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Senate Legal and Constitutional Affairs Committee

Submission on The Customs and Other Legislation Amendment Bill 2016

Dear Committee Secretary:

This submission is responding to the Schedule 6 of the Bill, which proposes changes to Section 40 of the *Maritime Powers Act 2013* ('the Act').

The amendments proposed in Schedule 6, section 2 of the Bill provide that limitations expressed in section 40 will not apply to an exercise of powers if:

(2) ...

(a) the exercise of powers:

(i) is part of a continuous exercise of powers that commenced in accordance with any applicable requirements of this Part (disregarding this subsection); and

(ii) occurs in the course of passage of a vessel or aircraft through or above waters that are part of a country; and

(b) a relevant maritime officer, or the Minister, considers that the passage is in accordance with [the United Nations Convention on the Law of the Sea (the Convention)].

(3) An exercise of powers in reliance (or purported reliance) on subsection (2) is not invalid because of a defective consideration of the Convention.

It has been argued by some previous submissions that the relevant Articles are intending to authorise the extension of Operation Sovereign Borders into the territorial waters of neighbouring countries, and most probably some potential

obligations imposed on Australia under international law are breached (RCA 2016). The Explanatory Memorandum to the Bill states that the purpose of the amendment is to confirm the operation of the *Act* in circumstances where vessels and aircraft are considered to be exercising passage rights consistent with the Convention.

Maybe it is arguable that turnback boats does not fit within the definition of 'passage' or 'innocent passage', as its not for navigation purpose (Voon and McAdam 2016). But possibly, the term is not always that clear-cut. If such 'passage' is recognized and agreed to by relevant parties, that is because escorting asylum seekers' boat back to another country could be regarded as a kind of special practice, and since the Australian vessel are traversing under Article 18 (1) of the Convention, and so passage is a way to describe the above practice. Bearing in mind that it might involve the Coastal State to consider if a passage is innocent and so be permitted under Article 19. That means, the current Section needs to be further verified by bilateral agreements or seek any other forms of consent given by the coastal states and see if they agree to give permission to 'passage' under the practice of boat turnbacks. Accordingly, Coastal states are also empowered to suspend a passage for national security reasons, under Article 25 (3) of the Convention. The risk here is the current Section implies that the Australian government is not only breaching the International Law, but also causing international disputes with neighboring sovereignty states.

Agus Barnas, the spokesman for the Co-ordinating Ministry of Political, Legal and Security Affairs, said the Indonesian government branded the Abbott government's asylum-seeker turnbacks policy and they are not happy since the Australian ships repeatedly breached Indonesian territorial waters, and it is "a serious matter in bilateral relations", and spokesman also said that "The government of Indonesia has the right to protect its sovereignty and territorial integrity in accordance with international laws and the charter of the United Nations." (Wroe and Bachelard 17 January 2014).

The second the respond proposed here is: if Australia has breached its refoulement obligations by turnback policies. We are very sympathetic regarding the refugee issue, but practical things are far more complex than trying to understand international treaty provisions. We are living in an era with 60 millions' of people been forcedly displaced from their homes, and so living in a refugee-like situations (UNHCR 18 December 2015). Displacing refugees in a different country is not always the best solution for solving such problems as once discussed by UNHCR official (Bertrand 1993). Additionally, the capability of each individual country regarding the intakes of refugees is limited and even if we would like to take more refugees & asylum seekers, there is still an artificial line to be drawn - regarding how many of refugees are acceptable and the particular ways of taking them in. It is more a policy issue, than a legal one. Additionally, from the legal practical point of view, it is assumed that the most vulnerable refugees are still left behind, even though there is no doubts that most boat arrivals are genuine refugees (Philips 2014). Still, it may not be offensive to say that refugees should not be encouraged to come by boat.

Unfortunately, we are also living in an era of Terrorism. National Security is a strong call for a country to give substantial supervision of all entering channels. There is no accusations of refugees or asylum seekers are terrorists, but rather the Police Clearance check is going to be more and more important to monitor everyone arriving to another country. In this sense, as a sovereignty country, Australia has a ground to be restrictive to choose who is allowed to come.

We expect Australia to be a highly ethical nation and abiding to all of its treaty obligations. However, another highly competitive moral and legal obligation for the country is also to be responsible for the interest and security of its citizens. Possibly, regarding the refugee issue there are more to be done other than turnbacks.

Yours Sincerely,

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