

[DRAFT LETTER OF DEMAND]

TO –

Secretary of the Department of Defence, Mr Greg Moriarty
R1-5-B Secretary Suite
Department of Defence
PO Box 7901
Canberra BC ACT 2610
Australia

AND COPY TO –

Defence Legal
By Email: DL.General.Enquiries@defence.gov.au

Dear Mr Moriarty

Re: Islander Enterprises Pty. Ltd. (ACN 072 560 555) and The Commonwealth of Australia

We act on behalf of Islander Enterprises Pty. Ltd. (“**IEPL**”).

On or about 7 August 2014, IEPL and the Commonwealth entered into a Contract pursuant to which IEPL agreed to provide to the Commonwealth air surveillance services in the Western Pacific Ocean (“**the Contract**”).

Under the Contract, IEPL was to provide aircraft for the purpose of visual air surveillance and reconnaissance over specified routes and areas generally in support of the assets of Pacific Island nations. Those assets included patrol boats provided to those nations by the Australian Government pursuant to the Pacific Patrol Boat Program (“**PPB**”). An initial Contractual term of 12 months, commencing 7 August 2014 and concluding on 6 August 2015, was provided for in clause 2 of Attachment A to the Contract.

Pursuant to clause 7 of Attachment A to the Contract, the parties agreed to review the operation of the Contract no later than 30 March 2015 with a view to determining the future viability of the Contract (“**the Extensions Clause A7 Term**”).

In order to perform the Contract, IEPL made various purchases and undertook various preparatory steps, including the purchase of a Cessna C337 aircraft and surveillance equipment.

The Contract was the first Civilian/Australian Military Contract for aerial surveillance in relation to the Pacific Ocean waters surrounding Western Pacific Islands. The aerial surveillance was being provided in order to assist the Commonwealth in the fulfilment of its obligations under the Niue Treaty and other international instruments and conventions.

The Contract also included the following terms, which were implied by law:-

- (a) IEPL and the Commonwealth would act reasonably and in good faith in performance of their obligations to each other under the Extensions Clause A7 Term (“**the Extension Term**”);
- (b) any failure to extend the Contract would only occur with the Commonwealth giving IEPL reasonable notice thereof, such notice being of the duration of four months and one week (“**the Reasonable Notice Term**”); and

- (c) IEPL and the Commonwealth were obliged to comply with any reasonable request for due performance of its contractual obligations by the other, even after any agreed time for performance had passed ("**the Due Performance Term**").

During the 12-month initial term of the Contract, IEPL provided air surveillance services in the Exclusive Economic Zones of the various countries to whom Australia has obligations pursuant to the Niue Treaty. IEPL employed staff, including pilots. IEPL, through its Director, Mr. Langton, also dealt regularly with the Commonwealth's Representative under the Contract, Lieutenant Commander Mal Parsons, who was a member of the Australian Defence Force stationed in Samoa.

In accordance with its obligations under the Contract, IEPL, during the period from in or about January 2015 to 5 August 2015 reviewed the Contract for viability in accordance with the Extensions Clause A7 Term and the Extension Term. IEPL put various offers, and proposed various contractual terms and conditions, to the Commonwealth before, and after, the review date of 30 March 2015. IEPL, through Mr. Langton, sought that the Commonwealth respond to IEPL's various offers and its proposed terms and conditions in relation to the extension of the Contract on many occasions.

In stark contrast, the Commonwealth did not respond to the various offers and positions being put by IEPL during that period. Indeed, the Commonwealth did not even conduct a review, which the Contract clearly obliged it to perform.

It was not until one day before the initial term of the Contract was due to conclude that Mr. Stephen Broadbent, acting for and on behalf of the Commonwealth, sent a terse email to Mr. Langton and advised him for the first time that the Commonwealth would not be extending the Contract with IEPL.

The very brief summary of the Commonwealth's conduct just set out is enough to illustrate that, in its dealings with IEPL, the Commonwealth failed to act reasonably and in good faith.

The Commonwealth's conduct amounts to:-

- (a) breach of the Extensions Clause A7 Term;
- (b) breach of the Extension Term;
- (c) breach of the Reasonable Notice Term; and
- (d) breach of the Due Performance Term.

The Commonwealth has also failed to pay invoices rendered under the Contract by IEPL, in the amount of \$44,649.00 and \$9,801.00.

The nature and detail of the Commonwealth's breaches of Contract are set out in the enclosed draft Statement of Claim prepared by Counsel. We require that you give the Statement of Claim careful consideration.

Our client's loss and damage, as a result of the Commonwealth's breaches, is substantial. It is set out in detail in the draft Statement of Claim, as well as the manner in which the loss is calculated.

Our client has instructed us, at present, not to commence proceedings against the Commonwealth, in order to give the Commonwealth an opportunity to consider resolving the claim without the need for litigation.

In the absence of such a response by the Commonwealth, we are instructed to file a Writ and a Statement of Claim substantially in the form of the enclosed draft.

Defence Department's Answer to the Joint Parliamentary Committee

We also take this opportunity to raise a further serious matter.

On or about 20 June 2017, the Department of Defence provided an Answer (the **Answer**) to a Request for information to the Joint Standing Committee on Foreign Affairs, Defence and Trade Defence Sub-Committee of the Commonwealth Parliament (the **Parliamentary Committee**). The Answer is enclosed with this letter.

The Answer concerned the Pacific Maritime Security Program ("PMSP"), which is being implemented by the Department to build upon the PPB.

As part of the PMSP, Australia will provide contracted civilian manned, fixed-wing aerial surveillance from late 2017. The identity of the new contractor is presently unknown to IEPL. The service to be provided is, in essence, the same as that which IEPL provided to the Commonwealth under the Contract.

The Answer includes the following statement: "Contracted aerial surveillance over the Pacific has never been attempted previously" (underline in original).

Whether made unwittingly or otherwise, this statement by the Department of Defence is false as the Contract and the matters referred to in the Statement of Claim demonstrate. The false statement must be corrected, as a matter of urgency. We note that the Answer is readily available to members of the public on the Internet. Tenderers to the IP DIV Integrated Aerial Surveillance across the Western and Central Pacific tender ATM ID: CASG/CD/EOI0379/16 ought be informed of the true position. Please provide, by 4.15 pm on 18 December 2017, evidence of steps which the Department of Defence has taken to correct the record, including evidence which demonstrates that the Parliamentary Committee has been notified of the error.

In the event that we have not received such evidence from you by then, we will take such steps on behalf of our client as it may be advised to correct the position.

We otherwise look forward to your response to the other matters raised in this correspondence by 1 February 2018.

Yours faithfully,
Etc.

**Joint Standing Committee on Foreign Affairs, Defence and Trade
Defence Sub-Committee**

Private Briefing – 20 June 2017

ANSWER TO REQUEST FOR INFORMATION

Department of Defence

Question: Pacific Maritime Security Program (PMSP) – Provide an overview of the three elements of the Pacific Maritime Security Program, patrol boats, surveillance, and technical support; including how surveillance information is/will be shared.

Response:

- The follow-on Pacific Maritime Security Program (PMSP) at a cost of AUD 2 billion over 30 years, builds on the success of the Pacific Patrol Boat (PPB) Program, and consists of three components:
 - Replacement patrol boats;
 - Integrated aerial surveillance; and
 - Enhancements to regional cooperation.
- The PMSP is being developed to incorporate lessons from the current PPB Program, and will:
 - Assist Pacific Island Countries to combat a wider range of maritime security threats (including transnational crime, illegal fishing, and irregular people movements);
 - Improve on existing maritime surveillance surface patrols with new integrated aerial surveillance; and
 - Promote a more coordinated and cooperative approach to maritime security, through support to regional coordination centres and improved coordination of support provided by our regional partners such as New Zealand, France and the United States.
- The PMSP will also include greater coordination of the existing maritime security support provided by a range of Australian Government agencies.
 - To date, 12 countries have agreed to participate in the PMSP and receive replacement vessels, including Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.
 - Timor-Leste has also been invited to participate in the PMSP and receive two vessels as a new member, although Defence has yet to receive a formal response from the Government of Timor-Leste.
- Australia will continue to provide participating states with enduring advisory, training, and maintenance support.

- A network of Royal Australian Navy advisers (and two Royal New Zealand Navy personnel in the Cook Islands) will continue to be resident in the participating Pacific Island Countries (PICs) to provide operational and technical advice.

Replacement Patrol Boats

- The project will involve the construction of up to 21 steel all-purpose patrol vessels built by Austal Pty Ltd.
 - 19 Guardian-class Patrol Boat (GPBs) will replace the current patrol boat fleet between 2018-2023 and two boats have been offered to Timor-Leste.
 - The replacement GPB is a 39.5 metre steel-hull design, based on the Bay-class Patrol Boat operated by the Australian Border Force.
 - The replacement vessels will have greater range and sea keeping ability, with improved accommodation for mixed gender crewing and updated satellite communications systems.
 - The vessel includes a 1500kg deck crane for movement of stores and equipment, as well as a 16m² cargo deck to support Humanitarian Assistance and Disaster Relief (HADR) and engineering taskings.
 - There is a significantly larger eight-person seaboat for boarding operations, with a safer launch and recovery ramp at the rear of the vessel, and allowances have been made for weapons systems to be installed.
 - The replacement vessels will be built to contemporary Australian commercial standards, and will be ‘purpose-designed’ for our Pacific Island partners.
 - The design specifications for the replacement vessels were developed in close consultation with the 12 countries and Timor-Leste, to ensure the replacement vessels will meet the region’s requirements over the next 25 years of their service life.
 - Based on the ship builder Austal Pty Ltd’s proposed build schedule, the construction of the first replacement vessel commenced in April 2017 with delivery to PNG in October 2018.
 - Crew, collective and transition training are part of the funded replacement project (Project SEA3036) and/or standard training arrangements with the Systems Project Office (SPO). Additional training is also being considered within International Policy Division and Navy.

PMSP Aerial Surveillance

- As part of the PMSP, Australia will provide contracted civilian manned, fixed-wing aerial surveillance platform from late 2017. This is in addition to current military aerial surveillance support offered through the Quadrilateral Defence Coordinating Group (QUADS)
 - PMSP aerial surveillance will support targeted, intelligence-driven maritime patrols and enhance the capacity of PICs to locate and apprehend illegal activity occurring within their Exclusive Economic Zones (EEZs), and adjacent high seas.
 - The provision of a contracted civilian fixed wing, manned aerial surveillance platform will be in addition to Australia's aerial surveillance offered under Operation Solania and assist PICs to enhance the effectiveness of their patrol boats to protect their national sovereignty and resources. It will also enable a more comprehensive and coordinated regional approach to addressing a broad range of regional maritime security issues.

- Australia intends for aerial surveillance to be available for Cook Islands, Fiji, Federated States of Micronesia, Kiribati, Nauru, Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu.
- Australia does not intend for aerial surveillance to be available for members of the QUAD alliance (quadrilateral agreement between Australia, France, New Zealand and the United States) and their non-Forum Fisheries Agency (FFA) territories, as these are included under separate national surveillance efforts.
- PMSA Aerial Surveillance will be implemented under a phased approach to build familiarity and interoperability with the platform.
 - Australia has proposed the FFA be given operational control of the aerial surveillance platform.
 - The Forum Fisheries Council Ministers Meeting (FFCMIN) in July 2016 agreed that FFA and Australia continue to develop the proposal in consultation with members.
 - Australia is proposing to focus aerial surveillance efforts on Illegal, Unreported, and Unregulated (IUU) fishing in the initial period, with opportunities to broaden the scope of surveillance to other transnational criminal activity over time.
 - Towards the conclusion of the first stage, Australia and the FFA Secretariat will conduct a review of the outcomes in consultation, with the findings to be presented to FFA Members to inform the next stage of the contractual arrangements to reflect the needs, requirements and capacity of the region.
 - Consideration could then be given to expanding to scope of aerial surveillance to also detect other transnational criminal activity.
- Contracted aerial surveillance over the Pacific has never been attempted previously.
 - Defence will be flexible in how we implement the program and expect to learn valuable lessons in the first few years that be incorporated into the contract.
 - The initial phase will develop arrangements for tasking and planning priorities, and the long term capacity requirements for operational control.
 - Limited bilateral aerial surveillance contracts are currently funded by Australia. These bilateral arrangements will continue to support
 - some PIC during FFA Operations (eg Palau and Kiribati). These bilateral arrangements will continue in the initial phases under PMSA aerial surveillance.
- Defence is in the process of procuring the services of a suitable aerial surveillance provider and has finalised a detailed concept of operations that describes the end-state vision for this program.
 - A Concept of Operations was agreed by all stakeholders (Australian Government agencies and FFA) and is a working document designed to inform the tendering process.
 - An Invitation to Register Interest was conducted first quarter 2017 and identified a shortlist of suitable providers. A Request for Tender was issued in April 2017 and closed on 9 June 2017. Defence conducted contract negotiations in third quarter 2017.
- The process by which countries will request aerial services is being developed through the FFA.

- The FFA has engaged a consultant (a former RAAF logistician) to develop the processes and procedures to manage aerial tasking requests.
- It is envisaged that FFA member nations will submit Air Tasking Requests which will be prioritised through the annual Monitoring Control and Surveillance Working Group. Urgent requests will be managed under agreed processes.
- Information collected by the aerial surveillance platform would be held by the FFA Secretariat and available under processes to be agreed by Members.
 - The information could be used to increase the effectiveness of the Pacific Patrol Boats and their replacements through a ‘detect and queue’ approach.

PMSP Regional Coordination

- The PMSP aims to foster greater regional cooperation on maritime security issues, as well as increased interagency coordination within participating countries.
- As part of the PMSP, the Government agreed to enhance regional coordination and cooperation on maritime security issues. An interagency Regional Coordination Working Group agreed that the following initiatives may be funded under the PMSP Regional Coordination funding line:
 - additional fuel for the Pacific Patrol Boats (PPB) undertaking cooperative patrols
 - satellite communications equipment and expenses for PPBs;
 - refurbishment and updated equipment in the PPB coordination centres; and
 - analysis of training needs for boardings, law enforcement, etc

Question: Patrol Boat Program – Provide the performance of the Program by country.

Response:

The PPBs provide PICs with a sovereign capability to conduct maritime surveillance and enforcement of their extensive EEZs, as well as search and rescue, disaster relief, election support, immigration and customs, and official government transport.

Reporting Sea Days is not necessarily the most effective way of measuring the performance of the PPBs. Some PICs achieved a high rate of sea days in 2016, while some countries recorded a lower rate of sea days due to a variety of factors including PPBs having major defects, undergoing Third Refits (26 weeks duration) or biennial slippings (12 weeks duration), or may have only conducted ‘national taskings’.

The PPBs are actively involved in the Forum Fisheries Agency-led maritime surveillance operations, KURU KURU, TUI MOANA, ISLAND CHIEF, and RAI BALANG. The PPBs also participate in sub-regional operations such as IKA MOANA, ISLAND STRONG, and REITAKI. We are aware of a number of successful boardings and interceptions conducted by PPBs during recent FFA-led regional operations. For example, during Operation KURU KURU in September 2016, 11 participating PPBs achieved a total of 1193 detections and 177 boardings.

In response to natural disasters, PICs support regional Humanitarian Assistance and Disaster Relief efforts utilising PPBs funded by Australia. In the wake of Tropical Cyclone Winston in

March 2016, Tonga deployed the Landing Craft Medium (LCM) VOEA LATE and the PPB VOEA NEIAFU to Fiji to assist with relief efforts. In response to Tropical Cyclone Pam in March 2015, Tonga's PPB VOEA NEIAFU and Solomon Islands' PPB RSIPF AUKI were deployed to Vanuatu to assist with relief efforts and Samoa's PPB MV NAFANUA to Tuvalu.

Question: PNGDF – Provide PNGDF numbers, including women in the force.

Response:

We understand there are approximately 120 women currently in the PNGDF, out of a total of approximately 3,700 PNGDF members.