

Fishing communities and maritime powers

Where poverty meets policy

Submission of the Australian Lawyers Alliance to the Senate Legal and Constitutional Affairs Committee on the *Maritime Powers Bill 2012* (Cth) and the *Maritime Powers (Consequential Amendments) Bill 2012* (Cth)

August 2012

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Introduction

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the *Maritime Powers Bill 2012 (Cth)* and the *Maritime Powers (Consequential Amendments) Bill 2012 (Cth)* ('the Bills').

The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

Principally, we are concerned about the practical implications of this legislative package on the human rights of asylum seekers, and Indonesian and Papua New Guinean citizens.

We are especially concerned in light of the Bills' intersection with the recently passed *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth)* ('Regional Processing Act').

We are also concerned given the history of undermining of the human rights of asylum seekers, and Indonesian fishermen in or near Australian waters.

We seek that the human rights elements within, in particular, the *Maritime Powers Bill*, be granted appropriate consideration.

This is crucial, as the Regional Processing Act, with which these Bills will operate in tandem, has not been subject to appropriate human rights scrutiny, as the *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011* was introduced prior to the operation of the *Human Rights (Parliamentary Scrutiny) Act 2012 (Cth)*.

While the Regional Processing Act provides a legislative framework to the implementation of regional processing, the Act also makes provisions in relation to Papua New Guinean citizens.

We note that 'monitoring law' is defined in section 8 of the *Maritime Powers Bill* as a number of laws, including the *Fisheries Management Act 1991*, the *Migration Act 1958* and the *Torres Strait Fisheries Act 1984* – all of which impact upon the rights of vulnerable peoples.

We note also, the small number of organisations that have provided submissions to this Inquiry, and that no terms of reference specifying human rights or international legal obligations.

While we acknowledge the annexure of a Statement of Compatibility with Human Rights, and a comprehensive analysis of the Bill's impact on human rights, we acknowledge that some areas have been missed.

We also query as to whether the provisions within these Bills can adequately fulfil the obligations as laid out in the UN Convention on the Law of the Sea (UNCLOS).

We recommend that further legal advice be sought on this topic, and that the opinion of an expert on UNCLOS would be of great assistance to the Committee in this Inquiry.

The treatment of Indonesian fishermen

The ALA believe that the aggressive expansion of maritime powers is contributing to the desperation of communities in Indonesia to seek an income for their families, and to the liability of the Commonwealth to pay compensation.

The ALA draws attention to our previous submission to the Senate Legal and Constitutional Affairs Committee on the *Deterring People Smuggling Bill 2011* (Cth), where we highlighted the historical connection between aggressive maritime regulation, people smuggling and compensation.¹

In this submission, we outlined our concern with previous expansions to maritime powers, including the power to strip search individuals and burn boats in 2007.

We note, that a test case is currently being run in the Federal Court of Australia, *Sahring & Ors v Commonwealth of Australia & Anor*,² seeking compensation for the destruction of fishing boats of Indonesian fishermen.

We note that the decision in this case will be influential in understanding the lawful bounds of power and the exercise of such powers by maritime officers.

We also acknowledge the past case of *Muslimin v The Queen*³, where an individual was charged with unlawful fishing outside the Australian Fishing Zone, was acquitted by the High Court.

¹ See Australian Lawyers Alliance, 'Understanding the complexities: People smuggling, deterrence and intersection with Australia's maritime regulation' (Nov 2011). Accessible at <http://www.lawyersalliance.com.au/public.php?id=115>

² NTD9/201

³ [2010] HCA 7

We also note that ABC radio program, *Background Briefing*, drew attention to Muslimin, in their 2011 report into people smuggling. In their report, they stated that Muslimin, in an effort to seek a livelihood upon his return to Indonesia, took up people smuggling.⁴

This has been exacerbated by the ongoing and continuing impact of the 2009 Montara oil spill, Australia's largest offshore oil spill, which has had detrimental impact on communities in West Papua. We annex to this submission previous information provided by the ALA to the Expert Panel on Asylum Seekers.

Application in relation to Papua New Guinean citizens

The Bills have direct relevance to the treatment of Papua New Guinean citizens as the *Torres Strait Fisheries Act 1984*, the *Fisheries Management Act 1991* and the *Migration Act* - which was amended by the *Regional Processing Act* – all of which are included in definitions of 'monitoring law'⁵, impact upon Papua New Guinean citizens, especially those in or near the Protection Zone.

The *Regional Processing Act* inserted s189 (3A) into the *Migration Act*, provides discretion to officers to detain Papua New Guinean citizens in or near a protected area.

Given the scope where contravening a law includes 'intention to contravene' (which we comment on later), there is scope for similar circumstances to that seen within the case of *Muslimin*, to occur in the Protected Zone.

The *Regional Processing Act* provides that an officer may detain a person in a protected area if the officer knows or reasonably suspects that a person is an allowed inhabitant of the Protected Zone and is an unlawful non-citizen.⁶

A protected area is an area that is:

*(a) part of the migration zone; and (b) in, or in an area in the vicinity of, the Protected Zone – the Protected Zone being the zone established under Article 10 of the Torres Strait Treaty; the area bounded by the line described in Annex 9 to that treaty.*⁷

⁴ See Australian Lawyers Alliance, 'Understanding the complexities: People smuggling, deterrence and intersection with Australia's maritime regulation' (Nov 2011).

⁵ *Maritime Powers Bill 2012* (Cth), cl 8

⁶ *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) Schedule 1, Item 13

⁷ *Migration Act 1958* (Cth) s5

This appears to amount to an expansion of Australia's imprisonment of unlawful fishermen, however on the PNG border (as opposed to the Indonesian border – where the most aggressive expansion of powers has occurred).

An 'allowed inhabitant of the Protected Zone' means an inhabitant of the Protected Zone, other than an inhabitant to whom a declaration under section 16 (presence declared undesirable) applies, and 'inhabitant of the Protected Zone' means, more specifically, a person who is a citizen of Papua New Guinea and who is a traditional inhabitant.⁸

This means that Torres Strait Islanders who are citizens of Australia will not be captured in these laws, but that traditional Papua New Guinean fishermen will be.⁹

The purpose of establishing the Protection Zone is identified in Article 10 of the Torres Strait Treaty:

1. A Protected Zone in the Torres Strait is hereby established comprising all the land, sea, airspace, seabed and subsoil within the area bounded by the line described in Annex 9 to this Treaty...

*2. The Parties shall adopt and apply measures in relation to the Protected Zone in **accordance with the provisions of this Treaty**.*

*3. The **principal purpose of the Parties** in establishing the Protected Zone, and in determining its northern, southern, eastern and western boundaries, is to **acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement**.*

4. A further purpose of the Parties in establishing the Protected Zone is to protect and preserve the marine environment and indigenous fauna and flora in and in the vicinity of the Protected Zone.

The Regional Processing Act therefore may undermine the provisions of the Torres Strait Treaty, as it may potentially allow for the detaining of Papua New Guinean citizens engaging in traditional fishing.

We are deeply concerned as to how these new provisions will operate in tandem with the proposed Bills currently being investigated by this Inquiry.

The terms of the Bill

⁸ *Migration Act 1958* (Cth) s5

⁹ See Torres Strait Treaty, Article 1(m)(i)(ii)(iii)(i)(ii)

The ALA raises concern at a number of elements within the Bill. We will address these briefly now in this submission.

Extra-territorial application

The ALA raises deep concern regarding clause 14 of the *Maritime Powers Bill 2012*.

The introduction of such a provision may amount to an expansion of the reach of Australian domestic law that is not mandated by international law, in particular, the UN Convention on the Law of the Sea (UNCLOS).

Treated with humanity and respect for human dignity

The ALA welcomes cl 95, however submit that more needs to be done to enshrine the character of this clause into the holistic nature of the Bill.

Law intended to be contravened

The ALA raises concern about the phrase ‘intended to [contravene a law]’ in cl 9.

The ALA is concerned as there does not appear to be an appropriate test for proving ‘intention’.

Where a person ‘intends’ to contravene a law, a maritime officer may then authorise the exercise of maritime powers (as per Division 2).

Extraterritorial application

The ALA is concerned regarding the extra-territorial application of Australian law in the presence of an ‘agreement’ between Australia and another country, in cl14. At no point is there reference to the overarching power of the UN Convention on the Law of the Sea and the importance of any agreement adhering to the text of the Convention, for the agreement to be valid.

We are also concerned regarding the operation of cl 40 – especially in relation to Indonesian waters and also, in connection to a protected area – and therefore the implementation of s189(3A) of the *Migration Act 1958*, where a traditional inhabitant of Papua New Guinea may be detained in or near the Protection Zone.

This is contrary to the principal purpose of the *Torres Strait Treaty*:

*The **principal purpose of the Parties** in establishing the Protected Zone, and in determining its northern, southern, eastern and western boundaries, is to **acknowledge and protect the traditional way of life and livelihood***

*of the traditional inhabitants including their traditional fishing and free movement.*¹⁰

Use of force

The ALA is also concerned at the exemption specified in cl 37(2), as open to abuse.

Restraint is not arrest

The ALA is also concerned regarding cl 75(1) as it appears to be intended to block claims of unlawful detention in instances such as are applied under this Bill.

Compensation for acquisition of property

Part 7, Division 5 of the *Maritime Powers Bill* provides for the compensation of acquisition of property.

We query as to whether people will have true access to 'reasonable' amounts of compensation, especially taking into account the likelihood of lack of access to legal advice.

Costs

Part 7, Division 3 provides that the owner of a vessel is liable to pay the Commonwealth for reasonable costs incurred in conducting a chase.

We are concerned at this Part, especially cl 113. We raise concerns about placing the liability of cost on a person who makes the application for their possession to be stored by the Commonwealth. In many cases, individuals that are living in poverty, such as Indonesian or Papua New Guinean fishermen, will be unable to secure their possessions. This is especially the case regarding storage of boats. This will inevitably contribute to the cycle of poverty within their communities.

Evidentiary certificates

We are concerned regarding the retrospective application of cl 109, citing that Minister may by signed writing, certify that the Minister had previously approved without writing, a particular exercise of power. We believe that this could be used to prejudice the rights of individuals. This is especially the case regarding the operation of cl 111, citing that the certificates are prima facie evidence.

Protection from suit

¹⁰ Torres Strait Treaty, Article 10(3)

We are also concerned regarding the practical operation of cl 107, protecting maritime officers from actions in relation to acts done in the exercise or performance of a power under this Act, as we believe this prejudice future claims .

Creation of offences

The offences created under cl 103 are excessive and punitive. The penalty of 2 years imprisonment, or 120 penalty units, or both, are excessive for the offences listed.

Furthermore, the cost of imprisonment for persons charged with this offence, will be of high cost to the taxpayer.

Access to legal advice

We raise concern regarding the interaction between cl 100 and cl 101. Cl100 (c) provides that a person does not need to inform a person of the offence for which they are arrested if the officer 'believes on reasonable grounds that the person does not speak English'. Cl 101 provides that the officer must take the person as soon as practicable before a magistrate. It is possible in these instances that people will be charged before they are aware of the offence, without access to translators or lawyers to provide assistance to their case.

Detaining persons

The ALA is concerned about the operation of cl 72(5), in that a maritime officer may *within or outside Australia*, place, restrain or remove a person from a vessel or aircraft.

Returning things

Cl 81 provides that an application must be made within 30 days after the notice of Commonwealth ownership is given. The ALA is concerned that individuals will not have effective access to translators or legal advice within such 30 day period to lodge such an application.

Disposing of things

Clause 91 provides for destruction of seized things, including detained vessels.

The ALA submits that it is likely that vessels transporting fishermen from both Indonesia and Papua New Guinea, and/or asylum seekers, are likely to be destroyed under this clause.

We highlight again, comments made earlier in relation to the impact that this has had on Indonesian communities.

Ultimately, failure to have a sustainable approach to the treatment of fishing boats means that the Commonwealth government is not utilising its expenditure effectively.

The cost of finding boats, destroying boats, imprisoning individuals, paying compensation to families, paying legal fees in such claims and supporting communities through AusAID whose livelihoods have been further reduced as a direct results of the above – is a cyclical pattern that must be broken.

Conclusion

The ALA is concerned regarding the ongoing impact of maritime laws on Australia's neighbours.

The losses being sustained in communities today as a direct result of the exercise of powers under the various 'monitoring laws' covered by these Bills, are substantial, and are contributing to and exacerbating the cycle of poverty in communities in our region.

Ironically, while negotiations occur between Australia and Papua New Guinea regarding an offshore processing centre on Manus Island, the Australian Parliament is also legislating to remove the rights of fishermen in Papua New Guinea to access oceans near where they live, and to be imprisoned in Australia.

The failure to adequately adopt a regional approach to maritime management, fishing, preservation of livelihoods and the effective conservation of marine species, will continue to have impact on communities until further solutions are sourced.

This failure also runs antecedent to the objectives of the *Fisheries Management Act*, a 'monitoring law' under these proposed Bills, which includes:

'implementing efficient and cost-effective fisheries management on behalf of the Commonwealth.'¹¹

Such policy failure is not only costing the livelihoods of Indonesian communities, it is also costing the Australian taxpayer. Such inconsistencies must be rectified and alternative policy solutions sought.

¹¹ *Fisheries Management Act 1991* (Cth), s3

Addendum to Submission of the Australian Lawyers Alliance

INTRODUCTION

Further to our submission provided to the Expert Panel on 19 July 2012, we wish to highlight to the Committee a recent report released in Jakarta assessing the continuing impact of the Montara 2009 oil spill.

PTT Exploration and Production Public Company Ltd (PTTEP) is the company responsible for the Montara rig. The spill is continuing to have a prejudicial impact on the livelihoods of Indonesian fishing villages, with an estimated economic loss of \$1.5 billion per year.¹

EXECUTIVE SUMMARY

We contend that the impacts of the Montara oil spill have potentially contributed to poverty in Indonesia, through a detrimental impact on marine health and community livelihoods.

We believe that this may have caused:

- Increases in labour migration of young people, who are therefore more vulnerable to fraudulent activities by people smuggling organisers because they are away from their families, communities and homes;
- Increases in the necessity of individuals to seek alternative employment (such as “fishing tours”) which turn out to be people smuggling activities;
- Increases in persons agreeing to crew boats to Australia so that they are able to support their families.

BACKGROUND

In our submission, we highlighted the importance of combatting poverty in Indonesia and addressing the adverse impact on marine life ecosystems, as a long term strategy to fight the inducement of individuals to be involved as crew in people smuggling operations.

¹ George Roberts and staff, ‘Call to compensate Indonesian fishermen over oil spill’ *Australia Network News*, July 26 2012, <http://www.abc.net.au/news/2012-07-26/an-oil-spill-report/4155548> and George Roberts, ‘Forgotten Tragedy – Timor oil spill’ *ABC AM*, July 28 2012. Accessible at <http://www.abc.net.au/news/2012-07-28/forgotten-tragedy---timor-sea-oil-spill/4160866>

We also highlighted the impact of the 1974 Memorandum of Understanding in inhibiting fishermen from fishing in Australian waters, which has led to overfishing in Indonesian waters. In a 2006 scientific study, few fish greater than 25 cm in length and none longer than 50 cm were recorded some areas.² We also noted the increase in presence of unlawful fishermen in Australian waters following the 2006 Boxing Day Tsunami.

BACKGROUND – THE OIL SPILL

The recently released report of the Centre for Energy and Environmental Studies in Jakarta found that the oil - and the chemical dispersants used - are still affecting marine ecosystems and the associated Indonesian communities. We suggest that the long term impact of the Montara oil spill may be further contributing to poverty in Indonesia, and assisting in inducing people to be involved as crew in people smuggling operations.

Dr. Robert Spies, who was the Chief Scientist for the Exxon Valdez Oil Spill Trustee Council recently noted that ‘the pollution caused by the Montara leak was just as severe as the Gulf of Mexico spill.’³

Dr Spies also made the comment that ‘the Timor Sea can still be restored, but only with “serious attempts” made by the Indonesian and Australian governments in coordination with PTTEP.’⁴

In a large number of cases, people that are from Roti Island have been sourced to crew boats, which are then involved in people smuggling operations.

THE IMPACT OF THE OIL SPILL

The Montara oil spill occurred in August 2009, and continued unabated for 74 days (or nearly 11 weeks) until 3 November 2009.⁵ Official Australian government reports cited that ‘the closest patch of weathered oil was observed on 21 September some

² Robert Foster, Annelise Hagan, Nishan Perera, Cipto Aji Gunawan, Ivan Silaban, Yunaldi Yaha, Yan Manuputty, Ibnu Hazam, and Gregor Hodgson (2006) *Tsunami and Earthquake Damage to Coral Reefs of Aceh, Indonesia*. Reef Check Foundation, Pacific Palisades, California, USA, at 16. Accessed at

http://reefcheck.org/PDFs/reefcheck_aceh_jan2006_web.pdf

³ ‘2009 Timor Sea Oil Spill ‘Just as Devastating as Gulf of Mexico’, *The Jakarta Globe*, July 22 2012, <http://www.thejakartaglobe.com/nvironment/2009-timor-sea-oil-spill-just-as-devastating-as-gulf-of-mexico/531949>

⁴ Ibid.

⁵ Report of the Montara Commission of Inquiry (2010) at 300. Accessible at <http://www.ret.gov.au/Department/Documents/MIR/Montara-Report.pdf>

94 kilometres south-east of Roti Island.⁶ However, NGO reports have said that the impact of the oil spill has been much greater.

The Montara Commission Inquiry Report said that the full quantity of barrels of oil released is unknown, but was approximated at 400 barrels per day. Such approximations would mean that 'if the total volume of oil released was around 29,600 barrels, it would establish the blowout as the largest spill from an offshore oil platform, and the third largest spill by volume in Australia's history.'⁷

However, in evidence given during the Inquiry's public hearing, Mr Jacob of PTTEPAA advised that the initial release of oil could have been as high as 1000 to 1500 barrels per day, which would then substantially increase the above total.⁸

The submission of the West Timor Care Foundation (WTCF) to the Report of the Montara Commission Inquiry identified that the oil spill had led to contamination of waters in West Timor, of both oil, and of dispersants used to control the spill, that have been banned in the United Kingdom.⁹ WTCF also identified a significant decrease in profits within seaweed farms. The Australian Embassy's Direct Aid Programme commenced providing funding in 2001 to long seaweed farms on Roti Island.

WTCF said that:

'In 2008, the seaweed farm made a profit of c. Rp. 265 million (c. \$A \$33, 125). However, in 2009 this figure dropped by 80% to only Rp. 58, 200,000 million (c. \$A \$ 7,275). Such a drastic loss of income and near destruction of the farms currently impacts upon such areas as health, education and employment in Rote.'¹⁰

WTCF also noted significant decreases in fish catches between 2007 and 2010.¹¹ WTCF cited that 'severe reduction in seaweed farming (Rote Island) and a dramatic loss in fish catches (villages in the South Coast District of West Timor and Kefamanu) throughout West Timor. This has led to the migration of local fishermen.'¹²

⁶ Australian Embassy, Indonesia, Media Release (2009)
http://www.indonesia.embassy.gov.au/jakt/MR09_086.html

⁷ Above n 5, at 301.

⁸ Ibid.

⁹ At 7

¹⁰ Dr Christine Mason, 'Submission by the West Timor Care Foundation, Kupang (West Timor), Republic of Indonesia, to the Draft Government Response to the Report of the Montara Commission of Inquiry', *West Timor Care Foundation*, at 8. Accessible at http://www.ret.gov.au/Department/Documents/MIR/11_West_Timor_Care_Foundation.pdf

¹¹ Tables indicating significant decreases can be viewed at 9 and 10,

¹² WTCF, above n 10, at 10.

Deep sea scampi and lobster operations have also been affected, with one company asserting a loss of approximately \$2 million Australian dollars.

The 2010 Report of the Montara Commission Inquiry acknowledged that:

‘the impact of the blowout on less visible but more delicate organisms, such as coral spawn and fish larvae, may be profound but may not become apparent for some years, if at all.’¹³

FURTHER RECOMMENDATIONS

In our submission, we asserted that further injections of overseas development assistance (ODA) needed to be invested in poverty reduction programs in Indonesia. We assert that some of the investment made through the Australian Embassy’s Direct Aid Programme in Roti Island, has been wasted.

Recommendation 1:

Instead of simple increases in ODA, we recommend that in addition, a holistic approach to poverty reduction is required, including extensive environmental assessment and dedicated efforts to the improvement of marine health.

Recommendation 2:

We submit that there should be a dedication on the part of the Australian government to a massive clean up effort of the oil spill and contamination of Indonesian waters, in consultation and co-operation with the Indonesian government, Indonesian marine experts and NGOs.

Recommendation 3:

In addition, the losses sustained by communities in light of the oil spill, must be compensated.

AUSTRALIA’S RESPONSIBILITY

WTCF suggested that Australia may have breached the *United Nations Convention on the Law of the Sea*, and the 1996 *Memorandum of Understanding between the*

¹³ Above n 5, at 307.

*Government of Australia and Indonesia on Oil Pollution Preparedness and Response.*¹⁴

Australia has failed to adhere to its international obligations in the region. As a result, Indonesian fishermen are bearing the bulk of the burden that should be upon PTT and the Australian government.

The direct effects include the subsequent destruction of marine life habitats, stripping of livelihoods and exacerbation of poverty. However, the indirect effects have included the inducement of individuals to be involved as crew - sometimes unknowing crew pressured by duress – to smuggle people to Australia. This may constitute fulfilment of the international definition of ‘human trafficking’.

Such individuals have been subject to detention and imprisonment in Australia. Some individuals have been imprisoned, as minors, with adults, in violation of the *Convention on the Rights of the Child*.

Ultimately, these events link to the direct failure of Australia in the wake of the Montara oil spill.

This is unacceptable.

Australia has a direct and ongoing responsibility to assist in combatting the effects of the oil spill and its aftermath.

The Australian Lawyers Alliance recommends that the Expert Panel take note of these issues raised within our Addendum, in addition to those raised within our Submission.

¹⁴ For more details, see WTCF, above n 10, at 11 and 12.