



Western

Australia

RECORD OF INVESTIGATION INTO DEATH

Ref No: 23/13

I, Alastair Neil Hope, State Coroner, having investigated the deaths of 17 persons who were on board a vessel known as the Kaniva which sank in international waters approximately 110 nautical miles north-north-west of Christmas Island on 21 June 2012 and whose bodies were located afterwards, find that the identity of each of the following named persons has been established, that all the deaths occurred at sea and that in each case the cause of death was consistent with immersion (drowning) in the circumstances detailed herein.

<i>Name</i>	<i>Gender</i>	<i>Believed Country of Origin</i>	<i>Age</i>
<i>Hasmat HUSSAIN</i>	<i>Male</i>	<i>PAKISTAN</i>	<i>24 years</i>
<i>Kamal HUSSAIN</i>	<i>Male</i>	<i>PAKISTAN</i>	<i>25-30 years</i>
<i>Gulfam HUSSAIN (AKA Sayed Gulfam HUSSAIN)</i>	<i>Male</i>	<i>PAKISTAN</i>	<i>29 years</i>
<i>Zulffaqar ALI (AKA Bhutto ALI)</i>	<i>Male</i>	<i>PAKISTAN</i>	<i>37 years</i>
<i>Quambar ALI</i>	<i>Male</i>	<i>PAKISTAN</i>	<i>30-40 years</i>
<i>Unknown</i>	<i>Male</i>	<i>not known</i>	<i>not known</i>
<i>Khalilullah IBRAHIMI (AKA Khalil RAHIMI)</i>	<i>Male</i>	<i>AFGHANISTAN</i>	<i>17 years</i>
<i>Kyleni Sabir HUSSAIN</i>	<i>Male</i>	<i>PAKISTAN</i>	<i>24 years</i>
<i>Sarfaraz HUSSAIN</i>	<i>Male</i>	<i>PAKISTAN</i>	<i>20 years</i>
<i>Abbas NADIRI</i>	<i>Male</i>	<i>AFGHANISTAN</i>	<i>16 years</i>
<i>Intezar HUSSAIN</i>	<i>Male</i>	<i>PAKISTAN</i>	<i>23 years</i>
<i>Mazhar ABBAS</i>	<i>Male</i>	<i>PAKISTAN</i>	<i>15 years</i>
<i>Unknown</i>	<i>Male</i>	<i>not known</i>	<i>not known</i>



<i>Nazir AHMED (AKA AHMAD)</i>	<i>Male</i>	<i>PAKISTAN</i>	<i>22 years</i>
<i>Syed Shakeel MEHMOOD</i>	<i>Male</i>	<i>PAKISTAN</i>	<i>20 years</i>
<i>Asad HUSSAIN</i>	<i>Male</i>	<i>PAKISTAN</i>	<i>23 years</i>
<i>Ghulam MOHAMMAD</i>	<i>Male</i>	<i>AFGHANISTAN</i>	<i>23 years</i>

Counsel Appearing :

Mr Marco Tedeschi assisting the State Coroner

Mr Peter Hanks QC (instructed by AGS) appearing on behalf of DIAC, Department of Defence and Australian Customs and Border Protection Services

Mr Stephen Owen-Conway QC with Mr Slater and Barbara Pearson appearing on behalf of AMSA

Mr Nilan Ekanayake and Lian Hall (Shine Lawyers) appearing for Survivor KVA 094

Table of Contents

Introduction..... 2

The Date and Time of the Incident..... 5

Telephone Calls to RCC Australia 14

Involvement of BASARNAS 21

Response by RCC Australia & the Transferring of Coordination Responsibility .. 25

The Rescue Efforts 31

Problems Associated with Responding to Calls From Asylum Seeker Boats..... 35

Disaster Victim Identification Enquiries 39

Examination of Life Jackets Issued to Passengers On Board the Kaniva 40

The Likely Causes of the Kaniva Capsizing and Sinking..... 41

Investigations Following the Incident 43

The People Smugglers 47

Conclusion..... 48

Comments on Safety Issues..... 50

Recommendation..... 54

Recommendation 54

Comments in Respect of the Administration of Justice 54

Recommendation 60

INTRODUCTION

On 21 June 2012 the vessel, code named Kaniva, sank in international waters approximately 110 nautical miles north-north-west of Christmas Island. The vessel was approximately 109 nautical miles south of the Sunda Strait in Indonesia.



The Kaniva sank in the Indonesian search and rescue region.

At 12.58pm that day Australian Western Standard Time (UTC + 8 hours: times are given in Western Australian time unless otherwise stated) persons on a Customs and Border Protection Dash 8 aircraft sighted the vessel with approximately 75 people in the water and on an upturned hull of the boat. Some survivors were as far as three nautical miles from the vessel. Some had life vests and some did not.

This information was conveyed to the Australian Maritime Safety Authority (AMSA) Rescue Coordination Centre (RCC) Australia. RCC Australia then commenced mayday relays to shipping.

The Customs and Border Protection aircraft continued to monitor the situation. A Royal Australian Air Force AP-3C Orion maritime patrol aircraft was diverted to attend the scene. The RAAF aircraft arrived at approximately 3pm and commenced dropping air sea rescue kits (life rafts). A Perth Dornier Rescue 481 was tasked to assist in the search by dropping self locating search and rescue (SAR) datum marker buoys to provide RCC Australia with an indication of the tidal drift at the scene. This was to assist in locating survivors at sea as the search progressed.



There was an immediate response to the broadcast and merchant vessels WSA Dragon, JPO Vulpecula and Cape Oceania travelled quickly to the scene.

HMAS Wollongong and HMAS Larrakia also travelled immediately to the scene.

The WSA Dragon arrived at the scene at about 2.48pm (it was the first vessel at the scene). The first survivor was rescued at 3.30pm.

Following the search and rescue efforts 110 survivors were rescued.

The bodies of 17 deceased persons were located and these were taken to Christmas Island.

At the conclusion of the search it appeared that approximately 85 persons who had been on the Kaniva were missing, presumed dead.

It appears, therefore, that approximately 102 persons died in this tragedy.

As 17 bodies were taken to Christmas Island, the deaths of those persons were reportable deaths pursuant to the Coroners Act 1996 (WA)(CI) and as a result I had jurisdiction to investigate the deaths.



Information at the inquest revealed that there had been multiple satellite telephone calls from an unknown male person or persons believed to be on board the Kaniva from as early as 7.52am on 19 June 2012 to RCC Australia in which concerns were raised as to the safety of the vessel and help was sought.

Clearly if a search and rescue response had been initiated at that early time or at any later time significantly earlier than the search and rescue response was in fact initiated, lives could have been saved and if the response had been early enough, all of the deaths could have been avoided.

In the above context the focus of this inquest hearing has been on the search and rescue response and whether or not actions taken were reasonable and appropriate in all of the circumstances.

THE DATE AND TIME OF THE INCIDENT

Witness statements of the survivors are to the effect that the Kaniva capsized at some time between about 3am and 5.30am on 21 June 2012. One of the survivors claimed that he looked at his wristwatch and noted that it was about 4am when the boat capsized. These times were based on Jakarta time (UTC plus 7 hours), 4am equates to 5am Australian Western Standard time.



Assuming the Kaniva capsized at about 5am the survivors had been in the water or on the upturned vessel for about 8 hours before they were first located by the occupants of the Dash 8 aircraft and nearly 10 hours before the first rescue vessel arrived at the scene.

The first survivor to be rescued was rescued about 10 ½ hours after the Kaniva capsized.

THE LOCATION OF THE INCIDENT

The Kaniva sank in international waters, about 110 nautical miles north-north-west of Christmas Island and 109 nautical miles south of the mainland of Indonesia. The Kaniva sank in the Indonesian search and rescue region.

The approximate coordinates of the site where the Kaniva sank are:

Latitude 08 38.00 south
Longitude 105 03.00 east

The depth of the ocean at that location is in excess of 5000 metres and there are no major land masses in the vicinity.

In respect of reference to search and rescue regions, both the International Maritime Organisation and the International Civil Aviation Organisation sponsor global search and rescue plans allocating search and rescue



regions to nations so that a national search and rescue authority is identified as having responsibility for the coordination of search and rescue for every region of the earth.

Christmas Island is in fact within the Indonesian search and rescue designated region.

In order to promote search and rescue activities in their location arrangements have been made between AMSA, which operates RCC Australia, and BASARNAS (Badan SAR Nasional, Indonesia's equivalent to RCC Australia).

AMSA and BASARNAS have an understanding that Australia will provide a local search and rescue response for the immediate Christmas Island area (24 nautical miles from the island). This response is provided by the Australian Federal Police (AFP).

In a document signed in 2004 and submitted with the International Maritime Organisation the working arrangements between AMSA and BASARNAS were detailed. This agreement delineated the search and rescue regions for Australia and Indonesia, but recognised that each search and rescue region covered land areas of the other party, and noted that cooperation should be as close as possible.



Clause 4 of the 2004 agreement deals with cross border SAR missions and provides in part as follows:

- 4.1 Parties to this agreement acknowledge that each Party has land areas within the SRR of the other Party and, as a principle, each country will plan for a local SAR response to occur, where appropriate, before local authorities request assistance from the National RCC. However, these SRR limits should not be viewed as barriers to assisting persons in distress. Any facility within a search and rescue organization should respond to all distress situations whenever and wherever it is capable of doing so. In this respect, co-operation between Australia and Indonesia, their RCCs and their search and rescue services should be as close as possible.
- 4.2 Given the urgent life saving nature of these operations, all possible assistance will be rendered to enable the SAR mission to be carried out successfully. The normal Diplomatic Clearance process for a Party's aircraft or vessel to enter the air space or Territorial Sea of the other Party will not be required for a search and rescue facility to respond to an incident.
- 4.3 Each Party will recognise the established interest of the other Party whose aircraft or ship is the subject of, or participating in, a SAR mission. Either Party will be notified without delay about any SAR mission by SAR units of the other Party into its search and rescue region to render assistance.

This agreement is supplementary to, and not inconsistent with, applicable international conventions and agreements including the United Nations Convention on the Law of the Sea (UNCLOS), the Safety of Life at Sea Convention 1974 and its Protocol of 1988, as amended, and the International Convention on Maritime Search and Rescue of 1979 (the SAR Convention).

SURVIVOR WITNESS ACCOUNTS

The majority of the passengers on the Kaniva were from Parachinar Province which is situated in north-west Pakistan adjacent to the Afghanistan border. Many of the



passengers claimed that they had left their homeland due to persecution by the Pakistani and Afghani Taliban or other terrorist associated groups.

The survivors' accounts indicate that there were between 210 and 214 persons on board the Kaniva when it departed from Indonesia for Australia. This included four Indonesian crew members. All were male and though there were teenagers on board, there were no small children or infants on board.

110 people survived the sinking of the Kaniva of whom 83 were Pakistanis, 24 Afghanis, 1 Iranian and 2 Indonesians.

The ages of the survivors ranged between 16 years and 45 years of age. Several teenagers are believed to be amongst the missing, presumed dead.

The survivors appear to have used different people smugglers in Pakistan to whom they paid in the vicinity of \$4500 - \$6000 (US). This initial payment was for accommodation and travel to Jakarta and in some cases included the preparation of false passports or other travel documents.

They travelled by commercial aircraft from their respective countries of origin, either directly to Malaysia, or



through Thailand. Those travelling through Thailand appear to have either stayed in transit for a short period of time in Bangkok before flying to Kuala Lumpur, or entered Thailand through customs before driving to Malaysia.

The survivors appear to have stayed for a short time in Kuala Lumpur before being taken to a shoreline area and ferried to Indonesia by boat. On arrival in Indonesia vehicles met them and transported them to houses belonging to Indonesian families. After a short stay they were then transported to Pekanbaru Domestic Airport in Sumatra to board a flight to Jakarta. The survivors appear to have been provided with boarding passes and false names.

Upon arrival at Jakarta Airport the survivors travelled to the Sabanoz Hotel. This was the end point of the arrangement with the original people smuggler.

The survivors then arranged transportation to Bogor using the hotel's courtesy vehicles.

In Bogor the survivors sought people smugglers to arrange their travel to Australia.

When those people smugglers had been contacted additional payments of about \$5000 - \$5500 (US) per



person were made. Survivors were then transported to a block of flats where they were kept for a period of days.

Indonesian agents picked up the survivors from the flats and conveyed them to an unknown bus depot. Here they boarded multiple buses and were transported to a shoreline area where two speed boats waited. They were then shuttled to a larger boat, the Kaniva.

Many of the survivors stated that upon boarding the Kaniva they thought it to be overcrowded by more than one hundred people, they considered that it was an old boat and it was not suitable for the intended journey.

Survivor KVA 097 described the Kaniva as being constructed of wood, with two rooms and a shelter at the front of the boat. He described the Kaniva as a fishing boat, about 20 metres long and 5 metres wide. The survivors described the condition of the boat as being poor and referred to wood eaten by termites and the timber floor below deck as not being stable.

Most of the survivors agreed that there were four Indonesian crew members, although one of these crew members left the Kaniva and returned to Indonesia on another fishing boat early in the voyage.



On boarding the Kaniva a number of passengers and crew expressed concerns about the overcrowding to the main people smuggler. He appears to have responded by telling them that they were to keep sailing to avoid the Indonesian police and he would send a follow up boat to allow people to get off and ease the overcrowding and/or to provide additional life jackets.

This did not happen.

Many of passengers were given life jackets, but these were not of reasonable quality.

The Kaniva left Indonesia from an unknown Javanese location at about 2.04am on Monday 18 June 2012. It travelled for a period of five or six hours before it became stuck in the mud or on a sandbank.

One member of the crew announced that he did not believe that the boat would make it to Australia. He then returned to Indonesia on one of the fishing vessels which had come to the assistance of the Kaniva.

The boat was eventually freed with the assistance of local fisherman but this appears to have taken between about four and eight hours to achieve.



It is not known what damage (if any) was sustained by the Kaniva's hull as the result of running aground.

During the journey the weather conditions appeared to have deteriorated and the swell and sea conditions got worse.

Survivor KVA 68 gave evidence that the ocean was "wild" and "waves of the water was coming inside the boat."¹

According to survivor KVA 10, who also gave evidence, by the second night the Indonesian police were called and he spoke with them in the Bahasa language. He claimed he asked for help and to be saved. He said that many of the asylum seekers wanted the boat to go back and that during the voyage many of them were vomiting and some were crying.

During the voyage passengers noticed large amounts of water flowing into the hull of the boat. This resulted from an engine cooling pipe becoming dislodged. Although the crew carried out repairs, the pipe became dislodged on several further occasions and required constant attention.

On the morning of the sinking it appears that the bilge pump had not been turned on and the water level inside the boat was such that when it was turned on it could not cope.



Within a short period of time water covered the engine, causing it to stop.

According to survivors, the Kaniva then listed heavily to one side and capsized.

KVA 004 states he heard the engine making funny noises and other passengers declaring it was broken. A short time later the Kaniva “flipped” and threw him into the water.

TELEPHONE CALLS TO RCC AUSTRALIA

RCC Australia operates an automated voice recording system for telephone calls into and from the RCC. The system used at the time was a commercial product called “Call Parrot”. The calls are recorded for search and rescue purposes, so that an officer is able to return to listen to a call if there is any doubt about the information provided during a call. The calls are not normally transcribed.

For the purposes of the inquest, however, the telephone calls were transcribed and the recorded calls were played at the inquest hearing.

The first call appears to have been received at about 7.52pm on 19 June 2012.



A portion of that telephone call as transcribed was as follows:

MR (indistinct) yeah, we have – it's too dangerous, too dangerous.
Please help me, sir, Please do help me.

DAN You're going to have to repeat that.

MR (indistinct) we have no, we have no life jacket.
We have no life jacket.

DAN Okay. No life - - - -

MR (indistinct)

DAN No life jackets. Okay. I understand that. No life jackets.
Do you have GPS?

DAN I need to know where you are

MR Yeah (indistinct) we have, we have (indistinct) we have no life jacket (indistinct) we have 250 people in one small boat.

DAN Say that again?

MR Yeah, sir, we have asylum seeker. We have asylum seeker but we have no life jacket. We have no life jacket.

In the same call the caller advised that they were from Pakistan but had come from Indonesia.

The RCC operator attempted to obtain the boat's position unsuccessfully during the call. An extract of the relevant conversations is as follows:

DAN Okay. For me to help you, you need to tell me where you are. I don't know where you are. You need to tell me your GPS position.

MR We are from, we are from Pakistan. Yeah, we are from Pakistan but we come from Indonesia.



DAN You came from Indonesia. Okay. Okay. From Indonesia.

MR Yeah. Yeah, we, yeah, we come from Indonesia but we have (indistinct) now (indistinct) we have (indistinct).

DAN Okay. Do you have GPS?

MR Yeah, sir, help me, help me (indistinct) we have no life jacket.

From 7.52pm until 8.38pm RCC Australia received eight telephone calls believed to have come from the same vessel. As a result of the short duration of the calls and bad quality of the call lines as well as language barriers, relatively little information was obtained from those calls.

RCC Australia engaged an Arabic interpreter during the last two calls, but the calls ceased before the interpreter was able to join the call and communication difficulties remained.

At about 8.23pm RCC Australia contacted the Australian Maritime Security Operations Centre (AMSOC). AMSOC advised there were no known SIEV vessels approaching Australia.

At about 10.04pm RCC Australia sent a message to BASARNAS requesting any advice about the vessel's departure. This message was also addressed to a customs officer working out of the Australian Embassy in Jakarta. At



about 10.59pm that officer replied offering to help with information to be provided to other Indonesian agencies.

It was not until 11.28pm on 19 June that the caller from the vessel provided RCC Australia with a position which enabled the location of the Kaniva to be determined.

This location showed that the boat was in Indonesian waters, approximately 38 nautical miles south of Indonesia.

During the call at 11.28pm the caller stated that the boat was now “broken”.

The RCC Australia operator advised that if the boat was “broken” Christmas Island was a long way away and they should go back to Indonesia. The caller then responded with, “Oh, OK, OK, OK.”

There was nothing said which would indicate that the caller had any position of authority on the boat and was able to make the decision that the boat should return to Indonesia.

The line was then lost and the vessel continued on its passage south.



At about 12.01am on 20 June RCC Australia sent a message to BASARNAS confirming the boat's position and other information provided by the caller.

At six minutes past midnight RCC Australia rang BASARNAS requesting that BASARNAS accept coordination of the incident. The BASARNAS officer who took the call advised that this had been discussed and he would respond by facsimile transmission.

After the call from the Kaniva which began at 11.28pm on 19 June, RCC Australia did not receive another call from the vessel for about three hours and 53 minutes. At about 3.21am RCC Australia received another call from the boat and a new position was given. This position was noted to be 42 nautical miles south of Sunda Strait.

At 4.50am another call was received from the vessel.

During this call the following exchange took place:

MR No, no, our boat has problem. Our boat have problem. Our boat have (indistinct) go down in water

MEL The boat is going down in the water? ²

This question was not satisfactorily answered and later in the same call the caller advised that the boat was not going fast because of something to do with water. He agreed

² paras 811-812



to call back with the telephone number for the telephone he was using.

At about 6.31am on 20 June an officer from BASARNAS called RCC Australia and discussed BASARNAS taking over coordination of the response.³

At about 7am RCC Australia received a fax from BASARNAS which, though unclear, was understood to advise that BASARNAS had taken action to give an urgency broadcast to all vessels close to the distress position by Indonesian coast radio station, navy and marine police and BASARNAS had taken coordination of the incident.⁴

On 20 June at about 11.16am RCC Australia received another call from the boat. This was approximately six hours and twenty six minutes after the last call. The caller provided new position coordinates and also provided a telephone number. He stated that the boat was taking on water and that people were scared. He said that people were crying. The caller was advised that Indonesia had coordination of the incident and this information would be passed on to the Indonesian authority.

On Wednesday afternoon, 20 June 2012, Mr Lloyd attended a meeting of the People Smuggling Operations Group chaired by Customs and Border Protection. At that

³ This call is discussed later in these reasons.

⁴ This fax is discussed later in these reasons.



meeting the agencies assessed that the vessel was not in distress. This view was based on information made available to all parties present at the meeting.

At about 3.15pm RCC Australia received a telephone call from AMSOC advising that a vessel, believed to be the boat in question, had been seen at specified coordinates. That information was faxed through to BASARNAS.

Further calls were received from the boat at 6.12pm, 6.27pm and 6.30pm. The coverage was broken but the caller repeated that there was a problem with the boat.

At about 6.49pm RCC Australia received a further call from the boat and was given a telephone number from the boat. During the call the caller asked whether the vessel was in Australian waters now. The caller was advised that the boat was still in Indonesian waters.

At about 6.58pm RCC Australia attempted to call the boat but there was no response. At 7.29pm RCC Australia sent a fax to BASARNAS confirming information received about the boat and its positions and telephone number and asking BASARNAS whether RCC Australia should issue a maritime broadcast to shipping.

At 10.47pm on 20 June RCC Australia contacted BASARNAS and during the call advice was received which



though unclear was taken to mean that an Indonesian naval vessel had been deployed at 3pm to the last known coordinates. It was believed that the reference to “3pm” related to Jakarta time, which would have been one hour earlier than Western Australian time. ⁵

At about 9.44am on 21 June RCC Australia received a message from AMSOC that a vessel approximately 110 nautical north northwest of Christmas Island may be taking on water and persons on board were fearful for their safety.

This information was forwarded to BASARNAS.

At about 1pm on 21 June information was received from the Dash 8 surveillance aircraft to the effect that the Kaniva had been located overturned with people clinging to the hull.

INVOLVEMENT OF BASARNAS

At 6.31am on 20 June an officer from BASARNAS called RCC Australia in relation to the incident and advised, “We are still with my (indistinct) or my RCC in Jakarta”.

The RCC Australia operator, Mr Johnson, and the BASARNAS representative, Imam, took part in the following exchange:

⁵ This advice is discussed in greater detail later in these reasons.



MR JOHNSON Iman, yes. Go ahead, Imam

IMAM Okay. I'm ringing about the incident, sir.

MR JOHNSON Yes, sir.

IMAN We are still coordinating with my (indistinct) or my RCC in Jakarta.

MR JOHNSON Yes.

IMAM And then we are still coordinating with navy at West Java.

MR JOHNSON Yes, sir.

IMAM And then police, and then the coast tower radio station.

MR JOHNSON Yes, sir.

During the conversation the RCC Australia operator asked if the caller could send a fax to confirm that Indonesia was coordinating the response.

The RCC Australia operator provided the following advice about the vessel:

MR JOHNSON Thank, thank you very much, sir, and just one, one more thing. Just for information, the last, the last position we gave you, the last position we gave you – we believe the vessel is drifting to the south-east at one knot, so drift to south-east at one knot.

IMAM One knot.

MR JOHNSON One knot to the south-east. So if you plot the first position we gave you in the first message and the second position we gave you in the second message, we believe it is drifting one knot to the south-east.

IMAM Okay (indistinct) position there. Okay. Thank you.



MR JOHNSON Thank you. Thank you.

At about 7am RCC Australia received a fax from BASARNAS which contained the following:

Was following BASARNAS action:

Give urgency broadcast to all vessel closed the distressed position by Indonesia coast radio station, navy and marine police. (sic)

The transmission continued with,

BASARNAS still investigate this position and take coordination for this vessel and request your assistance if the distressed vessel is going to Christmas Island closely.⁶

This was taken by RCC Australia to mean that BASARNAS was coordinating a response and that some form of broadcast to shipping had been made. If any such broadcast was ever made it was ineffective as no shipping responded by rendering any form of assistance to the Kaniva and AMSA's HF radio provider (Kordia) did not receive any such broadcast.

At 10.47pm an RCC Australia operator, Mr Johnson, contacted BASARNAS by telephone and during the call Mr Stirna of BASARNAS advised that:

STIRNA And I will inform you that the Indonesia navy (indistinct) the location.

MR JOHNSON Okay then. Okay, so the Indonesian navy have been there or they're heading to the position?



STIRNA To the position – the coordinates.

MR JOHNSON Okay, so they're going there now, are they?

STIRNA Yeah, I'm, I'm still waiting for the response from them.

MR JOHNSON Okay. Okay. Understood. Waiting for response. They – have they found the boat or they're going there now?

STIRNA They (indistinct) about 3pm. ⁷

It appears that this conversation was interpreted as an indication that an Indonesian naval vessel had been deployed at 3pm Indonesian time on that day (4pm) to assist with the vessel in distress.

It is clear that no Indonesian naval vessel assisted with the emergency response to the sinking of the Kaniva.

As indicated earlier herein, at about 1pm on 21 June 2012 the Kaniva was seen upturned by those on a Customs and Border Protection aircraft and the Australian emergency response commenced shortly afterwards.

At 2.13pm on 21 June RCC Australia requested that Jakarta First Secretary Customs and Border Protection arrange a meeting with BASARNAS representatives in relation to the coordination efforts. While waiting for the meeting Jakarta's First Secretary called Bakorkamla (the Indonesian maritime security coordination organisation) at

⁷ paras 239-244



3.50pm and was informed that the only available Indonesian asset was a fibreglass hulled vessel which could not reach the incident location.

A meeting was held between Jakarta's First Secretary, Customs and Border Protection, and BASARNAS at about 4pm during which BASARNAS acknowledged that while they still had operational command for the search and rescue efforts, the only suitable vessel it had available to render assistance was an asset which would take over 24 hours to arrive at the location. They further advised that this asset was not being deployed because merchant vessels would soon be on the scene.

The information was passed on to RCC Australia.

At 5.56pm on 21 June RCC Australia received a fax from BASARNAS requesting transfer of coordination be assumed by RCC Australia. RCC Australia agreed to accept coordination and the transfer was confirmed at 8.41pm. RCC Australia sought advice as to any Indonesian assets being employed, but no response was provided.

RESPONSE BY RCC AUSTRALIA AND THE TRANSFERRING OF COORDINATION RESPONSIBILITY

In the period from receipt of the first telephone call from the Kaniva at 7.52pm on 19 June until the coordinates had been given and the location of the vessel was



identifiable at 11.28pm that day, RCC Australia had the responsibility of coordinating the response, but there was little which could be done.

The 2004 Arrangement between Australia and Indonesia for the Coordination of Search and Rescue Services relevantly provided in 5.1.2:

5.1.2 When the position of the ship or aircraft is unknown, SAR action will be initiated by the RCC which first becomes aware that the ship or aircraft may need assistance. The RCC initiating a SAR operation will remain in charge of the mission until the responsible RCC takes over.

During that period it was important for RCC Australia to evaluate the telephone calls and in particular to determine whether the vessel was in what has been described as the “distress phase”. This concept is defined in Volume I of the International Aeronautical and Maritime Search and Rescue Manual in the following terms:

Distress phase A situation wherein there is reasonable certainty that a vessel or other craft, including an aircraft or a person, is threatened by grave and imminent danger and requires immediate assistance.⁸

It was the assessment of RCC Australia that until the time when the vessel was seen upturned in the ocean this phase was not reached.

In that context Alan Lloyd, Manager, Search and Rescue Operations with AMSA, stated that asylum seekers

⁸ Volume I, 2010 Edition



who wish to ensure early Australian intervention often exaggerate the extent of problems with their boats so as to initiate an early response from Australian assets. He described these calls as “normal refugee patter”⁹ which he used to describe accounts given by refugees which were not necessarily reliable. He said that callers from refugee vessels “seem to follow a script.”¹⁰

Mr Lloyd stated that since August 2010, of 272 vessels which had travelled from Indonesia to go to Australia, 209 interacted with RCC Australia, but only eight had not arrived safely.

At 11.28pm the location of the vessel was identified as the result of a telephone call and RCC Australia entered into communications with BASARNAS in the terms discussed earlier herein with a view to BASARNAS taking over coordination of the incident.

The view of RCC Australia at that time was that as the boat was only about 40 nautical miles from Indonesia, well within the Indonesian search and rescue region, it was appropriate for Indonesia to take over coordination of the search and rescue response.

⁹ t 89
¹⁰ t 90



Transfer of coordination of search and rescue responsibility is detailed in the 2004 agreement between Australia and Indonesia at 5.2 in the following terms:

Transferring Overall Coordination Responsibility

When a transfer of responsibility for overall SAR coordination is to take place, either from the subsequent establishment of the aircraft's or ship's position or movement, or because an RCC other than the one initiating the action is more favourably placed to assume control of the mission by reason of better communications, proximity to the search area, more readily available SAR units or facilities, or any other reasons, the following procedures will be adopted:

5.2.1 Direct discussions or communications will be conducted between the SMCs concerned, to determine the best course of action.

5.2.2 If it is decided that a transfer of responsibility is appropriate for the whole mission or part thereof, full details of the previous action taken will be exchanged.

5.2.2 The initiating RCC will retain responsibility until the accepting RCC formally advises the initiating RCC that it has assumed responsibility for overall SAR coordination, or part thereof.

In this case the transfer of responsibility was to take place because the vessel's position had been identified as being within the Indonesian search and rescue region. The transfer did not take place because of any discussion to the effect that Indonesia's RCC would be more favourably placed to assume control of the response.

It appears relatively clear that BASARNAS was not better placed compared with RCC Australia in respect of a number of aspects of search and rescue capability. That



was certainly not a suggestion made by Imam, the BASARNAS representative, during the transcribed telephone conversation with Mr Johnson referred to earlier in these reasons.

At the time when communications took place about transferring overall coordination responsibility, while RCC Australia provided information to BASARNAS in some detail, communications in respect of “the best course of action” to be adopted were extremely limited (contrary to 5.2.1 of the 2004 agreement).

BASARNAS was aware of the limited action which had been taken by RCC Australia up until that time but there appears to have been no discussion about the best way to progress the matter further.

When RCC Australia received the call of 11.16am on 20 June from the Kaniva, however, that call would have provided some comfort as the new position provided by the caller indicated that in the significant period since the last call the Kaniva had been travelling at approximately 2.5 knots over a distance of approximately 16 nautical miles. The vessel, therefore, did not appear to have been sinking.

The Kaniva was sighted from the Dash 8 at 3.15pm that afternoon at a position which indicated that it had been travelling at a speed of approximately 3.5 knots from the



time of the last telephone call and had covered a distance of 15 nautical miles. Again that sighting would have provided RCC Australia with some comfort.

The further calls from the Kaniva at 6.12pm, 6.27pm and 6.30pm did not greatly advance RCC Australia's knowledge in relation to the Kaniva's situation. The coverage in respect of those calls was broken and although the caller repeated there was a problem with the boat, little useful information was obtained.

At 10.47pm RCC Australia contacted BASARNAS and the discussion about the possible deployment of an Indonesian naval vessel at about 3pm (4pm WA time) took place. That discussion was far from clear. Based on the recorded conversation, it is difficult to positively conclude that the representative of BASARNAS, Mr Stirna, was definitely stating that the naval vessel had been deployed at all and at one stage he said, "Yeah, I'm, I'm still waiting for the response from them".

It is clear that no Indonesian naval vessel assisted the Kaniva and when enquiries were subsequently made in respect of the Indonesian capability for a rescue response, no mention was made of any such vessel.

In my view the communications in respect of the transfer of the overall coordination responsibility were



inadequate, particularly on BASARNAS' part, and ongoing information from BASARNAS as to any actual response by them was extremely limited and unhelpful.

At the time of communications on 21 June, there was then an ongoing emergency and while BASARNAS acknowledged that they still had operational command for the search and rescue efforts, they were not able to make any meaningful contribution to the response.

From 10.47pm on 20 June until 1pm on 21 June, there is no objective evidence which would indicate that BASARNAS had taken further action to deploy any vessels or aircraft to assist the Kaniva and no information was provided to RCC Australia to indicate that any such actions had been taken. There was no further information in respect of the Indonesian naval vessel claimed to have been deployed at 3pm Indonesian time on 20 June.

THE RESCUE EFFORTS

AMSA was first advised by other Commonwealth agencies of a heightened level of concern for the safety of the Kaniva at a briefing with Customs and Border Protection that commenced at 11.30pm on 21 June 2012. This briefing included confirmation that Customs and Border Protection were already acting on the heightened level of concern by directing the Dash 8 surveillance aircraft be tasked with



locating the vessel and tasking HMAS Larrakia and HMAS Wollongong to commence passage north.

The first time that RCC Australia was made aware of the heightened level of concern by other Commonwealth agencies was 12.20pm AEST on 21 June 2012 by the AMSA Liaison Officer who attended the briefing at 11.30pm.

At 1pm the Dash 8 aircraft located the vessel upturned in the ocean and at about 1.30pm RCC Australia issued a distress broadcast to shipping.

The merchant vessel WSA Dragon is a container ship registered under the Liberian flag. On 21 June 2012 WSA Dragon was travelling from Jakarta to Esperance in Western Australia.

On 21 June 2012 at 1.32pm WSA Dragon received a mayday distress relay. At approximately 2.48pm WSA Dragon was the first vessel to arrive at the search and rescue zone.

On arrival they found 40-60 persons in the water, scattered in a 2.5 mile radius. The ship was manoeuvred so as to get close to persons in the water and life rings were thrown to those persons. The first survivor was rescued at 3.30pm.



The merchant vessel JPO Vulpecula is also a container ship registered under the Liberian flag. That ship was travelling from Fremantle to Port Klang in Malaysia.

On 21 June 2012 the JPO Vulpecula received a distress message from RCC Australia at 1.40pm. The JPO Vulpecula was about 64 nautical miles from the indicated position and estimated that it would arrive in the area in three hours.

At 4.48pm the upturned Kaniva was sighted with people on the hull. The ship's ladder and gangway were lowered readying the ship to rescue people.

When the JPO Vulpecula was about 25 metres away from the upturned hull, people began to jump from the hull and swim towards the ship. Due to the rough weather they began to spread out on the ship's side. JPO Vulpecula's crew split into three groups along the ship and manned the ladders. As the survivors swam to the ship and climbed up they were helped on board.

The merchant vessel Cape Oceania is an ore carrier registered under the Hong Kong flag. On 21 June 2012 the MV Cape Oceania was travelling from Singapore to Esperance.



On 21 June 2012 at 1.20pm the MV Cape Oceania received a VHF call from Australian Customs and at 2.24pm RCC Australia gave the MV Cape Oceania coordinates to attend and assist with the rescue operation of the Kaniva.

At 5.30pm MV Cape Oceania arrived at the rescue area. At that time the captain could not see any upturned vessel in the water, only various floating objects.

A rescue boat was launched and survivors were brought on board.

On 21 June 2012 at approximately 11.40am Lieutenant Commander Paul Hindes, the Commanding Officer in charge of the unit on HMAS Wollongong, was briefed that the vessel would be required to attend to a search and rescue response. At 12.05pm he was advised that the HMAS Wollongong and HMAS Larrakia would be responding to a survival of life at sea incident and he was given the coordinates of the sinking Kaniva.

The HMAS Wollongong and HMAS Larrakia played a major role in the rescue operation until at 8.17pm on 21 June RCC Australia directed the HMAS Wollongong and the merchant vessels to proceed to Christmas Island to offload survivors and deceased persons. HMAS Larrakia was directed to remain on the scene overnight and to continue searching for survivors.



HMAS Wollongong arrived at Christmas Island at 4.20am on 22 June 2012 and began offloading the survivors and the deceased bodies. Due to weather conditions the merchant vessels were directed to offload their survivors and bodies before HMAS Wollongong and this delayed HMAS Wollongong's return to the search and rescue zone. The Wollongong arrived back on the site at 3.25pm on Friday 22 June 2012.

The rescue efforts of those involved, particularly those on the three merchant vessels and HMAS Wollongong and HMAS Larrakia, were outstanding and they deserve to be commended for their considerable efforts.

PROBLEMS ASSOCIATED WITH RESPONDING TO CALLS FROM ASYLUM SEEKER BOATS

From the point of view of RCC Australia asylum seeker boats present unusual and difficult problems for the organisation in determining whether calls are in fact "distress" calls and identifying the location and appreciating the condition of the boats.

As Mr Lloyd pointed out in his evidence, boats in distress at sea are now normally expected to operate distress beacons on 406 MHz with a 121.5 MHz transmission feature being used for final stage homing.



The technology of these distress beacons is so advanced that the location of a boat in distress can be calculated to a search area as little as 110 metres if the 406 MHz beacon is encoded with GPS.

The utilisation of satellites in modern distress beacons has reduced the “search” aspect in many rescue situations as the location of the distressed vessel can be readily detected. This is not the case with asylum seeker boats. To Mr Lloyd’s knowledge a 406 MHz beacon has never been used by any such vessel.

In addition these asylum seeker boats do not meet any of the most basic requirements that a passenger vessel would have to meet under the Safety of Life at Sea (SOLAS) Convention in the way of safety, survivability and emergency communications. In contrast they are usually overloaded, under equipped and have crew who are under skilled and act contrary to safe practice. This complicates judgments about what are necessary or unnecessary calls for assistance.¹¹

In his evidence Mr Lloyd referred to “normal refugee patter”, which was a description he applied to communications from asylum seeker boats in a context where asylum seekers were seeking assistance. He gave

¹¹ see Boat People Report at 4



evidence that often the persons making these calls overstated the dangers of their situation.

In my view for many asylum seekers, unaccustomed to being on boats on the ocean, who find themselves on unsafe and overcrowded boats, it is understandable that there would be a high level of alarm and fear. It is also understandable that these people ask to be rescued before the boats taking them actually sink.

However these requests for assistance are viewed, it is clear that unreliable information from those on the boats complicates the evaluation task being conducted by RCC Australia as to whether or not boats are in immediate peril.

As Mr Lloyd pointed out, if RCC Australia was to commence mayday relays to shipping and merchant ships were to respond to situations where asylum seeker boats are not in immediate danger of sinking, and this occurred on a number of occasions, the future response by shipping to such relays could well be affected.

In this case merchant ships responded promptly to the emergency broadcast on the understanding that lives were at risk and an immediate response was required. If there were to be false alarms, such an immediate response could not be necessarily relied upon in future cases.



In addition in this context it is important to recognise that in respect of the Australian rescue response, that was provided largely by Border Protection Command assets. Border Protection Command assets are not deployed on the basis of possible search and rescue needs, but rather to meet the requirements of a civil maritime security law enforcement mandate.

Clearly issues will arise if these assets are deployed in circumstances where there is not an immediate need, particularly as increased deployment can result in fatigue of crews, who remain for long periods of time on high levels of readiness to respond to search and rescue incidents, and the exhaustion of fuel and other resources. In addition to potentially compromising Border Protection Command's core function, any unnecessary alerting can compromise Border Protection Command capability to respond in the case of further emergency situations arising.

As pointed out in the Buckpitt Report, it is likely that potential and actual asylum seeker boat search and rescue incidents will occur in rapid succession or at simultaneous times in the future. In these cases any instances of unnecessary reporting will necessitate an assessment of the state of each vessel and a judgment on the allocation of response to each incident.



In the present case the emergency calls were made by people who were not identified, the callers did not immediately give coordinates for the location of the boat and the advice as to what was wrong with the boat was unclear. The situation was further complicated by communication and language difficulties.

DISASTER VICTIM IDENTIFICATION ENQUIRIES

WA Police sent a Disaster Victim Identification (DVI) team to Christmas Island shortly after the incident.

That team was responsible for managing the 17 recovered bodies, attending to preliminary coronial duties and commencing DVI enquiries.

The 17 bodies recovered from the ocean following the sinking of the Kaniva were brought to Christmas Island and lodged in a temporary mortuary at the rear of the AFP Christmas Island Police Station.

Following comprehensive DVI procedures 16 of the 17 bodies were identified.

Full internal post mortem examinations were not conducted, but the bodies were examined externally by forensic pathologists.



As a result of the examinations the pathologists found the cause of death in relation to all 17 bodies was “consistent with immersion (drowning)”.

In respect of 85 people who had been reported by survivors as having been on the Kaniva when it capsized and who remain missing, although the WA Coroner’s Court does not have jurisdiction in respect of those deaths, investigations were conducted in relation to their identifications and a list of the believed missing persons was compiled. Information obtained has been passed to the International Red Cross which has cross-referenced that information with reports received from Pakistani and Afghani families seeking information on missing relatives.

EXAMINATION OF LIFE JACKETS ISSUED TO PASSENGERS ON BOARD THE KANIVA

During the search and rescue operation rescuers recovered 101 life jackets from survivors and the deceased in the ocean. All were of the same make and description.

WA Water police officers conducted testing of a life jacket and concluded that it did not meet Australian Standards and was significantly unsafe in a number of important respects.



THE LIKELY CAUSES OF THE KANIVA CAPSIZING AND SINKING

The WA Police investigation, competently conducted by Detective Inspector Bryson, concluded that there were four main factors in the sinking, the unseaworthy condition of the Kaniva, inexperience and inattention on the part of the crew, the fact that the Kaniva was severely overcrowded and the sea state.

In respect of the unseaworthy condition of the Kaniva it is noted that the Kaniva was an old wooden boat in poor condition with parts of its timber structure being described as rotten and termite damaged.

The vessel's condition made it susceptible to taking on water during the voyage due to an engine cooling pipe which repeatedly became dislodged from the engine, resulting in ocean water being pumped into the hold. In addition waves washed over the deck in heavy or rough seas, resulting in water flowing into the hull through hatches and openings on the deck and water penetrated the hull through holes created when timber planks became dislodged in heavy seas.

In respect of the crew it was noted that there were only three crew members on board at the time of the capsizing of the Kaniva.



In respect of two crew members who survived the incident, although they had some experience in crewing local fishing vessels, neither had any experience in relation to larger commercial ocean going vessels or had any formal maritime qualifications.

The emergency incident which resulted in the Kaniva capsizing appears to have been triggered by an unidentified crew member's inattentiveness. There is evidence that this crew member, who was responsible for monitoring the engine and bilge pump, fell asleep and was not aware of the engine cooling pipe again becoming dislodged and water rapidly filling the hold. By the time passengers woke this crew member and alerted him to the problem it was too late. In addition, the bilge pump was not operating and this crew member's attempts to activate the bilge pump to expel the incoming water were futile.

It appeared that lack of supervision by the captain (or senior crew member) and the collective inexperience of the crew contributed to mismanagement, the constant dislodging of the engine cooling pipe and the late activation of the bilge pump.

It is clear that the Kaniva was grossly overcrowded with about 212 passengers and crew on board. This appeared to be more than double the boat's reasonable capacity.



There were so many passengers on board that they were not easily able to move about on the boat.

Survivors described the sea as being rough, essentially from the time the Kaniva left Indonesia. It is likely that over the course of the trip the force of a heavy swell with waves constantly crashing on the sides of the Kaniva contributed to its listing heavily and the ultimate rollover.

There is no evidence to suggest that the Kaniva was deliberately damaged by anyone, nor were there any identified deliberate acts of sabotage which could have caused the boat to capsize.

The Kaniva was lost at sea and could not be forensically examined.

INVESTIGATIONS FOLLOWING THE INCIDENT

On 21 June 2012 the Western Australia Police Emergency Operations Centre at Maylands was activated in response to the sinking of the Kaniva. The response operation was commanded by Acting Assistant Commissioner John Brandham and the operation was designated Operation Calder (West).

Mr Brandham coordinated the WA Police resources and liaised with the Federal Government agencies involved



with the search and rescue operation. It was determined that WA Police would be the lead agency on the disaster victim identification DVI aspect of the investigation. They were also to be the lead agency on the coronial investigation into the sinking of the Kaniva.

Detective Inspector David Bryson, Major Crime Division, was appointed the Senior Investigating Officer for the coronial investigation. His duties included leading and managing the overall investigation into the circumstances surrounding the sinking of the Kaniva, identifying the deceased persons, interviewing relevant parties to the investigation and the creation of a timeline of the actions of all agencies, vessels and persons involved in the search and rescue operation.

In conducting that task Inspector Bryson liaised with an Australian Federal Police (AFP) agent who was to be the single point of contact in respect of any requests for provision of documents and other materials from Commonwealth agencies.

Unknown to Inspector Bryson it appears that an AFP officer told both the Customs and Border Protection Services and the Department of Defence that they should not provide to the investigators any classified material. ¹²

¹² t 467-471 – advice provided by Mr Hanks QC



In my view this approach compromised the WA Police investigation into the circumstances surrounding the deaths.

Included in the classified information which was not provided to Inspector Bryson was a comprehensive review of the incident conducted by Mr Jeff Buckpitt, National Director, Australian Customs and Border Protection Service.

Mr Buckpitt prepared a report responding to directions from the Chief Executive Officer and Acting Chief Executive Officer of the Australian Customs and Border Protection Service that an internal review be conducted into the whole of government response to two search and rescue incidents including the one in question.

Mr Buckpitt's review involved collecting all documents relating to the incidents, preparing a chronology narrative of each incident, identifying relevant policies, processes and procedures and identifying any issues requiring further analysis.

In my view the report prepared by Mr Buckpitt was of high quality and provided an extremely useful source of information.

At the inquest a redacted form of the report was made available, but I was given the opportunity of reading the



unredacted version which contained further useful information.

The Buckpitt Report helpfully referred to a significant body of classified information which was reviewed and assessed within the report.

The fact that none of this classified information was ever made available to the WA Police investigation was most unfortunate.

In addition, this failure to provide not only the classified information, but also chronologies and narratives which had been prepared, resulted in considerable duplication of effort by WA Police. A vast amount of man hours on the part of WA Police were spent in work which duplicated work contained in the Buckpitt Report, without the benefit of access to much of the classified information which was provided to Mr Buckpitt.

In my view this was a most unsatisfactory situation.

The fact that classified information had not been sought by the AFP and had, therefore, not been provided to WA Police investigators only came to light late in the inquest. After this matter was raised, following the conclusion of oral evidence, a letter was received from the Australian Government Solicitor's Office dated 30 July 2013



which advised that the AFP role was understood to only involve providing WA Police with information obtained for the purposes of the criminal investigation relating to the incident and so only unclassified documents had been obtained.

Unfortunately this does not appear to have been made clear to Inspector Bryson who understood that he was to receive all relevant information available to the Commonwealth. The result was that Inspector Bryson did not have access to a significant body of classified information and there was a considerable duplication of effort.

THE PEOPLE SMUGGLERS

The people smugglers responsible for sending the deceased persons on the Kaniva contributed to their deaths.

The asylum seekers were taken by other boats to the Kaniva and it was only when they were all on the Kaniva that they had an appreciation of how dangerous their situation was.

It is clear that the expectation of the people smugglers was that the Kaniva would be destroyed on arrival at Christmas Island and so from the outset that boat was chosen because it was dispensable and of little worth.



The life jackets were unsafe and unsuitable for the purpose and there were not enough life jackets for the asylum seekers on the boat.

On boarding the Kaniva a number of asylum seekers and crew expressed their concerns about the overcrowding to a people smuggler. He appears to have responded by telling them that they were to keep sailing to avoid the Indonesian Police and he would send another boat which would ease the overcrowding and/or provide additional life jackets. No second boat ever approached the Kaniva and it does not appear that any second boat was ever sent.

In my view the approach taken by the people smugglers to the safety of those on the Kaniva was correctly described by Counsel Assisting, Mr Tedeschi, in his submissions as “callous indifference”.

CONCLUSION

The Kaniva sank on 21 June 2012 with approximately 212 people on board.

The boat sank approximately half way between Indonesia and Christmas Island, within the Indonesian search and rescue region.

110 of those on board the Kaniva were rescued, 85 are missing presumed dead and 17 bodies were recovered.



The asylum seekers involved embarked on an open sea voyage in an unseaworthy vessel, which was grossly overloaded, with no EPIRB, inadequate personal safety devices and with a crew which had very limited sea experience.

When an emergency search and rescue operation was commenced at about 1.30pm on 21 June 2012, that was conducted at a professional standard and met obligations required under the Australian Maritime Safety Authority Act 1990 and international search and rescue conventions and protocols. Merchant vessels involved adhered to their international obligations. The response by those involved in the three merchant vessels was exemplary.

The Australian Customs and Border Protection naval vessels, the HMAS Wollongong and HMAS Larrakia, attended the search area and coordinated the search and rescue response with the merchant vessels in attendance. That response was of a high standard.

It appears that the incident which resulted in the Kaniva capsizing happened quite quickly and that up until the time when the vessel was seen upturned in the ocean on 21 June 2012, it was the view of Australian agencies involved, including RCC Australia, that the vessel was not in



“distress”, in the sense that it was not considered to be in imminent danger.

The people smugglers responsible for the deceased persons travelling on the Kaniva contributed to their deaths.

I find that the deaths arose by way of accident.

COMMENTS ON SAFETY ISSUES

In the present case I accept that until shortly before the Kaniva capsized, it was progressing with engines going and was not in immediate danger of sinking. It was largely as a result of a series of events described in these reasons which took place shortly before it capsized that the situation deteriorated.

The entire journey for the Kaniva, however, was hazardous in the extreme. The Kaniva was unseaworthy, it was grossly overloaded, there was no EPIRB on board and the life jackets which were available were unsafe. Throughout the journey it was at continual risk of sudden deterioration in its condition which could have resulted in its sinking.

The asylum seekers on board were justified in their fears that the Kaniva could sink at any time.



In that context it was important that from the time of the first satellite telephone calls from asylum seekers on the Kaniva to RCC Australia there would be ongoing appropriate concern about the vessel with action being taken so there could be an immediate response in the event of the boat sinking.

Up until the time when the Kaniva experienced serious difficulties, just before it capsized, I accept there was little that any rescue coordination centre in either Australia or Indonesia could do. Until the distress phase was reached, it was not appropriate for there to be a mayday relay to shipping and it would be unrealistic to expect merchant vessels to divert from their normal course to conduct some sort of safety check on the Kaniva . None of the merchant vessels would have been on a course which would have taken them close to the point where the Kaniva sank. I further accept that until the distress phase had been reached it was not realistic to expect that naval vessels would be dispatched to intercept the boat which was then in international waters.

Of concern, however, is the fact that at the time when there was a transfer of coordination of search and rescue responsibility from RCC Australia to BASARNAS there appears to have been inadequate communication as to the best course of action from that time onwards.



The 2004 Agreement between Australia and Indonesia for the coordination of search and rescue services provided in Clause 5.2.1:

Direct discussions or communications will be conducted between the SMCs concerned, to determine the best course of action.

There does not appear to have been any communication directed to determining what the best course of action was. As indicated in these reasons, no information was provided to suggest that BASARNAS was better placed compared with RCC Australia in respect of a number of aspects of search and rescue capability. This was certainly not a suggestion made by the BASARNAS representative, Imam, during the telephone conversation relating to the issue.

In my view the ongoing communications which took place between BASARNAS and RCC Australia in respect of coordination of responsibility for the response were inadequate and lacked detail.

These communications were further compromised by apparent language difficulties. They took place in English and were not confirmed in Indonesian and the BASARNAS representative did not appear to have good English language skills.



At the stage shortly after the Kaniva sank, when RCC Australia effectively took over coordination of the response, RCC Australia had access to little useful information in respect of actions taken by BASARNAS and subsequently learned that BASARNAS was not able to make any meaningful contribution to the emergency response.

In my view it would be helpful if the extent of interaction between BASARNAS and RCC Australia was to be increased and the quality of information sharing was to be improved.

In addition, as suggested in the Buckpitt Report, it would be helpful if communications in respect of transfer of responsibility were to take place at a relatively senior level, both during and after normal working hours. In this case the transfer from RCC Australia to BASARNAS took place in the early hours of the morning.

In this case the communications in respect of the transfer of responsibility for coordination of the search and rescue responsibility for the Kaniva were essentially conducted in the English language. Advice from BASARNAS was difficult to understand and in some respects was unclear and ambiguous as a result.¹³ This communication issue resulting from language problems should be

¹³ see p 21-24 herein



addressed so that important decisions are clearly communicated and understood by all concerned.

RECOMMENDATION 1

I RECOMMEND that Australia work with Indonesia to improve the quality of communication in respect of coordination of search and rescue responses to calls for assistance made by asylum seekers on boats travelling from Indonesia to Christmas Island.

RECOMMENDATION 2

I RECOMMEND that transfer of acceptance of search and rescue responsibility should take place at a relatively senior level.

RECOMMENDATION 3

I RECOMMEND that when possible documents containing information about any important decisions made about search and rescue responses be translated into languages of the involved countries.

COMMENTS IN RESPECT OF THE ADMINISTRATION OF JUSTICE

The coronial investigation into the circumstances surrounding the deaths in this case was conducted by Detective Inspector Bryson and a team of officers supplied by WA Police.



Although according to Detective Inspector Bryson he requested that he be provided with all relevant documents and other materials available from Commonwealth agencies and made that request to an AFP agent, it is clear that he was not supplied with classified material including the comprehensive review of the incident conducted by Mr Jeff Buckpitt, National Director, Australian Customs and Border Protection Service. In addition Detective Bryson was not provided with a substantial body of relevant classified information referred to in that report.

While access has now been provided to the classified material, Inspector Bryson's investigation team has now been disbanded, his report has been concluded and officers concerned have returned to their important functions in WA Police. It is not now possible to determine whether timely provision of this information would have resulted in further enquiries being conducted by Detective Bryson or his team and whether other issues of relevance to the inquest could have been identified.

In a letter dated 30 July 2013 the Australian Government Solicitor's Office submitted that I should not make any adverse comment about the handling of the internal review report and contended that the coroner's power to comment is confined and that the circumstances relating to the provision of the internal review report by the



Commonwealth post dated the incident and, therefore, was not a matter connected with the deaths. Reliance was placed on the Supreme Court of Victoria decision in *Harmsworth v State Coroner* [1989] VR 989 at 996.

There have been considerable developments in coronial law since Harmsworth's case was decided (see eg *Re The State Coroner; ex parte The Minister for Health* (2009) 38 WAR 553; (2009) 261 ALR 152; [2009] WASCA 165; *WRB Transport & Ors v Chivell* [1998] SASC S7002). These authorities effectively note that the jurisdiction and the obligation of a coroner to enquire extend beyond the mechanism of death and include the "circumstances attending the death".

Clearly in this case evidence which was classified and the material contained in the Buckpitt Report did relate to the circumstances relating to the deaths and it was appropriate that consideration was given to that material.

In an evaluation of the results of the investigations in this case it was important to note that WA Police, in the comprehensive investigation conducted on the part of the coroner, did not have access to much of this relevant material.

The question which arises is whether a coroner has jurisdiction to comment on issues bearing on the reliability



of information provided to the coroner as the result of investigations when those investigations are clearly directed to the circumstances of the deaths.

In this context I note that section 25(2) specifically provides that a coroner may comment on matters relating to “the administration of justice”. Section 25(2) does not only apply to cases of deaths in care, as section 25(3) does. It is, therefore, expected that in appropriate cases the coroner may comment on issues relating to the administration of justice in cases other than deaths in care.

The most important administration of justice issues in the context of a coronial investigations are those which bear on coronial investigations and coronial inquests. It is my view, therefore, that it is appropriate for comments to be made in respect of the investigations conducted and to make observations in respect of any matters which may have compromised the quality of information provided to the coroner and the reliability of any findings made.

In this context I note that aside from the specific provisions of section 25(2), it would normally be appropriate for a court to make observations about the quality of information provided on which its decisions were based.

On the basis of the letter provided by the Australian Government Solicitor it appears that the AFP Liaison Officer



did not understand that he was being asked to provide WA Police with all information which would be relevant to the coronial investigation, but only understood that his responsibility related to information which the AFP had accessed for the purposes of criminal investigations. Assuming that was the case, it is most unfortunate the situation was not clarified with Detective Bryson.

The Australian Government Solicitor's letter advises that there was no intention by the Commonwealth to withhold the internal review report prepared by Mr Buckpitt and the following contentions are made:

No secret was made of the existence of the report. The internal review was publicly announced on 27 June 2012, and was the subject of a media release and media reports at and subsequent to that time. The terms of reference of the internal review were, and still are, published on Customs' website.

We are instructed that WAPOL, at no stage, approached Customs or Defence for the internal review report or any other information in support of WAPOL's coronial investigation. Nor did WAPOL seek any material from the AFP beyond material that the AFP was gathering for the criminal investigation. The AFP has no knowledge of what WAPOL may have asked Customs and Defence.

In respect of this contention I make the observation that the Buckpitt Report was clearly made available to a limited number of highly placed officers in various organisations within the Commonwealth. Those officers should have all appreciated that the information contained in the Buckpitt Report would be of great assistance to police officers investigating the circumstances of the deaths on



behalf of the coroner and to the coroner investigating the matter.

The fact that no Commonwealth officer took the step of informing WA Police or the Coroner's Court about the important information contained in the Buckpitt Report or advised that it could be potentially extremely useful was most unfortunate.

As indicated earlier herein, had Detective Bryson had access to the report and to the classified information referred to therein, that would have been of great assistance to him in providing a comprehensive report to the coroner.

Importantly the Buckpitt Report contained chronologies and narratives which had been prepared which would have been of great use to WA Police. The fact that WA Police did not have that information resulted in a considerable duplication of effort. A vast amount of man hours on the part of WA Police was spent on work which duplicated work contained in the Buckpitt Report.

While WA Police and the Coroner's Court could have searched media releases and various Commonwealth websites with a view to determining the existence of any reports and could have identified the existence of the Buckpitt Report (which was then classified), the expectation was that the Commonwealth would assist by drawing



attention to important and useful material to assist with the investigations.

In my view the approach of the Commonwealth as described above in the letter from the Australian Government Solicitor was not helpful and not in keeping with what should be the spirit of such investigations.

I RECOMMEND that in any relation to any future tragedies where Commonwealth departments or organisations are involved and have access to relevant information, whether classified or not, that information is volunteered, or at least its existence is made known, to those investigating the circumstances of the deaths on behalf of the coroner.

A N HOPE
STATE CORONER
31 July 2013





The above photograph taken from the merchant vessel JPO Vulpecula on 21 June 2012 shows survivors on the hull of the Kaniva

