

Dissenting Report

Coalition Senators

Coalition members of the Committee did not support the majority view in a number of regards.

The nature of questioning during the inquiry and subsequently, some commentary in the report suffered from a failure to comprehend fundamental concepts of military command and control. This included the devolution of authority to subordinate commanders (such as the captains of vessels and aircraft or other units) and the concept of an authorized area of operation (AO). Despite explanation by witnesses, some committee members still seemed to think that a superior command was derelict in their duty if they did not know the precise point-location of a vessel or aircraft at any given point in time when in an AO.

There was a similar lack of understanding in discussion of technical issues such as the difference between ship borne equipment that emits a signal in the electro-magnetic spectrum as opposed to a passive device such as a global positioning system. Despite explanation by witnesses, some committee members did not seem to understand that for valid technical or operational reasons, a ship or aircraft may not transmit a continuous data stream providing real-time or near real-time position updates to a higher headquarters (HQ). This led to the false assumption by some committee members that vessels were not sure of their position for periods of time and that higher HQ did not know where their assets were to the required level of fidelity.

The majority report was selective in their use of evidence when highlighting the opinion of two witnesses that aspects of Operation Sovereign Borders (OSB) may not comply with the United Nations Convention on the Law of the Sea (UNCLOS). The two witnesses differed on their interpretation about critical elements of the legal basis for interdiction and yet the majority report only made comment on the area where the two witnesses agreed on the issue of control being exercised over interdicted boats in and beyond Australia's EEZ. There was no mention, for example, of the preceding evidence by Professor Rothwell in two parts of his submission that:

Importantly for OSB, a vessel entering Australia's territorial sea with the purpose of unloading persons contrary to the Migration Act 1958 (Cth) would not be engaged in innocent passage. Consistent with the LOSC, Australia is entitled to "take the necessary steps in the territorial sea to prevent passage that is not innocent" (Article 25 (1), LOSC). This could extend to ordering the delinquent ship to remove itself from the territorial sea, or physically removing the ship by taking control of it. A similar right exists in the case of the contiguous zone, where Australia can rely upon its capacity to "prevent infringement" of its immigration laws within the territorial sea (Article 33 (1(a))).

And that:

With that qualification [that his analysis is limited to that materiel which is in the public domain], by way of conclusion the following can be stated:

1. Australia has a firm legal basis under the law of the sea to interdict asylum seeker vessels within the Australian territorial sea contiguous zone, or EEZ.
2. Australia has a firm legal basis to be able to exercise control over those vessels to remove them from Australia's territorial sea and contiguous zone.
3. Australia's ability to exercise continuing control over asylum seeker vessels interdicted within the Australian EEZ, or taken from Australia's territorial sea and contiguous zone into the EEZ, is limited.

While the majority report notes that the views of Dr Purcell and Professor Rothwell are only two views on this issue, it makes no mention of previous public statements by the Government that joint legal advice was sought from the Office of International Law and AGS and that the Government is confident in the legal basis to conduct OSB. The majority report appears to ignore the fact that the Government has already accepted and understood that the incursions breached UNCLOS and has already taken timely and appropriate action to apologise to Indonesia and to establish why the incursions occurred and enact measures to ensure there is no repetition.

Finally, the majority report makes speculative claims about linkages between safety of life at sea and the border incursions which are not substantiated by any evidence.

Senator Alan Eggleston (Deputy Chair)

Liberal Senator for WA

Senator David Fawcett (Deputy Chair on 21 March 2014)

Liberal Senator for SA