
The Governance of Security in Australia's Maritime Domain

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The structures for managing the policing of Australia's maritime zones have been changed frequently since the 1970s in response to political crises. All responses avoided creation of a dedicated agency to undertake the task but none of the cooperative arrangements that emerged have been sufficiently robust to respond satisfactorily to the next crisis. The current arrangements under the Australian Customs and Border Protection Service have not prevented instances of poor performance, lax financial management and unclear responsibility. This article argues that these are inherent structural weaknesses of the current approach to maritime security and that it is time to establish a dedicated agency to perform the task.

A major issue of the 2010 Federal election campaign was about people coming by boat into Australian waters to seek political asylum. The opposition parties had seized on the issue as the numbers of asylum seekers increased from early 2009 and, for the duration of the campaign and beyond, one of the four points of the mantra repeated by Opposition Leader Tony Abbott was, "stop the boats". The then newly appointed Prime Minister, Julia Gillard, seemed compelled to mirror the Opposition's approach in her election policies.

At the end of the year, in the early morning of 15 December, a boat carrying asylum seekers was shipwrecked on the cliffs of the northern shore of Christmas Island during a bad storm. Australian officials and locals saved the lives of forty-one people but something like thirty died.¹ The tragedy aboard the boat thereafter designated as SIEV 221² drew widespread attention and comment, some of it driven by political viewpoint as well as compassion. Yet again, the political sensitivity surrounding the issue of boat people was demonstrated.

Governance in a Political Environment

This article is not directly concerned with policies on either immigration or refugees, as in reality control of irregular immigration is only one of the many problems that emerge across the vast spread of Australia's maritime domain.

¹ The total of those who died may never be established. There was no intelligence on how many passengers had embarked on SIEV 221 and of the various reports some placed the numbers as high as 100. Australian Customs and Border Protection Service, *SIEV 221 Internal Review*, January 2011, <<http://www.customs.gov.au/webdata/resources/files/110124CustomsInternalReview.pdf>> [Accessed 8 February 2011], pp. 23-4.

² The term stands for Suspect Irregular Entry Vessel and the number indicates it was the 221st intercepted that year.

Government stewardship of these waters has become increasingly complex since they first became a responsibility of the Commonwealth at the end of the 1960s. Procedures and equipment employed by the range of agencies involved in managing and policing Australia's maritime domain have developed since then, but the structures that govern these activities remain arguably inadequate.

The driving force behind the creation of most of the structures brought into existence since the 1970s has been political controversy. Few of these structures have had time to mature before being overtaken by an appearance of crisis generated by political controversy and thereafter the existing arrangements were reorganised as a demonstrable response to public concern. The constant throughout has been to avoid creating a single agency to police the maritime domain, even to the point of abandoning party policy or ignoring the recommendations of government commissioned enquiries. The result has been a process of halting changes to the structures for governing the maritime domain that has been typified as "crisis driven incrementalism"³ and which has been unable to halt the cycle of future "crises".

The relevance of events during the second half of 2010 is their demonstration that political intervention retains its potential to reshape the system. Campaigning for the 2010 election in the midst of increasing boat arrivals drew the candidates to arguing on the detail of operational procedure. Opposition leader Tony Abbott proclaimed that he, as Prime Minister, would decide whether an intercepted boat would be turned back to Indonesia. Prime Minister Gillard dismissed the idea that the commander of an Australian vessel at sea should have to communicate with the Prime Minister before taking necessary action.⁴ Yet this has happened. During Operation *Relex* in 2001, permission to evacuate any unwell asylum seekers to the mainland for medical treatment had to be sought from the Prime Minister. None was granted, despite occurrences of serious illness.⁵

Politicisation of administration in Australian governments has been the subject of a continuing debate for some time but the practice is usually subtle and rarely explicitly partisan.⁶ In particular, politicians have tended to avoid involvement in the operational aspects of law enforcement and national security. Instead, they will cite the sensitivity of legal proceedings to avoid commenting on policing matters. Even the exercise of Ministerial

³ Sam Bateman, Anthony Bergin, Martin Tsamenyi and Derek Woolner, 'Integrated Maritime Enforcement and Compliance in Australia', in Donald R. Rothwell and David L. VanderZwaag (eds), *Towards Principled Oceans Governance* (London: Routledge, 2006), p. 137.

⁴ Paul Maley, 'PM Shoots Down Plan to Turn Boats Back to Sea', *The Australian*, 17 August 2010.

⁵ David Marr and Marian Wilkinson, *Dark Victory* (Sydney: Allen and Unwin, 2003), p. 216.

⁶ Andrew Podger, 'The Subtle Nature of the Beast', *Australian Financial Review*, 30 September 2010.

authority as part of a police investigation can bring severe criticism upon a politician, as Kevin Andrews found when he acted to remove the visa of Dr Mohamed Haneef.⁷

Equally dangerous for politicians is appearing to dictate to the Australian Defence Force (ADF) on operational matters, potentially a manoeuvre between accusations of endangering lives and charges of compromising the ADF's apolitical traditions. Even comments marginally associated with operational matters can be politically tricky. Statements by Opposition Leader Tony Abbott, concerning the pending court martial of soldiers charged with offences after an incident in Afghanistan, brought a rebuke from the Australian Defence Association that his comments had been unhelpful.⁸

In contrast, the enthusiasm to voice opinion on interdicting asylum boats may rest on politicians feeling shielded by the limited electoral sympathy for boat people. Such intervention has only become tricky where it has clashed with established international or legal obligations, as when the Howard Government's directions to the Captain of the *Tampa* conflicted with the latter's obligations under the Safety Of Life At Sea (SOLAS) conventions for the rescue of people at sea. However, the operational priorities reflecting policy interventions can contribute to the death of people in Australian waters. There might also be a perception that intercepting boat people is a comparatively simple task, carrying little danger for the Australian personnel involved. Yet, as demonstrated by the Coroner's report into the explosion aboard the asylum seeker boat known as SIEV 36 in April 2009, boarding and taking command of refugee boats is a complex and challenging task where small errors can compound. In the case of SIEV 36 this action led to disaster and a situation where one crew member "was struggling and would have drowned but for prompt action."⁹

This article will examine the higher-level arrangements for governance of Australia's maritime domain and identify the causes of its persisting inadequacies. It will argue that the policing of Australia's interests in those waters requires the establishment of a single agency. As an area of public policy that is consistently subjected to political motivations, a dedicated agency can bring, over time, several advantages similar to those delivered

⁷ In 2007 Haneef was charged with supporting a terrorist plot. Andrew's intervention was shown to have been problematic by the findings of the Clark Inquiry into the case, which demonstrated that beside the legal niceties involved, the dynamics of such investigations may present traps for politicians. For a discussion of the Clark Inquiry see: Andrew Lynch, 'Learning from Haneef', *Inside Story*, <<http://inside.org.au/learning-from-haneef/>> [Accessed 11 November 2010].

⁸ Sabra Lane, 'Abbott "Doesn't Understand Military Justice"', *ABC News*, 14 October 2010, <<http://www.abc.net.au/news/stories/2010/10/13/3037649.htm>> [Accessed 15 October 2010].

⁹ Greg Cavanagh (Northern Territory Coroner), *Inquest into the Death of Mohammed Hassan Ayubi, Muzafar Ali Safarali, Mohammed Amen Zamen, Awar Nadar, Baquer Husani* (2010) NTMC 014, Darwin, 17 March 2010, p. 39, <<http://resources.news.com.au/files/2010/03/17/1225841/845075-siev-36-findings.pdf>> [Accessed 22 October 2010].

by the Australian Federal Police in terrestrial law enforcement. Defining the nature of such an agency is the subject for another article but its essential characteristics can be identified as direct responsibility to a Minister, control of operational, staffing, developmental and financial aspects of policing the maritime domain and having its responsibilities and powers specified by legislation.

Policing the Maritime Domain

AUSTRALIA'S MARITIME DOMAIN

The monitoring, evaluation and policing required to secure Australia's maritime approaches remains a monumental undertaking. The Australian coastline stretches for 37,000 kilometres and there are 12,000 land features lying within Australian waters.¹⁰ The maritime domain, stretching from the continental and island shorelines to a distance of 200 nautical miles (together with continental shelf resource zones), covers an area of 11 million square nautical miles. This is the world's third largest maritime exclusive economic zone (EEZ). Australia claims more than 40 percent of the Antarctic mainland and has established a Southern Ocean EEZ based on those territories, although this is not recognised by the international community.

In addition, Australia has international obligations for managing search and rescue operations under the Convention for the Safety Of Life At Sea (SOLAS) over an area that covers around 13 percent of the earth's surface. Over this area the International Maritime Organisation designates to Australia, as the security forces authority, the responsibility to react to security incidents.

The size of the domain hints at the vast distances it encloses. Australian islands extend the nation's maritime jurisdiction deep into the Pacific, Indian and Southern Oceans, covering virtually all of the range of maritime environmental conditions. Christmas Island and the Ashmore and Cartier reefs are around 200 nautical miles from the nearest of the Indonesian islands but Christmas Island is 1500 nautical miles and the reefs 450 nautical miles, west of Darwin. The sub-Antarctic territories (Australian possessions and not dependant on Australia's Antarctic EEZ claim) of the Heard and McDonald Islands lie 2200 nautical miles south-west of Perth.

Yet, with no strong tradition of being a maritime people, "the maritime infrastructure needed to support our oceans management responsibilities ... is underdeveloped",¹¹ despite maritime interests that are strategic, political,

¹⁰ The Hon. Brendan O'Connor MP, Minister for Home Affairs, 'Speech to the Pacific 2010 International Maritime Museum Exposition', 28 January 2010, p. 2.

¹¹ Sam Bateman and Anthony Bergin, *Sea Change: Advancing Australia's Ocean Interests* (Canberra: Australian Strategic Policy Institute, 2009), p. 16. This paper in the ASPI 'Strategy' series provides the most recent review of the nature of Australia's maritime domain and the

economic and environmental.¹² Management of the maritime domain encompasses commercial and traditional activities conservatively valued at \$38 billion in 2006-07, the wealthiest sector being the offshore oil and gas industry.¹³ The blowout of the Montara drilling platform in the Timor Sea, in August 2009, demonstrated that these activities often carry great environmental and safety risks. Most of the domain has fish stocks at commercial levels, while shipping carries some 99 percent of Australia's international trade.

INHERENT COMPLICATIONS: "CLIENT" AND ENFORCEMENT AGENCIES

The complexity of the legal arrangements that confer authority over Australia's maritime domain lends as much to the character of the arrangements for managing it as does the country's physical geography. Australia has established an EEZ and AFZ (Australian Fishing Zone—an area that is generally coextensive with the EEZ but is defined and managed under fisheries legislation) and claims sovereign rights to manage and exploit all living and mineral resources within them, including arrangements to maintain marine environments. In agreed areas of the continental shelf outside the EEZ Australia has the power to control the exploration for, and extraction of, minerals on or beneath the seabed. International recognition of these powers derives from the provisions of the UN Convention on the Law of the Sea (UNCLOS), signed by Australia in 1982 and ratified in 1994.

Executive and enforcement powers are based on a wide range of legislation at State and Commonwealth levels, sometimes involving international agreements. Indeed, so complex are the arrangements that underpin the management and policing of the maritime domain that Border Protection Command produced in 2009 a guide to "provide a common reference point on the arrangements to enhance the management of security in Australia's maritime domain."¹⁴ This, the "GAMSA", notes the basics of Australian jurisdiction offshore and much of the document's 52-page discussion deals with the relevance of specific legislation to aspects of policing the maritime domain.¹⁵

issues that are important in its management. It identifies areas where underperformance against policy goals has become significant and contains comprehensive recommendations for an improved management regime to overcome these problems.

¹² *Ibid.*, p. 26.

¹³ *Ibid.*, p. 32.

¹⁴ Border Protection Command, *Guide to Australian Maritime Security Arrangements*, Commonwealth of Australia, <<http://www.bpc.gov.au/webdata/resources/files/GAMSA.pdf>> [Accessed 10 February 2011], p. 3.

¹⁵ The GAMSA details the specific laws, conventions and agreements against which action can be initiated and authorised to meet a range of threats (such as "marine pollution") to the effective management of the maritime domain. The titles of Acts are linked helpfully to appropriate databases, such as the Commonwealth's *ComLaw* collection.

The most practical consequence of this skein of powers is the range of local, national and international agencies that have some involvement in happenings on Australian waters. The GAMSA lists twenty-eight Commonwealth agencies¹⁶ and six generic types of State body¹⁷ that have a role in management or policing of the domain. In addition there are what it terms commercial and non-commercial “stakeholders” whose activities on Australian waters requires that their interests be considered.¹⁸ Generally, authority to administer legislation relating to the maritime domain has been vested in those agencies that normally administer the functional area on land. Yet these agencies, such as State police forces, usually have little, more often nil, capacity for operations at sea.

Consequently, it is a broad feature of the management of Australia’s maritime domain that administration of legislation is not usually associated with the capacity to enforce it. This usually falls to Commonwealth personnel from four agencies; the Australian Customs and Border Protection Service (ACBPS), the Australian Defence Force (ADF), the Australian Fisheries Management Authority (AFMA) and the Australian Quarantine And Inspection Service (AQIS). As a result, operations within the maritime domain have necessarily required a high degree of consultation, cooperation, coordination and integrated planning between the enforcement authorities and the others, generally referred to as “client” agencies.

Over the last decade a “whole-of-government” approach has become the management model for directing activity concerning the maritime domain. A review of Homeland and Border Security in 2008¹⁹ renamed the Australian Customs Service the Australian Customs and Border Protection Service to mark the nomination of the ACBPS as the single point of accountability for the Commonwealth’s activities to combat people smuggling,²⁰ coordinating activities including those of the Department of Immigration and Citizenship and the Australian Federal Police. The ACBPS became a national intelligence agency and its responsibilities expanded to locating personnel inside source and transit countries to operate against people smugglers. This has accentuated the focus of government policy concern in the maritime domain on irregular maritime immigration.

One analyst interprets developments in the structure for managing the maritime domain since 2001 as the rise of a self-perpetuating entity, allocated growing funding as electoral concerns increase about “border

¹⁶ *Ibid.*, pp. 15-19.

¹⁷ *Ibid.*, pp. 19-20. The formal names of these agencies and their designated responsibilities vary from State to State.

¹⁸ A list of the more important government agencies is given at Appendix 1.

¹⁹ Ric Smith, ‘Summary and Conclusions’, *Report of the Review of Homeland and Border Security* (declassified version), Canberra, December 2008, p. 6.

²⁰ The Hon. Kevin Rudd MP, Prime Minister, *The First National Security Statement to the Australian Parliament*, 4 December 2008, p. 12.

security”.²¹ But those focused on the broader issues of the maritime domain generally differ. Bateman and Bergin note that Australia has generally failed to “fully grasp” the strategic significance of Australia’s oceans; not appreciating the potential benefits and leaving unattended some serious developing problems.²² They consider that Australia’s general oceans management continues to lack unified management and accountability, with the “failure to achieve a truly integrated approach to oceans management show[ing] that further hard thinking is required.”²³

Their proposal is to create an Office of Ocean’s and Maritime Affairs in the Department of Prime Minister and Cabinet, to ensure that the links between maritime security, marine science and technology, industry, national and international policies, federal-state issues and supply of the requisite data and information are provided for policy development and implementation.²⁴ In the absence of such reform, the current imperfect policy arrangements further complicate the implementation and policing of objectives for the maritime domain.

The Origins of a System: The Crisis of the Day

Today’s method of cobbling together capability elements to provide the capacity for policing the responsibilities of the client agencies is a more sophisticated but broadly similar method to that first devised when the Commonwealth established formal arrangements more than thirty years ago. There have been refinements in procedures and advances in the assets available to perform the required tasks. Yet most of the major changes in the machinery for managing the system have come through incremental responses to perceived weaknesses exposed by “crises” of a usually openly political nature. All government responses have been marked by a determination to avoid creation of any permanent agency to manage or police Australia’s maritime domain and, stimulated by the salience of current political imperatives, to overly focus the response upon a single issue.

THE FORMATIVE YEARS

The Commonwealth was first drawn into civil policing of the maritime domain in the late 1960s because of changes in jurisdictional responsibilities covering fishing. A 12-mile wide fishing zone was established and, as more

²¹ Peter Chambers, ‘The Rising Tide of Border Security’, *Inside Story*, 28 July 2010, <<http://inside.org.au/the-rising-tide-of-border-security/>> [Accessed 20 August 2010]. Chambers’ analysis provides a brief overview of developments since 1999 to control the entry of boat people, from the incursions on the east coast of Australia in 1999 to the announcements of Prime Minister Julia Gillard in the policy statement “Moving Australia Forward” at the beginning of the 2010 election campaign. Each development is viewed as logically unsupportable except as providing for the growth of a “border security” apparatus.

²² Bateman and Bergin, *Sea Change*, p. 4.

²³ *Ibid.*

²⁴ *Ibid.*, p. 63.

agencies became involved, a Standing Inter-Departmental Committee was established to coordinate their inputs in 1973.

However, concern about Indonesian trochus fishermen camping on Australia's north-west coastline first brought the Commonwealth's role in maritime border protection to public awareness in 1974. The attention was politically based. The north Australian cattle industry argued their intrusions heightened the threat of exotic disease infecting Australian herds and their cause was assiduously promoted the governments of Western Australia and Queensland.²⁵ The Commonwealth responded by an agreement with Indonesia in November 1974 and the RAN performing Operation Trochus 75 in March 1975.

The issue was expeditiously defused but its legacy lasted for over a decade. Since the focus of the outcry was the risk of exotic disease, management of the response fell to the agency with coverage of the issue, AQIS. Increasingly, ADF aircraft were withdrawn and chartered civil aircraft were tasked to follow the coastline for signs of quarantine breaches but, as AQIS lacked any capacity to manage an aerial surveillance program the Department of Transport, which had a Marine Operations Centre, assumed the role of coordinating surveillance activities.

The influence of these early decisions was perpetuated when the Frazer Coalition Government agreed to an Australian EEZ in early 1978 on the basis of the negotiation of UNCLOS, and announced a policy to provide increased aerial surveillance of the coastline and AFZ in July. Even though a political outcry had arisen over the arrival of boats carrying Vietnamese in 1976, with some 1600 asylum seekers arriving over 1977 and 1978,²⁶ the government's response continued to be based on the AQIS model. When it decided to expand the amount of contracted civil aerial surveillance along the north Australian littoral to ten times the military flying hours, AQIS received the bulk of the new funding and Transport continued to manage the now expanded aerial surveillance program.

Yet, although driven to action by the arrival of the Vietnamese boat people, the government's objective was to avoid longer-term commitments. As the Minister admitted:

²⁵ The author was policy adviser to Defence Ministers Lance Barnard and Bill Morrison during this period. In subsequent years he continued to advise members of Parliament on the policing of the maritime domain in the role of Director of the Foreign Affairs and Defence Group of the Commonwealth Parliament's research service.

²⁶ Although the numbers appear small by later standards, they represented a dramatic increase over the 111 that had arrived in 1976. Janet Phillips and Harriet Spinks, *Boat Arrivals in Australia since 1976*, Appendix A: 'Boat Arrivals since 1976 by Calendar Year' (Canberra: Parliamentary Library Parliament of Australia, 2010), p. 12. This reference paper is updated on an irregular basis.

The measures adopted at this stage have been designed to provide a high degree of flexibility *without commitments to capital expenditure.*²⁷ [emphasis added]

In 1983 the Hawke Labor Government was elected with a policy to establish a coastguard, a promise made in response to popular concern about drug trafficking. In office, it showed no less intention to avoid commitment than its predecessor. Management of policing the maritime domain was transferred to the Australian Federal Police (AFP) and it established a Coastal Protection Unit (CPU). Yet the AFP never gained effective control of operations as the appropriations, dominated by AQIS, remained with the participating agencies. In practice, the CPU could not introduce changes unless an agency was willing to finance proposals to benefit programs administered by other agencies.

Eventually, this tension produced another crisis. In December 1987 a review of quarantine arrangements recommended that the Department of Primary Industries and Energy cease aerial littoral surveillance and switch to direct surface operations.²⁸ Given AQIS' domination of funding, the arrangements for protecting Australia's maritime domain were in danger of collapse.

The government commissioned a report from Hugh Hudson, who noted that while the most pressing problem was unlawful Indonesian fishing well offshore the majority of surveillance flights remained shore-bound, focused on quarantine. His report, *Northern Approaches*, argued that the system's task was national law enforcement, yet the existing program was barely adequate and might not meet Australia's obligation to manage the resources of the EEZ under UNCLOS.²⁹ Hudson recommended that an Australian Maritime Safety and Coastwatch Agency be established (combining surveillance and search and rescue functions) and that it report directly to the appropriate minister.³⁰

The government again declined to establish a dedicated agency to manage the maritime domain and instead transferred responsibility for the aerial surveillance of the EEZ, for littoral patrols and for surveillance of the Great Barrier Reef Marine Park to the Australian Customs Service (ACS), which had been running its own aerial intervention program since the late 1970s. Importantly, funding for the operational functions was also transferred to the ACS.

²⁷ Peter Nixon, Minister for Transport, 'Australian Civil Coastal Surveillance', *Press Statement*, Canberra, 9 July 1978.

²⁸ Department of Primary Industries and Energy, Interim Report by the Quarantine Review Committee, *Report on Aerial Littoral Surveillance and Northern Australian Quarantine Strategy* (Canberra: Australian Government Publishing Service, December 1987), p. 79.

²⁹ Hugh Hudson, *Northern Approaches* (Canberra: Department of Transport and Communications, April 1988), p. 57.

³⁰ *Ibid.*, pp. 58-9.

Management of the maritime domain was steadily improved over a decade, particularly in moving from standing patrols to intelligence directed aerial surveillance. Yet, when political crisis returned the system's structure was again changed. In March 1999 landings of Chinese at Cairns, and at Nambucca Heads in April, forced the establishment of the Prime Minister's Coastal Surveillance Task Force, led by departmental head, Max Moore-Wilton. It identified a fundamental problem. Intelligence on the Chinese gangs that had organised the landings was poor and the technology available for inter-agency coordination was antiquated. To better manage intelligence, the taskforce recommended establishment of the previously delayed National Surveillance Centre and appointment of an ADF officer with rank equivalent to Rear Admiral as Director General of *Coastwatch*, reporting directly to the Chief Executive Officer (CEO) of the ACS. This corrected the loss of the relationship in a restructure of the ACS the year before.³¹

The taskforce also recommended improved technology, and increased hours of aerial surveillance, mostly on the east coast. Yet, even before this single issue could be addressed, significantly increased numbers of boat people began appearing on the north-west coast.³² The Northern Territory Chief Minister criticised the taskforce for ignoring north-western waters³³ and the Western Australian Government was soon to allege that resources on the west coast were inadequate.³⁴

THE 2000S: PROBLEMS OF A TURBULENT DECADE

Initially, the Howard Government avoided further changes and sought to manage the inflow by administrative means. It introduced the Temporary Protection Visa in October 1999, which in effect devalued the benefits of being determined to be a refugee. Initial signs seemed promising,³⁵ and there were 782 fewer boat people arriving in 2000. However, during 2001 the number jumped to 5516.³⁶ So, in August 2001 when the MV *Tampa* rescued a group of asylum seekers from the sinking Indonesian vessel the *Palapa*, the Howard Government that had been trailing the Labor party all year was facing a considerable political crisis driven by the arrival of almost 12,000 asylum seekers over three years.

³¹ The Prime Minister's Coastal Surveillance Task Force (PMTF), *Report*, Canberra, June 1999, pp. 1-10.

³² From 200 arrivals in 1998 the number increased to 3721 in 1999. Phillips and Spinks, *Boat Arrivals in Australia since 1976*, Appendix A, p. 13.

³³ 'Boat People Plan Ignores NT: Burke', *Northern Territory News*, 29 June 1999.

³⁴ Megan Saunders, 'Cabinet Call for Coastwatch Boost', *The Australian*, 9 October 2000.

³⁵ Immigration Minister Phillip Ruddock stated "The arrival of just two boat loads of illegal immigrants in the last week could be a sign that the Government's tough new ... laws were working ... some might say the fact we haven't had any for a week could be a suggestion that it is (working)." 'Visa Laws Hailed as Boat Arrivals Decrease', *Canberra Times*, 7 December 1999.

³⁶ Phillips and Spinks, *Boat Arrivals in Australia since 1976*, p. 13.

The government changed policy in an attempt to seize the political initiative³⁷ with the aim of having boat people denied access to the Australian judicial system for the determination of their refugee status. They would be prevented from coming to "Australia" in the first place. This required excising a number of offshore possessions for immigration purposes, encouraging refugee boats to return to Indonesia and if not, having refugee status determined in foreign territory, mostly on Nauru and Papua New Guinea's Manus Islands; hence the policy became known as the "Pacific solution".

Implementation required that no boat people should reach un-excised territory. The immediate consequence was to make irrelevant the management arrangements for the maritime domain and most of the assets supporting them. Dealing with the influx of boat people over the preceding three years had become relatively efficient, as asylum seekers made a convenient landfall and waited for Australian officials to transport them to the mainland. Indeed, the operation had become so predictable that the ACS had chartered a ferry to transport boat people from the Ashmore and Cartier Reefs to Darwin.

Interdiction and offshore processing was to require three frigates, a support tanker and a naval transport vessel, assisted by RAAF maritime surveillance aircraft, under Operation *Relex*. In addition, steaming teams, particularly from the Special Air Services Regiment, were needed to take control of the boats. Thus, the government's sudden change of policy stretched the Defence Force to its capacity.³⁸ This was hugely inefficient. ADF equipment was more expensive to operate, and implementation of the policy required repeated round trips of several thousand nautical miles. A naval vessel such as HMAS *Manoora*, costing \$480,288 *per day* to operate³⁹ replaced the ACS ferry on a contract of \$4.1 million *per year*. The operational changes introduced to support the policy of offshore processing were to persist for a decade and become a contributing cause of the loss of life suffered in the Christmas Island shipwreck of December 2011.

Although major ADF units were to be deployed off the north-west coast and Christmas Island for several more years,⁴⁰ it was the almost contemporaneous concern over terrorism that resulted in structural change

³⁷ Through a stroke of lucky co-incidence the policy change gained added political effectiveness shortly afterwards when terrorist attacks in north-eastern United States on 11 September conjoined boat people and terrorism as a central issues of the 2001 federal election.

³⁸ At the time the Royal Australian Navy (RAN) had an effective strength of ten frigates, with one in the Middle East and another to be paid off in October. Within 10 days of commencing Operation *Relex*, the 9/11 terrorist attacks foreshadowed further deployments of Defence Force assets.

³⁹ Senate Foreign Affairs, Defence and Trade Legislation Committee, 'Questions on Notice', *Department of Defence, Additional Estimates Hearings*, 20-21 February 2002, pp. 10-11.

⁴⁰ While a sharp decline in boat numbers in 2002 allowed Operation *Relex* to be scaled down, a naval surface combatant and Royal Australian Air Force Orion surveillance aircraft continued to be involved for several years under Operation *Relex II*.

in the policing of the maritime domain. The Joint Offshore Protection Command (JOPC) was established in March 2005 to develop arrangements for protecting offshore facilities against terrorist acts and to improve the collection and synthesis of intelligence from Commonwealth and State agencies.⁴¹

Yet, once again, just as policing the maritime domain was being restructured around a single issue, the decision was assaulted by reality. In 2005-2006 367 foreign fishing boats were detained whilst infringing the northern AFZ, compared with the long-term trend of around 100 per annum. Called on to review the situation in late 2005, the Department of Prime Minister and Cabinet concluded that the JOPC did not fully meet the requirements for managing the domain. It recommended that the JOPC should “assume responsibility for the control and coordination of all operational responses to civil maritime security threats”.⁴²

Finding that there had sometimes been inadequate coordination in managing the domain, the Department of Prime Minister and Cabinet recommended that it should establish and chair the Strategic Maritime Management Committee (SMMC) as a body to assess developments in the domain and recommend appropriate responses to government.⁴³ The JOPC was renamed Border Protection Command (BPC) and under these arrangements coordinated, broadly based initiatives costing \$145 million in 2005-06 and \$389 million the following year were delivered. By 2008-09 only 27 foreign vessels were apprehended for illegal fishing and foreign fishing activity was clustered at the outer limits of the Australian AFZ.⁴⁴

ENDING WITH A HOLLOW INITIATIVE?

In 2007 an Australian Labor Party (ALP) Government was elected with a platform supporting the establishment of a coastguard, and for a third time in less than a quarter of a century found a way to avoid establishing a single maritime agency. The issue was considered as part of a review of Homeland and Border Security in 2008, which commented that, “the Government could choose to rename the Border Protection Command as a ‘Coastguard’”⁴⁵ but that the arrangements for managing the maritime domain should not be revamped. The government chose to rename the Australian Customs Service the Australian Customs and Border Protection Service and

⁴¹ Rear Admiral Russ Crane, Director-General Coastwatch, ‘Increasing our Offshore Maritime Security’, *Defence*, May 2005, <<http://www.defence.au/defencemagazine/editions/20050510/groups/cjo.htm>> [Accessed 22 August 2010].

⁴² Auditor General, *Illegal Foreign Fishing in Australia’s Northern Waters*, Audit Report No, 23 2009-10 (Canberra: Australian National Audit Office, 2010), p. 48.

⁴³ *Ibid.*, p. 30.

⁴⁴ *Ibid.*, Table 1.1 ‘FFV apprehensions 2003-04 to 2008-09’, p. 32.

⁴⁵ Smith, ‘Summary and Conclusions’, *Report of the Review of Homeland and Border Security*, p. 6.

introduced the structural changes outlined above driven predominantly by a focus on people smuggling.

Border Protection Command continued within the ACBPS as the centre responsible for policing Australia's maritime domain. BPC performs the amalgamation and analysis of intelligence, undertakes planning for surface, aerial and space-borne surveillance and commands the maritime operations that are required to intervene in the maritime domain.⁴⁶ Client agencies identify the threats and provide the risk assessments that form the basis of BPC planning and operations. BPC has developed accepted standardised procedures for risk assessment reporting across client agencies and strategic planning coordinated by the Department of Prime Minister and Cabinet identified eight specific security threats to the maritime domain.⁴⁷ Listed as headings for Chapters 4 to 11 in the GAMSA, these are illegal activity, illegal exploitation of natural resources, marine pollution, prohibited imports or exports, irregular maritime arrivals, compromised biosecurity, crime at sea and maritime terrorism.

The BPC has no equipment of its own and calls on assets controlled by the ADF, Customs, the Australian Maritime Safety Authority (AMSA) and occasionally other agencies for surveillance and response capacity. The Chief of Navy now force assigns RAN vessels through the Head Quarters Joint Operational Command (HQJOC) to the operational control of the Commander BPC as Commander Joint Task Force 639.⁴⁸ The Commander BPC also directs ACBPS assets, primarily the eight *Bay Class* Australian Customs Vessels (ACV) that provide a total of 2400 sea days per annum. These are managed by Customs Maritime Operations Support Division, staffed by Customs officers but with its vessels supported under commercial contract. Maritime Operations also manages commercial contracts for vessels to perform specific operational roles, the largest of which are the ACV *Ocean Protector* and ACV *Triton*. They carry Customs officers (and officials of other client agencies) but are crewed by contractor staff and commercially maintained and supported. The Division also manages the contract for aerial surveillance, provided by Surveillance Australia (SAPL)

⁴⁶ Derek Woolner, *Policing our Ocean Domain: Establishing an Australian Coastguard* (Canberra: Australian Strategic Policy Institute, 2008), pp. 8-12. These pages describe the development of the current arrangements for policing the maritime domain and the assets available for the role. The report goes on to discuss the higher level organisation of the maritime policing function and to recommend a revised structure and executive authority for the BPC.

⁴⁷ Border Protection Command, *Guide to Australian Maritime Security Arrangements*, p. 13.

⁴⁸ Since the early days of the program 1800 patrol boat days had been allocated each year for civil surveillance tasks. Generally, half the Armidale patrol boat fleet is assigned to BPC. The allocation of other assets has developed in response to specific peaks in workload associated with increased people smuggling around 2000 and unlawful foreign fishing around 2005. Woolner, *Policing our Ocean Domain*, p. 10.

through a \$1 billion contract of 12 years duration, and also others for helicopter support.⁴⁹

Soon after the launching of the ACBPS name, numbers of asylum boats started to accelerate significantly. The now practiced machinery under the SMMC produced a coordinated multi-agency program costing \$654 million in time for the May 2009 Budget, with most of the operational initiatives focused on activities in source and transit countries. The problem was that this time the plan did not work. Numbers of boat arrivals reached 2700 in 2009 and grew to over 6000 in 2010.

The Rudd Government's reaction was to develop a political intervention that seemed to imitate the approach of the Howard Government almost a decade earlier. Where the Coalition had vilified asylum seekers, Rudd instead vilified the people smugglers, targeting them with legislation considered draconian by many lawyers. The government also adopted offshore processing, using the recently completed and greatly enlarged centre on Christmas Island. As pressure increased Rudd went further, in April 2010 visiting the Coalition's approach of keeping the determination of refugee status from the Australian legal system by suspending processing of claims by Sri Lankans and Afghani's for three and six months, respectively.

There was even an echo of the *Tampa* when the chartered ACBPS ship *Oceanic Viking* rescued some seventy-eight Sri Lankans from an unseaworthy vessel within the Indonesian search and rescue zone, in October 2009. The government argued that they should be accepted ashore in Indonesia and secured Indonesian Government agreement for a berth in Tanjung Pinang. Indeed, the Rudd Government's expectation that it could deflect the domestic political consequences of boat people arrivals by persuading Indonesia to prevent them sailing, was so palpable that it was labelled "Rudd's Indonesian solution".

Such interventions are rarely useful. For more than a month the Sri Lankans on the *Oceanic Viking* refused to disembark in Indonesia, as the Australian Government tried to avoid the appearance of a public capitulation to their demands. The government's actions simply further strained a system that was necessarily losing effectiveness.⁵⁰ The *Oceanic Viking*, costing over \$27,000 a day to operate (in addition to the basic lease cost)⁵¹ was immobilised and eventually the Sri Lankans gained the quick determination of their status and resettlement in Australia that they had demanded. The outcome was all too similar to that obtained by the Howard Government's

⁴⁹ Ibid., p. 12.

⁵⁰ The long transit flights to reach the area of operations against refugee boats caused a 7 percent shortfall in the area under surveillance during 2009-10. Australian Government, *Australian Customs and Border Protection Service Annual Report 2009-10*, p. 39.

⁵¹ The Senate, Senate Standing Committee on Legal and Constitutional Affairs, *Australian Customs and Border Protection Service*, 'Answer to Question No. 79'.

intervention in 2001. This may have led to a considerable drop in the arrival of refugee boats⁵² but the majority of asylum seekers found to be refugees were eventually settled in Australia.⁵³

Fundamentally, the standoff on the *Oceanic Viking* curtailed the “Indonesian solution” and the government’s ability to appear to have contained most of the problem in the archipelago. Thereafter, the government had little option but to pursue its funded programs quietly. This was a pity, for surveillance and intervention had achieved an interception rate of 95 percent by early 2010⁵⁴ and operations against people smugglers in transit countries may have deterred or prevented thousands of asylum seekers from taking passage to Australia. Nonetheless, the structural changes establishing the ACBPS seemed to have added no additional effectiveness to the programs that had existed before its creation.

Sustaining the Indonesian Relationship

The saga of the *Oceanic Viking* also emphasised, once again, the crucial importance of relations with Indonesia in policing a large section of Australia’s maritime domain. As one of the countries nearest to Australian waters and, indeed, one that shares agreed rights in parts of Australia’s maritime domain, events in Indonesia can significantly influence the policing environment in the northern area of operations and, therefore, the nature of policy outcomes. Unfortunately, political interventions have been applied all too frequently in this area, often with little sensitivity to Indonesian views or awareness of the potential impact on effective operations. In contrast, cooperative initiatives developed with Indonesia have acted to facilitate the operational support of policy objectives.

One of the defining images of the *Tampa* incident was that of three Australian Ministers waiting in Jakarta for a meeting with Indonesian President Megawati Sukarnoputri that never eventuated. Foreign Affairs Minister Alexander Downer, Defence Minister Peter Reith and Immigration Minister Philip Ruddock visited Jakarta on 5 September 2001, seeking Indonesian cooperation to reduce the numbers of refugee boats. The timing was not good. President Sukarnoputri had neglected to return John

⁵² There is little agreement on what factors affect the flow in the numbers of people seeking asylum. The numbers of refugees in the world greatly exceeds those seeking asylum and it may be that most prefer to remain closer to their former homeland. In the context of global trends those seeking refuge in Australia are a tiny minority. For a discussion of issues to do with people seeking asylum in Australia see: Janet Phillips, *Asylum Seekers and Refugees: What are the Facts?* (Canberra: Parliamentary Library Parliament of Australia, 2010).

⁵³ Of those whose claims were processed on Nauru and Manus Islands, 70 percent were found to be refugees and, of these 61 percent came to Australia. Phillips and Spinks, *Boat Arrivals in Australia since 1976*, Appendix A, p. 11.

⁵⁴ The Hon. Brendan O'Connor MP, Minister for Home Affairs, ‘Speech to the Pacific 2010 International Maritime Museum Exposition’, 28 January 2010, p. 6.

Howard's phone call a week earlier and Foreign Minister Hassan Wirayuda had described Australia's approach as "megaphone diplomacy".⁵⁵

Indonesia was smarting over Australia's earlier public demands that it accept responsibility for the *Tampa* since the rescue of those on the *Palapa* had occurred within the Indonesian search and rescue area. Many Indonesians continued to resent Australia's support for East Timorese independence and the Sukarnoputri Government was occupied by its own political problems. Australia's newly enunciated policy of forcing asylum boats to return to Indonesia drew no sympathy from the President. She was to agree to the AFP assisting the Indonesian police to control people smuggling gangs and to discussions that later led to the establishment (in 2002) of the Bali Process on Asia-Pacific coordination against people smuggling and trafficking but the three Australian Ministers gained nothing that effected the flow of asylum vessels.

Relations have improved under the presidency of Susilo Bambang Yudhoyono and cooperation on the maritime domain has increased. The Indonesian Government accepted Australian measures funded in the 2006-07 Budget in response to increased foreign fishing in the AFZ, particularly those designed to assist Indonesia deal with problems of illegal fishing in its own waters.⁵⁶ Discussions at the Australia-Indonesia Fisheries Surveillance Forum led to a four-day trial operation in October 2007, involving Australian vessels and aircraft and Indonesian Fisheries Department vessels in a coordinated patrol on their respective sides of the maritime border in the Arafura Sea.⁵⁷

The improvement has allowed Australia's response to the increase in boat people from 2009 to be more effective than was possible with that at the beginning of the decade. The Australian 2009-10 Budget supported the construction and running costs of an enlarged refugee detention centre at Kupang and funded AFP cooperation with Indonesian police task force groups to disrupt people smuggling networks. Indonesia proposes to increase the police teams from twelve to sixteen.

During her address to the Lowy Institute in July, Prime Minister Gillard stated that AFP cooperation with regional police forces since September 2009 had

⁵⁵ Mark Bowling, 'Downer Joins Reith and Ruddock in Jakarta', *AM* (ABC radio), 6 September 2001, <<http://www.abc.net.au/am/stories/s359484.htm>> [Accessed 12 September 2010].

⁵⁶ This was despite some in the Indonesian political elite being angered by Australia adopting the practice of burning a significant number of Indonesian fishing boats at sea. Theo Sambuaga, Chairman of the Parliamentary Committee 1 (Defence, Foreign Affairs and Information) expressed his concerns and a desire to see an improvement in the treatment of apprehended Indonesian fisherman in May 2008. Greg Earl, 'Tourism Safe Indonesia Says', *Australian Financial Review*, 2 June 2008.

⁵⁷ Woolner, *Policing our Ocean Domain*, p. 14.

prevented more than 5000 asylum seekers reaching Australian shores.⁵⁸ Allowance should be given for the methodological difficulties in deriving this result but it seems to represent a reduction of around 40 percent in the potential traffic.⁵⁹ Now that Indonesia has passed legislation to criminalise people smuggling⁶⁰ it should be possible to extend cooperation further. Indonesian police will be able to detain organisers of smuggling rings on substantive charges carrying significant jail terms, potentially improving the policing environment in the north-west of Australia's maritime domain.⁶¹

Nonetheless, Australia's reflexive politics retain the potential to compromise this advance. The possibility was foreshadowed when Indonesian Foreign Ministry spokesman Teuku Faizasyah described Opposition Leader Tony Abbott's reintroduction of the Pacific solution, with a commitment to force refugee boats to return to Indonesia, as "election fever" that would not "in any way address the issue of people-smuggling".⁶² The government's election proposal to establish a regional refugee-processing centre in East Timor, about which Indonesia was not consulted, left Indonesia similarly unimpressed. The facility would have compromised the porous border between East and West Timor, endangering social cohesion and security in the Indonesian province, thus prompting a senior aide to Vice President Boediono to describe the plan as a "terrible idea".⁶³

The detention of Indonesian boat crews under the Rudd Government's people smuggling legislation sustains such irritation. In July 2009 the Indonesian ambassador to Australia, Primo Alui Joelianto, warned that Australia's treatment of people smugglers had the potential to damage relations with his country because it dealt too harshly with the crews of the

⁵⁸ Julia Gillard's Speech to the Lowy Institute on Labor's New Asylum-Seeker Policy for Australia', *The Australian*, 6 July 2010.

⁵⁹ In January Brendan O'Connell stated that the joint operations had prevented 2449 people from sailing. By late July around 3700 asylum seekers had arrived in 2010. The Hon. Brendan O'Connor MP, Minister for Home Affairs, 'Speech to the Pacific 2010 International Maritime Museum Exposition', 28 January 2010, p. 6; Ian McPhedran, 'Navy Warned to Brace for Election Surge of Asylum Seeker Boats', *Herald Sun*, 24 July 2010.

⁶⁰ Matt Brown, 'Indonesia Passes Laws Criminalising People Smuggling', *ABC News Online*, 7 April 2011, <<http://www.abc.net.au/news/stories/2011/04/07/3185410.htm?section=world>> [Accessed 11 April 2011]. President Susilo Bambang Yudhoyono has to issue a decree to bring the new law into effect.

⁶¹ Under pre-existing arrangements, organisers of people smuggling operations can only be arrested for minor infringements of Indonesian immigration or navigational laws. Thus, attempts by Australia to extradite ringleaders have often been frustrated when they were released from prison following the expiry of convictions for such minor offences. See, for instance, Tom Allard, 'Indonesia Frees People Smuggling Suspects', *Sydney Morning Herald*, 7 December 2010.

⁶² Stephen Fitzpatrick and Paul Maley, 'Jakarta Rejects Return to Pacific Solution', *The Australian*, 28 May 2010.

⁶³ The aide, Dewi Fortuna Anwar, is experience in dealing with Australian tendencies to misconstrue Indonesia interests. P. T. Singham, 'Timor Solution a "Terrible Idea"', *West Australian*, 11 March 2011.

vessels, mostly impoverished fishermen.⁶⁴ The warning has since been reiterated by Indonesia's Foreign Ministry.⁶⁵

While Australia's relationship with Indonesia is in good health, memories of the consequences of Indonesia's indifference in 2001 should urge Australian political leaders to caution. Policies of forcing boats to return to Indonesia or to establish regional refugee processing centres close to Indonesia may appeal to the Australian electorate. However, should they lead to lessened cooperation between Australia and Indonesia, the consequences could be significant for the effectiveness of policing the northern area of Australia's maritime domain.

“Whole of Government”: Structural Roots of Weakness

According to the man who was brought in to establish it, the model we now have for policing the maritime domain is a “whole-of-government strategic border management framework”.⁶⁶ Large, co-ordinated inter-agency arrangements are a currently popular approach to achieving policy goals but they have significant systemic weaknesses.

Despite their name, such arrangements are anything but whole-of-government. They are essentially prioritising tools allowing governments to place resources for best effect, be it for delivering policy outcomes or minimising political consequences. Whole-of-government arrangements are usually a response to an emerging problem; they are created to focus on particular issues whose complexity involves several areas of government concern. However, while the various agencies involved will continue to own their part of the problem, there is often no one who owns the problem as a whole. Thus, loss of focus on major programs is often a structurally predetermined outcome of the whole-of-government approach.

Having no one in government with direct responsibility for the overall performance of policing the maritime domain has allowed loss of focus to be a recurring theme in this area. When Coastwatch was placed with Customs in 1988 it was to remain an autonomous agency reporting directly to the CEO. After a decade this intent had been lost so, during a 1998 restructure, two of its senior management positions were removed and Coastwatch was absorbed into the Border Management sub-program the ACS. It was to overcome this lapse that a Rear Admiral seconded from the RAN was appointed as Director General of Coastwatch following the Moore-Wilton

⁶⁴ Paul Maley, 'Law "Too Harsh" on Indonesian People Smugglers', *The Australian*, 4 July 2009.

⁶⁵ Teuku Faizasyah complained that the trials of more than 200 Indonesians held in Australia on people smuggling charges had been excessively delayed. He reiterated the view that Australia should differentiate between the fishermen who crewed the boats and the organisers of the people smuggling rings. 'Process our Accused People-Smugglers Faster, Jakarta Urges Canberra', *The Australian*, 4 September 2010.

⁶⁶ Michael Pezullo, 'The Role of the Australian Customs and Border Protection Service in Securing Australia's Borders', p. 8.

review of 1999. The Coastwatch successor, Border Protection Command, has again been relegated in the ACBPS hierarchy with its commander reporting to the CEO of Customs through the Deputy CEO Border Enforcement.⁶⁷

An equal loss of focus has now occurred with the package of measures originating in the 2005-06 Budget to combat foreign fishing. Progress had originally been reported to the Cabinet Implementation Unit but this ceased in mid-2007. No Minister had bothered to monitor a five-year program worth \$543 million (combining allocations from 2005-06 and 2006-07) beyond its first two years. And this was despite the intervention of the Minister of Finance in mid-2007 calling for a review of the effectiveness of spending on the program.⁶⁸

Such latitude was probably supported by the operational success of the program. Yet success was achieved in circumstances diametrically opposed to those expected and indicated that intelligence on foreign fishing was inadequate.⁶⁹ The consequence is that, with no Minister responsible for the efficiency of a half billion dollars of expenditure, arrangements to learn from the operation and extract lessons for future policy are weak.

With no central responsibility, the possibility of adverse consequences arising from established policies is less likely to be seen. Current operational planning for controlling the arrival of boat people accepts that "priority is to prevent a mainland arrival over one which would occur on an excised offshore island."⁷⁰ This is the ghost of the Howard Government's Pacific solution, essential if the government is determined to prevent asylum seekers gaining access to Australian judicial safeguards. Since surveillance resources are limited, the planning priority is to cover the coastal approaches from the north-west around to Torres Strait.⁷¹

This was the case in mid-December 2010 and "being an excised offshore island there was no planned aerial surveillance of Christmas Island during the period of the (SIEV 221) incident."⁷² The only RAN surveillance asset on station was HMAS *Pirie* but because of the weather and other circumstances it was sheltering to the east and could not detect SIEV 221 approaching the northern side of the island. The ACBPS report into the shipwreck notes as evidence of the effectiveness of the operational procedures employed that

⁶⁷ Australian Customs and Border Protection Service, *SIEV 221 Internal Review*, January 2011, p. 11, <<http://www.customs.gov.au/webdata/resources/files/110124CustomsInternalReview.pdf>> [Accessed 8 February 2011].

⁶⁸ Australian National Audit Office, *Illegal Foreign Fishing in Australia's Northern Waters*, pp. 39-40.

⁶⁹ *Ibid.*, pp. 69-70.

⁷⁰ Australian Customs and Border Protection Service, *SIEV 221 Internal Review*, p. 29.

⁷¹ *Ibid.*, p. 30.

⁷² *Ibid.*

six boats were intercepted in the period surrounding the incident. It comments, “No SIEV reached the mainland during this period” but does recommend a planning cycle review of operational policies, processes and procedures should be reviewed.⁷³

What the review could not say is that those aboard SIEV 221 who died were the collateral damage of procedures shaped by a policy to prevent asylum seekers reaching the Australian mainland and gaining rights of access to the Australian judicial system. The Minister for Immigration and Citizenship is responsible for the processing of asylum seekers, the Minister for Home Affairs for the ACBPS, the Minister for Defence for the operations of the Navy and the Attorney-General for the integrity of the judicial system—all areas involved in achieving the objectives of the offshore processing policy. None carries a clear responsibility for outcomes of the policy, including unintended deaths. Were there a Minister responsible for the policing of the maritime domain and “carrying the can” for misadventures of policy this would not be the case and there would be considerable incentive to critically review the nature of operations arising from current policy.

Loss of focus and reduced incentive to review policy outcomes are important weaknesses of the whole-of-government approach but without a Minister responsible for implementation, whole-of-government projects also may lack the endurance to achieve their objectives. The Smith review identified three areas of maritime border security that could be improved—streamlining the legal framework for maritime enforcement, improving budget information and better integrating search and rescue and other operational functions.⁷⁴ Work has started on the first but drafting integrated maritime powers legislation is an obviously difficult task and the project is behind schedule.⁷⁵ There is as yet little apparent result in the other two areas.

Tragically, the shipwreck of SIEV 221 indicated the need for more action on the integration of the search and rescue function. The tenders dispatched from both HMAS *Pirie* and ACV *Triton* were hindered by the ingestion of plankton or debris into their propulsion systems and were forced to return several times to the parent vessels to rectify the faults, potentially “introducing delays to recovering survivors from the water.”⁷⁶ This was not a problem of crew skill or equipment design. In the severe conditions encountered that morning the tenders were operating beyond design

⁷³ Ibid.

⁷⁴ Smith, ‘Summary and Conclusions’, *Report of the Review of Homeland and Border Security*, p. 6.

⁷⁵ The proposed *Maritime Powers Bill* was to be introduced in the first half of 2010. Robert McClelland, Attorney-General and Brendan O’Connor, Minister for Home Affairs, *Reform Of Maritime Enforcement Legislation*, Attorney General’s Department, Media Release, 15 September 2009, <http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_ThirdQuarter_15September2009-ReformofMaritimeEnforcementLegislation> [Accessed 25 January 2011].

⁷⁶ Australian Customs and Border Protection Service, *SIEV 221 Internal Review*, p. 41.

limitations and the rescue was dependent on the courage and skill of their crews.

The ACBPS review of the sinking commented that the tenders' propulsion systems were perhaps not ideal for the extreme conditions but observed that they would not have been selected for that purpose as Search and Rescue (SAR) operations in elevated sea states was not a primary function of the RAN or ACBPS.⁷⁷ SAR is the responsibility of the Australian Maritime Safety Authority (AMSA), which organises maritime search and rescue operations but has no seagoing capacity of its own. None of the Commonwealth's maritime operating agencies has noted the deficiency and the equipment needed for SAR in difficult conditions has not been acquired. Elsewhere, SAR requirements are developed as a primary function of the maritime agencies other countries usually categorise as "coastguard". The only occasional attendance of an AMSA liaison officer in BPC's Australian Maritime Security Operations Centre⁷⁸ seems unlikely to assist the rectification of this deficiency.

The logic of whole-of-government arrangements suggests that there will be no quick finalisation of problems such as these, because solutions are largely the responsibility of other agencies for which the issues are not a priority. Without an authority representing the interests of the system, participating agencies will tend to follow their own interests. In 1987, the Department of Aviation produced one of the more notable crises that have affected policing of the maritime domain. Having no stake in operations it simply selected the lowest bidder when renewing the contract for aerial surveillance.⁷⁹ Unfortunately the company, Amman Aviation, had neither the experience nor equipment suited for the role and when it failed to commence operations the previous operator had to be hurriedly re-signed to prevent the system collapsing.

There has been, more recently, a significant repetition of this characteristic. Since 2006 developments in the policing of the maritime domain have occurred under the coordination of the SMMC. It provided effective leadership and coordination of the program to counter foreign fishing.⁸⁰ However, in March 2009 the SMMC went into abeyance⁸¹ and was restructured as the Homeland and Border Security Policy Coordination Group (HPCG). This change allowed the Department of Prime Minister and Cabinet (PM&C) to meet a requirement to provide better support to the Secretaries Committee on National Security but the strategic focus of this

⁷⁷ Ibid.

⁷⁸ Ibid., p. 11.

⁷⁹ A. C. Menzies, *Review of Tender Procedures for the Coastwatch Contract*, Final Report, Canberra, November 1987, p. 70ff.

⁸⁰ Australian National Audit Office, *Illegal Foreign Fishing in Australia's Northern Waters*, p. 47.

⁸¹ Border Protection Command, *Guide to Australian Maritime Security Arrangements*, p. 3, fn.

task made the HPCG unsuitable for management of the fisheries package.⁸² Thus the individual agencies continued to perform their program roles but had no program leadership to manage the overall outcomes. Again, meeting the needs of one agency in a whole-of-government arrangement has created a dysfunctional situation in the overall system.

The prioritisation implicit in the whole-of-government approach has a natural consequence in the sometimes excessive relegation of some objectives. Following the Moore-Wilton policy revamp of 1999, AFMA announced publicly that the emphasis on people smuggling had reduced its capacity to police the AFZ.⁸³ The problem reoccurred in the aftermath of the *Tampa* incident and remained until the improvement in management oversight using the SMMC, following the events of 2005, rectified the situation.

It has proved equally difficult to sustain an appropriate capability to patrol the Southern Ocean and Australia's Antarctic territories. A decision of Defence Minister John Moore at the time of the 1999 review, that RAN vessels were unsuitable for operations in the Southern Ocean and would no longer be made available, forced the use of a chartered vessel to patrol fishing grounds in the Southern Ocean AFZ around Heard and McDonald islands. Management of the Antarctic maritime domain is difficult because what little occurs does so infrequently. Illegal foreign fishing has dropped away, allowing the budget to be reduced by \$29.3 million in a situation where:

there has been no illegal fishing detection (sic) in our economic exclusion zone, and we believe that, with a combination of satellite surveillance and our cooperation with the French in joint patrolling, we can provide a continuing and effective deterrence effect with less sailing.⁸⁴

Resurrecting relegated priorities can be expensive. Overcoming the inadequate capacity for fisheries protection in 2005 required the recommissioning of two mine hunters, at the not inconsiderable cost of \$94 million. Cooperation with the French in the Southern Ocean can occur because they maintain a naval unit at Reunion Island, an irony given that it is Australia that claims most of the continent and the abutting EEZ. In essence, France has made the policy decision on the importance of maintaining a capability in Antarctic waters, yet Australia, thinking inside a box marked "maritime border security", has not.

Time for a New Model?

The recurring crises in the policing of the maritime domain may simply be a series of unfortunate incidents with governments content that the next crisis occurs will not be their responsibility. Alternatively, Australia can seek a

⁸² *Ibid.*, pp. 46-7.

⁸³ Melissa Marino, 'Rogue Boats Escaping Prosecution', *The Age*, 9 September 2000.

⁸⁴ Michael Carmody, Senate, Legal and Constitutional Affairs Legislation Committee Estimates, *Official Committee Hansard*, 25 May 2010, p. L&C 34.

model that reduces the sources of dysfunction and offers to improve long-term systemic efficiency. This issue was certainly not rectified by the review of homeland and border security⁸⁵. There is no apparent reason that transferring the Department of Immigration and Citizenship's offshore intelligence role on people smuggling to ACBPS will better accomplish the mission (especially as the Minister for Immigration continues to chair the Border Protection Committee of Cabinet).⁸⁶ Neither is it apparent that adding a Chief Operations Officer in ACBPS, heading a Branch across the road from that containing BPC, will better coordinate intelligence and operational aspects of the task.⁸⁷

Indeed, the revised structure of ACBPS may conspire to reduce the effectiveness of policing the maritime domain. The Chief Operations Officer's contention that ACBPS is "no longer simply responsible for on-water interceptions" and now embodies "a much more sophisticated understanding of 'the border'"⁸⁸ carries some risk that maintenance of the competencies for maritime operations might come to be undervalued, like oversights in earlier Customs internal reviews. Undocumented rumours of tensions and loss of capacity within BPC during 2010⁸⁹ are, at the least, consistent with such dynamics. If nothing else, the restructuring of Customs around the issue of people smuggling has obscured the much broader concerns of policing in the maritime domain.

There appears to be evidence that a focus on "on water interceptions" needs continuing emphasis. In April 2009 HMA Ships *Childers* and *Albany* intercepted SIEV 36, which was later destroyed by an explosion while under the control of an ADF boarding party, resulting in the death of five asylum seekers. The operation was hindered by a number of unfortunate occurrences, starting with *Albany* having to sail with insufficient personnel to support the normal eight-strong boarding crew and SIEV 36's passengers having to be held aboard for an extended period because of a fifty hour delay in the availability of the amphibious transport HMAS *Tobruk*. Nonetheless, a great many mistakes were made, which caused the Coroner

⁸⁵ The Smith review, and other recent enquiries into aspects of the national security system have provided "very little in the way of systematic reform". Carl Ungerer, 'Australia's National Security Institutions: Reform and Renewal', *Special Report Issue 34*, Australian Strategic Policy Institute, Canberra, September 2010, p. 3.

⁸⁶ *Ibid.*, pp. 6-7.

⁸⁷ Appointing senior public servants to manage coordination on issue-specific security problems "has not worked as effectively as some had hoped." *Ibid.*, p. 5.

⁸⁸ Michael Pezullo, 'The Role of the Australian Customs and Border Protection Service in Securing Australia's Borders: Working with Partners across Traditional Boundaries on Border Risks', *Australian Financial Review Defence Conference 2009*, 23 September 2009, p. 3.

⁸⁹ Mark Farrer, "Good Operations and Bad Government Policy – Australia's Border Protection", *Asia Pacific Defence Reporter*, March 2011, pp.10-13.

to comment unfavourably on a total of eight counts⁹⁰ and conclude, "whatever else can be said, the search of SIEV 36 was clearly deficient."⁹¹

Of particular significance was that crucial mistakes were not simply crew errors but stemmed from faulty or absent guidance. An outdated and inappropriate notice was presented to the crew of SIEV 36 that suggested they immediately returned to Indonesia.⁹² Then poor communication between boarding parties handing over control on the morning of the blast was associated with a lack of training and written instructions on exchanging information during this process.⁹³ These deficiencies were recognised by the RAN and the Coroner was informed that they were being overcome. Yet the incident suggests an organisation that is not quite up to speed when taking on a new task, perhaps an outcome of the switching priorities of the series of focused operations—*Relex*, *Relex II*, *Cranberry*, *Resolute*—that deploy equipment and personnel to overcome the threat of the day.

It should not be surprising that even naval personnel need consistent practice of the skills involved in being a maritime policeman. The essence of the problem is that the arrangements for policing the maritime domain have for too long been structured around overcoming a dominant single problem. Thus the capital invested in responding to people smuggling is likely to prove inadequate if forced to quickly shift focus to another problem, such as SAR in high sea states.

What is needed instead is a single agency that specialises in enforcing Australian law over its maritime domain. The elements of such an agency exist in Border Protection Command and the Maritime Operations Support Division of ACBPS. The latter provides Australian Customs Vessels and management of the contracts to supply aerial and spaceborne maritime surveillance. It is also responsible for the definition of future capability requirements and acquiring new equipment.⁹⁴

In a logical line of command the officer responsible for the policing of the maritime domain would oversee these functions and thus be answerable for both the performance of the function and the adequacy of resources provided for that purpose. The Commander BPC has the first but no authority in the second, being an officer of equivalent status to the National

⁹⁰ Greg Cavanagh (Northern) Territory Coroner, *Inquest into the death of Mohammed Hassan Ayubi, Muzafar Ali Safarali, Mohammed Amen Zamen, Awar Nadar, Baquer Husani* (2010) NTMC 014, Darwin, 17 March 2010, <<http://resources.news.com.au/files/2010/03/17/1225841/845075-siev-36-findings.pdf>> [Accessed 22 October 2010], p. 21.

⁹¹ *Ibid.*, p.15.

⁹² *Ibid.*, pp. 19-20.

⁹³ *Ibid.*, p. 23.

⁹⁴ Australian Customs and Border Protection Service, *Annual Report 2009-10*, 'Figure 2: Customs and Border Protection organisation chart as at 30 June 2010', Canberra 2010, <<http://www.customs.gov.au/webdata/resources/files/43034-ACBPS09-10-AR-web.pdf>> [Accessed 28 November 2010], p. 6.

Director Maritime Operations and without direct access to the CEO of the ACBPS, let alone to a Minister directly administering maritime policing. This arrangement of the ACBPS Border Enforcement program reduces the authority of the Commander BPC and introduces inefficiencies beyond his control. Customs management imposes restrictions on the BPC Intelligence Centre, perhaps because of some redundancy which may exist between BPC's AMSOC and Customs National Operations Centre, "which adds to complexity ... and introduces some risk to the efficient management of an incident such as (the shipwreck of SIEV 221)".⁹⁵

The best way to overcome these problems and ensure the development of a single agency for policing the maritime domain is to nominate a Minister with direct control of the agency through powers established by legislation.⁹⁶ The current arrangements rest on nothing more substantial than an exchange of letters between Chief Executive of Customs and the Chief of the Defence Force and the changes of the last decade show these have not provided an enduring authority for structuring the function. The salience of debate about boat people from the 2010 Federal election onwards indicates that effective policing of the maritime domain requires a body to provide professional leadership, in much the same way that the AFP does for matters of law enforcement and terrorism.

Australia is lagging significantly behind its Asian neighbours in developing this type of professional capability. Japan, China, Taiwan, Vietnam, the Philippines, Thailand, Indonesia, Malaysia and India have all established or further developed maritime organisations for policing their interests at sea. While some of these forces, such as the Japanese Coast Guard, have more than fifty years service most have been created over the last ten years. During that time these Asian maritime forces have come to assert their nation's maritime interests with much greater frequency than traditional naval forces.⁹⁷ The growth of these largely paramilitary forces has also allowed the development of structures for expanding regional maritime understanding and cooperation. These include the Heads of Asian Coast Guard Agency's meetings, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, and the Cooperative Mechanism for Maritime Safety and Environmental Protection in the Malacca and Singapore Straits.⁹⁸

⁹⁵ *Ibid.*, p. 38.

⁹⁶ I have discussed the issues involved in establishing a maritime policing agency under the authority of a Minister in; Woolner, *Policing our Ocean Domain*, pp. 17-24.

⁹⁷ A detailed discussion of the development and importance of these maritime forces throughout Asia can be found in Christian Le Miere, 'Policing the Waves: Maritime Paramilitaries in the Asia-Pacific', *Survival*, vol. 53 (January 2011), <<http://dx.doi.org/10.1080/00396338.2011.555607>> [Accessed 7 April 2011], pp. 133-46.

⁹⁸ Sam Bateman, 'Piracy and Maritime Security in East Asia', *East Asia Forum*, 10 February 2011, <<http://www.eastasiaforum.org/2011/02/10/piracy-and-maritime-security-in-east-asia-2/>> [Accessed 8 April 2011].

There are some difficulties and many options to profit from joining the Asian experience by developing some form of an Australian maritime police force but there are plausible solutions and tangible benefits. Discussion of these is an issue for another article but it is sufficient to note that a full range of options seems to be viable. An effective arrangement could be created by some modest reorganisation of existing arrangements with the necessary changes to ensure better higher-level governance. For this option, the crucial issue is that the head of the agency must remain a serving Member of the ADF to be able to control force assigned ADF assets during operations.⁹⁹ A more ambitious or perhaps longer-term option would be the establishment of the agency as a fully capable Australian coastguard. This would be more costly but would provide a basis for the development of the optimum asset and personnel base for policing the maritime domain. In considering such an agency the crucial policy issue turns on options for developing a disciplined paramilitary force.¹⁰⁰

This article has argued that there is a strong case that the security of Australia's maritime domain is best served by a single maritime policing agency that focuses on developing expertise in the operational environment. Australia's attempts to meet this requirement in the past have been characterised by a high sensitivity to political issues and a reluctance to identify maritime security as the central issue rather than as the environment in which the crisis of the day is located. Despite concerted attempts to refine arrangements this established approach has not been able to avoid a predictable recurrence of significant problems. The issue is whether decision-makers will recognise the benefits of improved higher-level governance or continued to feel comfortable with committee-based management.

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⁹⁹ Section 9 of the *Defence Act 1903* requires command of the ADF be exercised by the Chief of the Defence Force, a situation held to pertain when elements of the ADF are force assigned to the operational control of serving Members. Woolner, *Policing our Ocean Domain*, p. 20.

¹⁰⁰ Sam Bateman has written at length on the requirements for asset and personal development best suited to Australia's security requirements in its maritime domain. Sam Bateman, 'Securing Australia's Maritime Approaches', *Security Challenges*, vol. 3, no. 3 (August 2007), pp. 109-129.