



Submission

Legal and Constitutional Affairs References Committee Inquiry into Commonwealth Government Payments to People Smugglers



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Centre for International
Refugee Law

Never Stand Still

Law

22 July 2015

Dear Committee Secretary,

The Andrew & Renata Kaldor Centre for International Refugee Law welcomes the opportunity to provide a submission to the Legal and Constitutional Affairs References Committee inquiry into the payment of cash or other inducements by the Commonwealth of Australia in exchange for the turn back of asylum seeker boats.

The Kaldor Centre is the world's first research centre dedicated to the study of international refugee law. Based in the Faculty of Law at the University of NSW, it was established in 2013 with the aim of bringing a principled, evidence-based approach to refugee law and policy in Australia.

This submission addresses paragraph (f) of the terms of reference, namely, the legality, under international and domestic law, of the alleged payment.

In summary, our assessment of the legal implications of the alleged payment of cash or other inducements to people smugglers by the Commonwealth government is that:

- the alleged payment was a breach of the *Protocol against the Smuggling of Migrants by Land, Sea and Air* ('Migrant Smuggling Protocol');
- the incident may have resulted in the *refoulement* of refugees and/or others in need of international protection, in contravention of international refugee and/or human rights law;
- the payment did not constitute a breach of the *Migration Act 1958* (Cth); and
- the payment constituted a breach of the Commonwealth Criminal Code.

If we can provide further information, please do not hesitate to contact us:

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Yours sincerely,

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Overview

1. The Andrew & Renata Kaldor Centre for International Refugee Law welcomes the opportunity to provide a submission to the Inquiry into the Payment of Cash or Other Inducements by the Commonwealth of Australia in exchange for the Turn Back of Asylum Seeker Boats.
2. In June 2015, allegations surface that Australian government officials had paid Indonesian people smugglers to turn back 65 Sri Lankan, Bangladeshi and Burmese asylum seekers who were attempting to reach New Zealand by boat. The boat, which had embarked from Indonesia, was reportedly intercepted in May in international waters by Australian Customs officials, who detained the vessel and warned the captain that individuals without valid Australian visas could not enter Australia. The boat then continued towards Australia, where it was detained for a second time by a Customs boat and an Australian Navy ship. The captain of the Indonesian boat was interrogated on the Customs ship for six hours. Reports have differed as to whether the boat was then escorted to Australian waters or Indonesian waters.¹
3. According to the asylum seekers, whose reports were recorded by the Indonesian police, the Australian officials, having escorted the boat to either Indonesian or Australian waters, gave the asylum seekers two wooden boats in which to return to Indonesia. It was at that point that six crew members on the Indonesian boat were allegedly paid about \$40,000 in total to return to Indonesia ('the alleged payment'). The Indonesian police claimed that an officer from the Australian Secret Intelligence Service (ASIS) 'facilitated' the payment. One of the wooden boats ran out of fuel before reaching land, so all of the asylum seekers on that boat had to board the second boat, which crashed on a reef near the Indonesian territory of Rote Island off West Timor. The asylum seekers swam to shore or were rescued by locals.
4. This submission provides an analysis of the international and legal consequences of the alleged payment.
5. We conclude that the Australian government official responsible for making the alleged payment breached the Migrant Smuggling Protocol and the Commonwealth Criminal Code.

¹ George Roberts, 'Indonesian police documents detail boat turn-back and alleged payments to people smuggling crew', *ABC News*, 17 June 2015 <<http://www.abc.net.au/news/2015-06-17/indonesian-documents-detail-boat-turnback-and-alleged-payments/6551472>>; Shalailah Medhora, 'People smugglers paid by Australia spy, Indonesian police documents allege', *The Guardian*, 16 June 2015 <<http://www.theguardian.com/australia-news/2015/jun/17/people-smugglers-paid-by-australian-spy-indonesia-police-documents-allege>>.

Part 1: Potential Breaches of International Law

1.1 Migrant Smuggling Protocol

6. If the allegations are true, the alleged payment may constitute a breach of the *Protocol against the Smuggling of Migrants by Land, Sea and Air* ('Migrant Smuggling Protocol') which supplements the United Nations *Convention against Transnational Organized Crime*. Australia is a signatory to both treaties. They are intended to be read and interpreted together, taking into account the Protocol's object and purpose (Convention against Transnational Organized Crime, art 37(4)).
7. The Protocol defines the 'smuggling of migrants' as:

the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.
8. Media reports have suggested that the crew of the Indonesian vessel were 'recruited by people smugglers in early April' and enlisted in Jakarta to work on a fishing boat with the promise of being paid 150 million rupiah (\$14,000).² This seems to fit the definition of obtaining a 'financial or other material benefit' and it can therefore be assumed that the crew were engaged in the 'smuggling of migrants', as defined in the Migrant Smuggling Protocol.
9. The Australian government may have violated the Migrant Smuggling Protocol for the following reasons. First, paying people smugglers to transport asylum seekers to any country they cannot lawfully enter is contrary to the stated purpose of the Protocol (art 2):

The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.
10. The practical effect of the alleged payment – and any other payments that may have been made in the past under both the current Coalition and the previous Labor government³ – is the creation of incentives for people smugglers to continue their activities, in the hope that they may also be paid to return their passengers. This clearly undermines the purpose of the Migrant Smuggling Protocol.
11. Second, the additional requirement in the Protocol's purpose – that the rights of smuggled migrants be protected – suggests that any action that could result in *refoulement* or otherwise put asylum seekers' lives or safety at risk would be contrary to the treaty. Article 19(1) clarifies that this is the case. It provides that:

² Roberts, above n 1.

³ Emma Griffiths and Matthew Doran, 'Bill Shorten won't comment on whether authorities paid people smugglers in Indonesia when Labor was in power', *ABC News*, 17 June 2015 <<http://www.abc.net.au/news/2015-06-16/bill-shorten-refuses-to-say-if-labor-paid-people-smugglers/6550268>>; David Wroe and Sarah Whyte, 'Asylum boat turnbacks: Australia paid people smugglers under former Labor government', *Sydney Morning Herald*, 16 June 2015 <<http://www.smh.com.au/federal-politics/political-news/asylum-boat-turnbacks-australia-paid-people-smugglers-under-former-labor-government-20150616-ghotbt.html>>.

Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

12. Third, article 7 of the Migrant Smuggling Protocol requires States Parties to engage in cooperative activities to prevent and disrupt people smuggling:

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

13. The alleged payment of people smugglers to return to Indonesia, without the knowledge or consent of the Indonesian government, undermines the principle of international cooperation. It seems clear that the Australian government neither consulted nor cooperated with the Indonesian government in facilitating the return of the asylum seekers to Indonesia, since Indonesia's Foreign Ministry made repeated requests for information from Australia about the incident, all of which were refused.⁴

14. Fourth, Australia's alleged payment amounts to criminal conduct as an accomplice to people smuggling. Article 6(2)(b) of the Migrant Smuggling Protocol requires States Parties to make this a criminal offence in their domestic law.

15. The final question is whether or not the alleged payment by Australia *itself* constituted people smuggling.

16. First, it needs to be established that the people who were turned around were not nationals or permanent residents of Indonesia, and that they had no lawful right to enter Indonesia. The available information suggests that these elements of the definition are satisfied.

17. Second, it may be difficult to demonstrate that the Australian government obtained a financial or other material benefit by paying the smugglers to return the asylum seekers to Indonesia. The government does not appear to have received any financial benefit; the question is what a 'material benefit' encompasses.

18. The drafting records of the Migrant Smuggling Protocol state that:

The reference to "a financial or other material benefit" as an element of the definition in subparagraph (a) was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family

⁴ 'Asylum seekers: Indonesian foreign minister wants answers over allegations Australia paid people smugglers', *ABC News*, 15 June 2015 <<http://www.abc.net.au/news/2015-06-13/indonesian-fm-wants-answers-over-smuggling-pay-allegations/6544206>>; George Roberts, 'Indonesia believes Australia made "illicit payments" to crew of people smuggling boat, foreign ministry says', *ABC News*, 20 June 2015 <<http://www.abc.net.au/news/2015-06-19/indonesia-believes-illicit-payments-made-to-people-smugglers/6559676>>.

ties. It was not the intention of the protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.⁵

19. This suggests that a 'material benefit' must also be for some kind of profit or gain. Anne Gallagher and Fiona David write in their book *The International Law of Migrant Smuggling* that 'it is clear that the reference is intended to go beyond mere payment of money'.⁶ Precisely what it is intended to cover is not altogether clear, however.
20. It will be recalled that the Migrant Smuggling Protocol supplements the Transnational Crime Convention. The Convention's definition of 'organized criminal group' refers to people who commit offences for 'a financial or other material benefit'.⁷ An Interpretive Note in the Legislative Guide for the Convention explains the term's reach:

...the words 'in order to obtain, directly or indirectly, a financial or other material benefit' should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members.⁸

21. Any 'benefit' obtained by the Australian government through its alleged actions seems to have been a political one connected to the broader narrative of the government's 'success' in 'stopping the boats'. It remains untested whether a political 'benefit' might be capable of being interpreted as a 'material benefit'.

1.2 Refugee Convention

22. The alleged incident may have also violated the principle of *non-refoulement* under international refugee and human rights law. International law prohibits States from sending asylum seekers to any country in which they have a well-founded fear of persecution⁹ or face a real risk of significant harm, such as being arbitrarily deprived of life, tortured, or subjected to cruel, inhuman or degrading treatment or punishment.¹⁰ The principle also prohibits asylum seekers from being sent to a country that may, in turn, send them on to a place where they risk such ill-treatment (sometimes called 'chain *refoulement*').
23. Indonesia is not a party to the Refugee Convention, and does not have national refugee status determination procedures in place to identify protection needs, nor legislative or practical frameworks to adequately safeguard the rights of asylum seekers in their territory. While there is insufficient information to ascertain whether the 65 asylum

⁵ United Nations Office on Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (Interpretive Note, 2006) 469 <http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf>.

⁶ Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 46.

⁷ Transnational Crime Convention, art 2.

⁸ United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto* (2004) 334 <https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf>.

⁹ Refugee Convention, art 33.

¹⁰ Convention against Torture, art 3; International Covenant on Civil and Political Rights, arts 6, 7.

seekers in the present case were in danger, the important point to note is that a policy of turning back boats creates an inherent risk that the principle of *non-refoulement* will be violated, because an individual determination of the protection needs of each asylum seeker is not undertaken. The legality of turnbacks under international law has been well canvassed by international lawyers¹¹ and UNHCR.¹²

Part 2: Potential Breaches of Australian Law

2.1 Migration Act offences

24. The government has not breached the *Migration Act 1958* (Cth) because the relevant sections apply only to the smuggling of persons *into* Australia. The Migration Act nevertheless shows how seriously the Australian government considers conduct of this kind. Severe criminal penalties are imposed on those who engage in, or otherwise support, people smuggling.
25. First, the offence of people smuggling in Australia requires only that someone ‘organises or facilitates’ the unlawful entry of a non-citizen to Australia. Unlike the definition in the Migrant Smuggling Protocol, it does not require that the person profit from it (either financially or through some other material benefit) (s 233A). This offence attracts a 10 year gaol term and/or a \$170,000 fine. Thus, if another government’s officials were to pay smugglers to take a boat of non-citizens to Australia, as Australian officials are alleged to have done vis-a-vis Indonesia, then this offence would arguably be made out.
26. Second, the Migration Act contains an additional ‘aggravated offence of people smuggling (at least 5 people)’ (s 233C). This offence is made out where someone ‘organises or facilitates the bringing or coming to Australia ... of a group of at least 5 persons’, who are non-citizens with no lawful right to come to Australia. It attracts a 20 year gaol term and/or a \$340,000 fine. The case in which Australian officials were allegedly involved concerned 65 people.
27. Third, the Migration Act contains an offence in Australian law called ‘supporting the offence of people smuggling’ (s 233D). This offence is committed if someone provides ‘material support or resources to another person’ which aids that person, or someone else, ‘to engage in conduct constituting the offence of people smuggling’. This attracts a 10 year gaol term and/or a \$170,000 fine.

¹¹ Natalie Klein, ‘Assessing Australia’s Push Back the Boats policy under international law: legality and accountability for maritime interceptions of irregular migrants’ (2014) 15 *Melbourne Journal of International Law* 1; Andrew and Renata Kaldor Centre for International Refugee Law, ‘Turning back boats’ (Fact sheet, 26 February 2015) <<http://www.kaldorcentre.unsw.edu.au/sites/default/files/Turning%20Back%20Boats%20factsheet%2024%202015.pdf>>.

¹² Executive Committee of UNHCR, *Interception of Asylum-seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, UN Doc EC/50/SC/CRP.17 (9 June 2000).

2.2 Commonwealth Criminal Code offences

28. Parallel offences are included in the Commonwealth Criminal Code. Importantly, for present purposes, they criminalise people smuggling into *any* country, not just Australia. Thus, if the alleged conduct were substantiated, then an Australian official could be prosecuted under this legislation.¹³ The offences are as follows:

- under section 73.1, a person (the first person) commits an offence if they organise or facilitate the entry of another person (the second person) into a foreign country (whether or not via Australia), where the entry is irregular and the second person is not a citizen of the foreign country. The offence carries the same penalty as the Migration Act offence (10 years imprisonment or a fine of \$170,000);
- under section 73.3, a person commits the aggravated offence of people smuggling if he or she smuggles five or more people into a foreign country. The offence carries double the penalty of s 73.1 (ie 20 years imprisonment);
- under section 73.3A, a person commits an offence if they provide material support or resources that aids someone to engage in people smuggling.

29. The offence of providing material support to people smugglers was introduced by the *Anti-People Smuggling and Other Measures Act 2010* (Cth). Its purpose, as explained in the Explanatory Memorandum to the Bill, was 'to provide greater deterrence of people smuggling activity and to address the serious consequences of such activity', and to 'provide greater capacity for Australian Government agencies to investigate and disrupt people smuggling networks'.¹⁴ The Explanatory Memorandum states that for the section 73.3A offence to be made out, a prosecutor would need to prove beyond reasonable doubt that:¹⁵

- the person (in this case, the ASIS official) intentionally provided material support or resources to another person or an organisation (the receiver); and
- the person (again, the ASIS official) was reckless as to the circumstance that the provision of the support or resources aided the receiver or another person or organisation to engage in conduct constituting a people smuggling offence.

30. Pursuant to section 5.4(1) of the Criminal Code, a person will be reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist, and that in the circumstances known to him or her, it is unjustifiable to take the risk. If the reported circumstances of the present case are correct, then it seems clear that Australian government officials paid people smugglers intentionally, and were indeed reckless to the circumstance that the money would aid the process of people smuggling as defined by the Criminal Code.

¹³ See comments by Nicholas Cowdery in Jewel Topsfield, David Wroe and Sarah Whyte, 'Indonesian vice-president Jusuf Kalla calls smuggler payments 'bribes'', *Sydney Morning Herald*, 16 June 2015 <<http://www.smh.com.au/federal-politics/political-news/indonesian-vicepresident-jusuf-kalla-calls-smuggler-payments-bribes-20150615-ghoo4q.html>>.

¹⁴ Explanatory Memorandum, *Anti-People Smuggling and Other Measures Bill 2010* (Cth) 1.

¹⁵ *Ibid* 7.

31. A potential hurdle to the launch of cases like this may be the jurisdiction in which the alleged payment was made. Section 73.4 of the Commonwealth Criminal Code requires either that:
- (i) the person is an Australian citizen or a resident of Australia; and
 - (ii) the conduct constituting the alleged offence occurs wholly outside Australia;
- or that:
- (i) the conduct constituting the alleged offence occurs wholly or partly in Australia; and
 - (ii) a result of the conduct occurs, or is intended by the person to occur, outside Australia.
32. In this case, it is not clear whether there is a jurisdictional problem. As explained above, reports have differed as to whether the alleged payment was made in Indonesian¹⁶ or Australian¹⁷ waters. If the alleged payment was made in Australian waters, it would appear to fall within section 73.4, as the result of the conduct (sending asylum seekers back to Indonesia) occurred outside Australia. However, even if the alleged payment was made outside Australian waters, Australian prosecutors would still have jurisdiction under the first limb of section 73.4, since any government official would necessarily meet the criterion of being an Australian citizen or resident.
33. While it appears that the alleged conduct of Australian officials would constitute an offence under the Criminal Code, there remain two potential obstacles to any prosecution.
34. First, section 73.5 provides that the Attorney-General's written consent is required before any proceedings may be commenced.
35. Second, and of relevance in the present case, if the alleged payment was made by an ASIS official,¹⁸ then he or she may be immune from prosecution under section 14 of the *Intelligence Services Act 2001* (Cth). Immunity will depend on whether disrupting people smuggling into Australia is considered to fall within the 'proper performance of a function' of ASIS, as set out in section 6(1). This is questionable, since most ASIS functions relate to intelligence-gathering, not operational activities. However, if the Attorney-General (as the Minister responsible for ASIS) directed an official to make the alleged payment, then the official would be immune from prosecution, since section 6(1)(e) of the Act includes as an ASIS 'function' 'such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia.'

¹⁶ Medhora, above n 1.

¹⁷ Roberts, above n 1.

¹⁸ Sarah Whyte, David Wroe and Jewel Topsfield, 'Boat turn-back payment to people smugglers the first of its kind', *Sydney Morning Herald*, 27 June 2015 <<http://www.smh.com.au/federal-politics/political-news/boat-turnback-payment-to-people-smugglers-the-first-of-its-kind-20150626-ghyswb.html>>; Medhora, above n 1.

2.3 Bribery offences

36. It has been mooted by several commentators and Indonesian officials that the government's actions amounted to bribery.¹⁹ However, under Australian law, bribery of foreign nationals applies exclusively to the provision of bribes to government officials or members of international organisations.
37. Section 70.2 of the Criminal Code creates an offence of bribing a foreign public official, with a penalty of 10 years imprisonment and/or a fine of \$1.7 million. The bribe, or benefit, must be provided to the foreign public official for the purpose of influencing that official in the exercise of his or her duties, in order to retain business or a business advantage (s 70.2(c)). 'Foreign Public Officials' include employees, contractors or officials of a foreign government department or agency, foreign controlled company, or public international organisation (like the United Nations); members of a foreign military or police force; or members of the executive, judiciary or magistracy of a foreign country (s 70.1).
38. It is clear that the people smugglers involved in this case held no official position in Indonesia and were individuals acting on their own. There is no offence of bribery of individuals in Australian law. This provision is unlikely to be used against the government in this case.

Part 3: Prosecution against Australian government officials

3.1 International prosecution

39. The Migrant Smuggling Protocol does not establish any international tribunal with the jurisdiction to prosecute offences. Instead, the Protocol envisages that States Parties will implement the offences it establishes in their domestic criminal law. This means that Indonesia could attempt to prosecute Australian government officials under its own national laws. Any immunities (eg for ASIS officials) would not bind Indonesian courts.
40. Indonesia has ratified the Transnational Crime Convention and the Migrant Smuggling Protocol. An offence of people smuggling was created under Indonesian law in 2011: Law 6/2011 on Immigration. Article 120 of Law 6/2011 states:
 - (1) Every Foreigner who conducts act [sic] aiming to seek advantage, either direct or indirect, for him/herself taking someone or a group of people, either organized or non-organized, or order other people to take someone or a group of people either organized or non-organized without having legal right to enter or exit the Indonesian Territory and/or enter other country without having legal right to enter the Indonesian Territory, either using legal document or false document, or without using the Travel Document, either through an immigration check or not, shall be punished for the reason of Human Smuggling with imprisonment for a minimum of 5 (five) years and for a maximum of 15 (fifteen) years and fine sentence at the

¹⁹ Michelle Innis, 'Australia's Policy on Migrants Questions After Smuggler Says He Was Bribed to Turn Back', *New York Times*, 21 June 2015 <http://www.nytimes.com/2015/06/22/world/asia/australias-policy-on-migrants-questioned-after-smuggler-says-he-was-bribed-to-turn-back.html?_r=0>; George Roberts, Louise Yaxley and Dan Conifer, 'Indonesian vice-president Jusuf Kalla likens allegations Australia paid people smuggling crews to "bribery"', ABC News, 16 June 2015 <<http://www.abc.net.au/news/2015-06-16/indonesian-vice-president-accuses-australia-of-paying-bribes/6548230>>.

minimum of Rp500,000,000.00 (five hundred million Rupiah) and for a maximum of Rp1,500,000,000.00 (one billion five hundred million Rupiah).

- (2) Attempt [sic] to perpetrate the criminal act of Human Smuggling shall be punished with a similar criminal sentence as contemplated in paragraph (1).²⁰

41. Article 124 of Law 6/2011 makes it an offence to assist illegal migrants, with a prison term of two years and a fine of up to Rp 200 million (AU\$19,500).
42. Research indicates that the vast majority of people convicted for smuggling offences in Indonesia are Indonesian nationals, and are generally those who have been involved at the lower levels of smuggling operations.²¹
43. Rather than pursuing legal action against Australia, Indonesia is much more likely to continue to put diplomatic pressure on the Australian government to reveal further information about the alleged payment, and may seek an undertaking from the Australian government that it will not make such a payment again.

3.2 Domestic prosecution

44. The Commonwealth Department of Public Prosecutions could try to commence a prosecution under section 73.3A of the Commonwealth Criminal Code. However, as noted above, a person cannot be prosecuted for the offence of providing material support to people smuggling without the approval of the Attorney-General to commence the prosecution (s 73.5). It is very unlikely that the Attorney-General would approve this since he recently said in the Senate that the government has 'at all times complied with the law'.²² Further, if the official who made the alleged payment was an ASIS official, then he or she may be immune from prosecution, as discussed above (Intelligence Services Act, s 14).

Conclusion

45. This submission has outlined the legal implications of a Commonwealth officer's alleged payment to people smugglers to turn back asylum seekers.
46. While the official may not be charged under Australian law for the reasons outlined above, the fact remains that provisions of both international law and domestic criminal law appear to have been infringed. Further, it is a breach of the trust that Australian citizens are entitled to place in their public officials, and risks jeopardising our political relationship with Indonesia.

²⁰ Law of the Republic of Indonesia Number 6 of 11 Concerning Immigration <<http://www.imigrasi.go.id/phocadownloadpap/Undang-Undang/uu%20nomor%206%20tahun%202011%20-%20%20english%20version.pdf>>.

²¹ Antje Missbach, 'Prosecuting people smugglers in Indonesia', *The Conversation*, 18 September 2013 <<https://theconversation.com/prosecuting-people-smugglers-in-indonesia-18251>>.

²² Lenore Taylor, 'Any payments to people smugglers "may have broken Australian law"', *The Guardian*, 14 June 2015 <<http://www.theguardian.com/australia-news/2015/jun/15/any-payments-to-people-smugglers-may-have-broken-australian-law>>.