these statements is that effective surveillance and enforcement within Australia's marine jurisdiction is fundamental to protecting our national interests, and the Government will continue its assertion of our sovereign interests in this area.[11]

The latest policy comments from Government on surveillance and enforcement are made in the Assessment Reports for the South East Marine Region, which were released in April 2003. Two of these reports contain significant sections on these areas. The report *Ocean Management -The Legal Framework*[12] contains a chapter titled 'The Regulatory Framework for Maritime Security'. The chapter gives a summary of the legislative and administrative structures in place to address the principal areas affecting maritime security in Australia, and the agencies associated with their enforcement. The areas discussed include maritime defence and enforcement powers in

relation to fisheries regulation, customs and quarantine, migration and environmental regulations.

The section on Maritime Defence defines the arrangements under the Constitution for the Commonwealth and the States to make laws concerning Defence. Essentially, the Commonwealth has wide powers, while the States are explicitly prohibited from raising naval or military forces without Commonwealth consent[13]. The legislation which controls maritime security and the use of waters by the RAN and regulates the RAN and its personnel includes the *Defence Act 1903 (Cth),* the *Naval Defence Act 1910 (Cth)* and the *Defence Force Discipline Act 1982 (Cth).* Also, the *Control of Naval Waters Act 1918 (Cth)* and the *Defence Act 1903 (Cth)* regulate the use of the waters by others. The potential impact of these Acts on Australian ports in the South East Marine Region, and nationally, is substantial. For example, the *Control of Naval Waters Act 1918* gives the ability to restrict access to, or limit the types of buildings that can be constructed on the foreshore adjacent to naval waters. The application of the Act could substantially interfere with day-to-day use of areas to an extent that few would currently be aware. The *Defence Act 1903 (Cth)* also has a potentially significant impact upon the use of certain parts of the waters under Australian jurisdiction, such as those gazetted for practice and exercise areas. While the scope for these regulations is extremely wide, in practice the regulations made are far more limited. Generally, the powers made available by these Acts are not fully utilised.

This chapter also includes a section on the areas of law with relevance to maritime security[14]. Maritime security is defined as ensuring that activities taking place in Australia's offshore approaches are legitimate. It also includes issues concerning enforcement of Australian law in these areas. Legislation that involves enforcement by the ADF or other agencies in the marine domain include:

- *Migration Act 1958 (Cth).*
- *Fisheries Management Act 1991 (Cth).*
- *Customs Act 1901 (Cth).*
- *Quarantine Act 1908 (Cth).*
- *Environment Protection (Sea Dumping) Act 1981135 (Cth).*

- *Hazardous Waste (Regulation of Exports and Imports) Act 1989 (Cth).*
- *Petroleum (Submerged Lands) Act 1967 (Cth).*
- *Migration Act 1958 (Cth).*
- *Border Protection (Validation and Enforcement Powers) Act 2001 (Cth).*
- *Border Protection Amendment Act 1999 (Cth).*
- *Migration Act 1958 (Cth).*

The Application of Australian Law[15]

The application of Australian law in Australian marine areas was recently defined in the new *Crimes at Sea Act 2000 (Cth).* Australian law applies as follows:

- Australian law applies aboard Australian flag vessels regardless of their location in the world.
- Australian law applies according to coastal State jurisdiction. The applicable law will be determined by the nature of the offence and the maritime zone in which it occurred. This will be the case for foreign vessels as well as Australian vessels, with the exception of foreign warships.
- Australian law will apply to offshore installations located in waters subject to Australian jurisdiction.
- Australian criminal law will apply to the acts of Australian citizens aboard a foreign vessel, and to foreign vessels whose next port of call is Australia.

At international law, Australian warships or police vessels can take steps to enforce such law, but not within the territorial sea of another country. Within domestic law, the *Crimes at Sea Act 2000* does not indicate an appropriate enforcement agency. Past practice would indicate that State and Federal police may use their own resources to deal with criminal activities close to shore, and act in concert with the ADF in respect of criminal activities further from shore.

The report *Resources - Using the Oceans*[16] contains a chapter headed ‘Surveillance’. This chapter gives a rationale for surveillance and a summary of its history including the development of Coastwatch. The range of activities and the results for the last two years are included.

The Assessed Threats for the South East Region

Threats to a marine region can be assessed in a number of ways. The approach taken in the South East Marine Region has been one of identifying the risks to the ecosystem as a whole, rather than examining a specific activity and its causal disturbance. The assessment was undertaken by a select group of experts from government, industry and conservation, dubbed the Impacts Working Group[17]. The focus has been on impacts caused by human activity, rather than natural processes. The results of the assessment are presented in the South East Marine Region Assessment Paper *Impacts - Identifying Disturbances*.[18]

The working group identified twelve disturbance categories, defined eleven different ocean environs in which the disturbances can occur, and thirteen different sources of the disturbances. For the final report an assessment was made on which activities or uses of the region cause the different disturbances under the broad categories of activities. This information has been used to create matrices that indicate the effects of each disturbance from each source on each of the ocean environs present. This information will be used to identify the relative risk of each impact to form the basis for developing strategies to manage the risks.

These impacts are all associated with the sustainable exploitation, management and preservation of the resources. There are, however, other threats that may have impacts on a marine region. These threats arise as a result of criminal activities. These include illegal fishing, poaching, piracy and unregulated population flow, as well as infringements against customs, fiscal, quarantine, immigration and sanitary laws.

The Current Enforcement Framework

An enforcement framework consists of a number of elements. Firstly, there are the prescriptive elements, or the legislation to set the laws for control and management. Secondly, there is the administrative structure to be able to manage the implementation of these laws. Thirdly, there is the adjudicative element to enforce the laws. The current framework for enforcement is an accumulation of responsibilities and powers for a variety of administering agencies to manage and control a range of different activities and/or industries. There are some 34 Acts of the Australian Commonwealth legislation

for at least eight different Commonwealth Departments, which are relevant to enforcement in the Territorial Sea and EEZ. A list of these is given in the South-East Regional Marine Plan Assessment Report *Ocean Management - The Legal Framework*.[19] There are only two Commonwealth agencies that have the capability for enforcement at sea, Defence and Customs, although the AFP and other agencies having powers under their legislation make use of these assets and State Police vessels as well.

The ADF has the capability to perform a wide range of enforcement tasks due to the variety and flexibility of its platforms. As a result, ADF personnel are given extensive powers as enforcement officers under a wide range of legislation.

Australian Defence Force Enforcement Powers

In addition to its core task of defending Australia's maritime interest and defeating attacks against Australian territory, the ADF has enforcement powers under a number of Commonwealth acts applying in the Territorial Sea and EEZ. These Acts normally have provisions whereby officers from agencies other than those specified in the legislation may be appointed as 'authorised persons'. Such appointments generally require written approval by the Minister or some other official and empower these persons to undertake specific enforcement actions. The following table summarises some powers that may be conferred on ADF personnel by particular Acts.

Legislation	ADF Powers
Quarantine Act 1908[20] (written approval only)	• Investigate offences. • Give assistance. • Boarding. • Detaining vessels. • Destroy any animal, plant or goods on board which is considered to be a source of infection. • Apprehend without a warrant any reasonable suspect against the Act.
Customs Act 1901[21] (written approval only)	• Board and search. • Open packages and examine. • Arrest without warrant any person who is reasonably suspected of: – smuggling – importing any prohibited imports

(without written approval)	– exporting any prohibited exports – unlawfully conveying any smuggled goods or prohibited imports or exports • COs of HMA Ships may stop & search ships reasonably suspected of the above offences in the territorial sea.
Fisheries Management Act 1991[22] (All members of ADF are designated officers. The ADF is only involved in foreign fisheries enforcement)	• Fishing without a license. • Using a boat for taking fish, processing, carrying or transhipping fish without a license. • Contravening a condition of a license or doing an act prohibited by a notice issued by the Minister. • Taking fish from a trap, net or other equipment unless he is the owner. • Using a foreign boat for taking, catching or capturing fish for private purposes or having in possession or charge a foreign boat equipped with nets, traps or other equipment for taking, catching or capturing fish without a license. • In the case of foreign boats, entering Australian ports or landing fish without a license.
Migration Act 1958[23]	• The provision of defence intelligence assets. • Surveillance on the sea, land and in the air. • The use of the command and control of infrastructure necessary to conduct surveillance and response. • The use of Defence's bare bases to accommodate some the apprehended illegal immigrants.
Environment Protection (Sea Dumping) Act 1981; Hazardous Waste (Regulation of Exports and Imports) Act 1989; Petroleum (Submerged Lands) Act 1967[24]	• The boarding and searching of vessels. • The arrest of vessels. • The direction to an Australian port.
Environment Protection Biodiversity & Conservation Act 1999[25] (written approval only)	• To board vessels and access premises. • Conduct searches and make arrests. • Obtain information from individuals suspected of involvement in the commission of an offence against the Act or regulations.

Comparison of the Enforcement Framework under the AOP to the Existing Framework.

The AOP and the supporting documents give a comprehensive summary of the current enforcement framework. Since the AOP was released there has been some new legislation passed and amendments have been made to existing legislation dealing with oceans governance. However, these have not been in response to the release of the AOP, but rather to other issues which have needed solving.

A comparison of the roles and functions for the ADF given in the AOP and the supporting documents with those detailed in the Defence White Paper[26] does show an inconsistency. The Defence White Paper indicates that the role of the RAN includes effective surveillance, patrolling and policing of our maritime approaches, without detracting from the core function of defending against armed attack.[27] Fisheries Law enforcement is not specifically mentioned. Fisheries protection is listed as a Military Support Operation in *Australian Maritime Doctrine*.[28] Two instances where major RAN ships have been involved in fisheries enforcement actions are cited. However, the importance of this role appears to be secondary. In contrast, the AOP places much more importance on this role. Fisheries law enforcement is listed as a Defence Task in the AOP[29] and is mentioned as a Defence-related activity on five separate instances, including a statement that 'The Government will: ensure the ADF contributes fully to fisheries law enforcement activities...'[30]

Enforcement Activities in the Australian Marine Domain

For enforcement activities to be undertaken, there must be some offence against Australian laws or the reasonable suspicion that an offence has occurred or is occurring. The enforcement agency must be aware that enforcement is required. At sea this awareness is normally provided by the National Surveillance Program, managed by Coastwatch. Coastwatch has been operational under the Australian Customs Service since 1 August 1988 to provide aerial surveillance of Australian coastal areas. The program involves the coordinated operation of contracted aircraft, Australian Defence Force patrol boats and aircraft, and vessels from the Customs Marine Fleet. Coastwatch conducts patrols on behalf of a variety of client organisations including:

- Australian Customs Service (ACS).
- Australian Quarantine and Inspection Service (AQIS).
- Australian Maritime Safety Authority (AMSA).
- Department of Agriculture, Fisheries and Forestry – Australia (AFFA).
  - Australian Fisheries Management Authority (AFMA).
- Department of Immigration and Multicultural Affairs (DIMA).
- Environment Australia (EA).
  - Great Barrier Reef Marine Park Authority (GBRMPA).
  - Australian Antarctic Division.
  - Parks Australia.
- Department of Transport and Regional Services (DOTARS).
- Attorney General's Department.
  - Australian Federal Police (AFP).

Coastwatch's operational area covers Australia's 37,000 kilometres of coastline and 9 million square kilometres of ocean within Australia's Exclusive Economic Zone (EEZ). Coastwatch is coordinated out of Canberra from the National Coastwatch operations centre. Using the available assets, any one point around the mainland or its EEZ is overpassed only once in every 12 days.[31] When a client agency requests a response action to a surveillance sighting, Coastwatch coordinates all activities for that response until the client agency is able to assume control of the situation. Response requirements can be undertaken by:

- The RAN Fremantle Class Patrol Boats
- Any of the eight ACS Bay Class vessels (or the ACS vessel *Wauri* which in May 2000 was stationed at the Ashmore Islands to provide a continual surface presence in that high-risk area).
- The Coastwatch helicopter capability.
- Several small response vessels stationed throughout the Torres Strait, which can be crewed at short notice from resources funded as part of the Government's National Illicit Drugs Strategy.[32]

It is important to note that Coastwatch is a ***surveillance*** organisation and does not have an enforcement function. In the 2001 Review of Coastwatch[33] it was noted that a significant proportion of

Coastwatch response operations in the north and north-west of Australia are conducted by RAN patrol boats, and that it is only the Defence assets which currently have the offensive capability to enforce an order for a foreign vessel to stop and be boarded.

The reliance on Defence assets was also highlighted in report of the Ministerial Advisory Group[34] in Section 5.4.3 (Surveillance and Enforcement) of the draft Oceans Policy. The report stated that the Group did not believe that the ocean-going Customs vessels had the capacity to carry out surveillance tasks similar to those now performed by the RAN's Patrol Boat Force. The Group also considered the current arrangements (in 1998) to be insufficient to cope with existing threats, let alone greater risks in the future.

The reliance on Defence assets for enforcement was recently demonstrated during the incident[35] with the 4000 tons North Korean freighter MV *Pong Su*. The *Pong Su* was suspected to be the mother ship of smaller craft that had landed a significant quantity of drugs in Lorne, Victoria. The *Pong Su* was ordered to stop by Victorian Police vessels, but failed to do so, and a hot pursuit entailed. The ship was pursued north-east from Victorian waters where NSW Police launches joined the pursuit. Coastwatch aircraft, assisted by RAAF aircraft, maintained surveillance. Seas were rough with a sea state of 4–5 and waves up to 30 feet. The police boats were unable to make the *Pong Su* stop. Further assistance from Defence was requested and the frigate HMAS *Stuart* sailed from Sydney, carrying Army Special Forces personnel. The *Pong Su* was stopped and boarded some 90 nautical miles from the coast, searched, and finally jurisdiction was handed over to the Australian Federal Police and Customs.

Since 1998 there has been a change in Australia's enforcement capability. The Australian Customs Service introduced eight Bay Class Patrol Boats during 1999 and 2000. Although there is a no home-porting policy, three of the boats operate out of Darwin, three in northern Queensland waters around Cairns, one around the south-east coast and one around the southern waters of Western Australia. At any time there is always a boat at Ashmore Reef. These boats undertake Customs enforcement activities, responding to information provided by Coastwatch and other sources. However, there are still some concerns about the effectiveness of these boats for enforcement, particularly given their lack of offensive armament.

There is anecdotal evidence of instances where Customs and/or police boats have been unable to make foreign vessels stop, particularly in rough seas. It has been said that such vessels do not stop unless a warship is present to enforce the order.

Even with this increased capacity, the effectiveness of the combination of surveillance and enforcement is still questionable. Firstly, there is no single organisation responsible for enforcement. Coastwatch manages the surveillance, but enforcement is the responsibility of the client agency. This could represent a dilution of the available assets should the boat on-site not have the appropriately 'authorised' person onboard. Having one organisation responsible would increase efficiency and effectiveness. Secondly, the frequency of surveillance and the small number of boats available for response operations spread over the total area of the Australian mainland's EEZ indicates that there is a strong possibility that many illegal activities are missed. Add to this the requirement for surveillance and enforcement in the off-shore territories and the southern oceans, and it can be concluded that more capacity is needed. For the enforcement activities to become more effective, the RAN must increase its level of activity, the Customs National Marine Unit needs to be expanded, or a combination of both must occur.

Australia's International Obligations for Oceans Governance

Australia is party to a large variety of International Instruments pertaining to Oceans Governance. A list of the major treaties ratified by Australia and applying to management of the marine environment is given in the Report *Ocean Management - The Legal Framework*.[36] A more comprehensive list is available in the APEC *Oceans Governance Report - Australia, 2002*.[37] The Conventions that Australia has ratified have generally been incorporated into Commonwealth legislation, and so direct the activities of the various agencies. The following Conventions or Agreements may have effects on ADF enforcement tasks in the marine domain which have not yet been fully identified:

- United Nations Law of the Sea Convention (LOSC) supplement *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 in relation to the Conservation and*

Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, (UNFSA).[38]

- Convention for the Conservation and Management of the Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC).[39]
- The Convention on the Conservation of Antarctic Marine Living Resources 1980 (CCAMLR).
- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA).[40]
- Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986 and Protocol (SPREP Convention and Protocol).
- Convention for the Prohibition of Fishing Long Driftnets in the South Pacific and Protocols (Driftnet Convention).

UNFSA

The UNFSA implements the United Nations Law of the Sea Convention by defining a framework for cooperation, which requires coastal States and Flag States to establish regional fisheries management organisations.[41] Within such regional organisations, States agree on specific conservation and management measures intended to ensure the long-term sustainability of the stocks, including cooperative mechanisms for effective maritime control and surveillance (MCS) and enforcement. This Agreement has been ratified by Australia and incorporated into the *Fisheries Management (Amendment) Act 1999*.

WCPFC

The WCPFC defines the regional organisation for the western and central Pacific Ocean. The Convention is not yet in force - Australia has signed, but not yet ratified the convention. WCPFC follows the international framework for cooperation set out by the UNFSA for highly migratory fish stocks, including involving both Fishing States and Coastal States.[42] It builds on the current western and central Pacific Ocean regional organisations by controlling vessels flying flags of both the Fishing States and the Coastal States through proper authorisation and permit systems. States should also take all measures necessary to ensure that their vessels comply with subregional and regional conservation and management measures.[43]

Fishing on the high seas is also controlled by these processes. The Convention includes taking enforcement action irrespective of where violations occur. This has significant implications for MCS and enforcement arrangements within the region. Under the existing arrangements, there are currently many examples of regional cooperation, particularly for MCS and enforcement, within the WCP region in which Australia plays a significant role. It is expected that once the WCPFC is in force Australia's role, and thus the RAN's role, will increase markedly.[44]

CCAMLR

The CCAMLR[45] Convention has 31 States Parties and promotes the conservation of Antarctic marine living resources between south of 60 degrees South latitude and the Antarctic Convergence. This convention pre-dates the 1995 UN Agreement on Straddling Stocks. When that Agreement enters into force the Parties' obligations under this convention will not be altered. Parties to the Agreement will have an obligation to strengthen this Convention as an existing regional fisheries management arrangement. The Act is implemented in Australia by the *Antarctic Marine Living Resources Conservation Act 1981 (Cth).*

SUA

The SUA was brought into force after the hijacking of the passenger liner MV *Achille Lauro* by Palestinian terrorists in, 1985. The Convention closes the gap in the system of law and order at sea created by the limited definition of piracy. SUA extends enforcement jurisdiction for parties beyond their territorial limits to a ship 'navigating, or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.'[46] This allows for one State to exercise jurisdiction in another State's territorial sea. SUA includes a list of offences concerning seizing control of, damaging or sabotaging ships, damaging navigation systems and acts of violence against persons aboard ships. The parties have the responsibility to ensure that they establish jurisdiction over these offences.

SPREP

The SPREP Convention[47] requires State Parties, either jointly or in cooperation with other Parties, to adopt measures to protect the

marine environment, and ensure the sound environmental management and development of the natural resources of the South Pacific region. The Convention encompasses the South-East Marine Region as it applies to the waters within 200 nautical miles of the coasts of the States Parties, including the waters of Macquarie Island. The Australian Acts that implement the Convention and Dumping Protocol include *Environment Protection (Sea Dumping) Act 1981* and the *Environment Protection and Conservation Act 1999*.

Convention for the Prohibition of Fishing Long Driftnets in the South Pacific and Protocols (Driftnet Convention)[48]

This Convention commits State Parties to prohibit nationals and vessels from engaging in driftnet fishing within the 'Convention Area'. The 'Convention defined as the area lying within 10 degrees latitude and 50 degrees South latitude and East longitude and 120 degrees West longitude includes waters under the jurisdiction of includes Australia's Exclusive Economic Zone and the majority of the South-East Marine Region including Macquarie Island. It is implemented in Australia *Fisheries Management Act 1991 (Cth).*

Growing Responsibilities

It is clear that there are growing responsibilities for enforcement actions related to fisheries. These are arising to satisfy Australia's existing and likely future responsibilities under the above international conventions and from the need to police Australia's Southern Oceans fisheries. However, the current surveillance system is focussed on the northern fisheries and does not have the capacity to monitor the southern fisheries or to meet emerging international fisheries control arrangements.[49] Indeed, Bergin et al (2003) stated that '… the UNFSA requirements will force the (Coastwatch) system to operate beyond its current capabilities.'[50]

Under the UN Fish Stocks Agreement, Australia has an expanded responsibility for controlling both domestic and foreign fishing vessels in the EEZ and the high seas. Currently, Australia cannot meet the requirements of this enforcement task. The task could expand even further when the Convention for the Conservation and Management of the Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC) comes into force.[51]

The assessed threats to the South East Marine Region as reported in the Assessment Report[52] focussed on those associated with the sustainable exploitation, management and preservation of the resources. Other threats such as illegal fishing, poaching, piracy and unregulated population flow as well as infringements against customs, fiscal, quarantine, immigration and sanitary laws, were not considered. However, the enforcement framework for the region must still allow for reaction to these criminal activities. Coastwatch does not consider this region to be under high or emerging threats, so no surveillance assets are based in the region. The nearest Coastwatch patrol aircraft are based in Cairns[53], while RAAF P3 *Orion* aircraft based at RAAF Base Edinburgh and C-130 *Hercules* aircraft based at RAAF Base Richmond are available for surveillance flights over the region. Also, there is no longer a standing naval presence in the region, so the only response capability is via either the State Water Police, the volunteer Coast Guard,[54] or when a Customs patrol boat is present. While the criminal activity is subject to the *Crimes at Sea Act*, and so under AFP jurisdiction, enforcement outside the three nautical mile coastal waters may prove to be difficult without ADF involvement.

Australia has sovereign rights over significant fisheries in the waters of Heard and MacDonald Islands and has claimed these rights for the waters off its Antarctica coast. It is apparent that illegal fishing is occurring in those fisheries. However, Australia has no dedicated capability for surface surveillance of the area and the response has been for AFMA to charter civilian vessels for surveillance and enforcement actions, supported by the involvement of RAAF aircraft and RAN major fleet units to undertake specific actions when identified. AFMA's current charter vessel is the MV *Southern Supporter*. This vessel is unarmed and its crew does not have boarding powers.[55] Its effectiveness as an enforcement tool can be questioned, particularly after the recent hot pursuit of the MV *South Tomi* to South Africa.[56]

Will the Role of the RAN Change under Australia's Oceans Policy?

It is clear from the Australia's Ocean Policy documentation that the Government considers the ADF has a greater role to play in the enforcement requirements arising from the management of Australia's marine resources, particularly in fisheries enforcement.

The acceptance of this concept is continued in the documentation issued from the National Oceans Office about the South East Marine Region. Also, it is noted in Volume 2 of the AOP that 'greater efficiencies in the use of current surveillance and enforcement assets might well be achieved.'[57] I believe that there will be strong pressure for the RAN to become more involved with the management and coordination of enforcement activities on the whole and for fisheries enforcement in the Australian Fishing Zone (ie. outside of three nautical miles from the coast) in particular.

Another possible change in role could involve the collection of environmental data during patrols. One need of the Regional Marine Planning process that underpins the Oceans Policy is the need for information. The second Marine Area to be subjected to the regional planning process will be the Northern Area, which consists of the Gulf of Carpentaria, the Torres Strait and the Arafura Sea. Both the RAN patrol boat fleet and many of the Customs boats patrol the Australian Fishing Zone in this region. Perhaps these vessels could be fitted with the appropriate recording devices for existing sensors, or other sensors if required, to gather some of the information needed for the preparation of the Northern Region Marine Plan. This information could then be distributed to GeoScience Australia, the National Oceans Office, and/or the Australian Oceanographic Data Centre (AODC).

Conclusion

Australia's enforcement task is huge and is continually growing. This growth is due to two main factors. Firstly, the growth in responsibilities which exist and will continue to arise by the continuing implementation of the AOP. The result of this policy is the tighter and better control of Australia's sovereign rights to explore and exploit and manage and conserve the living and non-living resources of its Exclusive Economic Zone and Continental Shelf.[58] Secondly, the growth arising from responsibilities Australia has accepted by being party to various International Agreements.

The current enforcement framework has an increased capacity over that which is discussed in the AOP. The Government has met the commitments it made in the AOP[59] to acquire eight Customs patrol boats to increase the enforcement capacity. However, whether the current framework can satisfy the requirements of the AOP and overcome the assessed threats for each of the Marine Regions,

particularly the South-East Marine Region, is questionable. Surveillance and enforcement capacity in the waters around the south of the mainland are limited. Meeting requirements outside the waters around the mainland is generally beyond the current framework. There is no surveillance and the vessels normally used for operational response are not designed for this purpose.

The current enforcement framework has sufficient prescriptive elements to meet the requirements under the AOP and those arising from International Agreements to which Australia is party. A single piece of overarching legislation would, perhaps, result in a better framework. There are at least eight administrative systems in place, but once again, coordination under one enforcement authority would improve efficiency and effectiveness. The major deficiency is with the adjudicative elements. The agencies charged with these tasks currently do not have sufficient capacity to fully undertake the function.

In April 1998 the then Deputy Commissioner of the Australia Federal Police expressed the view that while the surveillance might be adequate, the ability to respond to surveillance, to intercept and detain, to board and search, to enforce laws, and to effect sovereignty is entirely inadequate.[60] This is a generous assessment of Coastwatch's capability for surveillance throughout the Australian marine domain and an understatement of Australia's enforcement capabilities.

Accordingly, the Government should give careful consideration to the need to commit the necessary resources to fully 'protect Australia's national interests and sovereign rights'[61] in accordance with *Australia's Oceans Policy*. A specific recommendation for the RAN would be to consider amending its mission to read as follows:

> The Navy Mission is to fight and win in the maritime environment as an element of a joint or combined force to assist in maintaining Australia's sovereignty *and protecting Australia's sovereign rights* and to contribute to the security of our region.

This would better reflect the broader role of the RAN, incorporating its constabulary function as a core element within the continuum of maritime operations.

Bibliography

Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, of 4 December 1995.

APEC Oceans Governance Report - Australia, 2002, prepared by Centre for Maritime Policy, University of Wollongong.

Australia's Defence Policy: Defence 2000: Our Future Defence Force.

Australia Oceans Policy Volume 1, National Oceans Office, Hobart Tasmania.

Australia Oceans Policy Volume 2, National Oceans Office, Hobart Tasmania.

Australia's Oceans - New Horizons, 1997. ISBN 0 642 26659 X.

Australia's Marine Science and Technology Plan.

Australian Maritime Doctrine 2000. Sea Power Centre Australia, RAAF Base Fairbairn, Canberra.

Background Paper 3, National Oceans Office, Hobart Tasmania.

Background Paper 4, National Oceans Office, Hobart Tasmania.

Bergin, A., Woolner, D., Bateman, S., & Tsamenyi, M. (2003). *Australia's Maritime Border Protection Regime*. Unpublished paper.

Convention for the Conservation and Management of the Highly Migratory Fish Stocks in the Western and Central Pacific Ocean adopted 5 September 2000.

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. {Department of Foreign Affairs & Trade, Australian Treaty Series 1993 No. 10.}

Crimes at Sea Act 2000 (Cth).

Defence Minister Media Release of 12 April 2001. (www.defence.gov.au/media/index.html)

Mackinnon, D.R. & Hinkley, J. (1999). Report on Critical Issues Workshop - The regulation and Enforcement of Crime in Australia's maritime zones. *Maritime Studies*. 104, 1999.

Joint Committee of Public Accounts and Audit Report 384. The Parliament of the Commonwealth of Australia, 2001.

Joint Press Release. Navy, Customs, AFP, NSW Police of 20 April 2003. (www.defence.gov.au/media/index.html)

McLeod, Greg, (Federal Agent). reported by Bergin, A., Woolner, D., Bateman, S., and Tsamenyi, M. (2003). *Australia's Maritime Border Protection Regime*. Unpublished paper.

Report of the Ministerial Advisory Group, July 1998 from National Oceans Office, Hobart Tasmania.

The Auditor General *Coastwatch Australian Customs Service*, *Audit Report No. 38 1999-2000*, Australian Audit Office, Canberra, April 2000.

The South-East Regional Marine Plan Assessment Report *Communities - connecting with the ocean*; Tasmania State Library Ref 1-877043-08-7.

The South-East Regional Marine Plan Assessment Report *Impacts-identifying disturbances*; Tasmania State Library Ref 1-877043-10-9.

The South-East Regional Marine Plan Assessment Report *Ocean Management - the legal framework*; Tasmania State Library Ref 1-877043-20-6.

The South-East Regional Marine Plan Assessment Report Resources - using the ocean. Tasmania State Library Ref 1-877043-16-8.

Tsamenyi, M. & Manarangi-Trott, L. (2002). *The Implications of the WCPFC for Australia's Maritime Regulation and Enforcement*. A presentation to the Maritime Studies Conference in Canberra, November 2002.

United Nations Fish Stocks Agreement, Article 18.

United Nations Law of the Sea Convention 1984.

Woolner, D. (2001). Australian Coastal Surveillance: Changing Policy Pressures. 2001. *Maritime Studies,* 119, July-August 2001.

www.afma.gov.au.

www.afp.gov.au.

www.ahc.gov.au.

www.aims.gov.au.

www.amsa.gov.au.

www.antdiv.gov.au.

www.aqis.gov.au.

www.atsb.gov.au.

www.customs.gov.au.

www.customs.gov.au: Customs National Marine Unit Briefing Document.

www.dotars.gov.au.

www.gbrmpa.gov.au.

www.immi.gov.au.

NOTES

[1] *Australia's Oceans - New Horizons 1997*: ISBN 0 642 26659 X.

[2] *Australia Oceans Policy Volume 2*, p. 37, National Oceans Office: www.oceans.gov.au.

[3] The South-East Regional Marine Plan Assessment Report *Ocean Management – The Legal Framework*; Tasmania State Library Ref 1-877043-20-6.

[4] The South-East Regional Marine Plan Assessment Report *Resources - Using the Ocean*, Tasmania State Library Ref 1-877043-16-8.

[5] Background Paper 3, National Oceans Office: www.oceans.gov.au.

[6] Background Paper 4, National Oceans Office: www.oceans.gov.au.

[7] *Australia's Ocean Policy V2*, op cit, p. 37.

[8] Ibid, p. 40.

[9] Ibid, p. 41.

[10] Ibid.

[11] Ibid.

[12] *Ocean Management - The Legal Framework*, op cit.

[13] Ibid, p. 32.

[14] Ibid, p. 34.

[15] *Crimes at Sea Act 2000 (Cth)*.

[16] *Resources - Using the Ocean*, op cit, p. 131.

[17] The South-East Regional Marine Plan Assessment Report *Impacts - Identifying Disturbances*; Tasmania State Library Ref 1-877043-10-9.

[18] Ibid.

[19] The Ocean Management - The Legal Framework, op cit.

[20] www.aqis.gov.au.

[21] www.acs.gov.au.

[22] *Ocean Management - the Legal Framework*, op cit.

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26] *Australia's Defence Policy: Defence 2000: Our Future Defence Force*.

[27] Ibid, paragraph 2.16.

[28] *Australian Maritime Doctrine: RAN Doctrine 1*. Sea Power Centre Australia. 2000.

[29] *Australia's Ocean Policy Volume 2*, op cit, p. 37.

[30] Ibid, p. 42.

[31] The Auditor General *Coastwatch Australian Customs Service*, Audit Report No. 38 1999–2000, Australian Audit Office, Canberra, April 2000.

[32] www.immi.gov.au/illegals/border2000/border09.htm.

[33] Joint Committee of Public Accounts and Audit Report 384, 2001, The Parliament of the Commonwealth of Australia, p. 129.

[34] Report of the Ministerial Advisory Group, July 1998 from National Oceans Office, Hobart Tasmania.

[35] Joint Media Release, Navy, Customs, AFP, NSW Police on 20 April 2003.

[36] *Ocean Management - The Legal Framework*, op cit.

[37] APEC Oceans Governance Report - Australia, 2002, prepared by Centre for Maritime Policy, University of Wollongong.

[38] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, of 4 December 1995.

[39] Convention for the Conservation and Management of the Highly Migratory Fish Stocks in the Western and Central Pacific Ocean adopted 5 September 2000.

[40] Department of Foreign Affairs & Trade, *Australian Treaty Series 1993 No. 10.*

[41] Tsamenyi, M. & Manarangi-Trott, L. (2002). *The Implications of the WCPFC for Australia's Maritime Regulation and Enforcement*. A presentation to the Maritime Studies Conference in Canberra, November 2002.

[42] Ibid.

[43] UNFSA, Article 18.

[44] Tsamenyi, M. & Manarangi-Trott, L. (2002), op cit.

[45] *Ocean Management - The Legal Framework*, op cit.

[46] SUA article 4.

[47] *Ocean Management - The Legal Framework*, op cit.

[48] Ibid.

[49] Woolner, D. (2001). Australian Coastal Surveillance: Changing Policy Pressures. *Maritime Studies* 119, July–August 2001.

[50] Bergin, A., Woolner, D., Bateman, S., & Tsamenyi, M. (2003). *Australia's Maritime Border Protection Regime*. Unpublished paper.

[51] Tsamenyi, M. & Manarangi-Trott, L. (2002), op cit.

[52] *Impacts - Identifying Disturbances*, op cit.

[53] *Resources - Using the Ocean*, op cit.

[54] Bergin, A., Woolner, D., Bateman, S., & Tsamenyi, M. (2003), op cit.

[55] Ibid.

[56] Minister of Defence Media Release, 12 April 2001.

[57] *Australia's Ocean Policy Volume 2*, op cit, p. 40.

[58] United Nations Law of the Sea Convention 1984.

[59] *Australia's Ocean Policy Volume 2*, op cit, p. 42.

[60] Mackinnon, D.R. & Hinkley, J. (1999). Report on Critical Issues Workshop – The regulation and Enforcement of Crime in Australia' maritime Zones. *Maritime Studies*, 104, 1999, p. 11.

[61] *Australia's Ocean Policy Volume 2*, op cit, p. 37.