

Chapter 3

Conclusion and recommendations

Committee view

3.1 At its hearing on 21 March, Mr Pezzullo advised the committee that apart from the six territorial breaches into Indonesian waters between 1 December 2013 and 20 January 2014, he was not aware of any other inadvertent breaches of another country's territorial waters, and that such breaches are uncommon:

There have been no inadvertent incursions that I can recall in the five years I have been in this role or the deputy's role. There have been times where under recognised safety of life at sea, or SOLAS, provisions we have had coordination across the two rescue command and control centres—AMSA for our part and the relevant counterpart authority in Indonesia—permission has been granted. There was a case reported in the press where ACV Triton was given permission to land persons who had been rescued, but that is by design.¹

Policy direction

3.2 As discussed in Chapter 2, the joint review report noted two key policy constraints which underpinned the strategic directions given to commanders of vessels conducting missions under Operation Sovereign Borders (OSB): activities are only to be conducted when deemed safe by the Commanding Officer, and activities are only to be conducted outside of 12 nautical miles from Indonesia's archipelagic baseline.²

3.3 The committee is concerned that the two policy directions may not be compatible in the challenging real-life situations in which vessel commanders find themselves under Operation Sovereign Borders. Ensuring the safety of crew and asylum seekers while turning back or towing back vessels outside of 12 nautical miles from Indonesia's archipelagic baseline may not be an achievable policy goal, depending on the prevailing conditions, the sea-worthiness of vessels and the possible use of lifeboats.

3.4 Based on the paucity of evidence before it, the committee can only speculate on situations where a vessel commander, in following the first policy direction, may have inadvertently breached the second policy direction, particularly to ensure safety of life at sea. This eventuality, therefore, may account for some or all of the six breaches occurring under the government's policy

Recommendation 1

The committee recommends that the government consider the apparent conflict between its key policy constraints, especially in light of the difficult decisions that Navy and Customs captains are required to make as part of OSB.

¹ *Committee Hansard*, 21 March 2014, pp. 50-51.

² *Joint Review of Positioning of Vessels Engaged in Operation Sovereign Borders*, paragraph 11.

3.5 The committee is also concerned by the evidence it received from academic experts that the incursions into Indonesian territorial waters breached international law. The committee is concerned about the implications of this situation and urges the government to consider the evidence in relation to Australia's obligations under international law. This includes the potential breaches of international law which are committed when vessels are towed into Indonesia's Exclusive Economic Zone, not just their Territorial waters.

Recommendation 2

The committee recommends that the government review the evidence provided to the committee in relation to Australia's obligations under international law, including the encoding of UNCLOS in Australian domestic law.

Secrecy

3.6 The committee believes that there is confusion in the public arena about Australia's actions under Operation Sovereign Borders and their effect on our relations with other countries in our region. This is mainly due to the lack of publicly available information and the government's repeated refusal to comply with Senate orders relating to OSB matters. Such confusion is also exacerbated by the government's use of military language to describe OSB matters³ and the fact that the joint task force coordinating OSB is led by a military officer, even though it is a civilian operation under the Migration and Customs Acts.⁴

3.7 The committee is concerned that officials who appeared at the public hearing on 21 March relied on the public interest immunity claim previously used by the Immigration Minister as the basis for refusing to answer questions on the committee's terms of reference. The committee believes this was not a proper use of the Senate's resolution of August 2009 establishing a process to be followed by officials in making a public interest immunity claim.

Recommendation 3

That the committee recommends the public Interest immunity claim relating to activities that lead to the breach of Indonesian territorial waters be referred to the Minister for Immigration and Border Protection for justification.

3.8 The committee heard from Mr Pezzullo that it was only due to Freedom of Information requests received in relation to the joint review report that the government considered releasing a redacted copy of the report.⁵ The committee does not believe it should take a Freedom of Information claim for the government to take its accountability responsibilities seriously. Consideration of the release of a redacted report, further to the publication of the joint review report's executive summary, should have been a consideration of government from the outset.

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

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

5 *Committee Hansard*, 21 March 2104, p. 4.

3.9 While the committee acknowledges that there may be a need for certain operational details surrounding OSB to remain confidential, the committee is concerned that the normal processes of parliamentary scrutiny have been repeatedly frustrated by the government's unwillingness to provide clear information about OSB matters to the parliament and the public.

Recommendation 4

The committee recommends that the Minister for Immigration table, as soon as possible, an appropriately redacted copy of the joint review report outlined in his letter of 20 March 2014 to the committee.

3.10 The committee notes Mr Pezzullo's comments in relation to the implementation of recommendation 4 of the joint review report, that work on updating the operational documents, policies and procedures will be concluded by mid April 2014.

Recommendation 5

In the interests of accountability and transparency of Operation Sovereign Border activities, the committee recommends that the Minister for Immigration table, as soon as possible after April 2014, a report regarding the implementation of recommendation 4 of the joint review report.

3.11 The committee notes Mr Pezzullo's advice that the implementation of the revised force preparation training, including the revised training in relation to UNCLOS (recommendations 3 and 5 of the joint review report) is to start in May and June 2014 respectively.

Recommendation 6

In the interests of accountability and transparency of Operation Sovereign Borders, the committee recommends that the Minister for Immigration table, as soon as possible after June 2014, a report regarding the implementation of the revised force preparation training and the revised UNCLOS training.

3.12 The committee notes the joint review report's comments relating to the delegation without review of the obligation to remain outside Indonesian waters.⁶ From the evidence it received during its inquiry, the committee sees significant benefits in the agencies involved with Operation Sovereign Borders conducting a review to determine whether there were any issues in the chain of command from headquarters to commanders of vessels which may have contributed to the incursions into Indonesian waters.

Recommendation 7

The committee recommends that such a review be undertaken and that the Minister for Immigration table a report with the review findings by September 2014.

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

**Senator the Hon Ursula Stephens
Chair**