

25 March 2014

Mr David Sullivan
Committee Secretary
Foreign Affairs, Defence and Trade Committee
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**Submission to the Senate Foreign Affairs, Defence and Trade Committee
Inquiry into the breach of Indonesian territorial waters**

Terms of Reference

An inquiry into the breach of Indonesian territorial waters between 1 December 2013 and 20 January 2014 by Royal Australian Navy and/or Customs vessels in connection with Operation Sovereign Borders (the incidents), and in doing so, the committee must consider:

- a. the sequence of events that led to the incidents, including detailed accounts of each incident;
- b. the operational protocols and procedures observed by the Royal Australian Navy, Customs and Border Protection and by other relevant Commonwealth agencies during the incidents;
- c. the extent to which the incidents complied with international law;
- d. the steps being taken to prevent similar incidents from taking place in the future;
- e. the communications between Operation Sovereign Borders agencies, including the Department of Immigration and Border Protection, the Joint Agency Taskforce, the Department of Defence and Customs and Border Protection, regarding the incidents;
- f. the communications between the Minister for Immigration and Border Protection, the Minister for Defence, the Senior Command of the Australian Defence Force, the Department of Immigration and Border Protection, the Department of Defence, Customs and Border Protection and Operation Sovereign Borders agencies, including the Joint Agency Taskforce, regarding the incidents;
- g. the operational procedures observed by the Royal Australian Navy and other Commonwealth agencies involved in Operation Sovereign Borders to ensure the safety of its personnel and asylum seekers during the incidents;
- h. the briefings given to Australian Navy and Customs and Border Protection personnel (both on-water and off-water) about maritime borders and laws of the sea during on-water operations; and
- i. any other matters relating to Operation Sovereign Borders.

Recent 'On-Water' Developments

Prof. Donald Rothwell (Submission 2) notes that *"the recent apparent deployment under OSB of lifeboats into which asylum seekers have been transferred and returned to Indonesia raise additional legal issues...and the safety and security of that..."*. (my emphasis)

Contemporaneous footage recently aired on the ABC "7.30" program shows an eye-witness account of OSB's Border Protection Command ('BPC') assets deployed adjacent to Indonesian territorial waters. In the context of a 'mothership', the armed 2200t "ACV Triton" has launched and is filmed towing a vessel on the High Seas. This custom-built vessel

contains 34 asylum seekers. On the edge of Indonesia's Territorial Sea, near the island of Java, the vessel is cut loose. After a couple of hours navigating across these internal waters by its crew of two alleged Indonesian people-smugglers, the vessel beaches in rough surf near remote Pangandaran fishing village. Local police impound the vessel.¹

Lt.-Gen. Angus Campbell, Commander OSB names these vessels "lifeboats". Yet arguably these vessels are a dubious 'place of safety'² especially for seasick asylum seekers just lifted out from distress. In the alternative, one might just well refer to these vessels as 'self-propelled semi-submersibles' ('SPSS'). These vessels do have a diesel engine (that is, are 'self-propelled'), have a low freeboard yet are fully enclosed like a submersible, and are capable of operating when semi-submersed (for example, as seen typically when launching from the deck of their 'mothership', these vessels do submerge before bobbing up).

I wish to give the Committee an unorthodox perspective from which to frame this novel practice of OSB. The US *Drug Trafficking Vessel Interdiction Act* 2008 ('DTVIA') provides in the relevant part, that one shall not "*knowingly operate, or conspire to operate a semi submersible vessel that is without nationality and that has navigated into, through, or from waters beyond the outer limit of the territorial sea of (Indonesia) or a lateral limit of (Indonesia's) territorial sea with the adjacent country (Australia), with the intent to evade detection*".

Crucially, the DTVIA is not a drug trafficking statute, but it does have extraterritorial jurisdiction. On appeal, cases in the US Supreme Court of Appeals (11th Circuit) have challenged the DTVIA as an excess of Congressional power and against international law. I submit however that the DTVIA provides the Committee with an irony from which to reflect on the policy and this potential 'refoulement' practice of OSB. In the totality of its circumstances, these SPSS appear to be without flag, or registration, or tracking devices, and are operated seemingly intent on evading detection. It is a moot point, yet such a practice is arguably contrary to the law of the USA, Australia's maritime security partner.

'Statelessness' - be it in the guise of a boat or a person - is not (yet) an internationally recognised offence. The United States, as too Australia, has zealously expanded its maritime jurisdiction with enforcement.³ I submit that the Senate Committee may within its terms of reference ask what emboldens sovereign nations to replace customarily the *mare clausum* of maritime zones with the stark functional jurisdiction of a *mare crisium*. Thank you for this opportunity to make a submission.

Yours sincerely
Greg Hogan

¹ Australian Broadcasting Corporation, the "7.30" report, 17 March 2014
<http://www.abc.net.au/7.30/content/2014/s3965617.htm>

² "A location where the rescue operation is considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met": IMO Resolution MSC.167 (78)/26/Add.2. Annex 34. Pg10.

³ Australia's newly assented *Maritime Powers Act* 2013; its *Work Health and Safety (Operation Sovereign Borders) Declaration* 2013 under the *Work Health and Safety Act* 2011.