

*Submission to the Senate Legal and Constitutional Affairs References Committee
Inquiry into Payment of Cash or Other Inducements by the Commonwealth of
Australia in Exchange for the Turn Back of Asylum Seeker Boats*

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This submission addresses the legality of the actions of the Commonwealth of Australia in paying cash or other inducements to members of the crew of a boat intercepted in international waters and carrying asylum-seekers, in exchange for the crew's agreement to return to their country of origin (Indonesia).

This submission is based on the following understanding of the facts, as reported in the Australian media.

In May 2015, a boat from Indonesia carrying 65 asylum-seekers was intercepted by Australian authorities (Australian Customs and Navy) in international waters. The boat, which held asylum-seekers from Bangladesh, Burma and Sri Lanka as well as six crew members, was travelling to New Zealand. The boat was taken to waters off the coast off the Australian Ashmore Reef. There, the asylum-seekers were transferred to two smaller boats and escorted back to Indonesian waters. One of the boats later crashed on a reef near Rote Island in Indonesia. The six crew members, who are facing charges in Indonesia for people-smuggling, have stated that an Australian official paid them US\$5,000 each to return with the asylum-seekers to Indonesia (a total of US\$30,000). This has been corroborated by statements from the asylum-seekers who are now detained in Indonesia.

This submission considers the question of the legality under international law of the actions of Australian authorities. Our conclusion is that the payments to the crew members are inconsistent with Australia's obligations under the People-Smuggling Protocol (2000) and the Refugees Convention (1951).

(A) The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime

Australia ratified the Protocol against the Smuggling of Migrants by Land, Sea and Air ('the People-Smuggling Protocol')⁴ on 27 May 2004, and Indonesia ratified it on 28 September 2009. The purpose of the Protocol is to 'prevent and combat the smuggling of migrants [...] while protecting the rights of smuggled migrants' (article 2). 'Smuggling of migrants' is defined as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into

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⁴ *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004).

a State Party of which the person is not a national or a permanent resident’ (article 3(a)). The action by the Australian authorities of ensuring the entry of the boat into Indonesian waters in pursuit of Australia’s internal policy aims may thus itself constitute people-smuggling under international law.

Article 6 of the Protocol requires States Parties to criminalise people-smuggling and certain associated behaviours, including participating as an accomplice in people-smuggling or directing others to smuggle people. The actions of the Australian authorities clearly fall within the behaviour that is targeted by article 6. Indeed, on the face of it, the behaviour also contravenes the criminal provisions enacted by Australia to implement the Protocol.⁵

Australia’s actions in returning asylum-seekers to Indonesian waters—where one of the boats later crashed on a reef and all 65 asylum seekers were detained by Indonesian authorities—also fall within the category of ‘aggravating circumstances’ identified in article 6(3) of the Protocol. These include circumstances ‘that endanger, or are likely to endanger, the lives or safety of the migrants concerned.’

Finally, Australia’s actions in paying the Indonesian crew are clearly inconsistent with article 7 of the Protocol, which obliges Australia to ‘cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea’. Payment by Australian authorities to people-smugglers involves providing a financial benefit for engaging in an illicit trade, as well as an incentive to continue doing it.

(B) The Convention relating to the Status of Refugees

The actions of the Australian authorities in diverting the asylum-seekers to Indonesia are contrary to the object and purpose of the Convention relating to the Status of Refugees (‘Refugees Convention’),⁶ including to assure to refugees the widest possible exercise of their fundamental rights and freedoms, and to deal with the problem of refugees through international cooperation (preamble). Australia has been a party to the Refugees Convention since 1954.⁷

The Convention implicitly requires States Parties to consider the refugee status claims of asylum-seekers who are subject to their control. This involves assessing claims of refugee status in good faith and through a robust determination process. The circumstances of the transaction between Australian authorities and the Indonesian boat crew suggests that no substantive or comprehensive assessment of the asylum-seekers’ protection claims were carried out.

Assuming that the asylum-seekers met the criteria for refugee status under the Convention, Australia’s actions may have breached the critical principle of *non-refoulement*, enshrined in article 33(1). It provides that:

No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be

⁵ *Criminal Code Act 1995* (Cth) ss 73.1 and 73.3A.

⁶ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

⁷ Australia acceded to the Refugees Convention on 22 January 1954.

threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The obligation of *non-refoulement* also forms part of customary international law.⁸

The fact that the refugee may not face an immediate threat to life or freedom in a third country (such as Indonesia) does not relieve Australia of responsibility for *refoulement* that occurs if that country in turn expels the refugee.⁹ Before Australia sends refugees to a third country, it is thus under a duty to examine whether this could result in eventual *refoulement*.¹⁰ We also note that Indonesia is not a party to the Refugees Convention and that the asylum-seekers will not be able to claim its protection in Indonesia even if they can establish their refugee status.

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⁸ *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UN Doc HCR/MMSP/2001/09 (16 January 2002) Preamble para 4.

⁹ Committee against Torture, *Report of the Committee against Torture*, 53rd sess, Supp No 44, UN Doc A/53/44 (16 September 1988) annex IX ('*General Comment on the Implementation of Article 3 of the Convention in the Context of Article 22*') [2]; Human Rights Committee, *General Comment No 31*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [12]; Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff, 2009) 235.

¹⁰ Coleman, above n 9, 235.