THE UNIVERSITY OF QUEENSLAND
AUSTRALIA

T.C. Beirne School of Law
CRICOS PROVIDER NUMBER 00025B

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

24 July 2015

[By Electronic Submission]

Dear Ms Dunstone

Inquiry into the payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats

We refer to the call for submissions to the Inquiry being undertaken by the Legal and Constitutional Affairs References Committee into the possible payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats according to the terms of reference established by the Senate on 24 June 2014.

We have expertise in the fields of public international law and administrative law. Our submission will therefore principally focus on international legal issues and administrative law issues raised by paragraph (f) of the Senate's terms of reference for the inquiry, namely 'the legality, under international and domestic law, of … [any money paid to anyone on board a vessel *en route* to Australia or New Zealand by any Customs, Immigration or other Commonwealth officer from September 2013 to date]'. We shall also briefly address potential criminal and tortious liability under Australian Law and potential criminal liability and issues of immunity under Indonesian law.

Should you require any further information, please do not hesitate to contact us.

Yours sincerely

Dr Anthony E Cassimatis
BA LLB (*Hons*) (*Qld*) LLM (*Cantab*) PhD (*Qld*)
Associate Professor (Reader) in Law

Ms Catherine Drummond
BA LLB (*Hons*) (*Qld*) LLM (Class I) (*Cantab*)
Visiting Scholar, TC Beirne School of Law

CONTENTS

I. INTRODUCTION AND RELEVANT FACTUAL CIRCUMSTANCES

Media reports[1] indicate that an Indonesia fishing vessel departed from the southern coast of West Java on 5 May 2015 carrying nationals from Bangladesh, Sri Lanka and Myanmar (including three children and a pregnant woman) who intended to seek asylum in New Zealand. Australian government vessels made contact with the vessel on multiple occasions and in waters off the coast of East Timor (presumably in or near East Timor's Exclusive Economic Zone) eventually required the vessel to sail to waters near Ashmore Reef (presumably within Australia's Territorial Sea). It was at this time that the alleged payments totalling approximately $US31,000 were made to the crew of the Indonesian fishing vessel. Australian officials then provided two Australian owned vessels which were used to transport the persons who had been on board the Indonesian fishing vessel towards the coast of the Indonesian Island of Rote and West Timor. One of these two vessels then ran out of fuel and those on board that vessel were transferred to the other vessel which then ran aground near Landu and Rote Islands on 31 May 2015. All those on board either swam ashore or were rescued by local villagers.

We note that the making of such payments by Australian officials has been denied by the Minister for Immigration and the Minister for Foreign Affairs.[2] We also note that the Prime Minister, in a media interview on 12 June, refused to confirm or deny whether such payments have ever been made.[3] Media reports have also indicated that the payments may have been made by an official of the Australian Secret Intelligence Agency (ASIS).[4] Concerns have also been raised in the media regarding payments made by the previous Labor government.[5]

Given the uncertainty regarding the underlying facts, this submission will address the following possible factual scenarios:

1. That cash payments were made by a Commonwealth Officer or Officers to persons in command of boats carrying potential asylum seekers while those boats were within Australia's Territorial Sea off Ashmore Reef;
2. Those cash payments were made by a Commonwealth Officer or Officers who were staff members or agents of ASIS; and
3. That other relevant actions by Commonwealth Officers occurred in the Exclusive Economic Zones of Australia, Indonesia and/or East Timor.

---

[1] See, for example, George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, 17 June 2015, <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472>.

[2] See, for example, Claire Phipps, 'Did Australia pay people-smugglers to turn back asylum seekers?', *The Guardian*, 17 June 2015, <http://www.theguardian.com/world/2015/jun/17/did-australia-pay-people-smugglers-to-turn-back-boats>.

[3] See, for example, Daniel Hurst, 'Tony Abbott refuses to rule out paying people smugglers to turn back boats', *The Guardian*, 12 June 2015, <http://www.theguardian.com/australia-news/2015/jun/12/tony-abbott-refuses-to-rule-out-paying-people-smugglers-to-turn-back-boats>.

[4] See, for example, Lenore Taylor, 'Any payments to people smugglers "may have broken Australian law"', *The Guardian*, 15 June 2015, <http://www.theguardian.com/australia-news/2015/jun/15/any-payments-to-people-smugglers-may-have-broken-australian-law>.

[5] See, for example, Emma Griffiths and Matthew Doran, 'Bill Shorten won't comment on whether authorities paid people smugglers in Indonesia when Labor was in power', *ABC New*, 17 June 2015, <http://www.abc.net.au/news/2015-06-16/bill-shorten-refuses-to-say-if-labor-paid-people-smugglers/6550268>.

II. SUMMARY CONCLUSIONS

In summary, our conclusions as to the legality of the alleged conduct by the Commonwealth government, including any alleged payment of cash or other inducements to people smugglers, are as follows.

Under international law:

- The alleged conduct of the Australian officials constitutes breaches of the *Protocol against the Smuggling of Migrants by Land, Sea and Air, to the United Nations Convention against Transnational Organized Crime*;
- The alleged interdiction of the vessel may have breached the *United Nations Convention on the Law of the Sea* and equivalent customary international law obligations; and
- The alleged conduct of the Australian officials may have constituted a breach of the *Agreement between Australia and Indonesia on the Framework for Security Cooperation* (the *Lombok Treaty*) and the Joint Understanding on a Code of Conduct in Implementation of the *Lombok Treaty*.

Under Australian domestic law:

- The alleged payments would have constituted a breach of the *Criminal Code* 1995 (Cth);
- The constitutional writ of prohibition may be available to prohibit future payments to people smugglers;
- The alleged payments and releasing asylum including children and a pregnant into the hands of people smugglers and providing a vessel with insufficient fuel raises the potential for tortious liability notwithstanding the immunity contained in section 14 of the *Intelligence Services Act* 2001 (Cth).

Under Indonesian law:

- The alleged payments would have constituted a breach of the Indonesian Law 6/2011 on Immigration;
- ASIS officers are not entitled to the statutory immunity provided by section 14 *Intelligence Service Act* 2001 (Cth) before Indonesian courts; and
- If Australia acknowledged that the alleged conduct of the Australian officials occurred and accepted it to be the conduct of an organ Australia as a State under international law, the Australian officials would be entitled to benefit from the protection of State immunity from proceedings in Indonesian courts. If Australia refused to acknowledge and accept the alleged conduct as conduct of Australia under international law, Australian officials involved in the payment of funds to people smugglers would not benefit from any immunity under international law before Indonesian courts.

III. POTENTIAL BREACHES OF INTERNATIONAL LAW

A. Protocol against the Smuggling of Migrants by Land, Sea and Air (and related obligations under the law of the sea)

The *Protocol against the Smuggling of Migrants by Land, Sea and Air* ("*Migrant Smuggling Protocol*")[6] supplements the *United Nations Convention against Transnational Organized Crime*.[7] The Convention and Protocol are intended to be interpreted together, taking into account the purpose of

[6] Concluded 15 November 2000, entered into force 28 January 2004, [2004] ATS 11, 2241 UNTS 507.
[7] Concluded 15 November 2000, entered into force 29 September 2003, [2004] ATS 12, 2225 UNTS 209.

the Protocol.[8] Australia and Indonesia are both parties to the *Convention against Transnational Organized Crime* and the *Migrant Smuggling Protocol*.[9]

(i) Migrant smuggling offences and the nature of suppression instruments

Article 6 of the *Migrant Smuggling Protocol* obliges States Parties to criminalise certain migrant smuggling offences. It provides, in relevant part:

> 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:
>
> (a) The smuggling of migrants;
>
> …
>
> 2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
>
> (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
>
> (b) Participating as an accomplice in an offence established in accordance with paragraph 1 (a) … of this article …;
>
> (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.
>
> …

The Migrant Smuggling Protocol defines the 'smuggling of migrants' in Article 3(a) 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 a permanent resident[.]

The *Migrant Smuggling Protocol* is, in respect of the migrant smuggling offences, a suppression instrument. That is, it obliges States Parties to criminalise migrant smuggling offences in their domestic legal systems. This is the extent of the obligation contained in Article 6. It does not create an offence under international law and it does not directly oblige Australia as a State not to engage in migrant smuggling. Therefore, even if the acts or omissions of Australian officials meet the definition of a migrant smuggling offence under the Protocol, it would be incorrect to say that Australia had breached Article 6 of the Migrant Smuggling Protocol by committing, attempting to commit, participating as an accomplice in or organising or directing migrant smuggling. The only way that Australia could breach Article 6 is if it failed to adopt domestic legislation to criminalise the migrant smuggling offences specified in Article 6. Australia has criminalised those migrant smuggling offences through sections 11.1, 11.2, 73.1, 73.2, 73.3, 73.3A and 73.4 of the *Criminal Code* 1995 (Cth), less the Protocol's requirement that the offences be motivated by a financial or other material benefit.[10]

[8] *Convention against Transnational Organized Crime*, Article 37(4); *Migrant Smuggling Protocol*, Article 1(1).

[9] Australia ratified both the Convention and Protocol on 27 May 2004. Indonesia ratified the Convention on 20 April 2009 and the Protocol on 28 September 2009.

[10] Australia's criminalisation of migrant smuggling offences is broader than that required by the Protocol, and as such, is not a breach of Article 6 of the Migrant Smuggling Protocol. Cf Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (2014), 366.

If Australian officials were to found to have engaged in conduct that met the definition of migrant smuggling under the *Migrant Smuggling Protocol*, those officials would be liable to prosecution pursuant to the relevant provisions of the *Criminal Code* (unless a statutory immunity applied[11]).

Under the law of State responsibility, Australia is responsible for the acts of its organs, including individual officials, where those acts constitute a breach of an international obligation.[12] On our analysis, if the allegations are true, Australia has breached the *Migrant Smuggling Protocol* in a number of ways, not limited to a finding that the conduct of Australian officials meets the definition of migrant smuggling under the Protocol.

(ii) Acting contrary to the purpose of the Migrant Smuggling Protocol (Article 2) and related obligations

Article 2. Statement of Purpose

> The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

There are three purposes of the Protocol:

(a) To prevent and combat the smuggling of migrants;
(b) To protect the rights of smuggled migrants; and
(c) To promote cooperation among States Parties to prevent and combat migrant smuggling.

(a) <u>To prevent and combat the smuggling of migrants</u>

First, that Australia not engage in migrant smuggling through its officials is implied in the purpose of the *Migrant Smuggling Protocol* to prevent and combat migrant smuggling. If the conduct of Australian officials meets the definition of migrant smuggling under the Protocol, Australia would undeniably have acted contrary to the purpose of the Protocol to prevent and combat migrant smuggling.

Does the alleged conduct of Australian officials meet the definition of migrant smuggling in the Migrant Smuggling Protocol?

The relevant elements to be considered are:[13]

(1) Procurement:

'Procurement' is not defined in the *Convention against Organized Crime* or the *Migrant Smuggling Protocol* and neither the *travaux preparatoires* nor legislative guides to implementation for either instrument provide any interpretive guidance. Gallagher and David point to the official Spanish and French texts that use the terms '*facilitación*' and '*assurer*' respectively, which suggests that 'procurement' should be understood broadly to refer to facilitation or enablement.[14]

[11] Such as that contained in Articles 14(1) and (2) of the *Intelligence Services Act* 2001 (Cth).
[12] International Law Commission, Articles on State Responsibility (2001), Articles 2, 4.
[13] See *Migrant Smuggling Protocol*, Articles 3(a) and 4.
[14] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (2014), 364-365.

The reported provision of two boats, lifejackets, a map and directions to Indonesia's Rote Island, as well as the payment of approximately $US31,000 to people smugglers by Australian officials for the return of the smuggled persons to Indonesia clearly constitutes 'procurement'.[15]

(2) Illegal entry of a person into a State Party of which the person is not a national or a permanent resident:

'Illegal entry' is defined in Article 3(b) of the Protocol to mean 'crossing borders without complying with the necessary requirements for legal entry into the receiving State'. Article 113 of Indonesian Immigration Law No 6 of 2011 states that any entry into Indonesian territory other than through immigration officers is a violation of Indonesian law.[16]

A media report based on information provided by an Indonesian police document states that when approaching Rote Island, one of the vessels ran out of fuel and the second vessel had to take the passengers from the first vessel on board. The second vessel later crashed onto a reef at Landu Island, near Rote Island, where some passengers made it ashore and the rest were rescued by locals. The crew were later arrested on Rote Island.[17] This report suggests that the proper entry procedures required by Indonesian law were not complied with. The available information about the nationality and residence status of the passengers suggests none were of Indonesian nationality or were permanent residents. This element appears to be satisfied.

(3) In order to obtain, directly or indirectly, a financial or other material benefit:

The term 'financial or other material benefit' is found in both the *Convention against Transnational Organized Crime* and the *Migrant Smuggling Protocol* and should be interpreted consistently.[18] The agreed Interpretive Notes and the Legislative Guide to Implementation of the Convention and Protocol[19] make clear that this term was intended to exclude groups with purely political, social or humanitarian motives and is not limited to financial, monetary or equivalent benefits. It should be understood broadly to include tangible non-monetary or personal benefits, such as sexual gratification.[20] It is clear that what is relevant is benefit to the group, not the private individual.

If the allegations are true, the Australian officials, in the implementation of government policy or directions, sought to obtain and did obtain a political benefit connected to the government's policy "success" in "stopping the boats". As the intention of the Convention and Protocol was to exclude purely political or ideological benefits, this may not be sufficient to satisfy this element. However, the Australian officials also sought to obtain and did obtain the material benefit of the lack of physical presence of the asylum seekers in Australia's territory and the indirect financial benefit of not having to support the cost of detaining and processing the asylum seekers in

[15] George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, 17 June 2015, <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472>.
[16] Indonesian Immigration Law, Number 6 of 2011, <http://www.refworld.org/pdfid/54eedf814.pdf>.
[17] George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, 17 June 2015, <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472>.
[18] *Convention against Transnational Organized Crime*, Article 37(4); *Migrant Smuggling Protocol*, Article 1(1).
[19] Relevant to interpretation: *Vienna Convention on the Law of Treaties*, concluded 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, Articles 31(2)(a) (as regards agreed Interpretative Notes), 32 (as regards the *travaux* which the Legislative Guides speak to).
[20] UNODC, *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crimes and the Protocols thereto (2006), 17; UNODC, Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (2004), 13, 333-334.

Australia's offshore detention centres. These benefits may be sufficient to satisfy this element.

(4) Transnational in nature and involving an 'organized criminal group':

Article 4 of the *Migrant Smuggling Protocol* concerns the scope of application of the Protocol. It requires that migrant smuggling offences be transnational in nature and involve an 'organized criminal group'. The alleged incident was transnational in nature, insofar as it involved Australian officials providing the means and payment for the return journey while in Australian territory and/or territorial waters (Ashmore Reef) and the offence was to be completed in Indonesian waters and/or territory.[21] Article 2 of the *Convention against Transnational Organized Crime* defines an 'organized criminal group' as a:

> structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit[.]

It is unclear how many Australian officials were involved in the alleged incident. It is presumed that more than three officials were involved, given the presence of an Australian Customs vessel and an Australian Navy vessel, and the number of persons that would have been required to facilitate the transfer of 65 asylum seekers from the initial people smuggling boat onto the Navy ship and then back into the two vessels they were to undertake the return journey on.[22] It is also presumed that the officials would have had to act in concert for the purpose of facilitating the turn around and payment for return of the people smugglers and their passengers. The elements of having the aim of committing an offence established in accordance with the Convention (migrant smuggling[23]) in order to obtain a financial or other material benefit may be satisfied for the same reasoning as that given earlier in this submission.

(5) Participation as an accomplice, or organising or directing

These offences are designed to capture the different roles played by multiple persons in the commission of migrant smuggling. In order for these offences to be committed, they must be connected with an underlying offence of people smuggling.

Media reports suggest the crew of the Indonesian vessel were recruited by people smugglers with the promise of being paid 150 million rupiah ($14,000) to transport the 65 asylum seekers to New Zealand.[24] It is therefore a sound assumption that the Indonesian vessel was engaged in people smuggling when intercepted by Australian vessels. If the crew agreed to return the passengers to Indonesia to obtain a financial or other material benefit, such as a monetary payment or to avoid criminal prosecution in Australia, then the return journey to Indonesia would also fall within the meaning of migrant smuggling under the Protocol.

Interdiction of the people smuggling vessel by Australian customs and naval vessels, extended interrogation of the vessel's captain, the potential threat of prosecution under the *Migration Act* 1958 (Cth) if they did not agree to Australia's request of returning to Indonesia, the provision of two boats, lifejackets, a map, directions and the payment of approximately $US31,000 to the

[21] George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, 17 June 2015, <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472>.

[22] George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, 17 June 2015, <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472>.

[23] *Migrant Smuggling Protocol*, Article 1(3).

[24] George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, 17 June 2015, <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472>.

captain and crew could constitute either participation as an accomplice or organising or directing migrant smuggling under the Protocol.

(6) Aggravated offences

It is worth noting that Article 6(3) obliges States Parties to adopt legislative and other measures as necessary to establish aggravating circumstances to migrant smuggling offences, including circumstances that endanger, or are likely to endanger, the lives or safety of the migrants concerned.[25] Media reports state that one of the wooden boats which Australian officials allegedly gave people smugglers to return their passengers to Indonesia ran out of fuel, forcing the second vessel to take its passengers on board. That second vessel then crashed on a reef near an Indonesian island. This suggests that insufficient fuel was provided for the journey which is inherently dangerous and was likely to endanger the lives and safety of the migrants concerned, which included at least one pregnant woman and three children.[26]

Conclusion

It is arguable that the conduct of Australian officials falls within the scope of one of the migrant smuggling offences as set out in Article 6 (read in conjunction with Article 3(a) and 4) of the *Migrant Smuggling Protocol*. As such, Australia has clearly acted contrary to the purpose of the Protocol to prevent and combat migrant smuggling.

Second, even if the conduct of Australian officials did not itself meet the Protocol's definition of one of the migrant smuggling offences, if the conduct in any way encouraged the return journey in late May 2015 that constituted a further offence of migrant smuggling, such conduct is directly contrary to the Protocol's purpose of preventing and combatting of migrant smuggling.

Third, the alleged payment made in May 2015, in isolation or in addition to any previous payments that have been made by the present or former Australian governments, plausibly creates an incentive for people smugglers to continue their operations in the hope that they will be paid both for their initial trip to Australia or New Zealand and again to return the persons being smuggled, undermines and is clearly inconsistent the purpose of the Protocol to prevent and combat migrant smuggling.

(b) To protect the rights of smuggled migrants

The Migrant Smuggling Protocol recognises that efforts to combat people smuggling may adversely impact on the rights of the migrant passengers. The protection of the rights of migrants forms part of the purpose of the Protocol, as set out in Article 2, but is also the subject of more specific provisions in Articles 9(1)(a) (ensure safety and humane treatment of persons on board) and Article 16 (protection and assistance measures) of the Protocol. Chief among these rights is the right to life and to not be subjected to cruel, inhuman or degrading treatment or punishment and the obligation to provide assistance to migrants whose lives or safety are endangered by reason of their being smuggled.[27]

As noted above, the provision of insufficient fuel for the return journey to Indonesia was inherently dangerous and led to potential overcrowding on the second vessel, which ultimately crashed on a

[25] *Migrant Smuggling Protocol*, Article 6(3)(a). This is implemented in section 73.2 *Criminal Code* 1995 (Cth).
[26] George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, 17 June 2015, <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472>.
[27] *Migrant Smuggling Protocol*, Articles 16(1), 16(3).

reef. The alleged conduct of Australian officials in facilitating this journey that did endanger the lives and safety of the migrants concerned, which included at least one pregnant woman and three children,[28] is inconsistent with the purpose of the Protocol to protect the rights of smuggled migrants and, arguably, with Articles 9(1)(a), 16(1), 16(3) and 16(4). Depending on the facts, Australia may have also violated obligations it has under the *International Convention for the Safety of Life at Sea*.[29]

(c) To promote cooperation among States Parties to prevent and combat migrant smuggling

See (iii). Any violation of the obligation to cooperate would also be inconsistent with the Protocol's purpose to promote cooperation to prevent and combat migrant smuggling.

(iii) Acting contrary to the obligation to cooperate to the fullest extent in the prevention and suppression of people smuggling (Article 7)

Article 7. Cooperation

> States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

First, that Australia not engage in migrant smuggling through its officials is implied in the obligation to cooperate to the fullest extent possible to prevent and suppress migrant smuggling by sea in Article 7. If the conduct of Australian officials meets the definition of migrant smuggling under the Protocol, as discussed above, Australia would have breached its obligation to cooperate to the fullest extent to prevent and suppress migrant smuggling by sea.

Second, Australia's failure to consult with Indonesia over the alleged May 2015 return of asylum seekers breaches the obligation to cooperate in Article 7. Article 7 imposes a specific and ongoing obligation on States Parties to cooperate to the fullest extent in the prevention and suppression of migrant smuggling by sea. It is acknowledged that Australia and Indonesia have cooperated in relation to combatting and disrupting people smuggling, including through the regional platform provided by the 2002 Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime and the 2010 bilateral Implementation Framework for Cooperation to Combat People Smuggling and Trafficking.[30] While this obligation to cooperate to the fullest extent possible may not require consultation with Indonesia on every aspect of Australia's policies to disrupt people smuggling, it would certainly require Indonesian consultation with respect to Australian practices directly involving Indonesian waters and territory, which the alleged payment of people smugglers to return persons to Indonesia clearly did. The alleged payment and instructed return of smuggled persons occurred without Indonesia's knowledge or consent, evidenced by the Indonesian Foreign Ministry's requests for information which went unanswered.[31] This is inconsistent with the obligation

[28] See also Article 16(4) of the *Migrant Smuggling Protocol* which provides that States Parties must take into account the special needs of women and children in applying the protocol.

[29] Concluded on 1 November 1974, entered into force 25 May 1980, 1184 UNTS 277. This Convention came into effect for Australia on 17 November 1983.

[30] For the Bali Process, see <http://www.baliprocess.net/>. The 2010 Implementation Framework for Cooperation to Combat People Smuggling and Trafficking falls under the 2006 *Agreement on the Framework for Security Cooperation* (see below). See also Report of the Expert Panel on Asylum Seekers (August 2012), paragraphs 3.20-3.21, <http://artsonline.monash.edu.au/thebordercrossingobservatory/files/2015/03/expert_panel_on_asylum_seekers_full_report.pdf>.

[31] AAP, 'Jakarta seeks answers on "boat payment"', *SBS News*, 13 June 2015, <http://www.sbs.com.au/news/article/2015/06/13/jakarta-seeks-answers-boat-payment>.

to cooperate to the fullest extent possible and undermines the purpose of the *Migrant Smuggling Protocol* to promote cooperation in preventing and combatting migrant smuggling.

Further, the incident may also threaten Indonesia's willingness to cooperate with Australia on people smuggling matters in the future, and the bilateral relationship more broadly.[32] Indonesian Foreign Ministry spokesman Arrmanatha Nasir has repeatedly said that Australia may have committed to cooperate on people smuggling, but there was little evidence of this occurring in practice.[33]

(iv) Acting contrary to obligations owed to Indonesia as the flag State (Article 8) and associated breaches of the international law of the sea

Media reports suggest the initial people smuggling vessel was an Indonesian fishing vessel.[34] It is unclear whether the vessel was bearing the marks of the Indonesian registry or flew an Indonesian flag. There are also conflicting reports as to what maritime zone the vessel was in when it was intercepted by Australians customs and naval vessels. One ABC News article reports that asylum seekers viewed their GPS at the point they were intercepted by Australian vessels and it showed they were in 'international waters'.[35] Given the overlapping Exclusive Economic Zones (EEZs) of Indonesia, Australia and Timor Leste[36] it is presumed that the asylum seekers were not in the High Seas, but instead were in the EEZ of Indonesia, Australia or Timor Leste and were exercising freedom of navigation in accordance with the *United Nations Convention for the Law of the Sea* (UNCLOS) and the equivalent customary international law freedom of navigation.[37]

If the vessel was an Indonesian flagged or registered fishing vessel and it was exercising freedom of navigation consistent with the international law of the sea, Australia had obligations under Article 8 of the *Migrant Smuggling Protocol* towards Indonesia. The most important of those obligations are:

- To notify Indonesia where Australia had reasonable grounds to suspect the vessel was engaged in migrant smuggling and request confirmation of registry;
- To request authorisation from Indonesia to take appropriate measures with regard to the vessel, including to board, search and take other appropriate measures as authorised if evidence of migrant smuggling is found; and

[32] It may be recalled that after revelations about Australia's surveillance of the Indonesian Prime Minister in 2013, Indonesia suspended all security cooperation activities with Australia: George Roberts, 'Julie Bishop signs joint understanding agreement with Indonesia to return relationship to normal', *ABC News*, 28 August 2014, <http://www.abc.net.au/news/2014-08-28/bishop-signs-joint-understanding-agreement-with-indonesia/5703656>.

[33] Jewel Topsfield, Sarah Whyte and Karuni Rompies, 'Senate to launch inquiry into people smuggler payment claims', The Sydney Morning Herald, 25 June 2015, <http://www.smh.com.au/federal-politics/political-news/senate-to-launch-inquiry-into-people-smuggler-payment-claims-20150625-ghwt0a.html>.

[34] George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, 17 June 2015, <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472>.

[35] George Roberts and Matthew Doran, 'Asylum seekers boat at centre of turn-back payment allegations ask why they were intercepted in international waters', *ABC News*, 19 June 2015, <http://www.abc.net.au/news/2015-06-17/boat-allegedly-paid-turn-back-stopped-international-waters/6553966>.

[36] See the interactive map of overlapping EEZs on *Marineregions.org* <http://www.marineregions.org/eezsovereign.php?sov_id=231>.

[37] Concluded on 10 December 1982, entered into force 16 November 1994, 1833 UNTS 3. Australia ratified UNCLOS on 5 October 1994. Indonesia ratified UNCLOS on 3 February 1986, Article s 58(1), 87(1)(a).

- To take no additional measures without the express authorisation of Indonesia except to relieve imminent danger to the lives of persons or those deriving from other bilateral or multilateral agreements.[38]

In light of the Indonesian Foreign Ministry's surprise and request for information in relation to the May 2015 incident, it is a sound assumption that if the vessel was Indonesian flagged, Australia breached these Article 8 obligations. Such conduct also constitutes breaches of Articles 58(1) and 110[39] of UNCLOS and their customary equivalents.

If the vessel was not bearing the marks of the Indonesian registry or Indonesian flagged and was, therefore, a "stateless" vessel, as many people smuggling vessels are, the situation is more complicated. UNCLOS gives a right for naval vessels to visit (board and inspect) a vessel without nationality on the High Seas or in an EEZ,[40] but it does not specify what actions beyond boarding and inspecting may be taken. The drafters of the *Migrant Smuggling Protocol* were cognisant of the need to ensure that the Protocol was drafted in a full conformity with the international law of the sea.[41] Article 8(7) of the Protocol provides that States Parties with reasonable grounds to suspect a vessel is engaged in people smuggling and is without nationality may board and search the vessel and if evidence confirming the suspicion is found, that State Party may take appropriate measures in accordance with relevant domestic and international law. The problem is that international law does not expressly permit any action beyond boarding and inspection. Gallagher and David set out the diametrically opposed positions on this issue: one being that vessels without nationality are subject to universal enforcement jurisdiction of all States, and the other being that enforcement action such as interdiction is not permitted without some further jurisdictional nexus or permissive rule, such as those that carefully circumscribe the situations in which enforcement action can be taken against flagged vessels.[42] There might, therefore, be a possibility that Australia's interdiction of the vessel in the EEZ (rather than, for instance, in Australia's contiguous zone) violated Article 8(7) of the *Migrant Smuggling Protocol*.

[38] See also *Migrant Smuggling Protocol*, Article 9(3) which provides that no measures taken should interfere with the flag State's jurisdiction in respect of administrative, technical and social matters.

[39] Article 110 of UNCLOS deals with the right of visit on the High Seas (the right to board and inspect). It provides that unless a power of interference is conferred by another treaty or by one of the enumerated sub-provisions (none of which are relevant here), there is no right of visit of a ship exercising freedom of navigation (Article 8 would be the relevant provision of the *Migrant Smuggling Protocol* that confers a right of interference, but such right is conditioned on authorisation by the flag State in accordance with Article 8). Article 58(2) of UNCLOS provides that Article 110 applies to vessels in the EEZ.

[40] Articles 58(2), 110(1)(d).

[41] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (2014), 78; Migrant Smuggling Protocol, Article 7 ("in accordance with the international law of the sea").

[42] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (2014), 421-423. See UNCLOS, Article 110.

B. Agreement Between Australia and Indonesia on the Framework for Security Cooperation (the Lombok Treaty) and the Joint Understanding on a Code of Conduct

The *Lombok Treaty*[43] is a bilateral defence and security cooperation agreement. Its nature as a framework agreement is to set out broad principles guiding defence and security cooperation between the parties with a view to the conclusion of separate arrangements in specific areas of cooperation covered by the *Lombok Treaty*.[44] Preventing and combatting people smuggling is prioritised by the *Lombok Treaty* as one of the transnational crimes to be addressed through law enforcement cooperation.[45]

Article 2(3) of the *Lombok Treaty* provides a commitment that Australia and Indonesia:

> consistent with their respective domestic laws and international obligations, shall not in any manner support or participate in activities by any person or entity which constitutes a threat to the stability, sovereignty or territorial integrity of the other Party…[46]

Whether or not Australia paying people smugglers to take migrants to Indonesia constitutes a threat to Indonesia's territorial integrity is a matter that could be debated. The interpretation of Article 2(3) was addressed by submissions to JSCOT during its consideration of the *Lombok Treaty*. One concern that was raised was that it depends entirely on how one defines 'support', 'participate' and 'threat'.[47] It is not outside the realm of possibility that if Indonesia were to pay people smugglers to bring migrants to Australia that the Australian government's position would be, consistent with its narrative of border "protection", that Australia's territorial integrity may be threatened.

More pertinently, in August 2014, Australia and Indonesia signed a Joint Understanding on a Code of Conduct in implementation of the *Lombok Treaty*.[48] It provides, in relevant part, that '[t]he Parties

---

[43] Concluded 13 November 2006, entered into force 7 February 2008, [2008] ATS 3, 2649 UNTS 103.

[44] See preambular paragraph 9 and Article 6(1) ('The Parties shall take any necessary steps to ensure effective implementation of this Agreement including through conclusion of separate arrangements on specific areas of cooperation.').

[45] *Lombok Treaty*, Article 3(7)(a). In 2010, Australia and Indonesia signed an Implementation Framework for Cooperation to Combat People Smuggling and Trafficking in Persons pursuant to the Lombok Treaty (Australia-Indonesia Joint Statement, Canberra, 10 March 2010, <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/REEW6/upload_binary/reew61.pdf >). The text of this Implementation Framework does not appear to be publicly available. The 2012 Report of the Expert Panel on Asylum Seekers states that it 'underpins bilateral cooperation and focuses on pursuing broader partnerships on issues such as people trafficking, protection claims, people smuggling and asylum seekers': Report of the Expert Panel on Asylum Seekers (August 2012), 160, <http://artsonline.monash.edu.au/thebordercrossingobservatory/files/2015/03/expert_panel_on_asylum_seekers_full_report.pdf>.

[46] It is worth noting that the impetus behind the inclusion of Article 2(3) in the *Lombok Treaty* was, at least on Indonesia's part, asylum seeker and immigration related. In early 2006, Australia decided to grant expedited temporary protection visas to a number of West Papuan asylum seekers, causing diplomatic tension with Indonesia over what Indonesia perceived to be criticism of its policy in West Papua and potential Australian support for West Papuan separatists. See Hugh White, 'Security: The Lombok Pact's Empty Promise' (2006) *Far Eastern Economic Review* 26. See also JSCOT Report 84 (June 2007) Chapter 4.

[47] JSCOT Report 84 (June 2007) Chapter 4, para 4.8.

[48] Concluded 28 August 2014. Press Conference, Bali – Joint Understanding on a Code of Conduct between the Republic of Indonesia and Australia, Transcript, 28 August 2014, <http://foreignminister.gov.au/transcripts/Pages/2014/jb_tr_140828.aspx?ministerid=4> (Marty Natalegawa: '[T]he Joint Understanding that we have just now signed is part and parcel of the broader Lombok Treaty,

will not use any of their intelligence, including surveillance capacities, or other resources, in ways that would harm the interests of the Parties.'[49] It is clearly the case that the payment of funds by Australian officials to people smugglers to take migrants to enter Indonesia illegally constitutes the use of Australian resources to harm the interests of Indonesia. According to at least one media report, the spokesman for the Indonesian Coordinating Ministry for Politics, Law and Security, Agus Barnas, and an international law expert from the University of Indonesia, Hikmahanto Juwana, agree, and have publicly stated that Australia has breached the Joint Understanding by using their intelligence services, including surveillance capacities, or other resources, including the payment of money, in ways that would harm the interests of Indonesia.[50]

IV. POTENTIAL BREACHES OF AUSTRALIAN LAW

A. Criminal Code 1995 (Cth)

We support the submissions of Ben Saul, Civil Liberties Australia and the Andrew and Renata Kaldor Centre for International Refugee Law as to the position that the alleged conduct of the Australian officials could constitute violations of sections 73.1, 73.2, 73.3 and 73.3A of the *Criminal Code* 1995 (Cth), including by operation of section 11.2 (complicity and common purpose). We also support the submission of Civil Liberties Australia that emphasises an investigation should take place and is not dependent upon the consent of the Attorney-General, which is required only for the commencement of a prosecution according to section 73.5 of the *Criminal Code* 1995 (Cth).

B. Administrative Law

As noted in the other submissions made to the committee, staff members and agents of ASIS are immune from criminal and civil liability under Australian law by operation of section 14 of the *Intelligence Services Act* 2001 (Cth). Such immunity is dependent on showing that the acts in question were 'done in the proper performance of a function of the agency'. In our submission, this would be difficult to prove. The functions of ASIS are set out in section 6(1) of the *Intelligence Services Act* 2001 (Cth) and concern primarily intelligence gathering and counter-intelligence activities.[51] A broader function is specified in section 6(1)(e) which permits ASIS staff and agents to 'undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia'. This open-ended function enables the Minister to order ASIS staff and agents to engage in operational activities, including those to prevent and disrupt people smuggling. Despite this broad function, it still seems unlikely that conduct which Australia has criminalised and assumed international obligations to prevent and suppress could be regarded as being done in the proper performance of the functions of ASIS. If the alleged incident were part of some covert operation to gain the trust of people smugglers for the purpose of gathering intelligence to prevent and disrupt people smuggling, then the case may be stronger for it falling within the proper performance of ASIS functions. On the available facts, this is not the case.

---

which the two countries have already signed.' Julie Bishop: 'As Pak Marty indicated, the Joint Understanding is within the framework of the security cooperation treaty, the 2006 Lombok Treaty'). Despite being described as part of or an addendum to the *Lombok Treaty*, it does not appear that the Joint Understanding on a Code of Conduct has been tabled before Parliament, referred to the JSCOT or registered with the UN as yet.

[49] Clause 1.

[50] Jewel Topsfield, Sarah Whyte and Karuni Rompies, 'Senate to launch inquiry into people smuggler payment claims', *The Sydney Morning Herald*, 25 June 2015, <http://www.smh.com.au/federal-politics/political-news/senate-to-launch-inquiry-into-people-smuggler-payment-claims-20150625-ghwt0a.html>.

[51] See ss 6(1)(a)-(d).

There may be avenues available through which the question of whether the alleged conduct was carried out in the proper performance of the functions of ASIS can be tested or the conduct itself challenged. These are dealt with below in B.(ii) and C. Relevant to these proceedings, are the provisions of the *Intelligence Services Act* 2001 (Cth) that concern certificates. Under section 14(2B) *Intelligence Services Act* '[t]he Inspector-General of Intelligence and Security may give a certificate in writing certifying any fact relevant to the question of whether an act was done in the proper performance of a function of an agency'. Section 14(2C) provides that '[i]n any proceedings, a certificate given under subsection (2B) is prima facie evidence of the facts certified'. Unlike the position under section 73.5 of the *Criminal Code* 1995 (Cth) in relation to criminal prosecutions for alleged people smuggling, judicial review proceedings do not require the consent of the Attorney-General. Judicial review under section 75(v) of the Constitution also cannot be completely excluded by ordinary legislation such as the *Intelligence Services Act* 2001 (Cth). The original jurisdiction of the High Court to review the legality of conduct of officers of the Commonwealth remains notwithstanding the terms of section 14 of the *Intelligence Services Act* 2001 (Cth). It should also be noted that the Attorney's consent is not required in order to commence proceedings before an Australian court alleging tortious liability.

(i) Extraterritorial application of Australian administrative law

In *CPCF v Minister for Immigration and Border Protection*[52] (*CPCF*), Kiefel J at [276] observed that:

> [t]he actions of officers of the Commonwealth extra-territorially, on the high seas, remain subject to this court's jurisdiction given by s 75(v) of the Constitution in the same way as Defence Force service tribunals, which are constituted by Commonwealth officers[53] and may be conducted outside Australia,[54] are. The statements of Rich J in *R v Bevan; Ex parte Elias and Gordon*[55] imply that his Honour considered that navy personnel on naval vessels on the high seas would have been treated as Commonwealth officers, to whom s 75(v) applied, had they not been transferred with Commonwealth naval vessels to the King's naval forces.

As noted above, the alleged payments by an officer or officers of the Commonwealth appear to have occurred in the Territorial Sea surrounding Ashmore Reef thus avoiding any question of extra-territoriality. It is clear, however, from the above statement of principle that judicial review under section 75(v) of the Constitution would potentially be available in respect of extra-territorial conduct of officers of the Commonwealth, for example, in respect of conduct on the High Seas, or within an EEZ, notably for these purposes that of Australia, Indonesia or Timor Leste.

(ii) Administrative law arguments available regarding the absence of legal authority

Strangers appear to have *locus standi* to seek the constitutional writ of prohibition under section 75(v) of the Constitution.[56] Prohibition could potentially be sought to restrain Commonwealth officers from further payments to people smugglers on the basis that there is no legal authority for the making of such payments. Any attempt to invoke statutory authority to make payments to people smugglers could be challenged according to the principle recently recognised by the High

[52] (2015) 316 ALR 1.
[53] *Haskins v Commonwealth* (2011) 244 CLR 22; 279 ALR 434; [2011] HCA 28 at [56]. [Footnote in original.]
[54] See for instance s 136(b) of the *Defence Force Discipline Act* 1982 (Cth). [Footnote in original.]
[55] (1942) 66 CLR 452 at 462; [1942] ALR 170; [1942] HCA 12. [Footnote in original.]
[56] See, for example, McHugh J in *re McBain; ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [109].

Court of Australia in the context of maritime powers that statutory powers 'need to be exercised in good faith'.[57] According to Gageler J in *CPCF* at [360]:

> It may be accepted to be an implied condition of each maritime power that the maritime officer must act in good faith and that the maritime officer cannot be motivated by considerations which can be judged to be 'definitely extraneous to any objects the legislature could have had in view'.[58]

If non-statutory prerogative authority is sought to be invoked to provide authority for such action, judicial review nonetheless appears available. Keane J in *CPCF* appeared to accept the potential for judicial review of non-statutory powers and functions.[59] The Privy Council in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*[60] arrived at a similar conclusion in relation to contracts entered into by government bodies in cases of 'fraud, corruption or bad faith'.

C. Tortious Liability

As noted above, section 14 of the *Intelligence Services Act* provides for immunity for ASIS staff members and agents for civil liability for acts provided those acts were 'done in the proper performance of a function of the agency'. Again, it would be difficult to demonstrate this in the context of payments to people smugglers.

Seeking to establish tortious liability before Australian courts for such actions also potentially raises jurisdictional issues. If the payments in question and the facilitation by government officials of movement of asylum seekers by people smugglers occurred in Australia's Territorial Sea adjacent to Ashmore Reef then jurisdiction before Australian Courts appears unproblematic. However, even in relation to extra-territorial conduct by Australian government officials, jurisdictional issues regarding tortious liability may not be insurmountable. Gleeson CJ, Gummow, Hayne and Heydon JJ in *Blunden v Commonwealth*[61] observed at [23] that:

> … where … the relevant events giving rise to a 'maritime tort' occurred on the high seas, one asks what body of law other than that in force in the forum has any better claim to be regarded by the forum as the body of law dispositive of the action litigated in the forum?[62]

Hayne and Bell JJ in *CPCF* also acknowledged the potential for jurisdiction in relation to extra-territorial 'maritime torts' at [146]. And at [107] Hayne and Bell JJ explicitly asked 'whether an officer of the Commonwealth could lawfully be authorised to exercise a statutory power of the kind in issue in this case without reasonable care for the safety of the person concerned'.[63]

---

[57] See, for example, Crennan J in *CPCF* at [200] citing: *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; [1948] 1 ALR 89 at 94–5; [1947] HCA 21 per Dixon J; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; 252 ALR 471; [2009] HCA 4 at [59] per French CJ; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144; 280 ALR 18; 122 ALD 237; [2011] HCA 32 at [59] per French CJ, at [109] per Gummow, Hayne, Crennan and Bell JJ. See also Bingham, *The Rule of Law* (2010), 62.

[58] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; [1948] 1 ALR 89 at 94–5; [1947] HCA 21. [Footnote in original.]

[59] See *CPCF* at [486].

[60] [1994] 1 WLR 521 at 529.

[61] (2003) 218 CLR 330.

[62] Compare Foote, *A Concise Treatise on Private International Law*, 5th ed, 1925, p 524. [Footnote in original.]

[63] Citing *Commonwealth v Mewett* (1997) 191 CLR 471.

Paying people smugglers and releasing asylum seekers into the hands of people smugglers also potentially raises the tort of misfeasance of public office. The relevant tortious principles were considered by the High Court of Australia in *Mengel v Northern Territory*.[64] In the joint judgment of Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ it was observed at 347 that the tort can apply in cases where a government official acts 'with reckless indifference to the harm that is likely to ensue' and with knowledge that the act in question is beyond power.[65] Recalling that the asylum seekers included three children and a pregnant woman and that one of the vessels supplied by Australia appears to have had insufficient fuel, misfeasance of public office cannot be excluded. The conduct of Australian officials in paying people smugglers (a patently unlawful act) and then releasing asylum seekers back into their control raise an arguable case of reckless indifference.

V. POTENTIAL BREACHES OF INDONESIAN LAW

We also support the submission made by Ben Saul and the Andrew and Renata Kaldor Centre for International Refugee Law on the issue of potential offences by Australian officials under the immigration law of Indonesia.

To the extent that the relevant Australian officials whose actions are impugned are ASIS officials, the statutory immunity provided to ASIS officers under section 14 *Intelligence Services Act* 2001 (Cth) would be inapplicable before Indonesian courts.

As to immunity under international law, there are two possible scenarios to be considered. The first is if Australia acknowledges that the alleged conduct occurred and asserts it to be the conduct of an organ of Australia under international law. The second is if Australia refuses to do so.

---

[64] (1995) 185 CLR 307.

[65] According to Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ at 347:

> [t]he cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. Nor is that required by policy or by principle. Policy and principle both suggest that liability should be more closely confined. So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability … . And principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton* … , or which are done with reckless indifference to the harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach.
>
> It may be that analogy with the torts which impose liability on private individuals for the intentional infliction of harm would dictate the conclusion that, provided there is damage, liability for misfeasance in public office should rest on intentional infliction of harm, in the sense that that is the actuating motive, or on an act which the public officer knows is beyond power and which is calculated in the ordinary course to cause harm. However, it is sufficient for present purposes to proceed on the basis accepted as sufficient in *Bourgoin*, namely, that liability requires an act which the public officer knows is beyond power and which involves a foreseeable risk of harm.
>
> If misfeasance in public office is viewed as a counterpart to the torts imposing liability on private individuals for the intentional infliction of harm, there is much to be said for the view that, just as with the tort of inducing a breach of contract, misfeasance in public office is not confined to actual knowledge but extends to the situation in which a public officer recklessly disregards the means of ascertaining the extent of his or her power. However, that is not what was put in this case. The argument was that it is sufficient that the officer concerned ought to have known that he or she lacked power.

First, if Australia acknowledged that the alleged conduct of the Australian officials occurred and accepts it to be the conduct of an organ of Australia as a State under international law, the Australian officials would be entitled to the protection of State immunity from proceedings in Indonesian courts. This is sometimes referred to as 'functional immunity' because it is based on the concept that acts of State officials, acting in their official capacity, are acts of the State and for which the State alone may be responsible in foreign courts. In order for the Australian officials to benefit from State immunity, Australia must verify that the impugned acts were indeed acts within the scope of official duties as organs of Australia. In so claiming the impugned acts to be its own, Australia would be expected to notify the authorities of Indonesia.[66] It makes no difference if the act that is claimed to be an official act of Australia is an alleged violation of international law. International law is clear that State immunity operates as a procedural bar to the commencement of foreign proceedings and is not concerned with an assessment of legality of the conduct concerned.[67] This kind of immunity is to be distinguished from the personal immunity that Head of States and senior officials (such as foreign ministers) enjoy, and also from the personal immunity that diplomats enjoy ('diplomatic immunity'), neither of which is applicable here.

It is possible for a State to waive its immunity in proceedings before foreign courts. However, as a waiver is a renunciation of a right, it is construed narrowly; wavier is not to be presumed. Waivers, generally, must be express or unequivocally implied from conduct of the State that is alleged to have waived their right.[68] But waivers of immunity *must* be express.[69] The ratification of a specific treaty, such as the *Migrant Smuggling Protocol*, is not an express wavier.

Second, if Australia refused to accept the conduct as its own, Australian officials involved would not benefit from any immunity under international law before Indonesian courts. In situations where the government of a State does not wish to acknowledge and accept conduct as its own (which is not uncommon in situations involving covert intelligence operations), State officials can be subject to the criminal jurisdiction of other States. This is illustrated by the domestic criminal responsibility of French security agents before New Zealand courts in relation to the Rainbow Warrior incident.[70]

---

[66] *Certain Questions of Mutual Assistance in Criminal Matters Djibouti v France)* [2008] ICJ Rep 177, [185]-[197] especially [196].

[67] See, most recently, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99, [92]-[97].

[68] *Norwegian Loans (France v Norway) (Preliminary Objections)* [1957] ICJ Rep 9, 26; *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 168, [293].

[69] See, eg, *United Nations Convention on Jurisdictional Immunities of States and Their Property*, concluded 2 December 2004, yet to enter into force, UN Doc A/59/508, Article 7 (neither Australia nor Indonesia have signed but it is regarded to be reflective of customary international law in respect of waiver); *Vienna Convention on Diplomatic Relations*, concluded 18 April 1961, entered into force 24 April 1964, 500 UNTS 95, Article 32(2); *Vienna Convention on Consular Relations*, concluded 24 April 1963, entered into force 19 March 1967, 596 UNTS 261, Article 45(2); *Convention on Special Missions*, concluded on 8 December 1969, entered into force 21 June 1985, 1400 UNTS 231, Article 41(2).

[70] See, for example, Cristina Hoss and Jason Morgan-Foster, 'The Rainbow Warrior', in Rudiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Volume VIII (2012), 627-636.

VI. CONCLUDING OBSERVATIONS

The alleged payments to people smugglers raise serious questions regarding compliance with international law and Australian law. The Australian government's response to these issues also raises concerns regarding respect for the rule of law nationally and internationally. The lack of official information from the Australian government regarding the circumstances surrounding the alleged payments and Australian officials handing over control of asylum seekers to people smugglers also raises serious concerns. Independent oversight is essential to avoid abuse of power and to ensure the protection of the rights of some of the world's most vulnerable human beings. The allegations also raise broader issues regarding the bilateral relationship with Indonesia and ethical issues. This submission has focussed on questions on international and Australian law which are the subject of our legal expertise. We would, however, conclude by emphasising the importance of these broader political and ethical considerations that have not been the focus of this submission.