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Smooth sailing for Australia's automatic forfeiture of foreign fishing vessels

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Abstract

The High Court of Australia has brought to a close one chapter of the various legal proceedings arising out of Australia's arrest of the Russian fishing vessel *Volga* in 2002. The vessel was arrested on the high seas immediately adjacent to Australia's Exclusive Economic Zone (EEZ) surrounding the Heard and McDonald Islands in the Southern Ocean. It was suspected (and later found as a matter of fact) to have been engaged in unlawful fishing for the prized Patagonian Toothfish within Australia's EEZ two to three weeks prior to its detection and seizure by Australian authorities. The circumstances of the seizure and detention of the vessel and its senior crew led to a number of domestic legal proceedings in the Western Australian District and Supreme Courts and the Federal Court of Australia. There was also a largely successful application by Russia to the International Tribunal for the Law of the Sea (ITLOS) for the prompt release of the vessel. ITLOS ordered Australia to promptly release the vessel upon the posting of what it considered to be a reasonable bond or other security of A\$1.92 million. The ITLOS case concerned only the issue of the reasonableness of the conditions Australia set for the release of the vessel as required by the United Nations Convention on the Law of the Sea (LOSC).

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Editorial commentary

SMOOTH SAILING FOR AUSTRALIA'S AUTOMATIC FORFEITURE OF FOREIGN FISHING VESSELS

The High Court of Australia has brought to a close one chapter of the various legal proceedings arising out of Australia's arrest of the Russian fishing vessel *Volga* in 2002. The vessel was arrested on the high seas immediately adjacent to Australia's Exclusive Economic Zone (EEZ) surrounding the Heard and McDonald Islands in the Southern Ocean. It was suspected (and later found as a matter of fact¹) to have been engaged in unlawful fishing for the prized Patagonian Toothfish within Australia's EEZ two to three weeks prior to its detection and seizure by Australian authorities. The circumstances of the seizure and detention of the vessel and its senior crew led to a number of domestic legal proceedings in the Western Australian District² and Supreme Courts³ and the Federal Court of Australia.⁴ There was also a largely successful application by Russia to the International Tribunal for the Law of the Sea (ITLOS) for the prompt release of the vessel. ITLOS ordered Australia to promptly release the vessel upon the posting of what it considered to be a reasonable bond or other security of A\$1.92 million.⁵ The ITLOS case concerned only the issue of the reasonableness of the conditions Australia set for the release of the vessel as required by the *United Nations Convention on the Law of the Sea* (LOSC).⁶

The issue brought to the attention of the High Court in the present case on 22 April 2005 was an application by Olbers Co Ltd, the Russian former owners of the *Volga*, for special leave to appeal from the decision of the Full Federal Court of Australia⁷ affirming an earlier decision of a single judge of the Federal Court⁸ dismissing an application by Olbers for a declaration that Australia's seizure and detention of the vessel was illegal. Olbers sought damages for what it alleged was an unlawful seizure and expropriation of the vessel and its catch. The High Court dismissed the application.⁹

The refusal to grant special leave to appeal means the decision of the Full Federal Court holding that Australia's remarkable s 106A automatic forfeiture provision in the *Fisheries Management Act 1991* (Cth) operates to transfer legal ownership of a vessel at the time of illegal fishing, and not later upon proof of the offence in court, now has the imprimatur of the High Court of Australia. In the Full Federal Court Olbers had levelled an array of challenges to Australia's seizure and detention of the vessel. It is submitted that while the High Court's decision to refuse special leave is sound in terms of the weakness of the appellant's challenges to the arrest under Australian law, it nevertheless confirms the existence of a glaring inconsistency between Australia's domestic fisheries law and Australia's international obligations under LOSC. The nature of this inconsistency, the facts of the case and the first Federal Court decision of French J of 12 March 2004 are reviewed in an earlier piece in this journal that preceded the Full Federal Court decision of 16 September 2004.¹⁰ The inconsistency relates to the apparent effect of s 106A to deny the flag state of a foreign vessel seized by Australia

¹ *Olbers v Commonwealth (No 4)* (2004) 136 FCR 67; 205 ALR 432 at 449; [2004] FCA 229.

² *R v Lijo* [2004] WADC 29.

³ *Lijo v the Commonwealth Director of Public Prosecutions* [2003] WASCA 4.

⁴ *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547; 212 ALR 325; [2004] FCAFC 262, *Olbers v Commonwealth (No 4)* (2004) 136 FCR 67; 205 ALR 432; [2004] FCA 229, *Olbers v Commonwealth (No 3)* [2003] FCA 651, *Olbers Co Ltd v Commonwealth (No 2)* [2003] FCA 177, *Olbers Co Ltd v Commonwealth* [2002] FCA 1269.

⁵ *Russian Federation v Australia (Prompt Release) (Judgment)* (2002) ITLOS Case No 11 (the *Volga Case*). See Gullett W, "Prompt Release Procedures and the Challenge for Fisheries Law Enforcement: The Judgment of the International Tribunal for the Law of the Sea in the *Volga Case* (Russian Federation v Australia)" (2003) 31 FL Rev 395.

⁶ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3; ATS 1994 No 31; ILM 21 p 1261 (entered into force for Australia and generally 16 November 1994), Art 73.

⁷ *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547; 212 ALR 325; [2004] FCAFC 262.

⁸ *Olbers v Commonwealth (No 4)* (2004) 136 FCR 67; 205 ALR 432; [2004] FCA 229.

⁹ *Olbers v Commonwealth* [2005] HCA Trans 228 (per Hayne and Callinan JJ).

¹⁰ Gullett W, "Developments in Australian Fisheries Law: Setting the Law of the Sea Convention Adrift?" (2004) 21 EPLJ 169 at 173-176. See also Baird R, "Coastal State Fisheries Management: A Review of Australian Enforcement Action in the Heard and McDonald Islands Australian Fishing Zone" (2004) 9 Deakin LR 91 and Baird R, "Testing the Waters: Fine Tuning the Provisions of the Fisheries Management Act 1991 (Cth) applicable to foreign fishing boats" (2004) 32 UWALR 63.

the opportunity to make use of appeal mechanisms in LOSC to ITLOS on the basis that there is no international dispute because Australia would simply have seized its own vessel. The challenges presented by Olbers to the Full Federal Court concerned the relevance to s 106A of the condemnation provisions of the *Fisheries Management Act 1991* (Cth), the lawfulness of Australia's "hot pursuit" (both in terms of the *Fisheries Management Act 1991* (Cth) and LOSC), and a number of constitutional arguments.

Condemnation provisions

Olbers argued that the words in s 106A should not be ascribed their plain and ordinary meaning because they are qualified by the condemnation provisions which follow in ss 106B-106G. These sections allow for the institution of proceedings against the Commonwealth by a dispossessed owner seeking a declaration that the item has not been forfeited on the basis that a relevant offence had not occurred. If such proceedings are unsuccessful, the item will then be "condemned as forfeited".¹¹ The submission by Olbers was that forfeiture under s 106A is not legally effective until the steps specified in the condemnation provisions have been taken. This would mean that, at the time of the actual seizure of the *Volga*, legal title would not have passed from Olbers to Australia. It could only pass quite some time later after there had been a condemnation determination. If this argument were to be accepted, then the only manner in which Australia could have lawfully arrested the vessel on the high seas would be if it had done so in accordance with ss 84 (seizure power) and 87 (power to pursue outside Australian waters). Such an arrest must be done in a manner consistent with a lawful hot pursuit, as set out in s 87. Yet, as noted below, Olbers submitted that there had not been a lawful hot pursuit.

The Full Federal Court determined that the condemnation provision does not affect the forfeiture because it is merely a means to adjudge later a forfeiture that has already taken place, in order to ensure that the forfeiture is officially recognised and recorded. The condemnation provision would only assist in circumstances where the Commonwealth was unable to satisfy the court that the vessel had been involved in a relevant offence.¹² But here, the offence had been established on the facts.

Lawfulness of hot pursuit

Notwithstanding the failure of the condemnation submission, the Full Federal Court commented on the linked submission that the pursuit undertaken by Australia was not lawful. The circumstances leading up to and including the arrest of the vessel, as found by the primary judge, was that Australia's naval vessel had changed its course for the purpose of intercepting the *Volga* and had sent off its helicopter while the *Volga* was within Australia's EEZ, although no contact was made with the vessel until it had reached the high seas.¹³ Olbers pointed out that a requirement of LOSC¹⁴ was that a hot pursuit cannot commence until a vessel has been ordered to stop, and that this must take place while the vessel is within the coastal state's jurisdiction. As this had not occurred, Olbers submitted that Australia's subsequent arrest of the vessel on the high seas was unlawful.

The Full Court examined the s 87 hot pursuit provision and noted from its Second Reading Speech that it was intended to reflect the hot pursuit provisions of LOSC. However, the actual words used in the *Fisheries Management Act 1991* (Cth) are quite different from Art 111 of LOSC. One point of disparity is s 87(a). This provides that a foreign vessel may be seized if "one or more officers ... have pursued the ... boat from a place within the AFZ" (Australian Fishing Zone – a zone under domestic law which overlaps the entire EEZ and extends to a maximum of 200 nautical miles from the baseline) to a place outside (including the high seas). Without needing to decide the matter, the Full Court noted¹⁵ the finding of Blaxell DCJ in the Western Australian District Court in a separate litigation,¹⁶ that the pursuit had commenced before the *Volga* had left the AFZ and opined

¹¹ *Fisheries Management Act 1991* (Cth), s 106G(3)

¹² *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547; 212 ALR 325 at 331.

¹³ *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547; 212 ALR 325 at 332.

¹⁴ LOSC, Art 111(4).

¹⁵ *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547; 212 ALR 325 at 332.

¹⁶ *R v Lijo* [2004] WADC 29.

that “[t]he District Court judge’s reasons for that conclusion seem compelling”.¹⁷ Their Honours did not express a concluded view on whether s 87 simply reflected LOSC provisions, but it is clear that the Full Court did not consider that s 87 should be read as being confined to the LOSC provisions. In one of the earlier cases in the Federal Court, French J had also stated that the interpretation of s 87 “must have regard to the practical exigencies of the circumstances in which pursuit might have to be undertaken”.¹⁸

The effect of these pronouncements from the Federal Court, although strictly obiter, leave the position that a hot pursuit of a foreign vessel may be lawful under Australian law in circumstances where it patently is unlawful under international law, as expressed in LOSC. This relates most obviously to the circumstances in which a pursuit is taken to have commenced, the need for a “stop” order to be issued, and potentially with respect to whether contact has been lost in the course of the pursuit.¹⁹ It is to be remembered that Australia’s prescriptive jurisdiction in its EEZ is sourced from LOSC itself. Further, although LOSC envisages that coastal state parties enact laws for their maritime zones, these are circumscribed to the extent that they must be consistent with the Convention.²⁰ There are also some specific restrictions on what laws coastal states can enact.²¹

Constitutional arguments

The Full Court also dismissed a number of constitutional arguments respecting the manner in which the vessel was forfeited. Initially, before French J, Olbers had submitted that the forfeiture offended the constitutional guarantee that the acquisition of property is on just terms.²² French J rejected this argument on the basis that Australia had not “acquired” the vessel; rather, the vessel had been forfeited to Australia by way of penalty for an unlawful activity.²³ This point was not relitigated before the Full Court.

Olbers nevertheless raised new constitutional arguments before the Full Court. First, it submitted that the forfeiture amounted to an unlawful conferral of judicial power on the Executive. This submission was rejected on the basis that forfeiture is by operation of law and as such was not an exercise of judicial power.²⁴

Second, it was submitted that there was no head of power to support s 106A. The Full Court considered that sufficient power existed²⁵ in the fisheries power²⁶ and potentially also the external affairs power²⁷ or the trade and commerce power.²⁸

The final constitutional argument was that the automatic forfeiture provision was too broad and was not “reasonably proportionate and adapted” to the fisheries power. The Full Court considered otherwise and remarked that the forfeiture provision was an appropriate legislative response to the protection of a limited public resource and only occurred upon the existence of a specified offence.²⁹ Significantly, it stated:

¹⁷ *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547; 212 ALR 325 at 332.

¹⁸ *Olbers v Commonwealth (No 4)* (2004) 136 FCR 67; 205 ALR 432 at 457; [2004] FCA 229.

¹⁹ With respect to this last point, the declaration in s 87(2) and 87(3) that a pursuit is not taken to be terminated or substantially interrupted only because officers onboard the pursuit vessel have lost sight of the vessel they are pursuing, or have lost output from a radar or other sensing device, is a qualification not found in LOSC. Likewise, the statement in Art 111(4) of the LOSC that a pursuit can only commence “after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard” has not been included in the *Fisheries Management Act 1991* (Cth).

²⁰ LOSC, Art 62(4).

²¹ Of note, coastal states may not provide penalties of imprisonment or corporal punishment for violations of fisheries laws by foreigners: LOSC, Art 73(3).

²² *Commonwealth Constitution*, s 51(xxxi).

²³ *Olbers v Commonwealth (No 4)* (2004) 136 FCR 67; 205 ALR 432 at 456; [2004] FCA 229.

²⁴ *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547; 212 ALR 325 at 335.

²⁵ *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547; 212 ALR 325 at 334.

²⁶ *Commonwealth Constitution*, s 51(x).

²⁷ *Commonwealth Constitution*, s 51(xxix).

²⁸ *Commonwealth Constitution*, s 51(i).

²⁹ *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547; 212 ALR 325 at 335.

This is so even if the relevant legislative regime were in breach of some norm of international law (although we have not reached any view that any such breach occurred in this case).³⁰

Decision of the Full Court

The Full Court upheld French J's decision and concluded:

The *Volga* was forfeited to the Commonwealth upon the commission of the offence. The vessel, the relevant equipment and the catch were the property of the Commonwealth at the time that the vessel was boarded by military personnel. Those personnel were acting as agents for the owners of the vessel at the time that the vessel was boarded and taken into their custody.³¹

Comment

The decision of the Full Federal Court shows that a clear line is to be drawn between the seizure of a foreign vessel on the high seas pursuant to the hot pursuit provision of the *Fisheries Management Act 1991* (Cth) (which, as noted above, differs from international law), and a seizure of a formerly-foreign vessel on the high seas pursuant to s 106A. Under ss 84 and 87 of the *Fisheries Management Act 1991* (Cth), Australia can lawfully arrest a foreign vessel on the high seas if it reasonably believes that the vessel had previously engaged in unlawful fishing within Australia's maritime jurisdiction and Australia had continuously pursued it from within its EEZ to the high seas. But the circumstances in which Australia can lawfully arrest a vessel on the high seas pursuant to s 106A is far more wide ranging. With regard to a foreign vessel which had committed an offence within Australian waters, that vessel can now (under Australian law) be seized "anywhere on the globe",³² including on the high seas, without a need for there to be a hot pursuit. This is because Australia would simply be effecting a seizure of an Australian vessel (acting as its own agent), and the former foreign owners of the vessel would have been dispossessed of their title to it at the time of the commission of the acts constituting a relevant offence. Such a construction of Australian law – specifically declared by the Full Federal Court and not disavowed by the High Court – runs contrary to numerous rights granted to flag states under LOSC as well as the underlying rationale of the Convention, which sought to balance the interests of coastal and flag states.

Section 106A operates as a way for Australia, among other things (if it so wishes), to circumvent the entire hot pursuit provisions in LOSC and the rights of the flag state of a dispossessed owner to seek compensation for an alleged breach by Australia of its international obligations (such as using undue force when effecting an arrest or arresting a vessel without there being a lawful hot pursuit). It also renders redundant the pursuit provision in the *Fisheries Management Act 1991* (Cth) itself, at least with respect to arrests of (formerly) foreign vessels on the high seas where there has, in fact, been a relevant breach of Australian fisheries law. In these circumstances, Australia is simply seizing its own vessel.³³ It is unimaginable that ITLOS, if called upon to decide the matter, would consider the operation of s 106A as being properly within the limits imposed directly or indirectly by LOSC.

The remarkable aspect of s 106A is not so much that it operates to transfer legal title before proof of an offence in court, but that title to a foreign vessel passes to Australia before it is seized, and even before Australia has detected the commission of the offence. This can occur any length of time before Australia effects a seizure or is even aware that an offence has, or may have, been committed.

Such discrepancy between Australian fisheries law and international obligations cannot be satisfactorily defended on the basis that Australia is a world leader in combating the problems of large-scale illegal, unreported and unregulated fishing. If Russia were to return to ITLOS to challenge the lawfulness of the manner in which the vessel was arrested (an issue that was not specifically litigated in the prompt release application), Australia would be forced to assert at ITLOS that Russia

³⁰ *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547; 212 ALR 325 at 335.

³¹ *Olbers Co Ltd v Commonwealth* (2004) 148 A Crim R 547; 212 ALR 325 at 334.

³² Ian MacDonald (Minister for Fisheries), "New Chapter in Maritime Law: Attempt to Claim Back the *Volga* rejected" (Press release, 13 March 2004).

³³ Note that s 87 limits the operation of s 84 seizure powers, including s 84(ga) automatic forfeiture seizures, for seizures outside the AFZ to where there has been a pursuit consistent with s 87. However, this would be of no avail to a dispossessed owner because at the time of the seizure they would not have been the owner of the vessel and therefore could not challenge the manner in which it was seized.

had no right to bring an action because, prior to its seizure, the vessel had, by operation of Australian law, become an Australian vessel. The scepticism with which such a submission would be viewed would undermine the otherwise leading role Australia has taken in the fight against illegal, unreported and unregulated fishing.

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