

The changing tide of people smuggling

Federal Agent **Andrew Warton**¹ recently completed a three- year term transfer as both an intelligence analyst and Investigator in the Darwin office. This period saw an unprecedented rise in incidents of people smuggling in Australia with a substantial number of investigations conducted from the Australian Federal Police Darwin office. In this article he analyses the evolution of people smuggling as AFP core business and reflects on the legislative changes and investigative challenges encountered through dealing with more than 100 individual people smuggling offenders charged with Commonwealth offences.



Federal Agent Andrew Warton

The late 1990s and early 2000s have given rise to an unprecedented increase in the entry of unlawful non-citizens into Australia by boat with the majority of these landings taking place in Australian waters at Ashmore Reef in the Timor Sea.

While the AFP bears the responsibility for the investigation of people-smuggling offences nationally, between 1999 and 2000, the vast majority of boats arriving at Ashmore Reef were transferred to

the Northern Territory for investigation by the AFP Darwin office. As a result of Government policy, incidents of people smuggling have dramatically declined in recent times.

The investigation of people-smuggling offences fits squarely into Outcome 1 of the AFP's current Corporate

Directions, namely, the investigation and prevention of crime against the Commonwealth and protection of Commonwealth interests in Australia and overseas. Meeting this objective, at an operational level, has been effected through the investigation of people smuggling by several AFP regions, in particular Northern and Western, and the establishment of a centrally-based People Smuggling Team (PST). The transnational nature of people smuggling necessitates the requirement

for the intelligence-driven policing methods adopted to date.

Acknowledging the recent emergence of people smuggling as an issue in the world forum, the purpose of this article is to reflect on the development of people smuggling over the past three years as a relatively new form of AFP core business. Accordingly, from the perspective of an investigator, this paper aims to explain the mechanics of people smuggling, the common *modus operandi* and the legislative reforms and Northern Territory Supreme Court decisions occurring since the rise in unlawful non-citizens entering Australia by boat.

Unauthorised arrivals by sea 1999–2001

The developments addressed in this paper have occurred over a three-year period, namely 1999–2002. This timeframe unquestionably represents the peak of people-smuggling criminal activity in Australia's history. In 1998–1999 Australia saw 42 unauthorised boat arrivals carrying 920 unlawful entrants². This figure rose in 1999–2000 to a peak of 75 unauthorised boats carrying 4175 unlawful entrants. Finally, the year 2000–2001 saw 54 unauthorised boats carrying 4141 unlawful entrants. In contrast, unlawful arrivals by boat have recently declined as a result of current government policy. To put the period into perspective, the past three financial years have accounted for approximately 68 per cent of people entering Australia through unauthorised boat arrivals since 1989. The majority of these investigations were conducted by federal agents in the Darwin office of the AFP following the detection of Suspected Illegal Entrant Vessels (SIEVs) at or near Ashmore Reef in the Timor Sea.



As an Australian External Territory, Ashmore Reef forms part of the Ashmore and Cartier Island group. Customs photo.

Ashmore Reef

As an Australian External Territory, Ashmore Reef forms part of the Ashmore and Cartier Island group. The reef itself forms part of the Ashmore Reef National Nature Reserve and is located approximately 840km west of Darwin and 610km north of Broome. The actual nature reserve comprises 583km² of seabed, three small islands (West Island, Middle Island and East Island), and a large reef shelf with surrounding waters³. The islands are home to a myriad of marine life including the world's most diverse population of sea snakes. Likewise, the islands accommodate a broad range of migratory wetland birds. In announcing a new draft management plan for the reserve, the Ashmore and Cartier Islands were referred to as "central hubs for marine diversity in Australia's northern waters. They have the highest biodiversity of reefs in the region with 752 species of fish, 256 species of reef building corals, 136 species of sponges and 433 species of molluscs."⁴

In 1999, at the start of my term in Darwin, the reserve itself was physically supervised by an Environment Australia vessel, the *Aurelia II*. As incidents of people smuggling increased, this vessel was supplemented by an increased frequency in Australian Defence Force (ADF) and Australian Customs Service (ACS) patrols to Ashmore Reef, and eventually, the permanent location of the ACS manned ACV *Samson Explorer* to specifically deal with people-smuggling issues.

People smuggling and the law

For the purpose of this paper, people smuggling is defined in accordance with the People Smuggling Protocol attached to the recently ratified United Nations Convention Against Transnational Organised Crime. While people trafficking and smuggling are often used interchangeably, this document defines the latter as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident."⁵

In broad terms, the people-smuggling ventures of the past three years have involved a consistently similar pattern and fit squarely into this definition. In my experience the paying passengers, usually of Middle Eastern descent, fly to South-East Asia where they transit through countries such as Singapore and Malaysia. The next destination is usually Indonesia where they remain in safe-houses located on a range of islands, prior to departure for Australia. At this point, the organisers will have arranged a vessel, most commonly Indonesian fishing boats, and recruited an Indonesian master and crew to complete the journey to Australia. The safe houses may contain a stockpile of awaiting passengers and may also be

the subject of multiple attempts to depart Indonesian for Australia.

Indonesian crews investigated by the AFP for their involvement in people smuggling are most commonly charged with one of two provisions contained in the *Migration Act 1958*. Section 232A of the Act provides a maximum 20-year imprisonment term, \$220,000 fine or both for a person who "organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of five or more people". In proving the *mens rea* for this offence, the prosecution must establish that the accused did so "reckless as to whether the people had, or have a lawful right to come to Australia"⁶.



In 1999 as incidents of people smuggling grew, Customs and Defence patrols to Ashmore Reef were increased.

The second commonly used provision applies to people-smuggling offences involving less than five unlawful non-citizens. Section 233 of the Migration Act provides a maximum 10 year imprisonment term, \$110,000 fine or both for a person who, *inter alia*, takes part in "the bringing or coming to Australia of a non-citizen under circumstances from which it might reasonably be inferred that the non-citizen intended to enter Australia" in contravention of the Act⁷.

Attempts to start the journey to Australia may be thwarted by a number of factors including lack of organisation on the part of the people-smuggling syndicates, adverse weather, interception by Indonesian authorities or vessel unseaworthiness. Most of these obstacles have proven short term in nature and have been overcome by the syndicates using a variety of solutions.

Legislative amendments

In response to the increase in people smuggling incidents, the Australian Government introduced a series of legislative amendments to combat the issue

and deter potential people smugglers from breaching Australia's sovereignty. These legislative changes represent one part of a multi-faceted package specifically aimed at increased border control. Three significant changes particularly relevant to those undertaking people-smuggling investigations, are the re-definition of Australia's migration zones, revised sentencing provisions, and provisions enabling age-determination of suspects subject to Commonwealth investigations.

Migration Zones

Following the much-publicised MV *Tampa* incident in August 2001, significant legislative reform occurred by way of amendment to the Australia's migration legislation. To limit the geographical locations at which a person may apply for a protection visa, a number of places were removed from the Migration Act as migration zones for the purpose of making protection visa



An Indonesian marine vessel being boarded at Ashmore Reef lagoon.

applications. These include Christmas Island in the Indian Ocean, the Ashmore and Cartier Islands in the Timor Sea, the Cocos (Keeling) Islands in the Indian Ocean, and any Australian installation or offshore resources, for example, an oil rig or other offshore installation.⁸ While the effect of this amendment has been to reduce incidents of people-smuggling arrivals at these locations, it is possible that future people-smuggling ventures may attempt to reach Australian mainland, or alternatively, target Australian islands not subject to the amendments. In northern Australia, the Bathurst and Melville Island groups are two potential examples.

Minimum sentences

Amendments to the Migration Act also included a mandatory minimum sentence of at least eight years imprisonment in the case of a repeat offender

convicted under section 232A or 233A of the Act, or five years imprisonment in any other case.⁹ Further amendments were also made by way of setting minimum non-parole periods of at least five years for repeat offenders and three years in any other case.

Age determination

Issues of jurisdiction in relation to the age of Indonesian crew members also arose as an investigative and judicial issue during 2000. Part way through the escalation in people smuggling incidents, many crew members claimed the status of juveniles, the result, a need to determine age in the absence of identity documents or verification. From the investigators perspective, establishing the age of a people-smuggling suspect is essential from the outset in order to determine issues relating to the suspects' rights including the conditions under which he or she is formally interviewed by police. From the court's perspective, the issue is equally important with respect to sentencing principles and the ultimate institution at which custodial sentences are served.

In *R v. Hatim*¹⁰, an Indonesian crew member interviewed by AFP members in the Darwin office argued that the Supreme Court of the Northern Territory did not have the requisite jurisdiction to hear the matter, based on his claim to authorities that he was 16-years-of-age at the time of the offence. To resolve this issue, the suspect was subject to a wrist X-ray for the purpose of age determination¹¹. This X-ray was requested by an immigration officer relying on section 258 of the Migration Act which allows an official to do "all such things as are reasonably necessary for photographing or measuring that person" in order to facilitate identification of the person. The suspect consented to the procedure and the central issue for the court was the admissibility of the X-ray for the purpose of determining jurisdiction¹².

In delivering his judgment, Thomas J concluded that the consensual nature of the procedure resulted in the wrist X-ray being admissible in relation to the issue of age determination. However, his honour made it clear that the Migration Act provision did not permit the taking of X-rays *per se*. Accordingly, the provision could no longer be relied on to assist with the age determination of Indonesian crew members.

In response to this issue, the *Crimes Act 1914* was amended with the insertion of Division 4A – "Determining a person's age". The amendment provides for the use of a *prescribed procedure*, including X-rays, by an appropriately qualified person for the purpose of determining whether a suspect is, or was at the time of the offence, under the age of 18. This may occur by consent or by order of a magistrate upon application. The amended provisions are only applicable to the investigation of

Commonwealth offences and are not confined to people-smuggling investigations.

Investigations and the law

As expected, the inevitable product of an increased number of illegal entrants, coupled with legislative reform to the Migration Act, was an increase in contested matters in the Supreme Court of the Northern Territory. Given that the members of the Darwin office were consistently cross-examined in many of these cases, it is appropriate to extract some of the more pertinent decisions for use by investigators in future people-smuggling investigations.

Start of the investigation period

When responding to people-smuggling incidents, investigators may be faced with a number of scenarios. For example, in the course of investigations, I have travelled on Royal Australian Navy (RAN) Patrol boats and ACS vessels to Ashmore reef and assisted with initial boardings of people-smuggling vessels on the high seas. In many instances, investigators may attend an Immigration Detention Centre to take custody of suspected people-smuggling offenders.

While all cases differ, the way in which investigators treat people-smuggling offenders at the outset, will have important implications on the eventual outcome of a prosecution. Specifically, the provisions contained in section 23C of the Crimes Act have proven fertile ground for defence counsel in pleas of not guilty for those accused with people-smuggling offences. The first example relevant to this provision arose during the peak of people-smuggling arrivals in mid 1999.

In July 1999, AFP officers travelled on the HMAS *Jervis Bay* from Darwin to Ashmore Reef in response to the arrival of 48 non-citizens at Ashmore Reef. On arrival at Ashmore Reef, the 44 passengers and four Indonesian crew were transferred to the *Jervis Bay* for transportation back to Darwin. While the federal agents took video footage and made other investigative inquiries at sea, they did not question the suspects about any alleged Commonwealth offences.

At trial in the Supreme Court of the Northern Territory, defence counsel argued that the AFP officers took the accused into custody during the journey from Ashmore Reef to Darwin. This argument was supported by the fact that the officers were collecting evidence, were physically present with the accused during the journey, and would not have allowed the accused to leave should they have sought to do so. The Crown argued that the AFP officers were merely present to provide security at the request of the commanding officer of the HMAS *Jervis Bay*, as was the case.

In reaching his decision, Riley J held that “the AFP officers did not take the accused or the passengers into their custody during that journey. They did not question the accused. Although they were present in the same spacious room that contained the accused and all other passengers, they limited their role to maintaining security and directing individuals to various parts of the room for various purposes¹³.” They key point in this judgment is that his honour held that the suspects were not under arrest in the sense contemplated by section 23B(2) of the Crimes Act, rather, they were under immigration detention.

For AFP members conducting people-smuggling investigations, the point at which immigration detention ends and AFP arrest commences will always provide opportunity for defence attack. The broad range of agencies whose members are deemed “investigating officials” under the Crimes Act provides further potential issues where such people start questioning the suspects in relation to a Commonwealth offence. For those investigating people-smuggling offences, the solution is twofold – refrain from asking questions while the suspects are in immigration detention, and understand precisely when immigration detention cease and arrest, or deemed arrest, begins.



Australian Federal Police and Australian Customs Service (National Marine Unit) at Ashmore Reef during September 1999.

Continuity of evidence

Continuity of evidence has long been a fundamental principle of evidence law. In narcotics investigations the commodity is obvious, in a people-smuggling investigation the commodity is the people. In principle, accounting for each and every non-citizen sounds relatively simple. However, in practice, this has, at times, proven difficult. In line with current Government policy, Australian agencies adopt a “whole-of-government” approach in responding to people-smuggling incidents. The very nature of this approach results in the potential for the RAN, the ACS, and in the case of the MV *Tampa*, civilian marine vessels all to take custody of the crew

and passengers associated with a people-smuggling operation.

Having been involved in the process of people smuggling at all stages, it is apparent that ensuring the welfare and transport of non-citizens from the high seas to land can be logistically, very difficult. Unlawful non-citizens and crew are inevitably transferred from RAN to ACS vessels and visa versa, while multiple landings can result in passengers and crew being separated and transported on different vessel, either at the start or during the transportation process. For the investigator, this raises several issues. Continuity of the people, their property, evidence gathered from the vessel used by the people smugglers, and even the navigational notes and logs taken by authorities is essential. Many of these examples are exacerbated by need to make decisions on the transportation of critically ill passengers on the high seas.

For the investigator, these are all issues that must be taken into consideration when obtaining witness statements. In many instances the search and seizure of evidence in relation to vessels used by people smugglers rests with the RAN or the ACS. In these instances, continuity of physical evidence becomes crucial. Recent AFP developments in the investigation of people smuggling in Northern Australia have resulted in streamlined process with regard to the collection, storage and continuity of evidence by external agencies.

Administration of the criminal caution

As is the case with the investigation of all Commonwealth offences involving suspects under arrest, section 23F of the Crimes Act requires that the person be cautioned that “he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence¹⁴.” However, the provision further requires that the caution be given “in, or translated into, a language in which the person is able to communicate with reasonable fluency¹⁵”.

Following the amendments increasing sentences attached to people-smuggling offences under the Migration Act, in July 2000 defence counsel attempted to exclude several records of interview on the basis that there was no effective communication of the caution. More specifically, in a case involving the arrest and interview of six Indonesian nationals in December 1999, defence relied upon the *Anunga Rules* arguing that there was no effective communication of the criminal caution because the defendants could not explain the caution to the investigating officials in their own words.

In delivering his judgment, Thomas J held that the Indonesian crew member being interviewed was a person to which rule three enunciated in *R v. Anunga*¹⁶ applied, namely, that the suspect must demonstrate an understanding of the caution by

explaining it back in his or her own words. While his honour held that “greater efforts could have been made” to have the suspect explain his understanding of the caution, it was concluded on the balance of probabilities that the entire record of interview was made voluntarily¹⁷.

To ensure this argument does not arise, those tasked with investigating people-smuggling matters must, as a matter of best practice, adhere to rule three of the *Anunga Rules*. Ultimately, this is a matter for the court to consider on grounds of public policy discretion and principles of public interest.

Development in modus operandi

Since the 1999, increase in people-smuggling ventures, defence counsel have challenged investigators in what have largely been uncharted legislative waters. Such challenges have come not only from those involved in the court process, but also by those organising and facilitating the unlawful arrivals. The following analysis is intended to provide a broad overview detailing the way in which the people smugglers themselves have changed the way they do business.

At first, people-smuggling investigations generally saw Indonesian fishing vessels with two to five Indonesian crew members arrive at Ashmore Reef, and subsequently be transported to Darwin for investigation. At the start of 1999, the number of passengers usually ranged between 15-65 people. This can now be contrasted with the use of larger vessels capable of carrying significantly more passengers.

At the time of arrival in November 1999, the Indonesian vessel *Harapan Satu* represented Australia’s largest people-smuggling incident, the vessel carrying more than 360 people from Indonesia to Australia. Similar scale incidents have been recorded on the Australian territory of Christmas Island. The number of people on the MV *Tampa* is further evidence of attempts to move large numbers of people to Australia unlawfully. For the organisers of people smuggling, considerable financial benefits result from the movement of large amounts of people.

Secondly, there occurred a notable increase in the number of juvenile crew members being used to sail the vessels from Indonesia to Australia. This was largely due to a belief among Indonesian crew members that juveniles would receive lesser sentences than their adult counterparts. Indeed, the sentencing principles adopted by courts justifiably differ between adults and juveniles. The trend was further complicated for investigators (and the courts) when adult crew members began to claim their status as juveniles when apprehended by Australian authorities. The legislative solution to

the age determination issue has been mentioned earlier in this paper.

Thirdly, in 2000, an Indonesian fishing vessel was located by Australian authorities attempting to enter Australian waters. The notable difference in this case was the absence of an Indonesian crew. In speaking with police, some passengers on the vessel stated that the crew had been removed from the vessel and had returned to Indonesia, leaving the passengers at sea.

Transnational crime

There exists little doubt that the recent emergence of people smuggling on a coordinated scale, is ultimately driven by organised criminal groups. They represent sophisticated operations in which the organisers remain cautiously distant from the actual operations, an immunity enhanced by a lack of adequate mutual assistance arrangements between Indonesian and Australian authorities. In discussing the issue, a recent Australian Criminology Institute report noted that "The involvement of transnational crime organised crime groups in people-smuggling activities is part of a global trend. The partial explanation for this lies in the fact that people smuggling is typically perceived to be a low risk, high gain activity. People smuggling can generate huge profits for organisers¹⁸".

If one accepts the organised crime foundation of people smuggling, one must also accept that these organised criminal groups may use people-smuggling networks to insert members of international terrorist cells into Australia, or to combine people-smuggling journeys with the importation of narcotics.

While the Indonesian crew members are a crucial ingredient of any successful people-smuggling venture, my experience suggests that the overall planning and coordination stems from organised criminal networks metaphorically immune from the prospect of drowning in an unseaworthy vessel. Like all organised criminals, people-smuggling organisers attempt to distance themselves from the physical criminal act.

A multi-dimensional solution

In the final analysis, the broader issue of people smuggling is, in many ways, akin to Australia's ongoing illicit drug problem. Both issues involve the movement of a product through organised criminal networks. Likewise, both issues involve an element of human misery, albeit displayed and measured by different means. However, the most relevant similarity exists with the solution. As is the case with illicit drug use, the solution to the people-smuggling epidemic is multi-dimensional. In both cases, law enforcement in isolation will not provide a resolution. As with illicit drugs, it is the root causes of people smuggling that must be addressed. For those involved in law enforcement, it is essential to

acknowledge the position of those seeking asylum in Australia. For many of the world's displaced people, distant fields don't look greener, they are.

As long as the world remains imperfect, the market for unlawfully moving desperate people between countries will always exist. To this end, the task for law enforcement must be to focus on the organised criminal networks that devise, manage and facilitate these enterprises. The challenge for law enforcement, and governments alike is to negotiate a framework within which this objective can be achieved – an ultimate objective clearly more complex than one could imagine. To this end, the tide of people smuggling will continue to change.



Ashmore Reef National Nature Reserve is located approximately 840km west of Darwin and 610km north of Broome and is home to a variety of wetland birds.

References

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8. Migration Amendment (Excision from Migration Zone) Act 2001.
9. The Border Protection (Validation and Enforcement Powers) Act 2001 amends section 233C of the Migration Act 1958 by providing for mandatory minimum sentences.
10. [2000] NTSC 54.
11. This procedure was undertaken by consent under the provision contained in s.258 of the Migration Act 1958.
12. The wrist X-ray procedure measures skeletal maturity by examining the fusing or partial fusing of the *ulna epiphysis*, a bone located in the wrist. Considerable medical research and opinion exists in relation to the reliability of wrist X-ray results.
13. R v. Sukami & Ors [2000] NTSC 13 per Riley J at 20.
14. Section 23F(1) *Crimes Act 1914*.
15. Section 23F(2) *Crimes Act 1914*
16. (1976) 11 ALR 412
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