

## Chapter 2

### Breaches of Indonesian territorial waters

#### Operation Sovereign Borders

2.1 Operation Sovereign Borders (OSB) is a civilian law enforcement operation run as a joint agency taskforce headed by Lieutenant General Angus Campbell, aimed at preventing the maritime arrival of asylum seekers to Australia. OSB commenced on 18 September 2013. The operation was an election commitment of the Coalition, described in two policy documents: the *Coalition's Policy on Regional Deterrence Framework to Combat People Smuggling* (August 2013) and the *Coalition's Operation Sovereign Borders Policy* (July 2013). The *Coalition's Operation Sovereign Borders Policy* included 'instructing the Australian Defence Force to turn back boats where it is safe to do so' as part of a policy intended to deter people smuggling operations to Australia.

2.2 Described as 'military led' the OSB taskforce operates with the support of a range of government agencies, organised into three task groups:

- Detection, Interception and Transfer Task Group—led by the Australian Customs and Border Protection Service (incorporating Border Protection Command);
- Disruption and Deterrence Task Group—led by the Australian Federal Police (AFP); and
- Offshore Detention and Returns Task Group—led by the Department of Immigration and Border Protection (DIBP).<sup>1</sup>

2.3 The commander of OSB, Lieutenant General Campbell, reports to the Minister for Immigration and Border Protection, the Hon Scott Morrison MP, who has portfolio responsibility for OSB.

2.4 Australian vessels supporting OSB activities are monitored from two command centres—the Australian Maritime Security Operations Centre in Canberra, and the military component, Joint Task Force 639, in NORCOM in Darwin.

#### Joint review into breaches of Indonesian territorial waters

2.5 As noted Chapter 1, following the identification of a Royal Australian Navy vessel having breached Indonesian territorial waters in the course of its participation in OSB, Lieutenant General Campbell asked the Chief of the Defence Force and the CEO of Australian Customs and Border Protection Service to conduct a joint review to identify other possible breaches.

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1 *Coalition's Operation Sovereign Borders Policy*, July 2013, p. 12.

***Joint review terms of reference***

2.6 The joint review focused on the facts and circumstances surrounding the entry of Australian vessels into Indonesian waters in connection with OSB during the period 1 December 2013 to 20 January 2014. The terms of reference for the joint review provided that it would:

- Identify instances of entry of Australian vessels into Indonesian waters and determine which could be considered in breach of Australian Government policy.
- Collect evidence on the sequence of events relating to instances of entry into Indonesian waters, including:
  - The planning prior to each activity, including planning by units and by higher headquarters;
  - The tasking of units and vessels and the processes for approving missions and activities;
  - The execution of activities, including time, date and location and whether the activities were executed in Indonesian waters;
  - Applicable plans, orders, instructions, charts, operating procedures, operating policies, briefings and practices relevant to the activities; and
  - Assessment of whether the planning and execution of the activities being considered conformed with the requirements of the applicable documents, and assess the extent to which any failures to conform with requirements may have contributed to the breaches.<sup>2</sup>
- Collect evidence on how instances of entry to Indonesian waters were identified and reported and the adequacy of these actions.
- Determine whether any weaknesses or deficiencies exist in:
  - Preparation and training of personnel involved in planning and executing activities;
  - Planning of activities, including physical and electronic charts and databases;
  - Any applicable orders, instructions, operating procedures, operating policies, briefings and practices; and
  - The post-incident response to the activities.

2.7 The terms of reference also identified the key stakeholders for the review: Department of Defence, Australian Defence Force (ADF), Australian Customs and Border Protection Service (Customs), OSB, Joint Agency Task Force (JATF), Department of Foreign Affairs and Trade, Attorney-General's Department, and the

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2 At Appendix 4 of this report.

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Department of Prime Minister and Cabinet. The joint review was also authorised under its terms of reference to seek information from and consult with key stakeholders and other agencies as required.

2.8 Finally, the terms of reference noted that the joint review is to exclude matters relating to professional conduct as these will be dealt with by Customs and the ADF respectively, although the review may make any appropriate recommendations as to inquiries into professional conduct matters.

### ***Joint review findings***

2.9 A public version of the review was released on 19 February 2014, entitled *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*. On 24 February, at an additional estimates hearing, Mr Pezzullo, CEO of the Australian Customs and Border Protection Service, stated:

[T]he CDF and I released a public version, essentially a summary of the narrative of events, the findings and the recommendations of the review team. The CDF and I would not be proposing to release anything more publicly. The content in some regards at least is covered by the public interest immunity claim that Minister Morrison and Minister Cash have made, and tabling the report to this committee would in effect make it public and therefore would be in breach of that claim.<sup>3</sup>

2.10 The executive summary of the joint review stated that 'Australian vessels inadvertently entered Indonesian waters on six occasions between December 2013 and January 2014 contrary to Australian Government policy and operational instructions in relation to Operation Sovereign Borders [OSB]'.<sup>4</sup> In terms of responsibility for the breaches, the report stated:

The headquarters identified the requirement to obtain authoritative information on Indonesian maritime boundaries to inform the safe and proper conduct of the patrols. Despite recognising the importance of this information, headquarters staff supervising OSB tactical missions, effectively devolved the obligation to remain outside Indonesian waters to vessel Commanders. Headquarters staff accepted, without proper review, that the proposed patrol plans would result in vessels remaining outside Indonesian waters. The implementation of appropriate control measures would have reduced the risk of the inadvertent entry of vessels into Indonesian waters.

Had headquarters staff implemented appropriate control measures, informed by authoritative information on Indonesian maritime boundaries, the normal post activity reporting and checks would have detected the

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3 Senate Legal and Constitutional Affairs Legislation Committee, *Additional Estimates, Committee Hansard*, 25 February 2014, p. 73.

4 Media release, 'Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders is completed', Australian Customs and Border Protection Service, 19 February 2014, <http://newsroom.customs.gov.au/releases/joint-review-of-positioning-of-vessels-engaged-in-operation-sovereign-borders-is-completed> (accessed 24 March 2014).

incursions as they occurred. This did not occur. The appropriate controls were not put in place by the relevant headquarters.<sup>5</sup>

2.11 The committee heard evidence that officers such as Mr Pezzullo and General Hurley expected that the actions of those in charge of Customs vessels—either Navy commanders or civilian masters—would always accord with the strategic directions given to commanders of vessels conducting missions under Operation Sovereign Borders.<sup>6</sup>

2.12 The joint review found that a lack of training may have contributed to the breaches. It noted that while 'RAN Commanding Officers had received professional training to understand the provisions of United Nations Convention on the Law of the Sea (UNCLOS)', the Australian Customs and Border Protection Service 'who are trained for operations inside the Australian Exclusive Economic Zone (EEZ), had not received this training as it applied to the Indonesian archipelago'.<sup>7</sup> Likewise, the appropriate control measures to review the actions of vessel commanders in carrying out the two key policy directions in their day to day missions under Operation Sovereign Borders were also lacking.<sup>8</sup>

2.13 The report included a summary of recommendations including:

Recommendation 1

It is recommended that the Chief of Joint Operations and the Deputy Chief Executive Officer (Border Enforcement) [Australian Customs and Border Protection Service] consider the review and monitoring processes undertaken by Headquarters Joint Task Force 639 and the Australian Maritime Security Operations Centre for any individual lapses in professional conduct that contributed to incursions by Australian vessels into Indonesian waters.

Recommendation 2

It is recommended that the Chief of Navy consider each incursion by RAN vessels into Indonesian waters during Operation Sovereign Borders, with regard to any individual lapses in professional conduct.

Recommendation 3

It is recommended that Force Preparation training for Australian vessels designated to be assigned to Operation Sovereign Borders should be amended to ensure crews are prepared to conduct operations while remaining outside Indonesian waters.

Recommendation 4

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5 *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*, paragraphs 13-14.

6 *Committee Hansard*, 21 March 2014, pp. 33-34.

7 *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*, paragraph 15.

8 *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*, paragraph 14.

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It is recommended that a range of policies procedures and operational documents be reviewed as a result of the incursions by Australian vessels into Indonesian waters.

#### Recommendation 5

It is recommended that Border Force Capability Division review operational training provided to [Australian Customs and Border Protection Service] Commanding Officers and Enforcement Commanders to ensure a tactical appreciation of UNCLOS.

2.14 Mr Pezzullo explained in his opening statement to the committee at its hearing on 21 March that control measures to prevent further breaches were implemented immediately.<sup>9</sup> Further, Mr Pezzullo advised that work to review and update all relevant operational documents (recommendation 4 of the joint review) 'began as soon as the incursions were discovered, not as a consequence of the Review process'.<sup>10</sup>

#### ***Implementation of the joint review recommendations***

2.15 Following the release of the report, Customs and Defence indicated that they accepted the joint review's findings and recommendations, and directed the implementation of the recommendations.

2.16 At the committee's public hearing on 21 March, Mr Pezzullo provided an update on the progress of implementation of the review's recommendations. In summary:

- Recommendations 1 and 2: inquiries are underway relating to the professional conduct of relevant personnel, but there would be no comment about the actions of individual officers at this stage.<sup>11</sup>
- Recommendation 3: Defence's and Customs' force preparation training regimes are under review and interim measures have been implemented to address any gaps while the review is completed. Revised force preparation training for crew and vessels under BPC would be implemented by early May 2014.<sup>12</sup>
- Recommendation 4: Mr Pezzullo advised that 'All relevant operational documents have been reviewed by BPC and are being amended to include additional advice regarding the conduct of operations and to include internal control measures'.<sup>13</sup> Relevant operational documents include charts and systems, and policy and planning documents; these have been updated to include operational information and to be explicit in their guidance on Indonesian maritime boundaries. Mr Pezzullo advised that 'A new procedure

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9 *Committee Hansard*, 21 March 2014, p. 2.

10 *Committee Hansard*, 21 March 2014, p. 3.

11 *Committee Hansard*, 21 March 2014, p. 3.

12 *Committee Hansard*, 21 March 2014, p. 3.

13 *Committee Hansard*, 21 March 2014, p. 3.

has been developed and implemented for approval and oversight of certain operational activity'.<sup>14</sup> Work in relation to implementing recommendation 4 would be complete by mid April 2014.<sup>15</sup>

- Recommendation 5: Mr Pezzullo advised that a comprehensive review of operational training had been initiated to implement the review recommendation that training to CBPS commanding officers and enforcement officers 'ensure a tactical appreciation of the UNCLOS'.<sup>16</sup> Remedial training for commanding officers and enforcement commanders had been implemented as an interim measure but permanent measures would be in place by the end of June 2014.<sup>17</sup>

2.17 Mr Pezzullo also stated that:

Both my service and Defence acknowledged at the time and continue to recognise the seriousness of these incursions into Indonesian waters. That is why we sought to review the matter as a matter of urgency and put immediate measures in place to prevent a recurrence.<sup>18</sup>

### **Reactions to the joint review findings**

2.18 The Indonesian government reacted negatively to the announcements regarding the breach of Indonesia's territorial waters. The incidents were perceived as contributing to a deterioration of the relationship between Australia and Indonesia. A spokesman for the Office of Indonesia's Co-ordinating Minister for Politics, Security and Law stated:

The government of Indonesia has the right to protect its sovereignty and territorial integrity in accordance with international laws and the charter of the United Nations. Indonesia demands that such operations conducted by the Australian government that led to these incidents be suspended until formal clarification is received and assurances of no recurrence of such incidents has been provided....Indonesia for its part will intensify its maritime patrols in areas where violation of its sovereignty and territorial integrity are at risk.<sup>19</sup>

2.19 Professor Donald Rothwell, in evidence to the committee on 21 March, noted that while Indonesia has some mechanisms available to it under the Law of the Sea

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14 *Committee Hansard*, 21 March 2014, p. 3.

15 *Committee Hansard*, 21 March 2014, p. 3.

16 *Committee Hansard*, 21 March 2014, p. 3.

17 *Committee Hansard*, 21 March 2014, p. 3.

18 *Committee Hansard*, 21 March 2014, p. 3.

19 Lenore Taylor, 'Indonesia demands suspension of Australia's asylum operations', *The Guardian*, 17 January 2014, available at: <http://www.theguardian.com/world/2014/jan/17/australia-apologises-patrol-boats-indonesian-waters> (accessed 19 March 2014).

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convention through which it could respond to the breaches by Australia, so far it has chosen only diplomatic action:

...I would note that there is nothing on the public record to suggest that Indonesia has sought to respond to incursions into its territorial sea by Australian warships and government ships via the mechanisms that it has available under the Law of the Sea convention, other than by way of diplomatic means whereby it has expressed its displeasure at Australia's conduct.<sup>20</sup>

2.20 A number of former naval commanders have publicly commented on the breaches of Indonesian territorial waters. Retired two-star Rear Admiral Goldrick, outlined that '[u]nder international law, the territorial sea of a state is generally considered to extend 12 nautical miles (just over 22 kilometres) from land'. However, he noted that Indonesia is an archipelago as defined by the 1982 United Nations Convention on the Law of the Sea (UNCLOS). He suggested that 'the ships seem at all times to have been well aware of their location...but did not include the critical legal element of the baselines in their calculations'.<sup>21</sup>

2.21 Another former RAN senior officer, Dr Sam Bateman commented:

While the territorial sea normally extends 12 [nautical miles] from land, if straight baselines are used, it can extend much further — a ship can be well beyond 12 [nautical miles] from land and still be within the territorial sea of Indonesia. Such straight baselines exist in two likely areas where Australian vessels may head when towing back asylum-seeker boats: to the south-west of Rote Island and off south-west Java adjacent to Christmas Island.<sup>22</sup>

2.22 Dr Bateman was critical of an apparent lack of maritime awareness by policy makers:

For a maritime country with a huge area of maritime jurisdiction, there should be a higher level of maritime awareness in government agencies, especially regarding fundamental issues of maritime jurisdiction. Commanding officers of all our maritime enforcement vessels should have a clear understanding of the law of the sea, including how it relates to our close neighbours, most of which are archipelagic states. Responsible authorities ashore should ensure this is the case. All departments and agencies in Canberra concerned with managing the maritime domain,

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20 *Committee Hansard*, 21 March 2014, p. 72.

21 James Goldrick, 'Understanding the maritime boundary problem', *ABC News*, 24 February 2014, available at: <http://www.abc.net.au/news/2014-02-24/james-goldrick3a-understanding-the-maritime-boundary-problem/5278374> (accessed 19 March 2014).

22 Sam Bateman, 'Incompetence: Australia's incursions in Indonesian waters', *Lowy Interpreter*, 28 February 2014, available at <http://www.lowyinterpreter.org/post/2014/02/28/Incompetence-Australias-incursions-into-Indonesian-waters.aspx>, (accessed 19 March 2014).

particularly law enforcement aspects, should have the requisite maritime knowledge and awareness.<sup>23</sup>

2.23 Retired Lieutenant-Commander Barry Learoyd also noted that '[t]he Indonesian archipelago and the archipelagic baseline [the formal name for Indonesia's maritime boundary] is well known to the Australian navy and well known to commanders and senior officers'. He considered that 'Indonesian maritime boundaries constituted important operational information that should have been provided by the headquarters to the commanders of vessels assigned to Operation Sovereign Borders'.<sup>24</sup>

### **Evidence in relation to the maritime breaches**

2.24 The committee's inquiry into the six breaches of Indonesian territorial waters focused on:

- the sequence of events that led to the incidents, including detailed accounts of each incident;
- the operational protocols and procedures observed by the Royal Australian Navy, Customs and Border Protection and by other relevant Commonwealth agencies during the incidents;
- the extent to which the incidents complied with international law;
- the steps being taken to prevent similar incidents from taking place in the future;
- the communications between Operation Sovereign Borders agencies, including the Department of Immigration and Border Protection, the Joint Agency Taskforce, the Department of Defence and Customs and Border Protection, regarding the incidents;
- the communications between the Minister for Immigration and Border Protection, the Minister for Defence, the Senior Command of the Australian Defence Force, the Department of Immigration and Border Protection, the Department of Defence, Customs and Border Protection and Operation Sovereign Borders agencies, including the Joint Agency Taskforce, regarding the incidents;
- the operational procedures observed by the Royal Australian Navy and other Commonwealth agencies involved in Operation Sovereign Borders to ensure the safety of its personnel and asylum seekers during the incidents;

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23 Sam Bateman, 'Incompetence: Australia's incursions in Indonesian waters', *Lowy Interpreter*, 28 February 2014, available at <http://www.lowyinterpreter.org/post/2014/02/28/Incompetence-Australias-incursions-into-Indonesian-waters.aspx>, (accessed 19 March 2014).

24 Tom Allard, 'Ex-navy officer stunned ships strayed into Indonesian waters', *Sydney Morning Herald*, 3 March 2014, available at: <http://www.smh.com.au/federal-politics/political-news/exnavy-officer-stunned-ships-strayed-into-indonesian-waters-20140302-33tzh.html>, (accessed 19 March 2014).

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- the briefings given to Australian Navy and Customs and Border Protection personnel (both on-water and off-water) about maritime borders and laws of the sea during on-water operations; and
  - any other matters relating to Operation Sovereign Borders.

2.25 In conducting its inquiry the committee was restricted by a lack of publicly available information relating to the maritime incursions. This situation was made worse at the public hearing on 21 March where the committee was frustrated by persistent claims that questions about OSB in general and the maritime incursions in particular were subject to the blanket public interest immunity claim which Minister Morrison had previously made.<sup>25</sup> The committee was unable to obtain even basic information about the GPS information which may have been made available to headquarters from the vessels involved in OSB.<sup>26</sup>

2.26 The following sections examine the evidence before the committee in relation to the sequence of events and lines of communication between OSB agencies, and the operational protocols and procedures followed by OSB vessels. The chapter concludes with sections on the extent to which the maritime incidents complied with international law, the public interest immunity issue raised by officials at the committee's hearing, and other issues raised in evidence.

### *Sequence of events and communications between OSB agencies*

2.27 At the public hearing, Mr Pezzullo advised the committee that he would 'prefer that we avoid specific discussion of OSB missions. We are happy to talk about generic BPC missions, which may or may not be OSB'.<sup>27</sup>

2.28 While the committee was not able to establish the sequence of events that led to the incursions identified in the joint review, it did manage to establish the general process which would be followed in the event of a BPC vessel encountering an OSB related issue or incident, and the lines of responsibility between OSB and BPC agencies.

2.29 Responsibility for Australia's national maritime security rests with the CEO of Australian Customs and Border Protection, Mr Pezzullo.<sup>28</sup> Customs has at its disposal a number of naval assets, as well as aviation and maritime assets of its own. Rear Admiral Noonan oversees deployment of Customs assets on national maritime security operations. The Rear Admiral reports on day-to-day operational matters to the Deputy CEO of Customs, Mr Roman Quaedvlieg (who reports to Mr Pezzullo) and for Defence assets to Chief of Joint Operations, Lieutenant General Ash Power.<sup>29</sup>

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25 See for example *Committee Hansard*, 21 March 2014, p. 42.

26 *Committee Hansard*, 21 March 2014, p. 28.

27 *Committee Hansard*, 21 March 2014, p. 5.

28 *Committee Hansard*, 21 March 2014, p. 8.

29 *Committee Hansard*, 21 March 2014, p. 15.

2.30 Mr Pezzullo explained that 'matters pertaining to the management of illegal maritime arrivals is executed under civil legislation—the Customs Act and the Migration Act'.<sup>30</sup> In the enforcement of these two pieces of legislation, Mr Pezzullo explained that:

ADF personnel who are detaining people, checking their property and doing the things that you have just described do so effectively as civilian law enforcement officers, pursuant to delegation from me.<sup>31</sup>

2.31 Rear Admiral Michael Noonan explained that the employment of a BPC vessel was something determined as part of the scheduling programs set in advance by 'higher headquarters'.<sup>32</sup> Strategic direction for OSB is set by Lieutenant General Campbell:

I will set the strategic direction with regard to issues relating to Operation Sovereign Borders within the wider roles and tasks of Border Protection Command. Admiral Noonan on behalf of the CEO and the CDF on a daily basis monitored by the DCEO and the Chief of Joint Operations will conduct those activities that are on water, while I am looking at the directional alignment across the on-water issues, the upstream issues, the OPC issues and the next month, next six months, next year resourcing capacity and planning.<sup>33</sup>

2.32 Lieutenant General Campbell and OSB are supported by Mr Pezzullo and the CDF. Mr Pezzullo told the committee that Lieutenant General Campbell is directly accountable to the Minister for Immigration. In describing the lines of communication between himself and the CDF on maritime operations, Mr Pezzullo noted that:

On other occasions, and this goes to Admiral Noonan's reference to the other maritime risks, General Hurley and I may need to have a discussion about things—we are obviously placing emphasis on OSB, and the government has made it clear that it is the priority effort...<sup>34</sup>

2.33 After the wider direction has been set for maritime security operations under the auspices of Customs, the specific detail is then delegated, as Rear Admiral Noonan explained:

The detail around the actual planning and execution of a passage for a ship to get to a particular point would then typically be delegated down various levels of command strata until we actually get to the ship which is responsible. The ship remains responsible for the planning and safe execution of the navigational practice.<sup>35</sup>

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30 *Committee Hansard*, 21 March 2014, p. 10.

31 *Committee Hansard*, 21 March 2014, p. 10.

32 *Committee Hansard*, 21 March 2014, p. 6.

33 *Committee Hansard*, 21 March 2014, p. 16.

34 *Committee Hansard*, 21 March 2014, p. 15.

35 *Committee Hansard*, 21 March 2014, p. 6.

2.34 Rear Admiral Noonan described the lines of reporting once a BPC vessel encounters an asylum seeker vessel in its area of patrol:

Typically, we would be operating in that mode. I would get advice. We might have a P3 out there that may gain visual detection of a vessel—an illegal entry vessel or a fishing vessel. That information would then be transmitted back to the headquarters in Darwin. The headquarters in Darwin would then look at the other response assets that it has available to it in terms of patrol boats or frigates, the state of their fuel stocks and their availability. That headquarters would potentially task suitable assets to respond. They would go out and conduct the interception of a vessel. During that period there is regular contact between the tactical unit—the ship or the aircraft—and the headquarters in Darwin. As the situation unfolds—as the vessel starts to sink—the nature of the reporting gets higher. If, in fact, it is just a routine interception the level of tactical reporting might be quite low.

I do not get visibility of this routine information until we get into a crisis situation.<sup>36</sup>

2.35 Vessels engaged in Customs operations, including OSB operations, have a number of headquarter locations exercising control over them: Headquarters Joint Operations Command (which controls ADF operations nationally, regionally and globally); AMSOC, the Australian Maritime Security Operations Centre (responsible for oversight of Customs assets under Rear Admiral Noonan); and headquarters in Darwin (which coordinates Defence assets).<sup>37</sup> Rear Admiral Noonan advised that:

There is information sharing that goes on between all these three headquarters. In terms of having a view, an understanding of what is going on in the operational area, be it specifically in people smuggling or illegal entry or any of the eight maritime threats, information is being shared through these two places. Similarly, we are currently sharing a lot of information with the rescue coordination centre of AMSA, which is a different operation centre again.<sup>38</sup>

2.36 Rear Admiral Noonan advised that the headquarters in Darwin 'have the picture of what is going on in that domain'.<sup>39</sup> Mr Pezzullo described too the displays of information which AMSOC could provide him as CEO of Customs, in an emergency or crisis situation.<sup>40</sup>

2.37 In terms of monitoring on a daily basis, Rear Admiral Noonan advised that a 24/7 watch staff in AMSOC keep track of vessels on operations, with regular reports

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36 *Committee Hansard*, 21 March 2014, p. 16.

37 *Committee Hansard*, 21 March 2014, pp. 17-18.

38 *Committee Hansard*, 21 March 2014, p. 18.

39 *Committee Hansard*, 21 March 2014, p. 18.

40 *Committee Hansard*, 21 March 2014, p. 18.

going to Rear Admiral Noonan.<sup>41</sup> Asked if he visited the watch floor himself, Rear Admiral Noonan explained:

...in the course of daily operations, I have a deputy in Darwin; I have a deputy in Canberra. They may be on the watch floor. It would be rare for me to go on to the watch floor and seek to have a hands-on command unless we were dealing with a safety-of-life situation. There have been a couple of occasions during my tenure of command where I have been on the watch floor and got personally involved in the management of specific medical emergencies and situations surrounding safety of Australians and people seeking to come to Australia—<sup>42</sup>

2.38 In relation to the six maritime incursions:

**Senator HANSON-YOUNG:** A clarification: out of the six incidents that are covered in the executive summary of the report, were any of those incidents ones for which you thought it was important for you to be on the watch floor?

**Rear Adm. Noonan:** No. At no specific instance during those six incidents did I feel it was necessary for me to be on the watch floor.<sup>43</sup>

2.39 The monitoring of arrivals at AMSOC was not General Campbell's responsibility either.<sup>44</sup> He was not present in the AMSOC during any of the incursions:

**Senator CONROY:** I think you indicated you were not present one floor down on any of the occasions of incursion.

**Lt Gen. Campbell:** That is correct.<sup>45</sup>

2.40 While headquarters maintains a general monitoring of the position of ships on their respective missions, the planning and execution of a passage for an individual ship is delegated. As Rear Admiral Noonan explained:

Typically, the employment of a vessel will be determined at a higher headquarters. That will be part of the sequencing and scheduling of ships programs both for Defence vessels and for customs vessels, so we would have a broad plan of employment for the fleet, as it were, that would be promulgated in advance. The detail around the actual planning and execution of a passage for a ship to get to a particular point would then typically be delegated down various levels of command strata until we actually get to the ship which is responsible. The ship remains responsible for the planning and safe execution of the navigational practice.<sup>46</sup>

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41 *Committee Hansard*, 21 March 2014, p. 22.

42 *Committee Hansard*, 21 March 2014, p. 23.

43 *Committee Hansard*, 21 March 2014, p. 23.

44 *Committee Hansard*, 21 March 2014, p. 17.

45 *Committee Hansard*, 21 March 2014, p. 22.

46 *Committee Hansard*, 21 March 2014, p. 6.

2.41 Rear Admiral Noonan also described the command-and-control system which provides for commanding officers of vessels to have freedom to manoeuvre inside a broad area:

Under the command-and-control system that we have in place, typically I would be providing an operational level of command. I would set an area that would typically be defined in the operation order that I have provided. For the mission command of the commander who has been authorised to conduct the mission—it might be a search-and-rescue mission, for example, where an area will be defined—the freedom of manoeuvre inside that area, under which mission command is being exercised, will be at the discretion of that commander. Typically it would be the commanding officer of the vessel or the aircraft in question.<sup>47</sup>

2.42 As Mr Pezzullo put it to the committee, headquarters had confidence that 'the ships knew where they were':

It related to an incorrect calculation of the position of the vessel. They knew where they were. As General Hurley said in some public commentary at the time, and he put it better than perhaps anyone else has, the ships knew where they were; it was the position relative to the archipelagic baseline of Indonesia, which is an archipelagic state for the purposes of the UN law of the sea.<sup>48</sup>

2.43 The joint review also mentioned the delegation of planning, and the flaws inherent in the approach of headquarters trusting that 'the ships knew where they were'. It noted that headquarters identified the need to have authoritative information on Indonesian maritime borders in order to 'inform the safe and proper conduct of the patrols'.<sup>49</sup> However, the report stated that the requirement to remain outside Indonesian waters was 'effectively devolved' to vessel Commanders by headquarters staff. This delegation, including to people who did not have the proper training, was made without proper review and control measures, the result of which was the increased risk of inadvertent entry into Indonesian waters.<sup>50</sup> The report found that:

Had headquarters staff implemented appropriate control measures, informed by authoritative information on Indonesian maritime boundaries, the normal post activity reporting and checks would have detected the incursions as they occurred. This did not occur. The appropriate controls were not put in place by headquarters.<sup>51</sup>

2.44 This disconnect between the actions of the vessels and the planning of headquarters was not discovered until 15 January 2014 when, according to the joint review, 'planning staff realised that the details of some post patrol reporting did not

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47 *Committee Hansard*, 21 March 2014, p. 28.

48 *Committee Hansard*, 21 March 2014, p.28.

49 *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*, paragraph 13.

50 *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*, paragraph 13.

51 *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*, paragraph 14.

correlate with the generic planning for the OSB patrols on which the operational instructions were predicated'.<sup>52</sup>

### ***Operational protocols and procedures***

2.45 The joint review found that the vessels which inadvertently entered Indonesian waters were in contravention of Australian Government policy and operational instructions in relation to OSB.<sup>53</sup> Government policy is described by the review as outlined in the Coalition's Regional Deterrence Framework to Combat People Smuggling, dated August 2013.<sup>54</sup> The review explained that this framework:

covers a spectrum of response options available under the Operation that were translated into operational instructions to both Commander Border Protection Command (COMBPC) [Rear Admiral Noonan] and assigned ADF and ACBPS units. Two key policy constraints were articulated in these instructions:

- Activities are only to be conducted when deemed safe to do so by the Commanding Officer of the assigned BPC vessels, and
- Activities are only to be conducted outside 12 nautical miles from Indonesia's archipelagic baseline.<sup>55</sup>

2.46 Mr Pezzullo told the committee that it was the expectation of himself as CEO of Customs and of General Hurley as CDF that the two key policy constraints, as translated into strategic direction for Customs and Defence vessels, would be followed:

There were two key policy constraints that were basically non-negotiable: activities pertaining to Operation Sovereign Borders were only to be conducted when deemed safe to do so by the CO, commanding officer, of the vessel and that activities were only to be conducted outside 12 nautical miles from Indonesia's archipelagic baseline. At the level of command and control, you issue those directions and you expect that they are going to be complied with.<sup>56</sup>

2.47 However, not all Customs vessels are under Navy command. Mr Pezzullo explained to the committee that while the patrol boats are under Navy command, larger Customs vessels are contracted and it is a civilian master who has charge of those vessels.<sup>57</sup> The contrast between the training for Navy commanding officers and the training for civilian masters was made in the findings of the joint review., which detailed:

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52 *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*, paragraph 16.

53 *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*, paragraph 10.

54 *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*, paragraph 11.

55 *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*, paragraph 11.

56 *Committee Hansard*, 21 March 2014, p. 34.

57 *Committee Hansard*, 21 March 2014, pp. 33-34.

The Review found that while ACBPS Enforcement Commanders and contracted vessel 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.<sup>58</sup>

2.48 Mr Pezzullo however told the committee that he had an expectation that strategic guidance for the operation connected to OSB had all 'appropriate oversight, control mechanisms, control procedures and requisite force preparation training in place'.<sup>59</sup> Mr Pezzullo's evidence suggested that he does not believe that the operational procedures and training needed to be more specific, as suggested by the joint review findings, in relation to how commanding officers and civilian masters should operate within the two key policies:

The review talks about what is called force preparation training as a unit is being assigned into an operation. It would not have struck us that we had to issue specific, direct instructions saying, 'Observe your stipulated navigational controls.' That, frankly, would be categorised as micro-management.<sup>60</sup>

2.49 Noting the findings of the joint review that there was a disconnect between the strategic direction given at headquarters level and the execution of that direction at vessel level, possibly by staff who had not received adequate training, the committee examined what oversight there was at headquarters level of ships in operation.

2.50 The committee sought general advice on the monitoring of ships in operation. Rear Admiral Noonan explained the information which he receives as Commander, Border Protection Command:

The level of the information that I seek back in my headquarters is not solely around the position of the ships. What I rely upon is what is typically called an operational report, and on a four-hourly or six-hourly basis I will get a standard report that provides positional information, information about what the ship is doing, and weather information about the ships operating—that is a formatted message that comes from the ship itself. That will provide me with a definitive position from that point in time.<sup>61</sup>

2.51 However, the committee also heard evidence that occasionally the ships may have had their GPS 'turned off':

**CHAIR:** Are you saying that the only reason you would not know where the vessels are is when we turn it off, and you are saying that you have not known sometimes? So clearly we have been are turning it off.

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58 *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*, findings 6-7.

59 *Committee Hansard*, 21 March 2014, p. 34.

60 *Committee Hansard*, 21 March 2014, p. 34.

61 *Committee Hansard*, 21 March 2014, p. 25.

**REAR ADM. NOONAN:** If I were conducting an operation off the east coast of Australia now—typically a drug interdiction operation, a peacetime operation—for reasons of operational security we might determine to turn off all the emitters on our ships so that other people with their iPhone apps and all their other great technology would not necessarily know where our vessel is, so that we could execute that operation.<sup>62</sup>

2.52 On the issue of ships turning off their GPS and the reports they would provide under these circumstances, the committee was frustrated by officials' reliance on Minister Morrison's blanket public interest immunity claim as grounds for withholding information from the committee. Lieutenant General Angus Campbell explained in relation to tracking ships:

I am making the point that our capacity to track is not necessarily uniformly continuous and real-time. That is all I am going to offer.<sup>63</sup>

2.53 Rear Admiral Noonan was confident in the ship commander's knowledge of their position in terms of the strategic direction not to breach Indonesian waters.<sup>64</sup> No explanation was offered to the committee that would explain how the breakdown between expectations and execution happened so completely and so quickly in relation to a key question of policy.

2.54 Mr Pezzullo twice told the committee that this was 'not the Soviet Union' and that it was not necessary for him to issue further instructions to vessel commanders or masters beyond the general directions provided:

General Hurley and I issued general directions to Commander Border Protection Command to execute the mission as stipulated and in the terms stipulated by General Campbell. As the admiral has been indicating all through the morning, he in turn issues more precise stipulated instructions and so it cascades down. It is not the Soviet Union. We do not have to second-guess what each corporal and each XO on a vessel is undertaking. When we issue general directions, we expect that they are carried out. On occasions, things happen. On this occasion, regrettably, things happened which were contrary to those stipulations. The matter has been reviewed and there is some follow-up action in hand. There is really not much more to be said.<sup>65</sup>

2.55 The committee cannot understand how lack of specific instructions and additional training can be easily discounted as a cause of these incursions when clearly mistakes were made.

### **Extent to which the maritime incidents complied with international law**

2.56 Professor Donald Rothwell explained that UNCLOS, which provides the overarching legal framework for the law of the sea, is particularly significant to

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62 *Committee Hansard*, 21 March 2014, p. 27.

63 *Committee Hansard*, 21 March 2014, p. 27.

64 *Committee Hansard*, 21 March 2014, p. 26.

65 *Committee Hansard*, 21 March 2014, p. 34.

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Indonesia as 'it provides the legal framework upon which archipelagic baselines have been declared'.<sup>66</sup>

2.57 Dr Kate Purcell's analysis of the breaches of Indonesian waters, based on UNCLOS, was that 'the simple fact of entry without legal justification is enough to constitute breach' of UNCLOS.<sup>67</sup>

2.58 The Kaldor Centre for International Refugee Law at the University of New South Wales provided a submission to the inquiry. The submission assessed that 'the incursions into Indonesian territorial waters by Australian Navy or Customs and Border Protection vessels without Indonesian consent were in violation of the international law of the sea and the obligation to respect the territorial sovereignty of other States, which is a basic principle of international law'. Further:

[T]here is a significant and inherent risk that Operation Sovereign Borders breaches Australia's obligations under international refugee law and international human rights law. The interdiction and pushback of boats is also inconsistent with Australia's obligations under the law of the sea, including the law relating to search and rescue at sea, as well as the Migrant Smuggling Protocol.<sup>68</sup>

2.59 In his submission to the committee's inquiry, Professor Rothwell expanded on the argument that entry of an Australian Navy or Customs vessel into Indonesian waters would be a violation of international law by noting that:

the mere presence of an Australian Navy ship within the Indonesian territorial sea is not a violation of international law. Australian Navy ships enjoy a right of innocent passage within the Indonesian territorial sea and the right of archipelagic sea lanes passage within recognised sea lanes that run through the Indonesian archipelago...However, the entry into Indonesia's territorial sea by an Australian Navy or Customs ship that has control over an asylum seeker boat by way of a tow line, with the intention of returning that boat to Indonesia, would not be consistent with the right of innocent passage.<sup>69</sup>

2.60 The Australian Lawyers Alliance argued in their submission that given the review period was only December 2013 to January 2014, there could be other breaches of Indonesian territorial waters in the period from September 2013 to December 2013, since the beginning of Operation Sovereign Borders.<sup>70</sup>

### **Public Interest Immunity**

2.61 On 14 November 2013, the Senate ordered the production of a range of documents related to border protection and the activities of Operation Sovereign

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66 *Committee Hansard*, 21 March 2014, p. 72.

67 *Committee Hansard*, 21 March, 2014, p. 71.

68 Kaldor Centre for International Refugee Law, *Submission 1*, p. 1.

69 Professor Donald Rothwell, *Submission 2*, p. 4.

70 Australian Lawyers Alliance, *Submission 3*, p. 5.

Borders.<sup>71</sup> In response, Minister Morrison provided a range of information already on the public record, including transcripts of OSB press conferences from 23 September to 15 November 2013, various media statements and the weekly operational updates commencing on 30 September 2013. The minister also offered to provide the Opposition and Australian Greens Senators with a confidential briefing delivered by OSB Commander, Lieutenant-General Campbell.<sup>72</sup>

2.62 Minister Morrison claimed that provision of the other documents requested by the Senate would not be in the public interest and cited possible damage to national security, defence, or international relations, and possible prejudice to law enforcement or protection of public safety as grounds for withholding the information from the Senate.<sup>73</sup> On 3 December 2013, the Senate resolved that the order had not been complied with and again ordered the production of the documents. In so doing, the Senate rejected the minister's claim of public interest immunity.<sup>74</sup>

2.63 On 10 December 2013, the Senate referred an inquiry to the Legal and Constitutional Affairs References Committee in relation to the claim of public interest immunity over the documents. The committee reiterated in the strongest possible terms the Senate's right to information and emphasised that a claim of public interest immunity made by a minister remains a claim until the Senate has either accepted or rejected the claim having regard to the basis upon which it is made.<sup>75</sup>

2.64 The committee concluded that its 'ability to examine the merits of the claim has been frustrated because the committee was not provided with the relevant documents nor the information contained therein, nor even a schedule listing the documents covered by the claim'. It recommended that the Senate should 'use the political and procedural remedies...as possible means to resolve non-compliance with the orders for production of documents and the related disputed claim of public interest'.<sup>76</sup>

2.65 On 20 March 2013, the day before the committee's public hearing, the committee Chair, Senator Dastyari,<sup>77</sup> received correspondence from Minister Morrison relating specifically to the public interest immunity issue. The minister's letter noted that the committee's terms of reference are such that information and

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71 *Journals of the Senate*, 14 November 2013, pp 131–132.

72 Senate Legal and Constitutional Affairs References Committee, *A claim of public interest immunity raised over documents*, March 2014, p. 3.

73 Senate Legal and Constitutional Affairs References Committee, *A claim of public interest immunity raised over documents*, March 2014, p. 3.

74 *Journals of the Senate*, 3 December 2013, p. 214.

75 Senate Legal and Constitutional Affairs References Committee, *A claim of public interest immunity raised over documents*, March 2014, p. 15

76 Senate Legal and Constitutional Affairs References Committee, *A claim of public interest immunity raised over documents*, March 2014, pp 17–18.

77 Chair of the Foreign Affairs, Defence and Trade References Committee from 17 to 21 March 2014.

documents which may be requested by the committee are likely to contain information relating to on-water and other operational activities similar in nature to material which was subject to the minister's previous public interest immunity claim. The letter stated very clearly that:

In the event that the Committee seeks such documents or information as part of this inquiry, I may wish to consider making a further public interest immunity claim, in line with the Government's stated position on these matters.<sup>78</sup>

2.66 In what amounted to an effort to pre-empt the committee's hearing, the letter re-stated the public interest grounds for not disclosing information pertaining to on-water and other operational matters which the minister provided in response to earlier Senate orders.

2.67 During the 21 March hearing witnesses did not raise any new public interest immunity claims as the basis for refusing to answer specific questions. However, Mr Pezzullo, Mr Bowles and Lieutenant-General Campbell referred to Minister Morrison's previous public interest claim on numerous occasions during the hearing as the basis for not addressing or answering questions on operational and on-water issues relating to the specific maritime incursions.

### **Other matters**

2.68 The committee took evidence on a number of other matters relevant to the committee's inquiry, and it sees benefits in noting them in its report for policy makers and to assist public debate in this area.

#### ***Use of orange lifeboats***

2.69 Given the detailed media reporting on the use of orange lifeboats to return asylum seekers to Indonesia, the committee looked into the implications that this practice may have had on the incursion into Indonesia. The committee also looked briefly at whether the lifeboats themselves may constitute an incursion into Indonesian waters.

2.70 Given that the lifeboats are owned by Australian Customs hardware, the committee put it to Mr Pezzullo that the Indonesians may perceive the lifeboats themselves as a breach of their territory by Australian 'vessels'. Mr Pezzullo-stated that he was not aware of the views of Indonesia on this matter:

I have got no idea. You are asking me how the Indonesians perceive the lifeboats. I have got no idea.<sup>79</sup>

2.71 Professor Rothwell offered a different perspective on the question of breach of Indonesian waters by the orange lifeboats, based on his consideration of the UNCLOS:

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78 The Hon Scott Morrison MP, Minister for Immigration and Border Protection, *Public Interest Immunity Claim*, letter dated 20 March 2013.

79 *Committee Hansard*, 21 March 2014, p. 40.

the entry into Indonesia's territorial sea by an Australian Navy or Customs ship that has control over an asylum seeker boat by way of a towline, with the intention of returning that boat to Indonesia, would not be consistent with the right of innocent passage.<sup>80</sup>

### ***International law and government policy***

2.72 Dr Kate Purcell, in her opening statement at the committee's hearing, raised concerns regarding the government's policy of 'turning back' boats. In Dr Purcell's view, interdicting boats in Australia's contiguous zone and turning them back would 'exceed Australia's limited right in that area to exercise the control necessary to prevent infringements of Australian immigration and customs laws and regulations'.<sup>81</sup>

2.73 It was Dr Purcell's view that 'turning boats back':

carries a significant and inherent risk of violating Australia's obligations not to return people to persecution or other serious harm, or to places where there is a real risk that they will then be returned to other countries where there is a real risk of persecution or other serious harm. Australian Navy and Customs and Border Protection personnel are bound by those obligations in extra-territorial activities, as they are organs of the state. The obligations apply where Australia exercises effective control over asylum seekers.

2.74 Professor Rothwell raised concerns with the policy of towing asylum seeker vessels through the Indonesian Exclusive Economic Zone under the UNCLOS:

the act of towing a vessel into the Indonesian exclusive economic zone, whether that is the original asylum-seeker craft or whether it is a lifeboat, cannot be consistent with Australia exercising the right of freedom of navigation. The right of freedom of navigation exists generally within the exclusive economic zone in the high seas and it is a right available to all states. But the exercise of the right of the freedom of navigation with the intention of towing a vessel which is not otherwise incidental to the normal mode of operation of that vessel with the ultimate aim of that towing operation or escorting operation ceasing, and directing persons on board that vessel to go, presumably, to the Indonesian coast, I do not believe is consistent with the legitimate exercise of the right of freedom of navigation.<sup>82</sup>

2.75 The committee commends the evidence it received regarding breaches of international law to policy makers and government. The committee is concerned by the evidence that was provided to it about potential breaches of International Law which are happening as a direct result of the government's policy.

2.76 The committee noted comments from Mr Pezzullo that indicated he believed that the UNCLOS had not been encoded in Australian law,<sup>83</sup> though this statement was in conflict with later comments from Dr Purcell.<sup>84</sup>

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80 *Committee Hansard*, 21 March 2014, p. 72.

81 *Committee Hansard*, 21 March 2014, p. 71.

82 *Committee Hansard*, 21 March 2014, p. 74.

83 *Committee Hansard*, 21 March 2014, p. 69.

84 *Committee Hansard*, 21 March 2014, p. 73.