

Chapter 2

Seeking the facts

2.1 This chapter examines the evidence obtained by the committee in relation to the factual circumstances of the reported incident of May 2015, and other alleged occurrences of the payment of people smugglers by the Australian government.

What happened in May 2015? Conflicting versions of events

2.2 The majority of submissions made to the committee's inquiry were unable to offer any insight into what actually occurred in the May 2015 incident, beyond the media reporting and the information released publicly by Indonesian authorities discussed in chapter 1.

2.3 The only participants in the inquiry who offered evidence about the facts of the May 2015 incident were the government and Amnesty International. Two further submissions offered information and views alleging a previous history of payments to people smugglers by the Australian government.

2.4 The committee notes that it invited the Government of the Republic of Indonesia (through the Indonesian Ambassador to Australia) to provide evidence to the inquiry, but it declined to do so. The committee also requested evidence from a number of specific Australian government representatives and agencies, including the Australian Secret Intelligence Service (ASIS) and the Royal Australian Navy (RAN). These also declined to engage directly with the committee, referring the committee to the Operation Sovereign Borders Joint Agency Task Force (OSB JATF).

The Amnesty report

2.5 The report provided to the committee and published by Amnesty International in October 2015 (the Amnesty report) set out details of that organisation's own investigation into 'Australia's abuse of asylum seekers at sea', including the May 2015 incident.¹ Amnesty's research, conducted between August and October 2015, included interviews with the 65 asylum-seekers and six crew members on board the vessel allegedly intercepted by Australian authorities in May 2015, as well as Indonesian police and government officials.

2.6 Amnesty International reported that the participants it interviewed consistently offered the following account of events:

- two Australian ships intercepted the asylum seeker boat a first time on 17 May 2015, in international waters. The boat was boarded without permission by six uniformed Australian Border Force (ABF) personnel, who inspected and took photographs on board, then disembarked, leaving leaflets with the passengers and crew which stated that they could never enter Australian waters;

1 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, October 2015, provided to the committee as additional information, received 29 October 2015.

- the two Australian ships continued to follow the boat for several days;
- on 22 May 2015, the boat was intercepted a second time. The crew believed they were in Indonesian waters at the time, while the Australian officials claimed they were in international waters. Eight Australian personnel boarded the boat and took its captain back to their vessel for several hours. The captain told Amnesty that an Australian officer on board the vessel told him that the Australians were worried about the boat and offered to take the passengers to Australia, and the crew by plane back to Indonesia;
- that evening, the captain returned to the boat, accompanied by eight RAN personnel. That night, according to the passengers, the adult male passengers were kept outside the cabin by armed Australian personnel, in very hard rain with no protection from the elements. Some were sick and vomiting but were prevented from going inside the cabin. No passengers (including the women inside the cabin) were given any food that night;
- the asylum seeker boat was escorted by the Australian ships to waters off Greenhill Island, an Australian territory near Darwin, where all the passengers and crew were interviewed and photographed by Australian officials. The asylum seekers were told that if they boarded the ABF ship, they would be permitted to bathe. Fifty passengers agreed to board the ship, while fifteen remained on their boat;
- it was at this time, on the original boat, that Australian officials gave money to the crew. Crew members told Amnesty International that two of them received US\$6000 each, and the other four US\$5000 each. It was not clear why the amounts differed. The payment was witnessed by at least one of the fifteen passengers who had remained on their boat;
- meanwhile, the 50 passengers who had boarded the ABF ship were detained there for what they estimated to be seven days, and 'subjected to various forms of ill-treatment' including being held in small, hot and airless 'cells' with 25 persons in each and no fans or windows, the confiscation of all their belongings including phones and food; and denial of medicines and medical care, despite the presence of a doctor on board;
- following the transfer of some further passengers from the original boat to the ABF ship, and the travel of the entire convoy to Ashmore Reef, a RAN officer informed the crew that they and the passengers would all be returning to Indonesia, on different boats;
- early on the morning of 31 May 2015, the asylum seekers and the crew were divided and transferred on to two Australian-supplied boats, the *Kanak* and the *Jasmine*. The crew described the condition of these boats as 'okay', but not as good as the original boat (they were small, with no toilets) and stated that the party was provided with no food, and with very little fuel – only one drum per boat. The crew stated that the Australian officials gave them a global positioning system (GPS) and marked maps, and instructed them to land on Rote Island, in Indonesian territory;

- the boats were escorted for a few hours by the Australian ships, which then departed. A few hours later, the *Jasmine* ran out of fuel, and the crew members transferred all the passengers to the *Kanak*. A few hours later, close to Landu Island in Indonesia, the 'overcrowded' *Kanak* struck a reef. Local people rescued those on board and took them to shore.²

2.7 Amnesty told the committee that '[a]ll of the people we interviewed denied they were in distress',³ and said that the evidence gathered by it 'points to Australian officials intercepting and boarding a vessel in international waters without permission'.⁴ Amnesty stated that:

Despite claims that this operation was there for the safety of the people who were supposedly rescued according to the government, we have highlighted that the individuals say they were never at risk and never put out a distress signal.⁵

2.8 With regard to the alleged payment made to the crew, the Amnesty report stated that the Indonesian police had confirmed publicly, as well as to Amnesty, that US\$32,000 in cash had been confiscated from the boat crew upon their apprehension in Indonesia. Amnesty's researchers had sighted the money, described as 'dozens of new-looking 100 USD bills' and a document listing the serial numbers of the bills.⁶

2.9 Amnesty stated that the circumstances of its interviews 'made it challenging to determine the precise understanding that was reached' in relation to the payment. The boat's captain stated that he believed when he first received the money that it was 'to start a new life', as the crew were told they would be flown back to Indonesia.⁷

2.10 At the committee's public hearing, Amnesty reiterated these findings, and elaborated on them. Amnesty stated that:

...the report goes into the detail of how it was witnessed by the passengers—one passenger, in particular, who we interviewed, witnessed money changing hands. We also have the testimony from the crew—who were obviously very distressed about the fact that they were not going to get any material gain, having been intercepted by the Australians—that they were told that they would be given this money and, initially, they were told that the passengers would be taken to Australia and they would be flown back to Indonesia. Subsequently they were told that, no, they would have

2 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, pp 14-20.

3 Dr Graham Thom, *Committee Hansard*, 5 February 2016, p. 13.

4 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 10.

5 Dr Graham Thom, *Committee Hansard*, 5 February 2016, p. 13.

6 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 18.

7 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, pp 18-19.

passenger ships that had been brought by the Australian government, not their initial ship...

...

[The crew] made it very clear that this was the money the Australian government was giving to them to take these vessels back. The mood changed quite significantly, as outlined in our report, and they were very clear on what the money was being provided to them for.⁸

2.11 At the time of publication of the Amnesty report in October 2015, the crew of the boat had been charged with a number of offences under Indonesian law and were in custody awaiting trial.⁹ At the committee's hearing in February 2016, Amnesty advised that in January 2016 the captain and crew had been fined and sentenced to jail terms of over five years for their role in the people smuggling incident of May 2015. Amnesty stated that the court cited the receipt of money from 'Australian Customs' as proof that the defendants derived a profit from people smuggling.¹⁰

2.12 Beyond the question of payments, Amnesty was of the view that the Australian Government had shown disregard for the safety and wellbeing of the asylum seekers in the way it handled the incident. In relation to the boats and equipment provided for the group's return to Indonesia, Refugee Coordinator Dr Graham Thom stated that:

If we get to the point of 'safe return', it is quite clear that it was not a safe return. The evidence is very clear that one of the boats ran out of fuel on the high seas, that the passengers then had to change ships *[sic]* completely unaided. They had been abandoned by the Australians at that point in time. We know from the Indonesian authorities that we interviewed that the boat ran ashore, and it was very risky—the Indonesian officials have used words like 'suicide mission'—so this is very serious and very much at odds...there are clearly contradictions there that we think need to be investigated in an open way.¹¹

2.13 Amnesty told the committee that it had video footage of the transfer of the asylum seekers from the *Jasmine* to the *Kanak* at sea, which it described as 'very chaotic', leaving the single remaining boat 'dangerously overcrowded'.¹²

2.14 Amnesty advised the committee that it had shared its findings with the Australian Federal Police (AFP), and understood that the information was being evaluated by the AFP. Amnesty also stated that it had:

received correspondence from the immigration minister in response to our report, denying that any ill-treatment occurred but stating that any

8 Dr Graham Thom, *Committee Hansard*, 5 February 2016, p. 13.

9 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 21.

10 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 11.

11 Dr Graham Thom, *Committee Hansard*, 5 February 2016, p. 16.

12 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 11.

allegations of mistreatment are taken seriously and will be assessed. We are unsure whether such an assessment has taken place.¹³

The government's version

2.15 As discussed in chapter 1, in the period immediately following the reported incident in May 2015, the government refused to provide any information about it, and declined to confirm or deny that money was paid to the boat crew by the government.

2.16 Subsequently, in its submission to this inquiry in July 2015, OSB JATF provided a few sentences of new information about the alleged events. As quoted in chapter 1 above, the submission stated that the vessel had been observed by Australian border protection assets experiencing difficulty in poor and deteriorating weather conditions, and the master of the vessel had requested assistance. Australian authorities had 'assisted the safe return of the people to Indonesia' in accordance with Australia's safety of life at sea (SOLAS) obligations.¹⁴

2.17 At the committee's public hearing on 5 February 2016, Major-General Andrew Bottrell, the Commander of OSB JATF, added that:

The prevailing weather conditions at the time were rough and were forecast to deteriorate significantly, which was a particular concern of mine. Had the vessel master not sought our assistance when he did so, I held serious concerns for the continued safety of all on board. Following the provision of initial assistance, all passengers and crew were assisted in a safe return to Indonesia on alternative vessels, as their vessel was no longer suitable.¹⁵

2.18 Major-General Bottrell stated that his 'primary concern' was 'the prevailing weather conditions that were about to hit them over the coming days'.¹⁶ He said that:

We know, for example, that many of the crews of people-smuggling vessels are under considerable pressure from the organisers back in their departure countries to complete their voyages, regardless of the state of their vessels or the prevailing weather conditions. The extent to which they have knowingly or unknowingly risked their lives and, by extension, the lives of their even more vulnerable passengers is shocking.¹⁷

2.19 There was only one element of the incident upon which the government was willing to provide more information at the committee's public hearing. In response to allegations in the Amnesty report that asylum seekers were forced to stay out all night on the deck of their vessel in the rain, while Australian officials stayed in the cabin, Major-General Bottrell stated that:

13 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 11.

14 Operation Sovereign Borders Joint Agency Task Force, *Submission 9*, p. 2.

15 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 24.

16 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 26.

17 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 23.

I specifically went back and looked at the allegation that we had placed people on the deck overnight, and yes that did occur. I will explain that it was for a very real and very practical reason. The vessel was in sea state 5, so we are talking winds of up to 21 knots and waves of up to two metres. We had put a steaming party on board—and I will not describe the makeup of that—but we had put some Australian personnel on board that vessel. The seas were too rough to be able to extract the people off that vessel. Those individuals, the passengers and crew, were put on the deck. We provided them with life jackets, because if that vessel then went down it was easier to rescue them from the deck of the vessel, as opposed to if they were below decks. So, we had individuals who were below deck trying to maintain their engine and elsewhere on the vessel. That is about all I can explain.

The first and overriding concern of the Australian vessel master was for the provision of their life. Life and the safety of life was the first concern. Subsequent comforts and life support were provided when the weather had improved and when we had transferred them to other vessels. That is about all I can explain under those circumstances, but it should give you some sense that the safety of the individuals was the first and overriding concern and why specific actions were taken. I know they were reported as an allegation, but that perhaps provides some context as to why those actions occurred.¹⁸

2.20 Major-General Bottrell told the committee that he had deemed that particular information to be no longer operationally sensitive, because 'providing that information now will not undermine our ability to use that approach in the future' if a 'genuine' SOLAS issue arose.¹⁹

2.21 The government's senior representatives repeatedly refused to confirm or deny to the committee whether payments had been made to the crew of the boat. When invited to simply refute the allegation that this had occurred, without divulging any operational details, the government maintained its refusal. Secretary of the Department of Immigration and Border Protection (the department), Mr Michael Pezzullo, stated that the government was 'neither confirming or denying it; we are just simply not commenting on it'.²⁰

2.22 Major-General Bottrell sought to explain the rationale for this position, referring to the grounds of public interest immunity claimed by the minister:

Material the disclosure of which could reasonably be expected to cause damage to national security, defence or international relations, including the disclosure of documents or information obtained in confidence from other governments—that is one. There are a number of others that I could refer to more broadly. Any and all engagements that we undertake as part of a

18 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 32.

19 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 32.

20 Mr Michael Pezzullo, *Committee Hansard*, 5 February 2016, p. 28.

return that may give people smugglers a sense that they have a better understanding of our tactics will not be discussed here today.²¹

2.23 The government representatives nevertheless sought to assure the committee that all of the actions that had taken place during that incident were both lawful, and authorised by government policy:

Setting aside any particular operational method, because neither General Bottrell nor I can confirm or deny that any such activities took place, for reasons that have been explained previously; but any operational method, tactic, technique, manoeuvre, procedure is conducted within the auspices of the Operation Sovereign Borders policy, yes—and then, obviously, within the further framing reference of applicable legislation, be it the Migration Act, the Maritime Powers Act or other acts of parliament.²²

2.24 The government advised the committee that it had undertaken an internal investigation into the allegations of mistreatment of asylum-seekers raised in the Amnesty report, by way of reference to the Integrity and Professional Standards Branch of the department. As of February 2016, some initial findings had been made, but the investigation had not been completed.²³

2.25 Mr Pezzullo said that the department's internal investigation 'did not go to the issue of alleged payments, because there is nothing to investigate', although this was not to be interpreted as a statement that the payments did not happen, which Mr Pezzullo again refused to confirm or deny.²⁴

Was this an anomalous event?

2.26 The committee received two submissions alleging that the reported payment of people smugglers by the Government of Australia in May 2015 was not an isolated incident.²⁵ Researcher Ms Marg Hutton asserted that '[f]or at least 15 years, Australian officials have paid money to people involved with people-smuggling. While she stated that these payments were 'usually in exchange for information', Ms Hutton submitted, citing previous Senate debate on people smuggling issues, that:

There have long been questions about what is being done in Australia's name to stop asylum seeker boats—that it has been done under the cloak of secrecy; that Australian Federal Police (AFP) and Australian Secret Intelligence Service (ASIS) "sailed close to the wind in Indonesia" and that it has been difficult for parliamentarians to find out what is being done by Australian officials to combat people smuggling.²⁶

21 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 27.

22 Mr Michael Pezzullo, *Committee Hansard*, 5 February 2016, p. 28.

23 Major-General Andrew Bottrell, *Committee Hansard*, 5 February 2016, p. 30.

24 Mr Michael Pezzullo, *Committee Hansard*, 5 February 2016, p. 30.

25 Ms Marg Hutton, *Submission 4*; Ms Marilyn Shepherd, *Submission 12*.

26 Ms Marg Hutton, *Submission 4*, p. 1 (internal footnotes removed).

2.27 Despite this 'shady fifteen year history of Australia entering into financial arrangements with people smugglers as part of the disruption program', Ms Hutton believed that making 'payments to people smugglers to induce them to turn boats around appears to be a new practice'.²⁷

2.28 Aside from the reported incident in May 2015, Amnesty International's report raised six other incidents brought to light in its research which it argued suggested a 'pattern of...abuse of asylum-seekers by Australian officials' between 2013 and 2015.²⁸

2.29 Five were alleged encounters between December 2013 and mid-2014, and in three of these, witnesses claimed that asylum-seekers were subjected to verbal and/or physical abuse including beatings, use of pepper spray, and violent threats from Australian officials.²⁹ Amnesty stated that although the accounts provided by six witnesses of these incidents were not as detailed as the 2015 incidents, they were consistent with the *modus operandi* of the incidents reported in May 2015 and in July, as noted below.³⁰

2.30 The sixth incident was alleged to have occurred in July 2015. According to Amnesty a boat containing 25 asylum-seekers seeking to travel from Indonesia to Australia was intercepted by two Australian ships on 25 July 2015, and the passengers and crew were made to return to Indonesia.³¹ In interviews with 15 of the passengers, Amnesty was told that the boat was not in good condition and had begun taking on water soon after its departure from Indonesia on 22 or 23 July. Two Australian ships—one ABF and one RAN—arrived alongside the boat on the morning of 25 July, at which point those on board signalled for several hours that the boat was in distress. The ship was boarded by Australian authorities six to eight hours later, and those on board were interviewed, photographed and detained aboard the ABF vessel, for seven days.³²

2.31 According to the passengers, on 1 August 2015 they were transferred on to a boat called the *Harum*, which was similar to their original boat, and sent back toward Rote Island in Indonesia. At this time, the passengers stated, the attitude of the crew had changed, and some reported that the crew had 'two bags' in their possession that they had not had before. When the passengers objected to returning to Indonesia, and

27 Ms Marg Hutton, *Submission 4*, p. 3.

28 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 40.

29 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, pp 28-29.

30 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 28

31 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, p. 25.

32 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, pp 26-27.

threatened to search the two new bags in the crew's possession, the crew sailed back to the RAN vessel, at which time armed Australian officials boarded the boat, ordered them to return and escorted the *Harum* to 'near Kupang'. Passengers reported that the Australian officials told them not to touch the crew's baggage, and threatened that if they returned again, 'we'll shoot you'. The *Harum* ran out of fuel before reaching land but was intercepted by Indonesian police and taken to Tablolong, Indonesia, where the passengers were detained.³³

2.32 In its evidence at the public hearing, Amnesty International said that these reports indicated that 'Australian officials may have made a second secret payment to a boat crew, which is a strong allegation that needs to be examined further'.³⁴

2.33 Amnesty further claimed that:

We know of at least one more pushback, in November [2015], that crashed off the coast of Kupang as well, potentially putting the crew and passengers at risk. The only reason we know about this pushback is that it was spotted off the coast of Christmas Island, where it was visible to onlookers. They could see the pushback occurring. We have no other way of knowing how many other pushbacks have occurred since that time because that information is kept secret.³⁵

Committee view

2.34 The committee has been able to consider several explanations of the incident of May 2015: from the Australian media, Amnesty International and (in part) the Australian government, as well as reported findings of the Indonesian police. There is some common ground in these accounts: there is no doubt that an asylum seeker boat was intercepted by Australian authorities in May 2015 in waters somewhere between Australia and Indonesia, and that Australian authorities ultimately placed the crew and passengers on two alternate boats which returned to Indonesia. This much has been confirmed by the Australian government.

2.35 But key parts of the narrative remain contested. One of these is whether the original asylum seeker boat was in distress and 'rescued' by Australian ships as a matter of humanitarian assistance, or whether an otherwise seaworthy boat was intercepted in international waters and turned around as a deliberate action to prevent it from completing its intended journey to New Zealand.

2.36 The other major unresolved element of the story, central to this inquiry, is whether representatives of the Australian government made cash payments to the captain and crew of the boat—and if so, upon whose authority, and why.

2.37 Due to the government's refusal to provide a full explanation of events, the committee unfortunately finds itself unable to answer these questions. The Australian

33 Amnesty International, *By hook or by crook: Australia's abuse of asylum seekers at sea*, additional information received 29 October 2015, pp 27-28.

34 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 11.

35 Ms Stephanie Cousins, *Committee Hansard*, 5 February 2016, p. 11.

government's unwillingness to offer any alternative narrative to the largely consistent versions offered by the Australian and Indonesian media, Amnesty International and the Indonesian police and government, may appear to suggest where the truth lies. Nevertheless, it is not possible for this committee, on the basis of the evidence (and lack of evidence) before it, to reach a conclusion on these points.

2.38 What the committee does wish to record is that the various reports of the events involve matters and give rise to allegations of a serious nature. In that light the unwillingness of the government so far to submit to any meaningful accountability in relation to this incident, and particularly its repeated refusal to deny that payments were made, is of concern.

2.39 Evidence received by the committee relating to the legal and policy implications of paying people smugglers to turn back asylum seeker boats is discussed in the following chapter, while issues around transparency and accountability of the executive government to parliament and the people in relation to Operation Sovereign Borders are discussed in chapter 4.