

Chapter 1

Introduction and background

Referral and conduct of the inquiry

1.1 On 24 June 2015 the Senate referred the following matter to the Senate Legal and Constitutional Affairs References Committee (the committee) for inquiry and report by 15 September 2015:

The payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats, with reference to:

- a) the reply of the Government to the order for production of documents ordered by the Senate in the amended general business notice of motion no. 724 moved by Senator Hanson-Young on 16 June 2015;
- b) 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;
- c) the facilitation or authorisation of the payment of any money 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;
- d) any payments made to any such vessels' captain, crew or passengers;
- e) any payments made in relation to the passage of any such vessels, their passengers or crew;
- f) the legality, under international and domestic law, of the above matters;
- g) the damage caused by the above matters to the bilateral relationship between Australia and Indonesia;
- h) the extent to which any such bribes constitute an incentive for people-smuggling operations to Australia;
- i) whether it is standard practice for Australia to pay cash or other inducements to the captains or crew of boats carrying asylum seekers and, if so, how long this practice has been carried on and how much has been spent on this policy in the past, including what payments have been made to particular individuals and the amount of any such payments;
- j) any related matters.¹

1 *Journals of the Senate* No.101, 24 June 2015, p. 2804.

1.2 The Senate agreed to extend the reporting date for the inquiry four times: to 11 November 2015,² 4 February 2016,³ 15 March 2016,⁴ and, on 1 March 2016, to 22 June 2016.⁵

1.3 In accordance with usual practice the committee advertised the inquiry on its webpage and in *The Australian* newspaper on 8 July 2015. The committee also wrote to a number of organisations and individuals inviting written submissions by 24 July 2015. The committee received 12 submissions (listed at Appendix 1). On 29 October 2015 the committee received a letter from Amnesty International, attaching a report it had publicly released that day on issues relevant to the inquiry, and requesting that it be considered by the committee. The committee accepted the material from Amnesty International as additional information.

1.4 The committee held a public hearing in Canberra on 5 February 2016. A list of the witnesses who appeared at the public hearing is at Appendix 2, and additional information received by the committee is listed at Appendix 3.

This interim report

1.5 Over some ten months the committee has progressed a fair distance toward completion of this inquiry. In view of the upcoming election, this interim report seeks to summarise the evidence received and the reflections of the committee to date.

1.6 The terms of reference for the inquiry are detailed and specific, and the committee has been unable to answer many of them in precise terms. However, the matters referred by the Senate to the committee can be summarised into four significant questions:

- What actually took place during the reported incident in May 2015?
- If payments were made by the Government of Australia to people smugglers to turn back the asylum seekers on that occasion, was it an isolated incident, or is it a recurrent practice?
- What are the legal and policy implications of the Australian government making payments to people smugglers?
- How should the Senate (further) respond to the public interest immunity claim made by the Minister for Immigration and Border Protection in relation to these matters?

1.7 Following the background information provided in this chapter, chapter 2 discusses evidence received in relation to the first two of the above questions, and the

2 *Journals of the Senate* No. 111, 7 September 2015, p. 3039.

3 *Journals of the Senate* No. 120, 13 October 2015, p. 3224.

4 *Journals of the Senate* No. 127, 23 November 2015, p. 3420.

5 *Journals of the Senate*, No. 143, 1 March 2016, p. 3858.

committee's views in that regard. Chapter 3 summarises the evidence received on the third question, particularly the issue of what laws may have been breached if the incident occurred as reported.

1.8 The committee has not yet completed its investigation of the fourth question in particular, relating to the minister's public interest immunity claim of June 2015, and the broader issue of the transparency and accountability of the executive government in relation to the conduct of Operation Sovereign Borders. Chapter 4 summarises the committee's work and the evidence received to date in this regard, and offers initial comments from the committee.

1.9 The committee assesses that further inquiry is needed in order to reach final conclusions and recommendations on these matters, and is therefore of the view that, if the inquiry lapses before the committee is able to complete it, the Senate should refer this matter to the new committee in the 45th Parliament for further consideration. A recommendation in this regard is offered in chapter 4.

A note on references

1.10 References to the committee Hansard in this report are to the Proof Hansard. Page numbers may vary between the Proof and the final Hansard transcript.

Background

The incident reported to have occurred in May 2015

1.11 On 10 June 2015 an article in the *Sydney Morning Herald* reported that Australian officials had 'paid thousands of dollars to the captain and crew of a boat carrying asylum seekers, who were then returned to Indonesia, according to passengers and an Indonesian police chief'.⁶ The article alleged that the incident occurred during May 2015 and that the crew of the boat had each been paid AU\$7000, wrapped in black plastic bags. According to an Indonesian police chief 'an Australian customs officer called Agus, who spoke fluent Indonesian' paid the boat's captain. The article stated:

Nazmul Hassan, a Bangladeshi on board the boat, said he saw the skipper put money in his pocket.

He said the crew initially told Australian officials they couldn't go back to Indonesia because they could be jailed for people smuggling.

However, after a meeting the captain reportedly said: "We have to go back. Australia want to pay for us."

6 Jewel Topsfield, Sarah Whyte and Karuni Rompies, 'Australian officials paid people smugglers to turn back to Indonesia, says police chief', *Sydney Morning Herald*, 10 June 2015, available: <http://www.smh.com.au/national/australian-officials-paid-people-smugglers-to-turn-back-to-indonesia-says-police-chief-20150609-ghk63g.html> (accessed 2 July 2015).

"After they finished the meeting, everyone looked happy and they agreed to the proposal", Mr Hassan said from Inaboi, a hostel in Kupang, Indonesia, where the asylum seekers are being detained.⁷

1.12 On 13 June the Australian Broadcasting Corporation (ABC) reported that the Indonesian foreign minister, Her Excellency Retno Marsudi, had raised the matter with Australia's ambassador in Jakarta, Mr Paul Grigson. Ms Marsudi stated that Mr Grigson 'promised to take my question, my inquiry, to Canberra and he promised to get back to me again'.⁸ *The Guardian* reported the same day that Indonesia had also launched its own investigation into the claims. An Indonesian foreign ministry spokesperson stated that if reports the navy paid people-smugglers were true, 'it would be a new low for the way the government of Australia handles the situation on irregular migration'.⁹

1.13 A report from the ABC on 17 June 2015 revealed details of documents obtained by the ABC from the Indonesian police, following its investigation of the alleged incident.¹⁰ The Indonesian police documents reportedly revealed that interviews with six witnesses as well as the captain and crew of the boat had elicited the following details:

- the boat departed from the coast of West Java on 5 May 2015, headed towards New Zealand, with 65 asylum seekers and five crew on board. The passengers comprised 54 Sri Lankans, 10 Bangladeshis and one person from Myanmar, including four women (one of whom was pregnant) and three children;
- the boat was stopped near East Timor, allegedly in international waters, by an 'Australian Customs' vessel, and those on board were warned that they could not enter Australian waters, before they were released and continued towards Australian waters for about four days;
- the boat was stopped again, allegedly in international waters, and detained by personnel from a Customs boat and a Royal Australian Navy (RAN) ship. Following discussion between Australian Customs personnel and the captain

7 Jewel Topsfield, Sarah Whyte and Karuni Rompies, 'Australian officials paid people smugglers to turn back to Indonesia, says police chief', *Sydney Morning Herald*, 10 June 2015.

8 ABC/Reuters, 'Asylum seekers: Indonesian foreign minister wants answers over allegations Australia paid people smugglers', *ABC News*, 13 June 2015, available: <http://www.abc.net.au/news/2015-06-13/indonesian-fm-wants-answers-over-smuggling-pay-allegations/6544206> (accessed 2 July 2015).

9 *The Guardian*, 'Australia has hit "new low" amid claims of payment to people smugglers', *The Guardian*, 13 June 2015, available: <http://www.theguardian.com/australia-news/2015/jun/13/pressure-on-abbott-over-claims-people-smugglers-were-paid-to-turn-back-boats> (accessed 2 July 2015).

10 George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, available: <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472> (accessed 29 July 2015).

of the boat, during which the captain was told the boat could not reach New Zealand because of its condition and the waves, an agreement was allegedly struck that the boat would be secured and escorted to Australian waters by Customs and the RAN;

- following four days' further journey, having arrived in Australian waters, those on the boat were registered and identified by the Customs officials. Some of the asylum seekers boarded the Customs ship, at their request. The boat was then taken back towards Australia's Ashmore Reef and anchored there for two days. The crew of the boat and the rest of the asylum seekers then asked to board the RAN ship;
- [some days later] two wooden boats belonging to Australia, called *Jasmine* and *Kanak*, were provided and the group was split in two and transferred to the boats, with three crew on each. They were given lifejackets, a map and directions to Rote Island (near West Timor), food and other supplies;
- it was at this point that the captain was allegedly given as much as US\$6,000 while members of the crew were given US\$5,000 each, bringing the total paid to US\$31,000;
- the crew then took the asylum seekers towards Indonesian waters, a voyage that took about eight hours. When they approached Rote Island, *Jasmine* ran out of fuel and *Kanak* had to take the passengers on board, meaning all 71 people were on board the one boat;
- at about 5:00pm on 31 May, *Kanak* crashed onto a reef at Landu Island, near Rote Island, with some people jumping from the boat and swimming ashore to the nearest village, and locals then helping to evacuate the rest of the asylum seekers from the stricken boat;
- according to local people, the crew fled to Rote Island but at around 9:00pm police arrested the six crew members. They were in custody, each facing a potential maximum of 15 years' imprisonment and up to 1.5 billion rupiah (approximately AU\$145,000) in fines. The 65 asylum seekers were detained by immigration authorities at a hotel in Kupang, West Timor.¹¹

1.14 On 17 June 2016, *The Australian* newspaper reported that payment to the boat crew in the alleged incident was facilitated by an Australian Secret Intelligence Service (ASIS) officer dressed in civilian clothes, aboard the RAN vessel *HMAS Wollongong*. The article stated that the asylum seeker boat was 'deemed unsafe'

11 George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, available at: <http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472> (accessed 29 July 2015).

because it was 'leaking and judged to be in danger of sinking...and its engine was also malfunctioning'.¹²

1.15 *The Australian* observed that '[t]he revelation that the boat was judged unseaworthy does not explain the mystery as to why payments were allegedly made to up to six of the boat's crew'.¹³ The article noted that the Australian government had refused to confirm the payment or disclose any aspect of the incident.¹⁴

1.16 A further article in the *Australian* on 18 June, citing an unnamed source, reported that:

The Australian Secret Intelligence Service is believed to have offered financial incentives to the crews of asylum-seeker boats several times in the past to persuade them to turn their vessels back to Indonesia.

But unlike the upfront payments allegedly made to the crew of an asylum boat last month, the previous payments were made discreetly, and only after the asylum-seekers were returned to Indonesia.

...

It is understood that there is no fixed practice of offering payment to the crews of asylum-seeker boats, but that the option is employed on a case-by-case basis if it is believed it will help to turn the boat around.¹⁵

1.17 The article referenced comments made by the asylum seeker boat captain to Indonesian media that the boats provided by Australia for the return journey were unseaworthy and had insufficient fuel, but stated that 'sources in Canberra' rejected those claims, saying the boats were provided with enough fuel and escorted safely by the Australian ships back to Indonesian waters then tracked by radar until they reached the coast.¹⁶

The government's response to the reports

1.18 At the time of the media reports in June 2015, the Australian Prime Minister and other ministers repeatedly declined to confirm or deny 'operational details' in relation to the alleged incident, including whether or not any payment had been made

12 Cameron Stewart, 'Sinking fears sparked emergency rescue of asylum 'bribes' boat', *The Australian*, 17 June 2015, p. 1.

13 Cameron Stewart, 'Sinking fears sparked emergency rescue of asylum 'bribes' boat', *The Australian*, 17 June 2015, p. 1.

14 Cameron Stewart, 'Sinking fears sparked emergency rescue of asylum 'bribes' boat', *The Australian*, 17 June 2015, p. 1.

15 Cameron Stewart, 'Spies have form in handing cash to asylum crews', *The Australian*, 18 June 2015, p. 1.

16 Cameron Stewart, 'Spies have form in handing cash to asylum crews', *The Australian*, 18 June 2015, p. 1.

to the asylum-seeker boat crew.¹⁷ Minister for Immigration and Border Protection the Hon Peter Dutton (the minister) stated that any information would be provided 'at a time which is operationally appropriate'.¹⁸

1.19 In the submission of the Operation Sovereign Borders Joint Agency Task Force (OSB JATF) to this inquiry, dated 30 July 2015, Major General Andrew Bottrell, CSC and Bar, DSM, Commander OSB JATF provided the following information, which he said had been deemed to be 'no longer operationally sensitive':

In late May 2015, a vessel was observed by, then, Border Protection Command assets north of Australia operating in poor weather conditions, which were rapidly deteriorating. The Master of the vessel indicated they were experiencing difficulty and requested assistance. Border Protection Command assets rendered immediate assistance in accordance with our international safety [of] life at sea obligations and assisted the safe return of the people to Indonesia.

I believe our actions to assist this vessel were necessary to preserve the safety of life of those on board. The officers on board the Border Protection Command vessels operated in dangerous sea conditions to render assistance to the distressed vessel.¹⁹

Consideration by the Senate

1.20 On 16 June 2015, the Senate agreed to an order for the production of documents moved by Senator Hanson-Young, requiring that:

- (a) there be laid on the table by the Assistant Minister for Immigration and Border Protection, by 3 pm on 17 June 2015, all documents containing information pertaining to:
 - (i) 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, and
 - (ii) the facilitation or authorisation of the payment of any money 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, and

17 See Emma Griffiths, 'Tony Abbott, Julie Bishop and Peter Dutton refuse to answer Opposition questions about paying people smugglers', *ABC News*, 15 June 2015, available at: <http://www.abc.net.au/news/2015-06-15/people-smugglers-abbott-bishop-dutton-refuse-discuss-payments/6547224> (accessed 29 September 2015).

18 'Tony Abbott rebuffs Indonesian questions on alleged cash payments to people smugglers', *ABC News*, 15 June 2015, available at: <http://www.abc.net.au/news/2015-06-14/abbott-dodges-questions-again-about-boat-turn-back-claims/6544558> (accessed 20 April 2016).

19 *Submission 9*, p. 2.

in relation to any such payment, a document containing information pertaining to the details of the interception of the vessel, the amount of money paid, to whom and for what purpose; and

- (b) there be laid on the table by the Assistant Minister for Immigration and Border Protection, by 3 pm on 17 June 2015, any documents produced by the office of the Minister for Immigration and Border Protection, the Department of Immigration and Border Protection or the Australian Customs and Border Protection Service regarding;
- (i) the interception of a vessel en route to Australia or New Zealand in May 2015,
 - (ii) any orders to turn back or take back that vessel, its passengers or crew,
 - (iii) any payments made to the vessel's captain, crew or passengers, and
 - (iv) any payments made in relation to the passage of the vessel, its passengers or crew.²⁰

1.21 On 17 June 2015, Senator the Hon Michaelia Cash, then Assistant Minister for Immigration and Border Protection, tabled a letter from herself attaching a letter from the minister, to the Clerk of the Senate, in response to the order for the production of documents.²¹

1.22 In his letter, the minister submitted that the requested documents should be withheld from the Senate on public interest immunity grounds. He stated that the documents requested related to operational matters, which should not be disclosed because:

- they would, or could reasonably be expected to, cause damage to national security, defence, or international relations, including disclosure of documents or information obtained in confidence from other governments; and
- they contained material relating to law enforcement or the protection of public safety which would, or could reasonably be expected to:
 - prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance;
 - endanger the life or physical safety of any person;
 - disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures;

20 *Journals of the Senate* No. 96, 16 June 2015, pp 2665-2666.

21 *Journals of the Senate* No. 97, 17 June 2015, p. 2680.

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- prejudice the maintenance or enforcement of lawful methods for the protection of public safety.²²

1.23 The minister's letter stated more specifically that the requested documents may disclose information which revealed the location, capacity, patrol and tactical routines relevant to Australian Defence Force and Customs and Border Protection vessels and aviation assets, undermining the tactical advantage of civil maritime surveillance assets over people smugglers and the ability of Australia to protect people from the practices of people smugglers and other serious criminal activities.²³ The minister further stated that such disclosure would 'enable an exploitation of confidential methodology and processes used by Australian Defence Force and Australian Customs and Border Protection vessels and assets'.²⁴

1.24 In relation to the impact on Australia's foreign relations, the letter stated that the confidentiality of communications between Australia and other sovereign states 'could not be maintained where the protection of material recording such communications could not be assured'. In addition, the minister submitted that disclosure of information relating to the handling of illegal maritime arrivals would cause serious damage to international relations between Australia and regional partners including Indonesia and Papua New Guinea by undermining international cooperation on these matters, and 'further increas[ing] the tactical advantage of people smugglers and consequently increas[ing] the risk to the wellbeing' of illegal maritime arrivals.²⁵

1.25 The full text of the minister's letter is at Appendix 4.

1.26 On 22 June 2015, on the motion of Senator Hanson-Young, the Senate resolved that it:

does not accept the claim of public interest immunity made by the Assistant Minister for Immigration and Border Protection in failing to provide the documents that were ordered by the Senate on 16 June 2015, namely, all documents relating to the payment of money to turn back or take back vessels bound for Australia and New Zealand.²⁶

22 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Response to Order for Production of Documents—Vessels en route to Australia*, 17 June 2015, pp 2-3.

23 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Response to Order for Production of Documents—Vessels en route to Australia*, 17 June 2015, p. 3.

24 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Response to Order for Production of Documents—Vessels en route to Australia*, 17 June 2015, p. 3.

25 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *Response to Order for Production of Documents—Vessels en route to Australia*, 17 June 2015, pp 3-4.

26 *Journals of the Senate* No. 99, 22 June 2015, p. 2746.

