



Western

Australia

RECORD OF INVESTIGATION INTO DEATH

Ref No: 30/12

*I, Alastair Neil Hope, State Coroner, having investigated the death of **Tharmeswaran THAMBIAIYA**, with an Inquest held at Perth Coroners Court on 14 September 2012 and 22 October 2012 to 24 October 2012 find that the identity of the deceased person was **Tharmeswaran THAMBIAIYA** and that death occurred on or about 1 November 2009 in the Indian Ocean and was Consistent with Immersion (Drowning) in the following circumstances -*

Counsel Appearing :

Mr Marco Tedeschi assisting the State Coroner
Dr Eric Heenan (instructed by Shine Lawyers) appeared on behalf of Anojan Selvanantham and Mr Balachandran Suganthan
Mr Stephen Owen-Conway QC (instructed by Australian Maritime Safety Authority Solicitors) appeared on behalf of the Australian Maritime Safety Authority (AMSA)

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INTRODUCTION

Tharmeswaran Thambiaiya (the deceased) was a 29 year old male, born in Sri Lanka, who died on or about 1 November 2009 in the Indian Ocean following the sinking of Suspected Illegal Entry Vessel (SIEV) 69.

SIEV 69 sank in rough seas in the Indian Ocean on 1 November 2009 at a location approximately 350 nautical miles north west of Cocos (Keeling) Islands. At the time of the sinking SIEV 69 was on its way from India to Christmas Island and had 40 persons on board. A total of 27 persons were rescued by a passing ship and a fishing vessel, both of which had responded to a distress signal. It is believed that 13 persons died as a result of the sinking, including the deceased. Only one body was recovered from the ocean, the body of the deceased, which was subsequently taken to Christmas Island and then Western Australia.

As the body of the deceased was taken to Western Australia and the death was not otherwise the subject of any death certification, that death was a reportable death and the Coroner's Court of Western Australia had jurisdiction to investigate the circumstances of the death.¹

SIEV 69 was taking in water in its hull to a concerning extent from at least 31 October 2009 and on 1 November

¹ Section 19 and Section 3 of the Coroners Act 1996, see definition of 'reportable death' and 'Western Australian death'.



2009 distress calls were made using a satellite telephone on SIEV 69 to the Australia Maritime Safety Authority (AMSA). The first telephone call received by AMSA took place at 4.10am.² During this call the caller, who was one of the passengers on the vessels and who had limited English language skills, did not provide sufficient information as to the location of the vessel to enable an effective response to take place.

A subsequent telephone call was received from the SIEV by AMSA but as a result of poor telephone connection and language barriers the position of the boat could not be established.

At 7.14am a call was received in which sufficient information was provided to enable identification of the position of the boat to be made.

Two further attempts to call AMSA were made at 9.32 and 9.39am but both calls “dropped out”.

The location of the vessel was within the Australian search and rescue region.

The role of coordination of search and rescue operations within the Australian search and rescue region rested with the Rescue Coordination Centre (RCC) located at

² All times given are in Australian Western Standard Time (AWST) although the closest local time was the Cocos (Keeling) Islands time which was 1 ½ hours behind AWST



AMSA's head office in Canberra. It was the RCC which had received the distress calls.

The RCC issued a distress broadcast at 8.02am and the Bahamas flagged MV LNG Pioneer responded to the distress call, advising that it was eleven hours travelling time from the distressed vessel and was heading in that direction.

The Japanese coastguard advised the RCC that a Japanese fishing vessel had made contact with a Taiwanese fishing vessel, the FV Kuang Win, which was in the vicinity of the distressed vessel and willing to assist.

At 12.25pm the RCC was advised that FV Kuang Win had reported finding the SIEV.

The RCC communicated with the FV Kuang Win using an interpreter and advised that it should stay with the SIEV until the arrival of the MV LNG Pioneer, which was expected to arrive in approximately 6 hours.

At one stage, while the two vessels were in close proximity, two persons from the SIEV swam to the FV Kuang Win. Those two persons were not permitted to stay on the fishing vessel and were required to swim back to the SIEV in dangerous circumstances, even though at least one of those persons was a poor swimmer.



At about 5.29pm the MV LNG Pioneer advised RCC that they were in communications with the FV Kuang Win and were 1.5 nautical miles from the SIEV and one nautical mile from FV Kuang Win. The master of MV LNG Pioneer advised the RCC that his plan was to use FV Kuang Win to tow the SIEV closer to his vessel.

The FV Kuang Win did not wait at the scene and at about 6.18pm, while the MV LNG Pioneer was approximately 0.7 nautical miles from the refugee boat, it moved away from the refugee boat, increasing its speed to 9.5 knots and headed in a south east direction.



The above photograph taken from the MV LNG Pioneer shows SIEV 69 at about the time FV Kuang Win left the area

The master of MV LNG Pioneer was surprised that FV Kuang Win was leaving the area because he expected



FV Kuang Win to stay and assist with the rescue. MV LNG Pioneer called FV Kuang Win on VHF radio channel 16 (the emergency channel) but there was no answer.

At about 7.40pm SIEV 69 sank and persons on board could be seen jumping into the water. MV LNG Pioneer deployed a man overboard buoy, a lifeboat and a life raft.

Unfortunately sunset at that location was at approximately 7.34pm and it was difficult to locate persons in the water.



The above photograph taken from the MV LNG Pioneer shows people in the sea shortly after SIEV 69 sank

Parachute flares were activated and search lights were used to assist visibility of the searching parties but at first



no survivors were located. At 8pm the lifeboat was recalled to MV LNG Pioneer due to the weather and sea conditions.

MV LNG Pioneer again requested assistance using radio contact with the FV Kuang Win which was now eight nautical miles away and still travelling in a south east direction. There was no response to the radio calls.

At 9.20pm MV LNG Pioneer crew heard shouts for help coming from the ship's starboard and sighted five survivors in the water. All five reached the ship and were rescued. A short time later another five survivors were sighted in the water and rescued. A further three survivors reached the life raft which was being towed at the rear of the stern and were rescued. At 11pm more survivors were sighted on the ship's starboard and all were rescued.

At about 10pm the FV Kuang Win was again at the search location and advised by radio that they had rescued two survivors from the man overboard lifebuoy.

During the night FV Kuang Win and MV LNG Pioneer continued to search for survivors.

At 8.36am on 2 November 2009 a survivor was sighted in the water and rescued by MV LNG Pioneer. At 9.18am another survivor was sighted and rescued.



One survivor who reached MV LNG Pioneer was seen to climb the rope ladder on the side, but after a short time fell back into the water. After more attempts to climb the ladder he again fell back into the water and was pulled by the sea into the ship's propeller.

Search planes dropped life rafts and survivors managed to swim to these rafts and climb on board, eventually being rescued by the FV Kuang Win.

At 10.30am on 2 November 2009 FV Kuang Win advised MV LNG Pioneer that they had rescued three survivors. At 11am FV Kuang Win advised that they had rescued a further three survivors from life rafts dropped from rescue aircraft. At 11.28am FV Kuang Win advised that they had rescued another survivor and at 11.54am the FV Kuang Win advised MV LNG Pioneer that they had recovered the deceased from the water.

One survivor who was rescued by the FV Kuang Win stated that he had a conversation with an Asian crewmember on FV Kuang Win who spoke English. The crewmember said to him that the reason why the FV Kuang Win had not saved them earlier was because they believed that they might be blamed for people smuggling.



Survivors who had been rescued by FV Kuang Win reported seeing a number of bodies in the water, although only one was retrieved.

At 3.15pm on 2 November 2009 FV Kuang Win began transferring survivors to MV LNG Pioneer. Ultimately 27 survivors and the body of the deceased were on board MV LNG Pioneer which continued to search the area.

At 1.19pm RCC was advised by MV LNG Pioneer that a total of 27 persons had been rescued, 18 by MV LNG Pioneer and 9 by FV Kuang Win. Three bodies had been sighted by MV LNG Pioneer but had not been recovered.

At 10pm on 2 November FV Kuang Win departed the area.

MV LNG Pioneer was released from further search and rescue operations at 8.04am on 4 November 2009 and the vessel proceeded to Christmas Island to disembark with 27 survivors and one deceased

In the circumstance that the RCC had been able to identify the position of SIEV 69 following the distress calls over 12 hours before it sank and the FV Kuang Win had been at the scene for about 6 ½ hours before SIEV 69 sank, it was obvious that questions should be asked at the



inquest as to why so many persons died. There was clearly plenty of time for all 40 on board to be saved.

The FV Kuang Win was a 737 tonne fishing vessel, registered under the Taiwanese national flag. Its home port was Niagia, which is in northern Tokyo, Japan. It had a crew of 28 persons consisting of a mixture of Vietnamese, Chinese, Pilipino and Indonesian nationals.



The above photograph shows the FV Kuang Win

It is clear that all 40 persons who had been on board SIEV 69 could have been offloaded onto FV Kuang Win for at least long enough for a safe transfer to the MV LNG Pioneer to take place and so they all could have been saved.



It is also clear that the fact the FV Kuang Win left the scene before MV LNG Pioneer was in a position to rescue the occupants of SIEV 69 was a major factor in there being so many deaths.

The MV LNG Pioneer was not well placed to rescue the people who had been on board SIEV 69 when it sank.

The MV LNG Pioneer is a liquefied natural gas carrier 277 metres in length. The vessel has a beam of 43.4 metres.

The maximum draft at the time of the incident was 8.08 metres, which relates to a freeboard of 17.85 metres. The freeboard is the distance from the water to the ship's deck.

MV LNG Pioneer, therefore, was a large vessel, the deck of which was very high above the sea. It had limited capabilities to perform a search and rescue role and there appears to be little doubt from the evidence of Nikola Brzica, the ship's master, and others on board the vessel, that all efforts were made by the master and crew to save as many persons as possible.

This inquest has been held to review the circumstances in which 13 persons appeared to have died



unnecessarily in a context where there was ample opportunity for all 40 occupants of SIEV 69 to be saved.

BACKGROUND

There were 40 persons on board SIEV 69 which was destined for Australia. All were males including the captain. The ages of the people on board ranged from approximately 17 years to approximately 52 years. All 39 passengers are believed to have come originally from Sri Lanka, the captain, who was about 25 years old, was believed to have come from India.

The captain was the only person on the vessel who was involved in driving and navigating it and he also appears to have provided the passengers with food, until the food ran out.

It is, however, possible that two of the missing persons may have been crew as they were seen helping the captain during the journey. The captain died as a result of the incident and his body has not been recovered.

Of the 40 people on the boat, 36 travelled alone, including the captain, and there were two family groups consisting of a father and son and an uncle and his nephew.



When the 27 survivors were first interviewed they claimed that they had all boarded the boat from Negambo, Sri Lanka. During interviews with WA Police, approximately 18 months later, they stated they had lied in their earlier account and had actually left from Mangalore, India. They stated that they had not told the truth earlier as they had been informed by the organisers of the boat trip that it would be better to say that they left from Sri Lanka instead of India for the purposes of visa applications in Australia.

The cost of the travel to Australia varied between the passengers, but was generally much less than the cost to the Iranian and Iraqi asylum seekers who were on SIEV 221 in December 2010. Many of the SIEV 69 asylum seekers appear to have paid around A\$1,000 for the journey.

The journey appears to have begun on about 5 October 2009. Initially the passengers were placed under the deck of the boat and were told to remain there. The passengers remained below deck for the first two days of the voyage, before being allowed to go above deck for short periods of time.

From the survivors' statements it appears that from the outset the boat was unseaworthy.



Most of the food ran out after about 13 days and for the last 10 days of the voyage the passengers only had three kilograms of rice on which to survive.

On 30 October the water tank on the boat broke and there was little available water. At the time it was raining hard and the waves were very strong.

On 30 October it was noted that there was a leak in the vessel although at first it was relatively easy to empty the water from the bottom of the boat.

Passengers were organised into teams of four people each to bucket out the water from the bottom of the boat.

On 31 October the leak was getting worse and the captain became more concerned. The captain told one of the passengers that his father wanted him to die with the boat and according to that passenger the captain was careless in respect of his own life but helped others on board.

As the leak got worse this passenger looked to identify the problem. He found that car tyres had been cut in half and nailed to the front of the boat into the wood. The end of three of the tyres had come loose and a section of wood was coming away from the central beam of the boat. At first there was only a small hole resulting from this, but as the



boat rose and fell in the waves the force of the water caused the piece of wood to come further away from the front of the boat.

On 1 November 2009 the captain was very concerned about the problem because the water was nearly up to the gearbox. It was at this stage that the captain used one of the other passengers with some limited English speaking skills in an effort to contact Australian authorities to seek assistance.

TELEPHONE CALLS TO THE RCC

It appears that the captain dialled the relevant emergency number into a satellite phone on SIEV 69 and then provided that telephone to one of the passengers, referred to at the inquest as RES 016.

The first telephone call was made at 4.10am on 1 November 2009 and was received by an operator known as Cindy working for RCC.

A portion of the telephone call which has been transcribed was as follows:

CALLER: Yes. We wanting immediately, madam, Yes. We are coming to Australia and have (indistinct) days to go. We are in your country, near the country (indistinct) 500 kilometres far away, but we don't have food and we don't have water also, but have – there's a huge hole in the bottom of the boat. A lot of water enter into the boat. We want to go immediately to (indistinct) madam. Can you help me (indistinct)



CINDY: Okay. You will have to slow down. I am having trouble understanding you. I Understand that you are - - -

CALLER: Yes

CINDY: - - - 500 kilometres from Australia. Do you have a position, a latitude and longitude?

CALLER: Yes. Sorry, ma'am (indistinct) Australian (indistinct) but nobody comes here, madam, we are (indistinct) here (indistinct) immediately. Please. I will give licence number (indistinct).

CINDY: Sir, I can't understand you. Slow down. What is your phone number?

CALLER: (indistinct) this number 87 128 (indistinct)

CINDY: Sir, I cannot understand you. Say, again, the phone number.

CALLER: Yes. Okay, ma'am. We are waiting for you (indistinct) please immediately. Send that out, please, ma'am.

CINDY: Sir, I cannot help you unless you give me your latitude and longitude. What is your location?

CALLER: Yes.

CINDY: And say it slowly.

CALLER: (indistinct) Okay. Okay.

CINDY: No. Give me your position sir.

CALLER: Pardon?

CINDY: I need your latitude and longitude, your position. What is the position of your boat?

CALLER: Yes, ma'am. (indistinct) to Australia but we have (indistinct) we cannot manage very well, because there's a big hole in bottom of boat. We have a big problem. We cannot go – move one metre, even.

CINDY: Yes, sir. I understand you need assistance, but I need to know where your boat is. What is the nearest point of land?



CALLER: Yes. I already given that (indistinct) number. We want to repeat this number, please (indistinct) madam, please inform the navy or in person, we want (indistinct)

At the conclusion of this call it is clear that the location of SIEV 69 could not be determined.

A second call took place which was received by a male operator, but after the caller had advised that he would give his position it appears that the call was unsuccessful.

A third call took place at 7.14am and again on this occasion the RCC operator was Cindy.

A portion of this call was as follows:

CINDY: Sir, Say again, your position.

CALLER: Yes, ma'am. Yes, ma'am, we're here, we're waiting for you here. We have a huge hole in the boat (indistinct)

CINDY: Yes, sir, We - - -

CALLER: (indistinct)

CINDY: We have received your two phone calls, sir, but we need your location. Where are you?

CALLER: (indistinct) another two hours we can manage. We cannot manage because there is a lot of water coming into the boat. We cannot do anything.

On this occasion, however, some coordinates were given and there was a reference to the boat being about 500 kilometres from Christmas Island.



RCC contacted Telstra who advised that the telephone calls received had been made to the RCC 1800 number using an international telecommunications provider and the caller's number could not be identified.

There were two further attempted calls to the RCC from SIEV 69 but both calls "dropped out".

In spite of the very limited information provided RCC operatives were able to identify the location of SIEV 69 with reasonable precision and at 8.02am a distress broadcast signal was issued.

In the circumstances RCC personnel involved performed in a professional and competent manner and did well to identify the location of the vessel.

In addition to issuing the distress broadcast, advice was sought from the Australian Maritime Security Operations Centre (AMSOC) seeking information about Australian assets capable of assisting in a search and rescue effort.

Unfortunately there were no naval vessels in a position to respond within a reasonable timeframe. RCC was advised that HMAS Larrakia was at Christmas Island and HMAS Armadale was on its way to Christmas Island, due to arrive there on 3 November. The nearest vessel under the



control of Border Protection Command was the ACV Oceanic Viking which at the time was at anchor at Tanjung Uban, Bintang Island, Indonesia, with 78 persons on board from another SIEV incident. Bintang Island is approximately 770 nautical miles from the then location of SIEV 69.

At 7.53am on 1 November RCC was advised by AMSOC that an RAAF AP-3C Orion aircraft was at Darwin on three hours notice for tasking. Ultimately a decision was made that that aircraft would not be used in the immediate response, when FV Kuang Win arrived at the scene.

The closest vessel which was contacted and able to respond to the emergency was the FV Kuang Win and it appears that the captain of that vessel was first contacted at about 11am on 1 November.

FV KUANG WIN

There were a number of communications between the RCC and the FV Kuang Win which were recorded and received at the inquest. Incident notes were prepared based on the recordings which were reviewed by counsel and considered to be reasonably accurate.

The first extensive relevant call took place at 1.11pm on 1 November 2009. As a result of an earlier telephone



call, an interpreter had been organised and so the communications took place indirectly, using the interpreter.

In this call it appears that the FV Kuang Win spokesman advised that they were aware that the vessel in distress was Sri Lankan. The claim was made that the Sri Lankan ship was “not sinking but there may be some small holes on the ship and the current crew saw them pumping water out of their ship.”

In fact it appears that there was no operating pump on SIEV 69 and buckets were used to empty water from the vessel. The reference to “pumping” may have resulted from language difficulties.

The following exchange as recorded in the incident notes took place in relation to the expectations of the RCC:

RCC: We request that the Taiwanese fishing vessel remain with the Sri Lankan vessel until the LNG Pioneer arrives on scene.

I: When will the LNG Pioneer arrive?

RCC: Approximately 6 hours.

I: If 6 hours, that’s ok because they are only a fishing vessel and cast their nets into the water and need to release some fish otherwise they will be dragged by the fish.

RCC: If they can stay in the area until LNG Pioneer arrives that will be greatly appreciated.

I: Ok no problem.

Another call took place at 3.28pm and again on this occasion an interpreter was used.



The following exchange as recorded in the incident notes took place in relation to the expectations of the RCC:

I: This gentleman says that the boat came from Sri Lanka and has been on the journey for 25 days and the boat is broken now. This gentleman is now in a situation. His company does not know that he is helping with the other boat and worried about the operation of his fishing.

RCC: RCC appreciate the impact on his fishing, need him to stay there until the LNG Pioneer arrives and then he can leave.

I: After it arrives, then he can leave?

... ..

RCC: Yes, but only after the LNG Pioneer arrives.

RCC: Repeated request to stay until the LNG Pioneer arrives; it could be 4 hours but it could be longer.

I: They rescued 2 people from the distress boat. There are 2 people on their boat. What should they do?

RCC: They should transfer them to the LNG Pioneer when it arrives.

RCC : When LNG Pioneer comes on scene it will take charge and then free to leave but cannot leave until LNG Pioneer arrives.

I: He was afraid that their boat might be involved in this case because he has not reported this.

A third call took place at 5.24pm and again an interpreter was used.

The following exchange recorded in the incident notes took place:

RCC: No change? Good news. If there is any concern, just give us a call but we are happy for them to talk to each other. I am in contact with the master of the LNG Pioneer so as soon as the



passengers have been transferred we will make sure that they can be on their way.

I: What passengers?

RCC: The two passengers on board the fishing vessel we referred to before, so I won't disturb them anymore but just make sure everyone gets accounted for and they get on board the LNG Pioneer and they will be on their way.

It is noted that in respect of the two passengers who had swum to the FV Kuang Win, these passengers had been required to swim back to the SIEV 69.

In fact the two passengers had stayed on FV Kuang Win for about 1 or 2 hours during which they were given food and water. These passengers asked the FV Kuang Win crew to rescue them and the other passengers but their request was denied.

Another call took place at 7.17pm. In this call the RCC called on the FV Kuang Win to assist with offloading persons from SIEV 69 to LNG Pioneer. The following communication took place:

I: I need to clarify – you just need to get the people from the vessel to the LNG Pioneer?

RCC: No, not to transfer them – need a tow to LNG

I: It is not easy to tow the broken boat; may be hit, may not be able to do. Dangerous.

RCC: What does he expect the 300 metre boat to do? What is he doing?

I: Tried to lead the LNG to the small boat; fishing vessel can lead.



RCC: No, no. That vessel cannot manoeuvre safety around small vessels. He needs to get everybody, either with many trips or 1 trip and he has to manoeuvre close to the vessel. The vessel cannot manoeuvre, it's too big and it's too dangerous, it could sink her. So the vessel needs to stay steady and he needs to approach. If it takes ten times, it doesn't matter. He needs to move all those people into the merchant vessel.

I: So just the people but you said tow the whole boat?

RCC: Whatever he prefers, whatever solution he prefers. If he doesn't feel that it's safe to tow the vessel, then he gets them on board. If he can't get them all at once, he does more than one trip. The mission is to get the people on board safety, (interpreter asks; They can't leave the boat there?)

RCC: I'm not interested in the boat, we are saving lives now and that's what we have to do.

I: Are they refugees?

RCC: Yes. Do the Sri Lankans on board know any English so they can speak to the master?

I: They also have difficulty getting close to the LNG to the big vessel. Also dangerous.

RCC: What is he doing to make sure they get safely on board? What is his plan?

I: He tried to lead the big boat, I don't know his plan – further discussion.

I: As regarding the 2 people that they have saved, they have already sent them back to the boat because the LNG would get close and save all of them. He has no idea how those people can be rescued. He cannot get close to LNG because it is too big.

Subsequently at 7.36pm the communication included a connection with the master of the LNG Pioneer who advised that the FV Kuang Win was departing from the scene and moving away.



At that stage the SIEV 69 had not sunk but very shortly afterwards it capsized and people could be seen swimming towards the LNG Pioneer.

RCC made considerable efforts to encourage FV Kuang Win to assist with the rescue attempts and the following exchange took place:

I: They have tried hard. They had stayed there for many hours. If they had seen the boat sinking they would have rescued the people. They saw the big vessel come and took it to the small boat. They tried to look after their fishing – large amount of money in Taiwan – they have to look after their interests. More discussion he is worried about their nets.

RCC: Yes but there are people in the water drowning.

I: He wants to know if people have been rescued – wants a message that they have been rescued.

RCC: (Senior SARO) we request that he return to assist with recovery of people from the water.

I: When he left the people were safe and after they left the people sank and were in the water. He has to consider his fish nets. He has to balance this. It is hard.

RCC: Tell him there are 44 people in the water who are drowning and need assistance to be rescued. The big ship cannot rescue the people on their own. If he fails to assist we will report him and he may be responsible for the drowning.

I: He says that is not reasonable because if they have a big loss what can they say to his company.

RCC: The big ship cannot rescue the people. He is the only other vessel nearby and if he does not assist the people will die and the authorities will be told that he failed to assist. [emphasis added]

I: They are going back now. He said that if they come back to rescue and the company asks them to take the loss will we talk to the company?



RCC: Yes; we will inform the company that they were responding on our behalf.

I: They are turning back now.

RCC: Thank him and appreciate his assistance. Will pass info to big ship. Pls travel back at best speed to 40 people in the water.

I: He is going out for a while but he said he will turn around.

Call back with LNG – pass on info. [internal discussion]

It is clear from the above that it was only thanks to the considerable efforts on the part of the RCC operator that the master of the FV Kuang Win was eventually convinced to turn his vessel around and to assist with the rescue efforts.

ACCOUNTS FROM FV KUANG WIN

In the days following the incident the only way for police investigating the circumstances of the deaths to interview the captain and the crew of the FV Kuang Win was by satellite telephone while the vessel was at sea.

On 5 November 2009 Detective Tan of WA Police contacted FV Kuang Win using a satellite telephone and spoke to a Mandarin speaking crew member who gave his name as Pan Xi Yung. This person claimed that the FV Kuang Win approached the distressed vessel with caution as they believed that persons on board may have been pirates. He stated, however, that when they came close to the SIEV persons on the distressed vessel told them that



their boat was in trouble and would sink within an hour and they needed to be rescued.

This person stated that because there was limited accommodation on the FV Kuang Win and because they could not be sure that the people on the SIEV were not pirates they only allowed one or two members from the other boat to come on board. He said that those members who did come on board told the crew that their boat was in trouble and would sink within an hour or two.

They were advised that the Kuang Win could not take all the passengers, but would seek assistance from a bigger boat.

He stated that when the bigger boat did arrive and it was thought that it was in a position to assist, the Kuang Win commenced to depart from the area.

This person stated that about 10-15 minutes later the other boat sank and they assisted with the rescue of survivors from the boat.

On 6 November 2009 WA Police Detective First Class Constable Jamie Merritt contacted the FV Kuang Win and spoke to the master of the vessel, Captain Abe, using a satellite telephone. Detective Merritt was able to conduct



the interview with the captain, who was Japanese, in that language. Captain Abe described his English as “terrible”.

According to Captain Abe when the FV Kuang Win first arrived at the scene he was not sure whether SIEV 69 contained pirates and so he organised for two of the refugees to board his ship. He was told by one of his crew members who spoke with the refugees that their ship was in danger of sinking. Captain Abe stated, however, that his vessel was too small to take the refugees on board.

He stated that at the time when they left the scene he did not think that there was anything wrong with SIEV 69 and he would not have left them in a “sinking situation”. He said that about fifteen minutes later he was requested over the radio to return to assist with the rescue efforts. He stated that the FV Kuang Win did return to the scene, but initially who could only see the large “Australian ship” (this must have been the LNG Pioneer) as the refugee boat was behind it.

Attempts were made by WA Police to formally interview the captain and crew members of FV Kuang Win. Three detectives from WA Police travelled to Singapore for a pre-arranged meeting with Captain Abe and the crew from the FV Kuang Win on 17 May 2010.



The FV Kuang Win did not arrive in port as arranged and Singapore police commenced enquiries at the request of Detective Sergeant Gary Saunders of WA Police who had travelled to Singapore.

The vessel was eventually contacted by the Singapore Coastguard, but the captain advised that the vessel would not be attending Singapore as arranged.

The captain provided no explanation for not attending Singapore, but only stated he was “still fishing”.

The captain stated that he would be going to Singapore at some time within the next month but would not provide a date.

Detective Sergeant Saunders briefed Deputy Superintendent Terrence Song of the Criminal Investigation Department of the Singapore Police Force in relation to the investigation and provided him with interview plans and a comprehensive reference file.

On 7 July 2010 Deputy Superintendent Song advised Detective Sergeant Saunders that although the FV Kuang Win had docked in Singapore on 30 June 2010 and he had attempted to arrange for interviews through the ship’s agent, he had been advised that the crew were busy



preparing the ship for a turnaround and that the ship had departed on 1 July 2010.

Deputy Superintendent Song also advised that he had been informed there had been a change of crew and that the new crew would not be able to assist with any interviews.

Further telephone calls were made by WA Police on 16 September 2011 to the FV Kuang Win but the advice received was that the entire crew had changed by that time. Despite all efforts on the part of WA Police, investigators have not been able to locate crew members from the FV Kuang Win and no interviews were conducted.

For the purposes of the inquest notices of likely adverse findings were provided to the owners of the FV Kuang Win and to its agent trading in Singapore and to the captain with a letter in Japanese and the cards of counsel assisting and Detective Sergeant Stephen Foley.

No response has been received in respect of any of the attempts to contact the captain and crew of the FV Kuang Win.

While the FV Kuang Win did travel to the scene and remained with SIEV 69 for approximately 6 ½ hours and subsequently assisted with the rescue efforts, the fact that the vessel left before the asylum seekers could be rescued



was callous and irresponsible. The recorded comments made by someone on the FV Kuang Win when the RCC was endeavouring to have the captain of the FV Kuang Win assist with the rescue efforts were initially, at least, callous and showed a remarkable disregard for the suffering and deaths of those on board SIEV 69.

The captain and crew of the FV Kuang Win were well aware from the outset that SIEV 69 was a vessel in distress. They had been asked to assist because of concerns that SIEV 69 was likely to sink and on their arrival they saw persons from SIEV 69 using buckets to bale water out of the boat.

Photographs taken from the LNG Pioneer show SIEV 69 low in the water at the time when the FV Kuang Win was still at the scene and very shortly afterwards. These photographs also show refugees on the deck and standing on top of the cabin, obviously hoping to be rescued.

There can be doubt that when the FV Kuang Win left the scene SIEV 69 was at risk of sinking at any time. Tragically it did sink within minutes of the FV Kuang Win departing.



THE LEGAL POSITION

At the inquest expert opinion evidence relating to relevant international law was provided by Dean and Winthrop Professor of Law at the University of Western Australia, Mr Stuart Kaye.

Professor Kaye advised the court that international law imposes a clear duty upon states to render assistance in emergency situations on the sea. Customary international law has long recognised that there is a duty upon mariners to come to the assistance of individuals in distress at sea.

Article 98 of the *United Nations Convention of the Law of the Sea* provides that every state shall require the master of the ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers, to render assistance in a range of circumstances.

Taiwan is not a party to the law of the Sea Convention, however, there may be similar provisions within Taiwanese domestic law.

The *Safety of Life at Sea Convention (SOLAS)* also contains provisions which impose a duty on the master of a ship at sea to assist in the case of a ship in distress.



Again, Taiwan is not a party to these arrangements, but may have analogous duties within its domestic law.

The Crimes at Sea Act 2000 (Cth) establishes a co-operative scheme for the application of Australian Criminal Law at Sea. There are several reasons why this legislation would not be of assistance in this instance, including that the incident did not involve any Australian nationals or vessels and the Taiwanese vessel was not bound for Australia. At least one of these requirements would be necessary to permit the application of Australian criminal law under Section 6 of *The Crimes at Sea Act 2000 (Cth)*. In addition, the law applied around the Cocos Islands and beyond would be the criminal laws of the Jervis Bay Territory. As these laws are derived from the ACT, which is landlocked, there does not appear to be an equivalent offence to failing to render assistance to a vessel in distress.

While failing to render assistance to those in distress at sea may be an offence under Taiwanese Law, at this stage it appears unlikely that Taiwanese authorities would be willing to proceed with a prosecution.

It appears unlikely that Australia, or the Territory of Cocos (Keeling) Islands, has any jurisdiction in respect of the incident and even if jurisdiction was found to exist, it is unlikely that the master of the Taiwanese vessel (who



appears to have been a Japanese citizen) could be extradited to Australia.

In this case the surprising and apparently callous action of the captain of FV Kuang Win in leaving the scene prior to the rescue of those on SIEV 69 being effected, is mitigated to some extent by the fact that he earlier provided assistance by remaining with SIEV 69 for a period of about 6½ hours and subsequently assisted with the search.

In the above context I do not propose to make any recommendations or referrals to any organisation or authority in relation to the conduct of those on FV Kuang Win, apart from expressing disappointment about the fact that the boat left the scene early and the captain only reluctantly returned and that return was not immediate.

OBSERVATIONS IN RELATION TO THE ORGANISERS OF THE JOURNEY OF SIEV 69

The organisers of this journey showed callous disregard for the lives and safety of the passengers using SIEV 69. SIEV 69 was a boat in poor condition from the outset and it is obvious that the boat was considered to be expendable.

There were no life jackets on SIEV 69 and no specific dedicated life saving equipment was available for the 40 persons on board



Inadequate food was provided for the journey and the circumstances in which water was stored were such that in the last days of the journey the water container broke and those on board were without water.

The organisers of the journey certainly contributed to the 13 deaths.

IDENTIFICATION OF THE DECEASED

As a result of inquiries conducted by WA Police investigators, the deceased was identified in accordance with Interpol standards and a victim identification brief was prepared.

A DNA profile was obtained from a blood sample taken from the deceased which was found to match DNA samples obtained from his mother and brother.

The identification brief was presented to an Identification Board on 20 December 2011 and the Board was satisfied with the identification.

In addition to the DNA evidence, the Identification Board had access to information which included material obtained by the AFP in Sri Lanka which included an electronic travel document indicating that the deceased left Sri Lanka on 5 June 2007 and had not returned. This



document provided details of an identity card used by the deceased including the card number. This was compared with a photograph of documents from a bag located attached to the deceased's body when it was located. The photograph showed the deceased's identification card and the number was identical to the one used in the electronic travel document.

Fortunately the photograph had been taken by police when custody of the deceased's property was transferred to SERCO at the Phosphate Hill Immigration Detention Centre. Inquiries by WA Police with SERCO have revealed that SERCO have lost this property, so a comparison could not be made with the actual identification card.

Based on the investigations described above, however, I was completely satisfied that the identity of the deceased has been established.

POST MORTEM EXAMINATION

A post mortem examination was conducted on the body of the deceased on 17 November 2009 by Chief Forensic Pathologist, Dr CT Cooke. Following receipt of the results of further investigations on 30 December 2009 Dr Cooke formed the opinion that the cause of death was consistent with immersion (drowning).



CONCLUSION

SIEV 69 sank on 1 November 2009 in the Indian Ocean at a location approximately 350 nautical miles north west of Cocos (Keeling) Islands. At the time of sinking SIEV 69 was on its way from India to Australia and had 40 persons on board.

13 persons died as a result of the boat sinking.

Distress calls were made from SIEV 69 which were received by the RCC in good time to effect a rescue. The RCC coordinated a search and rescue operation. Unfortunately no Australian assets were in a position to provide effective assistance and the RCC requested the FV Kuang Win and MV LNG Pioneer to provide assistance to the vessel in distress.

Although the FV Kuang Win arrived at the scene and was close to the vessel in distress by about 11am on 1 November 2009 and there was plenty of time to effect a rescue there was no rescue attempt until after the vessel sank.

FV Kuang Win did remain at the scene until shortly before the MV LNG Pioneer arrived, but left before all of those on board SIEV 69 could be rescued.



Approximately 18 minutes after the FV Kuang Win departed from the scene SIEV 69 sank.

In spite of every effort being made by those on board MV LNG Pioneer to rescue persons from SIEV 69 who were in the water, they were unable to rescue all of them.

The FV Kuang Win did return to the scene later and assisted with the search and rescue efforts. Ultimately 27 people were rescued, with 13 dead.

The body of the deceased was recovered and was taken to Australia.

The organisers of the voyage contributed to the deaths and if the FV Kuang Win had taken positive action earlier, all would have been saved.

I find that the deaths arose by way of accident. In particular the death of the deceased arose by accident and he died as a result of immersion (drowning).

COMMENTS ON SAFETY ISSUES - SECTION 25(2) OF THE CORONERS ACT 1996

The 13 deaths referred to herein resulted from the callous actions of the organisers of the journey of SIEV 69 and the fact that when SIEV 69 ultimately sank, the FV



Kuang Win which had been alongside until shortly beforehand, had left the location prior to the MV LNG Pioneer being in a position to save all of those on board.

In that context the extent of any comments relating to safety issues is necessarily limited.

In thoughtful observations and comments relating to the case Detective Superintendent Graeme Castlehow identified a number of suggested recommendations in respect of possible safety improvements.

Superintendent Castlehow recommended that AMSA, on behalf of the Commonwealth, should examine closely the SIEV 69 rescue situation and, if considered appropriate, develop a submission for changes to the *International Convention for the Safety of Life at Sea 1974*. The thrust of this recommendation would be to propose a change in international law which would enable AMSA, in this case through the RCC, to make specific and enforceable directions to assist with a search and rescue operation. In effect it was suggested that it would have been helpful in this case had the RCC had the power to direct the master of the FV Kuang Win to take direct and positive action to rescue those on board SIEV 69 and to ensure that they were all safe prior to leaving the area.



Mr Alan Lloyd, Manager Search and Rescue Operations with AMSA, however, expressed serious reservations as to whether any such proposal would ever be endorsed by sovereign states.

In that context, taking account of the discussions of relevant international law provided by Professor Kaye, I do not consider that such a recommendation would have any reasonable prospect of international acceptance and for that reason do not propose to make such a recommendation.

A further recommendation of Detective Superintendent Castlehow related to the use of interpreters by the RCC in its various communications with those on the three vessels concerned and in particular with those on SIEV 69 when it appeared that the operator struggled to understand and communicate with the caller.

Detective Superintendent Castlehow advised that the WA Police Operations Centre is currently investigating ways of rapidly patching in interpreters to assist with 000 distress calls received from approaching SIEVs. He advised that if successful the results of those efforts will be shared with AMSA and other emergency operators nationally. He stated that WA Police see this as an opportunity to respond better to this type of emergency situation, the risk of which appears to be ongoing.



In that context he suggested that a recommendation should be made encouraging cooperation between all of those involved in responding to 000 distress calls so that each organisation would have access to suitable interpreters, potentially from the same source.

I RECOMMEND that WA Police, other state police forces, the AFP, AMSA and all organisations and agencies involved in responding to 000 distress calls work together with a view to identifying mechanisms for accessing a high quality pool of interpreters to assist with foreign language distress calls. Ideally procedures should be in place to enable early identification of foreign languages being used with speedy ability to patch in interpreters capable of interpreting a wide range of languages while 000 distress calls are ongoing.

A N HOPE
STATE CORONER
December 2012

