TURNING KING CANUTE INTO LORD NEPTUNE: AUSTRALIA'S NEW OFFSHORE PROTECTION MEASURES

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INTRODUCTION

A small vessel in Australia's northern approaches today could be any one of a number of things. It could be a terrorist vessel with a radiological bomb seeking to attack a US warship in Darwin harbour. It might also have the aim of creating as many civilian casualties as possible in the attack. Instead, it could be intent on attacking an offshore installation in the Timor Sea. Much more likely, the vessel could be engaged in illegal fishing for shark fin.[1] Alternatively, it could be smuggling people or drugs. It could also possibly be smuggling weapons or wildlife.[2] In any of these cases, the vessel could be carrying diseases or pests which Australia is trying to keep out[3]. It is also equally likely that the vessel is innocent and poses none of the threats suggested.

Should Australian authorities board the vessel, it is highly likely they will find it is a foreign vessel and those on board will be

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1 Lindsay Murdoch, 'Illegal Boats "Outwitting Coastwatch"', *The Age* (Melbourne) 22 March 2006, <http://www.theage.com.au/text/articles/2006/03/21/1142703358073.html> at 11 April 2006.

2 Australian Customs Service *Coastwatch: An Overview* (2006) <http://www.customs.gov.au/site/page.cfm?u=4295> at 11 April 2006.

3 Australian Quarantine Inspection Service *Overview of the Northern Australian Quarantine Strategy* (2006) <http://www.daff.gov.au/content/output.cfm?ObjectID=D2C48F86-BA1A-11A1-A2200060A1B00590> at 11 April 2006.

foreign nationals.[4] It will not necessarily be clear whether there will be active or passive resistance to the boarding.[5] Importantly, the legality of the boarding will depend on which maritime zone the vessel is in, as well as what it is doing.

Protecting Australia's offshore interests can be a very complex task. While Australia has been attempting to deal with the challenges of offshore protection since at least 1967[6], it is just over a year since Prime Minister Howard made his announcement on 'Strengthening Australia's Offshore Security'.[7] The recent prominence of terrorism prompted significant developments in Australia's offshore protection arrangements. As the announcement stated '[t]hey focus, in particular, on the protection of Australia's offshore oil and gas facilities, and on ensuring that any terrorist threat to Australia's maritime assets and our coastline can be quickly detected and defeated.' Key elements of the announcement were:

An emphasis on protection of offshore facilities and shipping from terrorism;

> The creation of Australia's Maritime Identification Zone (now Australia's Maritime Information System);
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> The establishment of the Joint Offshore Protection Command, incorporating elements of the Australian Defence Force and Customs Coastwatch, and
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> The assumption by the Commonwealth, through the Australian Defence Force, of responsibility for counter-terrorism offshore.

These new developments addressed some of Australia's offshore protection challenges and created new ones. The law will not support all of the aims of the new measures, and, even where

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4 Minister for Fisheries, Forestry and Conservation, Minister for Defence and Minister for Justice and Customs Joint Statement, 'Operation Breakwater — protecting our borders while netting 23 suspected illegal fishing vessels' (Media release, 5 April 2006) <http://www.mffc.gov.au/releases/2006/06022aj.htm> at 11 April 2006.

5 ABC News Online, 'Navy Figures Highlight Illegal Fishing Patrol Clashes' ABC News Online, 27 February 2006 <http://www.abc.net.au/news/newsitems/200602/s1578787.htm> at 11 April 2006.

6 See Cameron Moore, *ADF on the Beat: A Legal Analysis of Offshore Enforcement by the Australian Defence Force* (2004) 2.

7 Prime Minister of Australia 'Strengthening Offshore Maritime Security' (Media Release of the Prime Minister 15 December 2004).

lawful, implementation of the measures will need to be mindful of the rule of law itself.

If it is consistent with the rule of law that violent threats to the rule of law itself are put to an end by lawful authority, then the lawful authority must have sufficient power at law to put an end to those violent threats. If force has to be used, then it is in the interests of the rule of law that the lawful authority prevails. In other words, if there is a physical fight between lawful authority and those against it, the lawful authority has to win. There must be enough power at law for the lawful authority to achieve this objective. In the context of terrorism, this can mean more power than is available for ordinary law enforcement. Terrorists can have greater force at their disposal than normal law enforcement agencies. Terrorists can achieve far more lethal and disruptive effects than ordinary criminals.[8] Still, while the use of force against terrorists may need to be overwhelming to be decisive, it can be very difficult to discern who the terrorists are before applying such force. They do not necessarily indicate their intentions before an attack. It is not consistent with the rule of law for people going about their lawful business to be subject to arbitrary, and lethal, uses of force by the lawful authority. In balancing the interests of people going about their lawful business with countering terrorism, it may be that the law should impinge to a limited extent on the interests of people going about their lawful business. It is extremely unlikely that this balance would often lean towards arbitrary and even lethal uses of force. To be consistent with the rule of law then, laws authorising the use of force in countering terrorism must not only permit the use of potentially overwhelming force, but must require that that use of force be very precise and confined to its proper objective. An inherent difficulty with applying decisive force is the requirement that there be sufficient flexibility to apply it at the right time and place, and in a way and to a level to be effective. Allowing flexibility can work against the requirement to be precise. This is in turn can lead to an arbitrariness that is contrary to the rule of law. This is the challenge of lawfully countering terrorism.

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[8] See Chief of the Army Lieutenant General P.F. Leahy AO (Speech delivered at ADI Thales Dinner with the Chiefs Series, Brisbane, 22 March 2006) 2–5, <http://www.aspi.org.au/pdf/Peter_Leahy_Speech.pdf> at 3 April 2006.

The aim of this paper is to consider whether Australia's new offshore protection measures will see decisive and lawful effects in countering terrorism offshore. It will deal with the most innovative aspects of the new measures, being Australia's Maritime Identification System, the formation of the Joint Offshore Protection Command and granting responsibility for countering terrorism offshore to the Australian Defence Force. Its conclusion is that these measures do work towards lawful responses to terrorism. The AMIS will be limited by international law considerations though, and there will need to be care to avoid possibly arbitrary actions under these measures in countering terrorism offshore.

I. AUSTRALIA'S MARITIME IDENTIFICATION SYSTEM

A. *AMIZ vs AMIS*

> Defense Minister Juwono Sudarsono said Indonesia would deploy its naval forces to anticipate possible Australian penetration into its territorial waters. Juwono said, with a surveillance reach of 1000 nautical miles from the Australian coastline, the AMIZ concept would cover two-thirds of Indonesian waters specifically the Java Seas, Halmahera Wea and Sulawesi Sea.[9]
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> Australia's plan to create a maritime monitoring zone extending 1000 nautical miles could create controversy and tension, said [Malaysian] Prime Minister Datuk Seri Abdullah Ahmad Badawi.[10]
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> Malaysia's Deputy Defense Minister, Zainal Abidin Zin, said … 'They cannot say, for the sake of security, they have the power to intercept ships. We are not happy with the statement showing their supremacy.'[11]

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9 News in Brief, "Indonesian Legislators Oppose Australia's Plan to Declare AMIZ", Embassy of the Republic of Indonesia in Canberra, 19 December 2004 <http://www.kbri-canberra.org.au/brief/2004/des/19des04.htm> at 11 March 2005.

10 Bernama, "Australia's Action Creates Controversy, Says Abdullah" <http://www.bernama.com/bernama/v3/news/.php?id=109381> in Mark Kelly (ed), *Australia's Maritime Identification Zone — A Special Press Summary* (2004) Virtual Information Centre <http://www.vic-info.org/RegionsTop.nsf> at 11 March 2005.

11 Cynthis Banham and Agencies, "Back off with the Bulldozer, Malaysia tells PM", *Sydney Morning Herald* (Sydney) 19 December 2004

It would be difficult to say in light of the above statements that the announcement of Australia's 1000 nautical mile Maritime Identification Zone (AMIZ) was a diplomatic success.[12] What was the Australian Government trying to do and will it aid decisive and lawful actions in countering terrorism offshore?

This is the relevant extract from Prime Minister Howard's announcement on 'Strengthening Offshore Maritime Security',

> Based on co-operative international arrangements, including with neighbouring countries, the Australian Government also intends to establish a Maritime Identification Zone. This will extend up to 1000 nautical miles from Australia's coastline. On entering this Zone vessels proposing to enter Australian ports will be required to provide comprehensive information such as ship identity, crew, cargo, location, course, speed and intended port of arrival. [13]

It would appear that using the word 'zone' and the distance of 1000 nautical miles created an impression that Australia was making a dramatic new claim to a maritime jurisdiction unheard of in the law of the sea. Australia's neighbours expressed quite reasonable concerns about this announcement. Australia's Maritime Identification Zone then quickly became Australia's Maritime Identification System (AMIS).[14] The 1000 nautical mile range remained though. Notably, the requirement has subsequently become that vessels must provide information 96 hours before entering an Australian port (equivalent to a 2000 nautical mile range), where a vessel's voyage from its last port is

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<http://www.smh.com.au/news/National/Back-off-with-the-bulldozer-Malaysia-tells-PM/2004/12/19/1103391643054.html> at 21 March 2005.

12 For a full discussion of the law of the sea implications of AMIS, see Natalie Klein, 'Legal Implications of Australia's Maritime Identification System' (2005) 55 *International and Comparative Law Quarterly* 337.

13 Prime Minister of Australia, above n 7.

14 See Andrew Metcalfe, Deputy Secretary, Department of Prime Minister and Cabinet, 'Advancing Coordination of National Security in Australia' (Paper presented at the National Security Australia 2005 Conference, Sydney, 21 February 21 2005), and Department of Transport and Regional Security, *Strengthening Australia's Offshore Maritime Security* <http://www.dotars.gov.au/transsec/docs.html> at 11 March 2005.

more than 96 hours.[15] What is the legal basis of this apparently bold maritime assertion?

B. *The ISPS Code*

Although the Prime Minister's announcement did not mention the *International Ship and Port Security Code* ('*ISPS Code*')[16] directly, the requirement to provide comprehensive information before entering port is in fact a requirement of this Code.[17] It came into force together with related amendments to the Annex to the *Safety of Life at Sea Convention* ('*SOLAS Convention*')[18] on 1 July 2004.[19] In essence, it was a response to the increased

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[15] Effective from 12 October 2005, *Australian Customs Notice* 2005/47 <http://www.customs.gov.au/webdata/resources/notices/ACN0547.pdf> at 10 Apr 06. The notification requirements are less for shorter voyages.

[16] Adopted 12 December 2002 by the *Conference of the Contracting Governments to the International Convention for the Safety of Life at Sea 1974* (entered force 1 July 2004). Part A is mandatory. Part B is described as guidance and is not strictly binding. Nonetheless, Part A and the cognate amendments to the *International Convention for the Safety of Life at Sea*, adopted 1 November 1974, 1184 UNTS 2 (entered into force 25 May 1980) ('*SOLAS Convention*') make frequent reference to Part B. The Code essentially provides that ships and ports must have security plans, which are subject to a certification system. Plans should specify certain actions at each of three levels of security threat. Level 1 is a general, standard level of threat. Level 2 is a higher level of possible threat and Level 3 is an imminent specific threat.

[17] *SOLAS Convention* Chapter XI-2 Regulation 9.2, referring to Part B (see paras 4.37–4.39).

[18] Being amendments to Chapters V and XI of the Annex to the *SOLAS Convention*. This created Chapters XI–1 and XI–2 of the Annex. Chapter XI–1 contains new regulations additional to those in the previous Chapter XI. Chapter XI–2 is completely new. Part A of the *ISPS Code* has force because the new Chapter XI–2 requires compliance with it in virtually each regulation. Whereas Part A may only be amended in accordance with the *SOLAS Convention*, Part B may be amended by the Maritime Safety Committee of the International Maritime Organisation ('IMO'). The IMO has published Parts A and B together with the amendments to Chapters V and XI and the relevant conference resolutions in a booklet titled the *ISPS Code*.

[19] *Conference of the Contracting Governments to the International Convention for the Safety of Life at Sea 1974 Resolution* 1, 12 December 2002, 'Adoption of amendments to the Annex to the International Convention for the Safety of Life at Sea, 1974' ('*Conference Resolution* 1'), and *Conference of the Contracting Government to the International Convention for the Safety of Life at Sea 1974 Resolution* 2, 12 December 2002, 'Adoption of the International Code for the Security of Ships and of Port Facilities'.

perception of a threat of terrorism following the terrorist attacks in the United States on September 11th 2001.[20] The *SOLAS Convention's* tacit acceptance procedure, whereby members are bound unless they indicate otherwise, ensured the *ISPS Code* had wide application very quickly.[21] 156 States are now party, covering 98.79% of global tonnage.[22] The AMIS is in large part an unexceptional element of Australia's implementation of the *ISPS Code*.

Before entering a port covered by the Code, ships covered by the Code should, upon the request of an officer duly authorised by the government of the port State,[23] provide detailed information about the ship, its voyage, crew and cargo.[24] This includes the information noted in the Prime Minister's announcement, 'such as ship identity, crew, cargo, location, course, speed and intended port of arrival.' Australia has implemented the requirements of the Code through the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth).[25] It has also extended requirements similar to those in the Code to offshore facilities and the vessels related to them.[26] Should a vessel not provide the information required the port State may, as a final sanction after a series of graduated steps, prevent the vessel from entering port.[27]

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20 *Conference Resolution* 1 specifically referred to *United Nations Security Council Resolution* 1373 of 28 September 2001, which dealt with the attacks of 11 September 2001. Remarkably, the Code moved through the IMO adoption procedures in less than three years.

21 *Conference Resolution* 1 and *SOLAS Convention* art VIII(b)(vi)(2)(bb). See IMO discussion of the tacit acceptance procedure <http://www.imo.org/Conventions/mainframe.asp?topic_id=148> at 11 April 2006.

22 See Status of Conventions at <http://www.imo.org/Conventions/mainframe.asp?topic_id=247> at 10 April 2006.

23 *SOLAS Convention* Chapter XI–2 Regulation 9.2.2.

24 *ISPS Code* Part B para 4.39.

25 The Act is not completely consistent with the *ISPS Code*. Note, for example, that sections 139 and 148 of the *Maritime Transport and Offshore Facilities Security Act* 2003, concerning boarding to inspect operational areas of ships, are less restrictive than the *ISPS Code*.

26 See mainly sections 17A to 17E and 100A to 113D. The *Maritime Transport Security Amendment Act* 2005 amended the *Maritime Transport Security Act* 2003 to effect the offshore facilities regime and change the title of the act to reflect this.

27 *SOLAS Convention* Chapter XI–2 Regulation 9, referring to Part B, particularly paras 4.29 to 4.46.

In so far as the AMIS implements the *ISPS Code*, in international law the AMIS is relatively uncontroversial. The understandable concerns about Australia creating a new zone or powers, or otherwise acting without international authority, would appear to be unwarranted in this particular respect. This is perhaps best illustrated by comparison with some other State practice.[28] The United States requires vessels to provide information 96 hours before entering its ports.[29] The United Kingdom requires vessels to provide information 24 hours before entering its ports.[30] New Zealand requires vessels to provide information 48 hours before entering a New Zealand port.[31]

C. *AMIS Outside the ISPS Code*

The AMIS is not just about gathering information from shipping bound for Australian ports or offshore facilities though. Its aim is to

> Co-ordinate and integrate the maritime information that is already collected by a number of Australian government agencies.
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> Identify threats as early and as far offshore as possible, so as to provide maximum time to determine the optimal response and position Australian assets accordingly.[32]

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[28] AMIS should also be seen in the context of other international measures to increase maritime security, such as the Proliferation Security Initiative: see Stuart Kaye, 'The Proliferation Security Initiative in the Maritime Domain' (2005) 35 *Israel Yearbook of Human Rights* 205, as well as the IMO *Protocol to the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* and *Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, both adopted in London, 14 October 2005, and open for signature, IMO Document LEG/CONF.15/21 (1 November 2005), (not yet in force). It is not within the scope of this paper to do more than mention these measures.

[29] *United States Federal Register* Vol.68 No.40, 28 February 2003, Rules and Regulations p 9537, and see <http://www.nvmc.uscg.gov/index.html> at 12 April 2006.

[30] See *Ship and Port (Security) Regulations 2004* (UK). See also <http://www.dft.gov.uk/stellent/groups/dft_transsec/documents/pdf/dft_transsec_pdf_030409.pdf> at 12 April 2006.

[31] Maritime New Zealand, *Port and Arrival Information* (2006) <http://www.maritimenz.govt.nz/Security/port_arrival.asp> at 12 April 2006. See *Maritime Security Regulations* 2004 (NZ).

[32] Rear Admiral Russ Crane, Commander Joint Offshore Protection Command, 'The Implementation of the Joint Offshore Protection

More specifically,

> Under the JOPC arrangements, ADF and Customs officers will not seek to intercept, board and search vessels, as a matter of course, out to 1000 nautical miles from the Australian mainland or Territories. Under the proposed Australian Maritime Identification System (AMIS), the Joint Offshore Protection Command (JOPC) will seek certain identifying information, at 1,000 nautical miles from the Australian mainland, from vessels proposing to enter Australian ports; at 500 nautical miles, information on vessels proposing to transit Australian waters, and, at 200 nautical miles, the identification of all vessels, other than day recreational boats, within Australia's Exclusive Economic Zone.[33]

How will AMIS be lawful where the ISPS Code requirements do not apply? There are two elements to this issue. The first is where the ISPS Code does not apply to inbound shipping. The second is where AMIS seeks to deal with shipping that is not inbound.

1. *Non ISPS Code Vessels*

The ISPS Code does not apply to some notable categories of vessels that may seek to enter an Australian port as follows:

> Fishing vessels
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> Vessels under 500 gross tonnage[34]
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> Vessels flagged by States not party to the *SOLAS Convention*, which include North Korea, Nauru, Kiribati, Micronesia, Palau and Somalia.[35]

Command' (Presentation to the Safeguarding Australia Summit, Canberra, 12 July 2005) <http://www.safeguardingaustraliasummit.org.au/Conf_presentations/Crane.pdf> at 24 Nov 2005.

33 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 May 2005, 190 (QUESTIONS IN WRITING: Joint Offshore Protection Command Maritime Security Regime (Question No. 452) — Reply by the Attorney-General, Mr Ruddock, on behalf of the Minister for Justice and Customs). See also <http://www.robertmcclelland.com/speeches/qRuddock10may05zx.htm> at 24 Nov 05.

34 *ISPS Code* Part A Para 3. The Code is expressed to apply only to passenger ships, cargo ships of 500 gross tonnage and upwards, and mobile offshore drilling units, as well as ports serving such ships engaged on international voyages. The Code does not apply to warships either, though, given the focus on terrorism, they are perhaps less relevant to this discussion.

What will international law allow Australia to do if these vessels do not provide the information required under AMIS? There is no obligation on these vessels to provide any information to Australian authorities before entering port. If such vessels do not provide information to the satisfaction of Australian authorities though, Australia may deny a vessel entry to port.[36]

2. *Vessels Not Bound for an Australian Port*

There is also the issue of shipping that is not bound for an Australian port but which still comes within the desired reach of AMIS. This would include vessels within 500 nautical miles proposing to transit Australian waters but not enter an Australian port. It would also include all vessels within 200 nautical miles other than day recreational boats.[37] The essential principle is the freedom of navigation. Article 87 of the *United Nations Convention on the Law of the* Sea recognises it as one of the freedoms of the high seas. This freedom also applies in other international waters beyond territorial seas.[38] There is also the cardinally important right of innocent passage in the territorial sea.[39] For *ISPS Code* vessels there is actually significant information they must provide, even when only on passage on the high seas. The Automatic Identification of Ships (AIS) transponder system will provide a certain amount of information, such as course, speed, vessel type, and so on, to other ships and shore stations much like the aircraft Identify Friend or Foe (IFF) system. Cargo ships, but not passenger ships or tankers, of 300 gross tonnage and upwards must have it.[40] There is also now a

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35 International Maritime Organisation, *Status of Conventions by Country* (2006) <http://www.imo.org/includes/blastDataOnly.asp/data_id%3D14308/status.xls> at 12 April 2006.

36 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3, art 25(2) (entered into force 16 November 1994) ('*LOSC*'). This would assume that these non *ISPS Code* vessels did not become subject to lawful interference pursuant to Australia's rights in its maritime zones before entering port, for example through fishing, *LOSC* art 56, or smuggling, eg *LOSC* art 33.

37 Ruddock, above n 33.

38 *LOSC* art 58, so far it is compatible with the sovereign rights of the coastal State in its zones of maritime jurisdiction.

39 *LOSC* arts 17–26.

40 Effectively from 31 December 2004. The law does not specify the range at which AIS must be detectable: *SOLAS Convention* Chapter V Regulation 19

requirement for prominent display of the ship identification number, which would assist in visual identification.[41] Further, there is the requirement for a ship security alert system to alert flag State authorities of threats to, or compromises of, ship security without raising any alarm on-board.[42] It is worth noting that *Conference Resolution 10 on Early Implementation of Long-Range Ships' Identification and Tracking*, from the conference that adopted the *ISPS Code*, is not yet in place but is subject to discussion as well. Whilst this level of information is not as extensive as that required for vessels entering port, it is still fairly significant.

For other vessels though, there is no obligation to provide such information. Even so, it should be noted that, in addition to the *ISPS Code*, there are other reasons that vessels will provide information to a coastal State. These information sources may also assist the effectiveness of AMIS and could include vessel monitoring systems for fishing vessels[43], oil and gas exploration and exploitation permits[44], and voluntary safety reporting under the AUSREP system.[45] It seems that government already lawfully collects a large amount of information useful to AMIS for other purposes.[46]

For shipping not bound for an Australian port, but within the desired reach of AMIS, there is then no general obligation to provide the information AMIS might seek. There are a variety of other mechanisms though which might provide AMIS with a more limited range of useful information.

<http://www.imo.org/Safety/mainframe.asp?topic_id=754.html> at 28 April 2005.

41 *SOLAS Convention* Chapter XI–1 Regulation 3.

42 *SOLAS Convention* Chapter XI–2 Regulation 6.

43 See Australian Fisheries Management Authority, *Vessel Monitoring Systems* (2006) <http://www.afma.gov.au/industry/vms/default.htm> at 12 April 2006.

44 See Department of Industry, Tourism and Resources, *Petroleum Exploration* (2006) <http://www.disr.gov.au/content/sitemap.cfm?objectid=48A46354-20E0-68D8-ED3D76448D51CB1D> at 12 April 2006.

45 See Australian Maritime Safety Authority, *AUSREP: Ship Reporting Instructions for the Australian Area* (2006) <http://www.amsa.gov.au/publications/AUSREP.pdf> at 12 April 2006.

46 Although it is another question whether information provided may be applied to AMIS purposes, but this is beyond the scope of this paper.

D. *Conclusion*

International law will not permit JOPC to gather all the information it might want. Appropriate collation of the lawfully available information though will support AMIS in improving 'the effectiveness of civil and military maritime surveillance in support of key tasks such as border protection and fisheries protection, as well as counter-terrorism response and interdiction'[47] to some extent. This should in turn hopefully lead to authorities directing their efforts to vessels and aircraft that are actually worthy of suspicion, and away from those that are not. Within the limitations imposed by the freedom of navigation, the consequence should be more decisive and lawful effects in countering terrorism offshore.

II. THE ESTABLISHMENT OF THE JOINT OFFSHORE PROTECTION COMMAND

Prime Minister Howard's announcement on 'Strengthening Offshore Maritime Security' included the following statement on the creation of a Joint Offshore Protection Command,

> To ensure an integrated approach that can draw, as necessary, on the full range of Australian Defence Force and Customs capabilities and make best use of available resources, a Joint Offshore Protection Command, will be established by March 2005. The Joint Command will be responsible for the implementation, coordination and management of off-shore maritime security.
>
> The new single Command will link the Defence Force responsibility with that undertaken by the Coastwatch Division of the Australian Customs Service. The Command will have a joint accountability structure, being responsible to the Chief of Defence Force for its military functions and to the Chief Executive Officer of Customs for its civil functions. The Director-General of Coastwatch, Admiral Russ Crane, will also be the Commander of the Joint Offshore Protection Command.

A. *The ADF and Customs Roles*

In assessing the legal basis of the Joint Offshore Protection Command concept, it might be said that the law induces it to

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47 Prime Minister of Australia, above n 7.

some extent. There is an essential tension in offshore law enforcement[48] which the Joint Offshore Protection Command appears to address. On one hand, only the Australian Defence Force, and the Royal Australian Navy in particular, has the physical capability to enforce the law offshore. On the other hand, as Mason CJ and Wilson and Dawson JJ stated in *Re: Tracey; Ex Parte Ryan*: 'It is not the ordinary function of the armed services to execute and maintain the laws of the Commonwealth'.[49]

The Royal Australian Navy has in fact been enforcing the laws of the Commonwealth at sea since its inception.[50] A range of statutes authorise this activity and there is little debate as to their constitutional validity. Such enforcement though has almost always been against foreigners and foreign vessels. Even though there is statutory authority to do so, the Navy has not ordinarily enforced the law against Australians or Australian vessels. The convention in Australia, in the Westminster tradition, is that the armed forces should act only against external threats except in the most extreme circumstances.[51]

The Customs element of the Command is important for two particular reasons. Firstly, it has primary responsibility within the Commonwealth Government for border law enforcement and surveillance. Secondly, although equally importantly, as a civil law enforcement agency, the ordinary business of Customs is enforcing the law against Australians and Australian vessels as much as it is against foreigners.[52]

From a legal perspective then, Joint Offshore Protection Command has the advantage of joining the physical capability of the ADF to enforce the law offshore, with the organisational capacity of Customs to enforce the law against Australians.

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48 Rather than offshore protection more broadly

49 (1989) 166 CLR 518, 540.

50 Royal Australian Navy Sea Power Centre, *Australia's Maritime Doctrine RAN Doctrine 1* (2000) 67.

51 See *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 195, and discussion in Moore, above n 6, 6-12.

52 Australian Customs Service, *About Customs* (2006) <http://www.customs.gov.au/site/page.cfm?u=4222> at 12 April 2006.

B. *Joint Command and Control*

Given the distinct legal character of the ADF and Customs, the joint nature of the Joint Offshore Protection Command raises some questions about the legal basis of its command and control. Members of the Australian Defence Force must be under the command of the Chief of the Defence Force by virtue of section 9 of the *Defence Act 1903* (Cth), which requires that the 'Chief of the Defence Force shall command the Defence Force'. To place ADF members under the command of a civilian, who is in turn not under the command of the Chief of the Defence Force, would be contrary to this requirement. The requirements of the *Customs Administration Act 1985* (Cth) do not appear to be as restrictive, in so far as it does not establish an exclusive command relationship between the Chief Executive Officer of Customs and Australian Customs Service personnel.[53] It is not known what specific arrangements are in place for the Commander of Joint Offshore Protection Command to direct Australian Customs Service personnel. The law would appear to require an arrangement whereby the Commander of Joint Offshore Protection Command must be a member of the ADF in order to command ADF personnel, but may also exercise the function or power of directing Australian Customs Service personnel. It may seem unusual to have an ADF officer responsible for law enforcement. Having a joint command that integrates ADF and Customs capabilities though appears to require it, if it is to maximise the strength and flexibility of the government's options in countering terrorism offshore.

C. *Ensuring Appropriate Responses through the Spectrum of Operations*

The Joint Offshore Protection Command concept also raises the question of how to apply the appropriate means of response in a spectrum of operations ranging from fairly benign civil surveillance, to potentially very violent military counter-terrorism or national self defence. It may be very difficult to ascertain the intention of a vessel until it is boarded or engages in an overtly illegal or hostile act. The two elements of the Command, Customs and the ADF, are quite different in terms of

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[53] Section 4(4) would appear to allow a person who is not part of the Australian Customs Service to exercise the function or power of directing Australian Customs service personnel, subject to the directions of the CEO.

physical capability and organisational function. There is a question then of how the Joint Commander determines which elements under his or her command should undertake a particular task. There is no ready answer as a range of variables are likely to influence the decision, such as the level and type of anticipated threat (including whether there is an armed conflict) whether the vessel is Australian, foreign or unknown, the proximity and capability of response vessels or aircraft, available intelligence, other concurrent tasks and so on. At the more benign end of the spectrum, as discussed, the ADF should not ordinarily enforce the law against Australians. At the potentially more violent end of the spectrum, Customs does not possess a military level of capability appropriate to violent counter-terrorist or national self defence operations. Further, in the event of an armed conflict, as civilians, members of the Australian Customs Service are not entitled to act as combatants under the law of armed conflict.[54] Perhaps the advantage of having a unified command over all elements engaged in offshore protection tasks is that there will be one decision maker. This Commander can be aware of the legal, physical and other limitations of those elements. Hopefully, the existence of a Joint Offshore Protection Command will mean that decisions on the appropriate means of response are therefore more likely to be lawful and decisive.

D. *Conclusion*

Will this 'integrated approach that can draw, as necessary, on the full range of Australian Defence Force and Customs capabilities' assist decisive and lawful counter terrorist actions offshore? The law does support this approach, although it is not free from legal complication and it will require careful decision making to be effective. This could also be a strength. A unity of command will hopefully provide a unity of purpose to the offshore counter terrorism task. This may in turn lead to favourable legal consequences, such as more coherent legislation and policy, and

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[54] *Protocol (1) Additional to the Geneva Conventions 1949 and Relating to the Protection of Victims of International Armed Conflicts*, agreed at Geneva, 8 June 1977 ATS 1991 No.29 art 43 (entered into force generally 7 December 1978 and for Australia 21 December 1991) ('Geneva Protocol 1') being Schedule 5 to the *Geneva Conventions Act 1957* (Cth). In order to avoid being legitimately targeted, the Australian Customs Service should also be clearly distinguishable from serving a military purpose: *Geneva Protocol 1* art 48.

more decisive and lawful responses in countering terrorism offshore.

III. THE ASSUMPTION BY THE COMMONWEALTH, THROUGH THE AUSTRALIAN DEFENCE FORCE, OF RESPONSIBILITY FOR COUNTER-TERRORISM OFFSHORE

As discussed above, the ordinary business of the Australian Defence Force is defending against external threats. Prime Minister Howard's announcement on 'Strengthening Offshore Maritime Security' made clear that,

> The Australian Government will assume direct responsibility for counter-terrorism prevention, interdiction, and response in all offshore areas of Australia. This approach will allow the States and the Northern Territory to focus on their clear responsibility for initial counter-terrorism incident response and security arrangements within ports.
>
> I am writing to the Premiers and to the Chief Minister of the Northern Territory to explain these revised counter-terrorism arrangements.
>
> This integrated approach to enhancing maritime security in Australia's offshore areas has several key elements.
>
> The Australian Defence Force will take responsibility for offshore counter-terrorism prevention, interdiction and response capabilities and activities, including the protection of offshore oil and gas facilities and the offshore interdiction of ships. At present, the arrangements for Defence Force involvement in counter-terrorism in Australia are in response to specific requests from civil authorities. The Australian Customs Service will retain responsibility for civil maritime surveillance and regulatory roles currently undertaken or coordinated by the Coastwatch Division of the Australian Customs Service.

Assessing whether this measure will see decisive and lawful effects in countering terrorism offshore raises a number of questions. These include the constitutional power of the Commonwealth in the offshore, defining what the offshore is, the loss of civil primacy in offshore counter-terrorism, and whether the ADF have the power to perform this role.

A. *What does 'Offshore' Mean?*

New South Wales v Commonwealth (the '*Seas and Submerged Lands Case*')[55] made clear that legislative power and proprietary rights offshore[56] vest in the Commonwealth by virtue of the external affairs power of the Constitution.[57] The Offshore Constitutional Settlement, as expressed in the *Coastal Waters (State Powers) Act 1980* (Cth) and the *Coastal Waters (State Title) Act 1980* (Cth), grants legislative power and proprietary rights respectively to the States seawards to 3 nautical miles[58]. It does not change this fundamental constitutional position. In fact it confirms it, as the States powers and proprietary rights offshore arise by virtue of the Commonwealth legislation granting them. There is a question though of where the jurisdiction of the States ends and where the offshore begins. There is a further issue too of how much this matters for countering terrorism offshore.

Of the majority in the *Seas and Submerged Lands Case*, Jacobs J gave perhaps the clearest explanation of the limits of the States. He stated the limits of the States were the same as the limits of the colonies at Federation on 1 January 1901. Imperial legislation or Letters Patent established the boundaries of the colonies from time to time. Whilst the colonies included islands, the only waters over which they had jurisdiction were those *intra fauces terrae*,[59] being bays, gulfs, estuaries, rivers, creeks, inlets, ports or harbours,[60] and the seashore between the high and low water marks.[61] The notable exception to this was South Australia. The Letters Patent establishing its boundaries included St. Vincent's

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55 (1975) 135 CLR 337. A number of other important cases applied or distinguished this case, such as *Pearce v Florenca* (1976) 135 CLR 507 and *Robinson v Western Australian Museum* (1977) 138 CLR 283, but this paper will only discuss the *Seas and Submerged Lands Case* as it established the relevant position, which still applies.

56 That is to say any seas or seabed external to the Commonwealth which the Commonwealth claims by virtue of its international personality.

57 *Seas and Submerged Lands Case* (1975) 135 CLR 337, 373 (Barwick CJ).

58 For further discussion, see Stuart Kaye, 'The Offshore Constitutional Settlement and it Impact on Enforcement Issues' in Douglas Mackinnon and Dick Sherwood (eds), *Policing Australia's Offshore Zones: Problems and Prospects* (1997) 227, and RD Lumb, *The Law of the Sea and Australia's Offshore Areas* (2nd ed, 1978).

59 Literally 'in the neck of the land'.

60 *Seas and Submerged Lands Case* (1975) 135 CLR 337, 479 (Jacobs J).

61 *Seas and Submerged Lands Case* (1975) 135 CLR 337, 491.

Gulf and Spencer's Gulf within the boundaries of the colony, even though they would not meet the description of *intra fauces terrae*. Further, Mason J made clear that waters that later became internal waters by virtue of being landward of straight territorial sea base lines,[62] such as within a bay, and which stood outside of the limits of the State, remained outside the limits of the State.[63] This is important because it means that Commonwealth jurisdiction effectively begins at the low water line, except for waters *intra fauces terrae* and the South Australian Gulfs. Commonwealth jurisdiction can therefore include some internal waters. Particularly in Western Australia, the Northern Territory and Queensland, there are a number of large bays, and waters landward of fringing islands, which are internal waters but are still constitutionally within Commonwealth jurisdiction.[64]

B. *The Loss of Civil Primacy Offshore*

Why does this matter? In one sense it does not because the Commonwealth can intervene within the boundaries of a State to protect its own interests.[65] In another sense it matters a great deal because the ADF now has primary responsibility for counter-terrorism offshore. This means that within areas of Commonwealth jurisdiction offshore, the police no longer have primary responsibility for counter-terrorism. There will still be civil primacy in the sense that the ADF is subordinate to the civilian government. There will not be civil primacy though where that would mean that the ADF would only have a role following a decision that the situation is beyond the capability of the police. Hence the reference in Prime Minister Howard's announcement that, 'At present, the arrangements for Defence Force involvement in counter-terrorism in Australia are in response to specific requests from civil authorities'. The careful process of hand over from the police commander to the ADF

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62 For the purposes of measuring the breadth of Australia's territorial sea under the international law of the sea.

63 *Seas and Submerged Lands Case* (1975) 135 CLR 337, 460 (Mason J).

64 See Geoscience Australia *Map — Australia's Maritime Zones* (2002) <http://www.ga.gov.au/image_cache/GA3746.pdf> at 12 April 2006.

65 *Defence Act 1903* (Cth) s 51A. See also Cameron Moore, '"To Execute and Maintain the Laws of the Commonwealth": The ADF and Internal Security — Some Old Issues with New Relevance' (2005) 28 *University of New South Wales Law Journal* 523–537.

commander, and then back again, will not now apply.[66] The police are not equipped for a substantial offshore role. Notwithstanding the existence of jurisdiction through the *Crimes at Sea Act 2000* (Cth), and relevant state legislation, for Federal, State or territory police services it appears that most counter terrorist situations offshore would be beyond their physical capability by virtue of a lack of offshore response capability. Now there will no longer be a requirement for a police commander to decide when it is appropriate for the ADF to take over. If the States object to this, which they do not appear to have to date, constitutionally it is beyond their jurisdiction in any event.

1. *Should There no Longer be Civil Primacy in Offshore Counter Terrorism?*

As discussed above, it is not the ordinary business of the ADF to have an internal security role but it is the ordinary role of the ADF to defend against external threats, including enforcing the laws of the Commonwealth offshore against foreigners. The possible difficulty with this is that for counter terrorism offshore, the threat is likely to be non-military and also of a type that civil authorities would normally have primary responsibility for ashore. What makes the offshore different? Firstly, the offshore is external, not just constitutionally, but also practically. Whilst civilians do operate offshore, it is not where people live, nor where governments sit. The historical concern with military forces enforcing the law within a democratic society was that they posed a threat to civilian government, because of the physical power at the military's disposal.[67] In England, from the Bill of Rights 1688 until 1955, there had to be an annual *Army Act* to authorise the continuance of a standing army. Even so, there was no similar requirement for the Royal Navy, which, although a powerful standing force that even enforced the law against civilians such as foreign smugglers[68], apparently did not pose the same threat to democratic government. The obvious distinction between the Royal Navy and the British Army is that

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66 National Counter-Terrorism Committee, *National Counter-Terrorism Plan* (2nd ed, 2005) 15–17.

67 See the joint judgment of Brennan and Toohey JJ in *Re: Tracey; Ex Parte Ryan* (1989) 166 CLR 518, 554–61.

68 See HA Smith, *The Law and Custom of the Sea* (3rd ed, 1959) 27.

the Royal Navy has operated primarily offshore with a focus on external security.[69] This historical and functional distinction is relevant to ADF operations offshore. When operating offshore, the ADF's power does not come to bear more than indirectly upon the civilian population or government. The second significant thing that makes the offshore different is it is physically difficult to operate offshore. Federal, State and territory police do not have the physical capability to respond to terrorist incidents aboard ships and platforms more than a few nautical miles from the major coastal centres. Moreover, terrorists with the capability to operate offshore could quite possibly have a greater level of capability than the police anyway.

2. *The Legal Concerns of the Loss of Civil Primacy*

Given that this reasoning would support the ADF having primary responsibility for counter terrorism offshore, there should still nonetheless be legal concern over the loss of civil primacy. It should always be a matter of concern when deploying military forces against civilians. The position of a member of the ADF enforcing the law is different to that of a police officer in a number of respects. Firstly, centuries of historical development have created an ADF culture of obeying the direction of the civilian government.[70] This is much greater than for the police, who may not be directed on operational matters by their responsible minister.[71] By virtue of operating alone or in small

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[69] *Re: Tracey; Ex Parte Ryan* (1989) 166 CLR 518, 561.

[70] See the joint judgment of Brennan and Toohey JJ in *Re: Tracey; Ex Parte Ryan* (1989) 166 CLR 518, 554–561.

[71] See, for example, *Australian Federal Police Act* 1979 (Cth) s 37:

> (1) Subject to this Act, the Commissioner has the general administration of, and the control of the operations of, the Australian Federal Police.
>
> Ministerial directions
>
> (2) The Minister may, after obtaining and considering the advice of the Commissioner and of the Secretary, give written directions to the Commissioner with respect to the general policy to be pursued in relation to the performance of the functions of the Australian Federal Police.
>
> [Author's note: By way of contrast see *Defence Act* s 8:
>
> > The Minister shall have the general control and administration of the Defence Force, and the powers vested in the Chief of the Defence Force, the Chief of Navy, the

groups, individual police officers have significantly greater discretion as to when to exercise powers than a member of the ADF. The ADF usually operates in formed units or sub-units under direct command, as opposed to individually. This is perhaps most important in respect of crew served weapons at sea, such as missiles or automated guns, where an ADF member may use lethal force under command without being fully aware of the information available to the commander giving the order. In sum, the power of the ADF is directed in a more concentrated way. Finally, almost by definition, a situation requiring the use of the ADF is much more likely to involve the use of more, and more lethal, force than the police would or could use.[72] Giving the ADF primary responsibility for counter terrorism offshore places a great degree of responsibility upon ADF commanders, and the government, to ensure that the level of force used is measured and appropriate.

C. *The Defence Legislation Amendment (Aid to Civil Authorities) Act 2006*

There is more than a constitutional argument to support the Australian Defence Force exercising responsibility for counter-terrorism offshore. The *Defence Legislation Amendment (Aid to Civil Authorities) Act 2006* (Cth) amended the *Defence Act* to implement this measure in great degree. It came into force on 1 March 2006. While it streamlines call out procedures for the ADF ashore, it also regulates for the first time ADF counter terrorism powers offshore[73], in the air[74] and in relation to critical infrastructure.[75] Critical infrastructure could possibly include offshore platforms. Noting the constitutional distinctions between offshore operations and those within the limits of States discussed above, the *Defence Act* now distinguishes between call

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> Chief of Army and the Chief of Air Force by virtue of section 9, and the powers vested jointly in the Secretary and the Chief of the Defence Force by virtue of section 9A, shall be exercised subject to and in accordance with any directions of the Minister.]

72 See Michael Head, 'Calling Out the Troops — Disturbing Trends and Unanswered Questions' (2005) 28 *University of New South Wales Law Journal* 479, 495.

73 *Defence Act 1903* (Cth) s 51AA.

74 Ibid Division 3B — Powers relating to aircraft.

75 Ibid s 51IB.

out of the ADF ashore within the States, in waters within the limits of States and in waters offshore.[76] Offshore counter terrorist operations until the amendment relied for the most part upon the executive power under the Constitution, with its inherent uncertainties.[77] The *Defence Act* now clarifies the powers available to the ADF in such operations to a large extent. Significantly, it also authorises the use of lethal force in some circumstances to destroy aircraft and vessels, and provides ministers and members of the ADF with considerable discretion in certain situations.[78]

1. *International Law Aspects*

With regard to international law, the amendments to the *Defence Act* clearly could operate contrary to the international law of the sea. This could occur, for example, where areas of international waters were declared as general security or designated areas, affecting freedom of navigation.[79] Even though they would not strictly apply in international law to foreigners in international waters, they could have the practical effect of deterring them from entering. To the extent such areas acted as a warning they could be lawful in international law.[80] Actually interfering with the navigation of foreign vessels could possibly be justified as national self defence in some situations.[81] The inherent uncertainty of defining an armed attack in the context of terrorism though makes it very difficult to predict all circumstances when interference with freedom of navigation on the high seas would be acceptable in national self defence.

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76 Ibid s 51(1).

77 See Moore, above n 65.

78 *Defence Act 1903* (Cth) s 51SE.

79 Ibid s 51SG or s 51SM.

80 As an exercise of due regard under *LOSC* art 87. This would be comparable to issuing to a Notice to Mariners to warn of high seas weapons firing practice. A comparison may also be drawn with the use of exclusion zones in the law of naval warfare. See the commentary on paragraphs 105 and 106 in the Institute for International Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994) (‘*San Remo Manual*’).

81 *Charter of the United Nations* art 51 and *San Remo Manual* Section II, ‘How far a State is justified in its military actions against the enemy will depend upon the intensity and scale of the armed attack for which the enemy is responsible and the gravity of the threat posed.’

Section 51SC of the *Defence Act* perhaps deals with this uncertainty appropriately by requiring the Minister to have regard to Australia's international obligations when exercising certain powers. This provision therefore gives weight to international law without binding ministers to its uncertainties. The extent of this discretion though will not relieve the consequences of failing to uphold the international rule of law. Ministers will need to exercise it with this in mind.

2. *Rule of Law Issues*

Dicey's classic conception of the rule of law saw arbitrary powers in the hands of the executive as contrary to the rule of law.[82] Indeed, the Right Honourable Sir Robert Menzies, Australia's longest serving Prime Minister, saw the rule of law as 'the complete negation of arbitrary power or any very extended use of prerogative right.'[83] The degree of discretion now available to ministers and members of the ADF under the *Defence Act* could be seen to have potential for arbitrary use. This is not necessarily a new issue. The Royal Australian Navy in particular is used to having more statutory power than it usually exercises in enforcement of laws such as those for fisheries and customs.[84] The difference under the new *Defence Act* powers is that the scope for using lethal force is much greater than under other civil enforcement legislation. The potential benefit of powerful legislation is that it can permit decisive action that might take lives but, in so doing, save many more.[85] The danger is that misapplied, such power might lead to loss of life that would not have otherwise occurred. If vulnerable people appear to suffer under this legislation, it might create an impression of repressiveness that fuels the indignation which terrorists exploit. If power is applied apparently arbitrarily, it

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82 A V Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915, Liberty Classics 1982 reprint), 110 in Dr Peter McDermott RFD, 'Internment During the Great War — A Challenge to the Rule of Law' (2005) 28 *University of New South Wales Law Journal* 330, 334.

83 Robert Menzies, *The Rule of Law During the War* (1917) 9, in McDermott, above n 82, 334.

84 For example, the power to fire at or into vessels, *Fisheries Management Act 1991* (Cth) s 84(1)(b)(ii) and *Customs Act 1901* (Cth) s 184A.

85 Indeed, this author has previously advocated such legislation in order to address the uncertainties of relying on the executive power. Moore, above n 65, 532.

may undermine the predictability upon which commerce relies. If the legislation appears to threaten freedom of navigation, it may well undermine the arguments of maritime nations for freedom of navigation elsewhere in the world. This would be no different if ADF counter terrorist operations relied upon the executive power. The considerable discretion available places great responsibility upon ministers and ADF commanders to use these powers with restraint, and to use care to avoid the impression of arbitrariness.

In asking then whether the law can support Australian Defence Force counter-terrorism operations offshore, the answer with regard to domestic legislation is yes, and with regard to international law it must be more equivocal. Restraint will be necessary to ensure the powers available are exercised in accordance with the rule of law. Noting these concerns, the *Defence Legislation Amendment (Aid to Civil Authorities) Act 2006* amendments do give a basis to Australian Defence Force counter-terrorist actions offshore that should make such actions more decisive and lawful.

CONCLUSION

This paper has considered whether some of the more innovative offshore protection measures announced by Prime Minister Howard in December 2004 will see more decisive, though lawful, effects in countering terrorism offshore. An analysis of the announcement suggests that the law will not support all of the measures, and some others, whilst lawful, raise legal concern. Nonetheless, the measures are likely to lead to more decisive and lawful effects in countering terrorism. This paper has considered Australia's Maritime Identification System, the creation of the Joint Offshore Protection Command and the assumption by the Commonwealth, through the Australian Defence Force, of responsibility for counter terrorism offshore. AMIS raises primarily international law questions and the latter two measures primarily domestic law questions. Even though international law will support some important aspects of AMIS, it will also limit the ability of AMIS to achieve the aim of 'ensuring that any terrorist threat to Australia's maritime assets and our coastline

can be quickly detected and defeated.'[86] Despite the initial alarm at an apparently bold and unlawful grab for jurisdiction by Australia, the *International Ship and Port Security Code* supports this system to a notable degree. Even so, it does not apply to all vessels, and has only a limited application to *ISPS Code* compliant vessels transiting the AMIS area that are not bound for an Australian port. The main limitation is the freedom of navigation. Certain vessels transiting the AMIS area will have no obligation to provide information. A vessel apparently acting lawfully can do much to avoid the scrutiny of Australian officials before engaging in an act of terrorism. Within these limitations, aiming to correlate as much information on vessels as possible, as far as away as 2000 nautical miles, would assist the Joint Offshore Protection Command to discern the benign from the threatening early enough to take appropriate action against threatening vessels. This should assist in seeing more decisive and lawful effects in countering terrorism offshore.

The Joint Offshore Protection Command concept addresses to some extent the difficulty of operating between relatively benign law enforcement situations and violent counter terrorist incidents. It seeks to integrate an ADF with the physical capability to operate offshore and in more violent situations, but not the function of enforcing the law against Australians; and a Customs Service structured for law enforcement, including against Australians, but without as much physical capability to operate offshore and in more violent situations. Given the potentially broad range of threats that may manifest offshore, having this range of capability under one Command may mean that the responses are more likely to be decisive, but precisely confined to their lawful objective.

The constitutional division of jurisdiction between the States and the Commonwealth offshore supports the Commonwealth assuming responsibility for offshore protection from the States. There is also a constitutional argument to support making the ADF primarily responsible for counter terrorism offshore. Such a measure is not without legal concern though. The ADF is able to concentrate considerable force. The *Defence Act* amendments that support this measure also grant considerable power and discretion in this role. Whilst allowing for decisive action, they

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[86] Prime Minister of Australia, above n 7.

place upon Ministers and ADF commanders a great responsibility to ensure such action is not arbitrary but consistent with the rule of law.

The new offshore protection measures are likely to see more decisive effects in countering terrorism offshore. Within the limitations that the freedom of navigation imposes upon it, the AMIS could still assist in making offshore counter terrorist responses more discerning and therefore more lawful. The contrastingly wide discretionary powers available in domestic law to counter terrorism offshore, even to act contrary to international law, whilst allowing for decisive action, will need to be exercised with concern for the rule of law itself.