Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Where waters meet

The breach of Indonesian waters and the need for a review of Australia's aggressive maritime policy

Submission to Senate Foreign Affairs, Defence and Trade References Committee

Inquiry into the breach of Indonesian waters

20 March 2014

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CONTENTS

WHO WE ARE

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.

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INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Senate Foreign Affairs, Defence and Trade References Committee in its inquiry into the breach of Indonesian waters.

We will be addressing terms of reference (d) and (f) in our submission:

- (d) the steps being taken to prevent similar incidents from taking place in the future; and
- (f) any other matters relating to Operation Sovereign Borders.

We wish to highlight that there are potentially many more unrecorded instances of incursions into Indonesian waters, and that this has led to gross miscarriages of justice for Indonesian citizens.

Ultimately, the differential treatment between incursions committed by Indonesian fishermen, and those committed by Australian officials, is inherently unjust, and must be reviewed.

Until this happens, any statements identifying that 'this will never happen again' are not reliable: incursions could be happening on a daily basis that are unrecorded and unknown.

Our submission will focus on:

- The findings of the Customs Review;
- Other unrecorded incursions into Indonesian waters;
- The gross hypocrisy between the treatment of the Australian navy's incursions and those of Indonesian fishermen.

We believe that there is a need for a review of Australia's maritime relationship with Indonesia.

Of high concern are the instances of Indonesian fishing boat seizures in Indonesian waters, when Australian authorities have acted on unfounded suspicions of violation of Australia's rights over the seabed by Indonesian fishers acting lawfully in their own waters.

The findings of the Customs Review

The Defence and Customs Review found that Australian ships inadvertently

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breached Indonesian territorial waters six times during December 2013 and January 2014, from both the Royal Australian Navy (RAN) and Australian Customs and Border Protection Services (ACBPS).

Incorrect calculations

The review held that 'on each occasion the incursion was inadvertent, in that each arose from **incorrect calculation of the boundaries of Indonesian waters** rather than as a deliberate action or navigational error. The intent for each patrol was advised to operational headquarters in advance of each mission and was approved by Operational Commanders.'

It is important to question: what was the intent for each patrol as advised to operational headquarters? Was it in relation to the policing of foreign fishers or in relation to the policing of refugees?

This is a pertinent question, as if the patrol was in relation to the policing of foreign fishers, this could indicate a long history of further breaches. If the patrol was in relation to the policing of refugees, it is important to identify whether this marks as a departure from previous approaches.

The review is troubling, in that it identifies that the ACBPS 'who are trained for operations inside the Australian Exclusive Economic Zone (EEZ), had not received training [on the UN Convention on the Law of the Sea] as it applied to the Indonesian archipelago.'

Furthermore, the review acknowledged that 'despite clear guidance to operational headquarters and assigned units, the imperative to remain outside Indonesian waters did not receive adequate attention during mission execution or oversight.'

However, the point remains that this should have received adequate attention before now, given the ACBPS activities.

Every year, the Department of Customs and Border Protection retains annual targets of apprehensions of Indonesian vessels which make 'incursions' into Australian waters, as key performance indicators. In the Department of Customs Annual Report 2010 – 11, it cites that 'some of this year's highlights include a continued containment of illegal foreign fishing incursions into our waters.'[1]

We note that the Review found that:

> 'RAN Commanding Officers had received the requisite professional training and experience to be aware of the operational implications of UNCLOS archipelagic baseline provisions in the calculation of Indonesian Maritime Boundaries.
>
> The Review found that while ACBPS Enforcement Commanders and contracted vessel

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> Masters are appropriately trained on the application of UNCLOS for operations inside the Australian Exclusive Economic Zone, **they did not have the requisite professional training to be aware of the operational implications of UNCLOS archipelagic baseline provisions** in the calculation of Indonesian Maritime Boundaries.'

This identifies that there is an ongoing lack of clarity surrounding archipelagic baseline provisions: something which has been experienced by Indonesian fishermen for decades.

However, for the RAN to rely on this is an inadequate excuse.

POTENTIAL OTHER UNRECORDED INCURSIONS

We note that the Review found that 'the initial identification of the incursions was the result of an ad hoc intervention by planning staff'.

For such a serious matter to be identified and intervened upon by planning staff indicates that there is an insufficient level of scrutiny than has been employed to date, and that further instances may certainly have occurred.

We note that the review team assessed over 2,200 documents, containing data relevant to the December 2013 to January 2014 period of time only.2 In two months, six incursions occurred. We question: if a similar review was to be undertaken over a period of twelve months, or twelve years, would further instances of incursions be found?

The Review found that 'the instructions issued by operational commanders subsequent to the incursions have effectively remediated lapses in planning of patrols'. No statement is evidence upon how long these 'lapses' may have been in place.

We believe that incursions into Indonesian waters are not isolated to the time periods being investigated by this Inquiry.

The Australian Lawyers Alliance believes that there have been other incursions into Indonesian waters.

We believe these may have occurred within the highly punitive and aggressive crackdown on Indonesian fishermen fishing in or near Australian waters.

This could have occurred for more than a decade.

Two cases in particular illustrate the point.

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***Sahring & Ors v Commonwealth of Australia* [2014] NTD9/2011**

On Wednesday 19 March 2014, a decision was handed down by the Mansfield J in the Federal Court of Australia, which recognised for the first time, that Indonesian fishermen whose boats, seized in Indonesian waters, had been destroyed by the Australian government without compensation, were eligible to seek compensation in particular circumstances. The case, *Sahring & Ors v Commonwealth of Australia & Anor* [2014] NTD 9/2011 acknowledged that the Royal Australian Navy patrol vessel HMAS Broome apprehended the plaintiff's boat, while it was in Indonesia's exclusive economic zone, before burning it at sea.

This case demonstrates a clear example of the Australian navy breaching Indonesian waters and overreaching in the enforcement of Australia's rights.

***Muslimin v The Queen* [2010] HCA 7**

In 2010, a case involving an Indonesian fisherman detained for almost two years under the *Fisheries Management Act 1991* (Cth) came before the High Court.

In *Muslimin v The Queen* [2010] HCA 7, an Indonesian fisherman from East Nusa Tenggara province, was apprehended at sea, above the Australian continental shelf, but outside the Australian Fishing Zone.

The High Court held that s101 of the *Fisheries Management Act* 1991 (Cth) was not a provision made in relation to fishing and thus its coverage was not extended beyond the AFZ to the Australian continental shelf by the operation of s 12(2).

The fact that the case of *Muslimin* progressed to the High Court in 2010 indicates the lack of clarity that has historically occupied this legal area.

The representation of Indonesian fishermen charged with fishing offences has to date, been criticised.

Muslimin was detained for almost two years, had to proceed to the High Court to prove his innocence. He was eventually acquitted, and returned to his home village riddled with debts.

This stands in stark contrast to the casual findings of the Review report that acknowledge the difficulty in the RAN determining its positioning.

The case of *Muslimin*, also speaks volumes for the perhaps thousands of other Indonesian fishermen who did not receive the level of support and representation received by Muslimin or Sahring. Many others, too, may have been sanctioned outside the Australian Fishing Zone, and may have been apprehended in

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Indonesian waters.

We also note that ABC's radio program, *Background Briefing,* drew attention to Muslimin, in their 2011 report into people smuggling. In their report, they stated that Muslimin, was induced into people smuggling.[3] Beset by the poverty imposed in him by Australia's heavy-handedness, Muslimin was targeted to skipper a boat travelling to Australia and was again apprehended, attempting to earn the few hundred dollars promised him.

As we have noted to parliamentary committees previously, we believe that the treatment of Indonesian fishermen is a component of Australia's maritime policy that is inherently linked to other policy areas, such as overseas development assistance, environmental degradation and pollution, human rights and people smuggling.

MISCARRIAGES OF JUSTICE

While no penalty has been exacted upon those Australian vessels that breached Indonesian waters, many miscarriages of justice have occurred as a result of Australia's aggressive crackdown on Indonesian fishermen.

We believe that there is an inherent hypocrisy in the Australian breach of Indonesian waters on a number of occasions.

Armed to the teeth with relevant technological equipment, with high levels of education and training, there is no genuine excuse for these apparent 'inadvertent' incursions. No penalty for such a serious breach has occurred.

As a contrast, Indonesian fishermen, who have sat in boats above the Australian continental shelf (but outside the Australian Fishing Zone), with perhaps a small GPS reader and with relevant fishing equipment on board, but not physically fishing, have been unlawfully apprehended, their boats burned at sea, and in some cases, the fishermen have been imprisoned. Such facts have been proven in Court for both Sahring and Muslimin and are known to apply to many others.

Within the 'MOU Box' near Ashmore Reef, some boats are apparently required to not utilise any form of technology to prove that they are 'fishing traditionally'. We have been told that there is a village on Rote Island, Indonesia, known colloquially as 'the village of widows', as so many of their husbands have died at sea.

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Economic impacts

The economic and social impact on communities of the removal of a boat cannot be underestimated, especially when combined with the removal of a key breadwinner via detention in Australia.

In August 2013, the Australian Lawyers Alliance travelled to Kupang, Indonesia, where we met with communities. In one village, we met fishermen who had had their boats destroyed by the Australian navy without compensation. As a direct result, their families now struggle in poverty to attempt to make ends meet. In one village, a father's children, aged 12 years and 7 years, cannot go to school as their family simply cannot afford the modest costs associated with attending school. Sahring's children went without schooling for 5 years and many others are affected in the same way with obvious repercussions to a whole generation.

The issue of destruction of fishing boats, combined with the significant and severe economic loss sustained in the Indonesian province of East Nusa Tenggara following the Montara oil spill, is one that is complicated by the appearing hypocrisy of the Australian government and navy in its responses to breaches of Indonesian waters.

It is deeply ironic that the Australian navy can use lack of training as an excuse for its activities, and utilise this rationale in their neglect of their duty of care.

TABLE: Rudimentary comparison of power inequality between Australian navy and Indonesian fishermen

Australian navy	Indonesian fishermen
Technology • Equipped with relevant technology to pinpoint position.	*Technology* • Equipped with, at most, a GPS positioning system that does not communicate information about the continental shelf. • In the MOU Box, fishermen are required to not have any technological equipment.

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Australian navy	Indonesian fishermen
Staffing requirements • Staffed by hundreds of navy personnel, with years of formal training.	*Staffing requirements* • Staffed by approximately 1 – 7 fishermen, with traditional knowledge of seas and waters, but with formal schooling often not surpassing primary school/early high school.
Training in international law • Trained in UNCLOS	*Training in international law* • No education re UNCLOS
Responsibility • Agents of the Australian government in a remote region, requiring a strong duty of care.	*Responsibility* • Breadwinners of family in one of the poorest provinces in Indonesia (East Nusa Tenggara is ranked in the top five priority provinces by the Australian aid program in Indonesia).
Type of ship • Navy warships	*Type of ship* • Rudimentary *perahu* wooden fishing boat, or more contemporary 'ice boat'.
Penalty sustained • No penalty for incursions into Indonesian waters.	*Penalty sustained* • Penalties include: - Apprehension at sea, destruction of property without compensation; - Imprisonment in Australian prisons; - Loss of family breadwinner for those at home in Indonesia; - Return to home village with debts owed to boat owner or village banker for destroyed

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Australian navy	Indonesian fishermen
	boat. In some cases, this means families cannot fund education or health care for their families. Please note, under the *Maritime Powers Act* 2013 (Cth), Australian officials also have powers to strip search individuals.

Policy of detention

Australia's policy of detention of Indonesians that have breached Australian waters via fishing has also been historically highly punitive. Until 2005, Indonesians were left to live on board boats for months on end strung up to wharves in Darwin Harbour. Two people died during these conditions: a 21 year old fisherman, Mansur La Ibu, and a 37 year old fisherman, Mohammed Heri. Now, Indonesian fishermen are imprisoned at Darwin Immigration Centre.

Previously, Australia has also been known to deport individuals charged with fishing offences to Denpasar, Bali, and leave individuals to travel to their homes in far flung islands without adequate finances.

Teenagers charged and imprisoned as adults?

We also query to this Committee whether Indonesian teenagers were also unlawfully charged and imprisoned as adults for such fishing offences.

The Australian Human Rights Commission, in its 2012 report, *An age of uncertainty,* noted that 151 individuals were of concern to the Commission as being underage and apprehended for people smuggling offences. Their ages determined by a defunct wrist X-ray procedure, we question as to whether Indonesian teenagers involved in fishing and apprehended in or near Australian waters, were also subject to this age determination test.

The Australian Human Rights Commission acknowledged to the Australian Lawyers Alliance that this Inquiry was restricted to an assessment of individuals charged with people smuggling only, and not individuals charged with fishing offences. Therefore, any instances of faulty age determination of Indonesian teenagers remains yet to be seen.

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The high rate of imprisonment and low rate of conviction evidences that the apprehension at sea is untoward.

In 2006 to 2007, 1034 foreign fishers were placed in immigration detention at the Northern Immigration Detention Centre. In 2007 – 8, 1020 foreign fishers were detained.

From 1 July 2008 to 30 June 2009, 169 foreign fishers were placed in immigration detention in the Northern Immigration Detention Centre in Darwin. From 1 July 2009 to 6 November 2009, 51 illegal foreign fishers were detained at the Northern Immigration Detention Centre.

Between 1 July 2008 and 31 October 2009, 261 illegal foreign fishers were apprehended for suspected breaches against fisheries legislation.[4] Of these 261 people, 98 were convicted for offences under fisheries legislation.[5]

STEPS BEING TAKEN TO PREVENT SIMILAR INCIDENTS

The Customs Review Report made five brief recommendations, none of which address the information that we have raised within our submission.

As we have described, Australia's maritime policy is one which has caused and continues to cause miscarriages of justice for many hundreds of Indonesian fishermen.

It is unknown as to how many further incursions into Indonesia's exclusive economic zone have indeed occurred.

Ultimately, these instances were occurrences simply waiting to happen.

The focus by the Australian navy and aggressive crackdown on foreign fishing vessels over the past decade has fostered unwieldy performance based on undue aggression.

Annual reports of the Department of Customs and Border Protection lists the number of apprehensions of foreign fishing vessels as a key performance indicator, or even a 'highlight' of the year's achievements.

Such a response to the trauma sustained by individuals in these situations, is lacking in a basic respect for human dignity.

We also believe that the incursions that are the subject of this Inquiry, were instances were waiting to happen, as they are a fulfilment of the Prime Minister's

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election promises to 'turn back the boats'.

The enforced return of asylum seeking boats to the Indonesian coastline is an occurrence that we do not believe to be 'inadvertent', but intentional: another step in the proposed 'deterrence' policy being aggressively pursued by the Australian government.

The right to seek asylum is a human right, one attached to a person's inalienable dignity as a human being.

The Australian government's policy on refugees is sadly lacking, and has been criticised by Human Rights Watch as 'draconian' in its *World Report 2014*. Human Rights Watch also identified that Australia has 'damaged its record and its potential to be a regional human rights leader by persistently undercutting refugee protections', and condemned Australian contemporary politics as 'scare mongering'.

In 2012, the European Court of Human Rights held Italy liable for violating the human rights of asylum seekers who were intercepted at sea and taken to Libya. Australia could place itself in a similar position.

CONCLUSION

We believe that genuine steps to prevent further incidences of breaches of Indonesian waters also needs to involve a comprehensive review of the treatment of Indonesian fishermen, including the approach to maritime boundary policing. Failure to do so, means that incursions may continue to occur.

Seeds were sown already for incursions in relation to the treatment of asylum seekers. These seeds found fertile ground in the treatment of Indonesian fishermen, and are continuing to bear fruit in the treatment of other vulnerable people: asylum seekers.

At the root, is the issue that the Australian navy must respect and adhere to international law and act in accordance with its responsibility and in accordance with the common law and its duty of care. Between friendly nations, the interface where maritime borders meet should be founded in cooperation and collaboration and not a constant sore undermining the global relationship between Australia and Indonesia. Genuine partnership in the Timor Sea may well revive the currently strained relationship.

It must be acknowledged that breaches of another sovereign state's waters do not only occur in relation to Australia's failed refugee policy, but in its maritime policy

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more largely, which incorporates fishing as well as the movement of people.

Until this recognition occurs, next steps to resolve this situation will be incomplete.

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[1] Australian Government, Department of Customs and Border Protection, Annual Report 2010 – 11, at xii.
[2] See SBS, 'Australian naval incursions blamed on errors,' 19 February 2014. Accessed 20 March 2014 at http://www.sbs.com.au/news/article/2014/02/19/australian-naval-incursions-blamed-errors
[3] See Australian Lawyers Alliance, 'Understanding the complexities: People smuggling, deterrence and intersection with Australia's maritime regulation' (Nov 2011).
[4] Senate Rural and Regional Affairs and Transport Legislation Committee, Answers to Questions on Notice, Supplementary Budget Estimates October 2009, Question AFMA 14, Legal and Constitutional Legislation Committee Hansard Page 122 (20/10/2009).
[5] Ibid.

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