

## 1. What powers were used by the former Government in giving effect to tow backs?

### Doctrine of Acquiescence

The Howard Government returned a number of vessels to the contiguous zone adjacent to Indonesia. This was done on the basis of the doctrine of acquiescence under international law. Indonesia was informed by diplomatic note that a vessel was about to be returned. If no response was given to the diplomatic note then Indonesia was taken to have acquiesced in an action which otherwise would have required Indonesian agreement under international law.

Efforts were made to ensure that the vessels were seaworthy. The vessels were escorted back to the Indonesian contiguous zone and were left with enough fuel to enable them to reach the Indonesian shore.

The Government has been advised that the return of vessels to Indonesia absent of Indonesian consent would be inconsistent with Australia's international obligations. It would also place lives at risk.

Most vessels intercepted do not have adequate navigation equipment and a number of the vessels are likely not to have capable mariners on board. To ensure the safety of those on board it is likely that they would have to be escorted. If an Australian Government vessel was to escort a vessel back to Indonesia, it would therefore need to enter Indonesian waters with the vessel that was "turned back". The Indonesian Government would have to agree to this.

Even if there was consent to the vessel being "turned back", Border Protection Command notes that when it boards these vessels, nearly all of the vessels are found in a poor condition and poorly maintained. It is therefore difficult in many situations to properly determine that the vessel would be seaworthy enough to allow the vessel to continue on without the loss of life.

As such "turning back" vessels that are considered to be seaworthy would require an Australian Government vessel to escort the vessel to Indonesian waters where the people are left with enough safety equipment such as life jackets and navigational equipment, food and fuel to reach the Indonesian mainland. This would mean an Australian Government vessel would have to carry enough supplies for these vessels, and would <sup>s37(2)(b)</sup> [REDACTED]  
[REDACTED] <sup>s37(2)(b)</sup>

### Law of the Sea

The key Convention to apply in such situations is the United Nations Convention on the Law of the Sea. Under this Convention and customary international law, with some limited exceptions Australia cannot intercept nor have control of foreign flagged vessels on the high seas. The most relevant exception is the permission of the flag State. If a vessel is to be returned to Indonesia, the permission of the flag State would be required.

In most cases, the flag State of the vessel is Indonesian and therefore Indonesian permission (or acquiescence) would be required. If the vessel is flagged to a State other than Indonesia, the permission of that State would also be required. Also, as a matter of policy, it would be appropriate to seek Indonesia's agreement to the return of the vessel to its contiguous zone irrespective of its flag status.

As a matter of international law, the Australian Government would be under a 'duty of care' obligation to ensure that the vessel is in a seaworthy condition, that it complied with all the rules concerning equipment (including life jackets etc), that it had enough fuel and supplies and that it was capable of reaching the place to which it is being returned. If it is believed and the vessel is likely to be sabotaged, then a return should not proceed as it would soon become a safety of life at sea situation.

**2. Is this the same power that would be applied under the current Act?**

Yes.

**Comment [c1]:** Until recently, Part 7 of the draft Maritime Powers Bill provided a legislative basis for the power to direct vessels to leave or not enter Australian waters. This Part has been removed. The existing prerogative power to control Australia's borders in this way remains and the Bill would not have changed current practices in the application of this power.

**3. Does the High Court's ruling on s198A interact or interfere with those powers?**

For DIAC to answer.

**4. Presumably any such action would be subject to injunctive action? Is that the case?**

For DIAC to answer.

**5. How would this action be different to the Oceanic Viking – that is, without a SOLAS incident what are the obligations if any of the receiving state?**

**SOLAS Obligations**

The Safety of Life at Sea (SOLAS) Convention articulates obligations on ships' masters to render assistance to vessels requiring assistance. Under SOLAS, the Master of a vessel at sea which is in a position to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the relevant search and rescue service that the ship is doing so.

A person's immigration status is irrelevant to the duty to render assistance under the SOLAS Convention, as the duty is aimed at preserving and ensuring the safety of life at sea. The International Convention on Maritime Search and Rescue 1979 states "Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality of status of such a person or the circumstances in which that person is found."

Chapter V Regulation 33 of the SOLAS Convention provides that governments shall coordinate and cooperate to ensure that masters of vessels providing assistance are released from their obligations with minimum further deviation from the vessel's intended voyage.

The State responsible for the search and rescue region in which the assistance is rendered shall exercise primary responsibility for ensuring such coordination and cooperation occurs, so that survivors assisted are disembarked to a place of safety.

There is no legal obligation on the next port of call or the nearest port to accept the rescued persons.

**Refugee and Human Rights Law**

A vessel could only be returned from where it came if Australia was satisfied that it would not be in breach of its obligations under the Refugee Convention and international human rights conventions, such as the Convention Against Torture, in so doing. The principle obligation is that of non-refoulement.

In the case of a return to Indonesia, Australia would need to be satisfied that Indonesia would not send the persons being returned to yet another country where they claim they would be subject to persecution or the death penalty, arbitrary deprivation of life, torture or cruel, inhuman or degrading treatment or punishment (non-refoulement obligation). Secondly, Australia would also need to be satisfied that their refugee status was capable of being assessed in Indonesia.