IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION

No. WAG No W73 of 2004

BETWEEN:
OLBERS CO LTD — Appellant

and
THE COMMONWEALTH OF AUSTRALIA — First Respondent

and
AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY — Second Respondent

OUTLINE OF APPELLANT'S SUBMISSONS ON APPEAL

Introduction

1. In this case a foreign flagged vessel was apprehended and seized on the High Seas by the respondents, purportedly under statutory powers vested in them under the *Fisheries Management Act 1991 (Cth)* ("**Act**"). At first instance, the Judge construed the Act in a manner which failed to have regard to the intention of Parliament expressed in the Act that a vessel would only be boarded, detained and apprehended outside the AFZ by using the powers under the Act, if certain specific conditions were met.

2. The Judge, by ignoring the particular sections of the Act which applied, arrived at an interpretation of the statute which left a detention and seizure of a vessel, which was not carried out in accordance with the provisions of the Act, without remedy under Australian law. Properly construed, the Act does, in fact, provide a regime which regulates extra-territorial actions and provides remedies where the regime is not followed. The statutory regime, properly interpreted, is consistent with Australia's international obligations in this area and with the important aspects of international policy applicable to the navigation of foreign flagged vessels on the High Seas.

Summary of argument

3. The central question before the Court is the proper interpretation and application of the Act. The appellant contends that:

   (a) The Judge wrongly construed the relevant provisions of the Act by finding that a forfeiture under the Act meant that the Commonwealth was entitled to board and detain the *Volga* on the High Seas (regardless of the provisions under s 87) as it

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was taking its own property, and that, as a consequence, the appellants had no remedy, whether under the Act or, at common law.

(b) The Act should be interpreted as a coherent whole and in a manner that is consistent with the international obligations owed by the first respondent under the *United Nations Convention on the Law of the Sea 1982* ("**UNCLOS**"). UNCLOS is the origin of the rights claimed by the Second Respondent in the AFZ. The obligations found in UNCLOS relating to the hot pursuit of vessels onto the High Seas are reflected in the provisions of s 87. (See paragraphs 17 & 21 below).

(c) Properly interpreted, the Act provides that, where a vessel is on the High Seas, an officer may only exercise the powers under s 84, if the requirements of s 87 are met. The Act either provides for a process which leads to a declaration under s 106A, and which provides for remedies if the process is not followed, or, if there is an immediate forfeiture, provides for remedies where the property is taken in breach of the powers under the Act. Even if there is an automatic forfeiture under the Act, it must still be followed by steps by which the Commonwealth takes possession of the property (ss 84 and 87 provide the power (with their limits) to take those steps). (Refer paragraphs 27 & 30).

(d) The requirements of s 87 should be interpreted and applied, in so far as is possible, to reflect the provisions of Article 111 of UNCLOS which set out the requirements for a "hot pursuit" of a vessel. These requirements have not been met in the current case. (Paragraph 34).

(e) On the proper interpretation of the Act, where the provisions of s 87 have not been followed as in the case of the *Volga*, the owner of the vessel has remedies under the Act (under ss 106B-G and/or s 167A) and claims at common law. (Paragraph 36).

(f) On the Judge's interpretation of the Act, the apprehension of property on the High Seas is without protection in any judicial process. Such a law offends the basic protection afforded by Chapter III of the *Constitution Act 1900*. The extra-territorial effect of the statutory scheme is also *ultra vires* the legislative power in s 51(x). (Paragraph 40).

Background

4. The facts giving rise to this proceeding are set out in the affidavits of evidence and in the agreed chronology (page 203 of the Appeal Book ("**AB**"); see also the judgment of French J (paragraphs 45 to 69, AB 224)). The key facts are:

(a) At 1012 local time on 7 February 2002 the HMAS *Canberra*, which was patrolling the Australian Fishing Zone ("**AFZ**") around the Heard and McDonalds, altered course to investigate a contact that had been reported by a patrol aircraft within the

AFZ. The *Canberra* launched a helicopter to investigate the contact and at 1158 the helicopter detected the contact on its radar (Boyce affidavit; AB 56, 4th para). The helicopter reported the contact's position as 51 38.6S 078 43.8E, approximately 0.7 nautical miles within the AFZ.

(b) At 1203 the vessel's position was determined on the helicopter's radar as being 51 37.11S 078 44.03E. The *Canberra* incorrectly informed the helicopter that the vessel was within the AFZ. In fact, the *Volga* was 0.5 nautical miles outside the AFZ and, at all material times, from 1203 was outside the AFZ on the High Seas. At 1204 the *Canberra* directed the helicopter crew to board the vessel, if it was deemed by the aircrew to be a suspected foreign fishing vessel. (Boyce; AB 56, 8th para).

(c) At 1205 the helicopter broadcast a challenge to the vessel on VHF Marine Channel 16. The position of the vessel at the time of the challenge was 51.36.3S 078.44.10E, outside the AFZ. (Dickfos affidavit; AB 144, 0405).

(d) At 1206 the *Canberra* rescinded the instruction to board. The helicopter was instructed to intercept the vessel and standby. (Boyce; AB 56, 8th para; AB 101, 0408).

(e) At 1212 the helicopter flew over the vessel and identified it as the *Volga* (Dickfos; AB 145, 0412). At 1213 the helicopter broadcast radio requests for the *Volga* to divert towards the *Canberra* (Dickfos; AB 146, 0413).

(f) At 1220 the Commanding Officer of the *Canberra* gave the helicopter permission to board and at 1223 the first armed crewmen were landed on the *Volga* from the helicopter. Shortly after boarding the Master of the *Volga* was given a notice of apprehension under the Act. (Boyce; AB 57, 1st para).

5. The appellant is the owner of the vessel *Volga* and has applied for recovery of the vessel, or otherwise for compensation, under the Act. Alternatively, the appellant has brought common law claims in negligence, detinue and for misfeasance in a public office (refer Re-Amended Statement of Claim – see AB 1 - 9). The claim is based on the wrongful exercise of powers under the Act by the Respondents (see AB 4 and 5, in particular, paragraphs 18 – 24A).

Arguments in the Court below

6. In the Federal Court before Justice French, the appellant argued that:

(a) The Act should be construed as a whole and interpreted consistently with Australia's international obligations, including the provisions of UNCLOS, in particular Article 111.

(b) The exercise of powers under s 84 outside the AFZ is limited by s 87. On the proper interpretation of s 87 the powers to detain, board and apprehend had not been exercised in accordance with s 87. There was no pursuit of the *Volga* from within the AFZ, no stop order had been given and, in any

event, any pursuit had been interrupted. The boarding, apprehension and seizure of the vessel on the High Seas was unlawful.

(c) The forfeiture provisions of s 106A give rise to an inchoate transfer of property to the Commonwealth which is capable of challenge by the owner of the property under the procedure in ss 106B – 106G.

(d) The consequence of an unlawful boarding and apprehension is that the Court may make orders for recovery of the property seized, or otherwise for compensation, under s 106G or s 167A. Alternatively, claims for damages at common law are available for an owner wrongfully dispossessed.

(e) If the Act did provide for an immediate transfer of title to the Commonwealth and the effect was to allow apprehension in breach of s 87 and deny the appellant any remedy, then the Act was invalid under the Constitution being ultra vires invalid because it was contrary to Chapter III, and inconsistent with the provisions of s 51(xxxi).

7. The respondents contended that:

(a) When the vessel was used in breach of the Act, forfeiture of the vessel was immediate and title vested in the Commonwealth. The appellant had therefore ceased to be the owner of the vessel at the time of seizure.

(b) As the vessel was forfeited on or before 7 February 2002, any actions by the second respondent could not be invalid, unlawful or illegal in relation to the appellant and give rise to any claim. Further, the vessel was lawfully seized on 20 February 2002 at the Port of Fremantle.

(c) There is no requirement under s 106A for a conviction before property is forfeit. The section does not make conviction a condition of forfeiture. Section 106A is constitutionally valid as a law sufficiently connected with fishing in Australian waters and external affairs to fall within ss 51(x) and 51(xxlx) of the Constitution. A law in relation to forfeiture is not a law to which s 51(xxxi) applies.

(d) The vessel was pursued validly in accordance with s 87 despite the fact that no stop order was given. It is not necessary to interpret the term "pursuit" in s 87 as it is used in Article 111 of UNCLOS.

The judgment of French J

8. In his judgment of 12 March 2004, Justice French held that the threshold question was whether or not the appellant owned the vessel at the time of seizure (paragraph 66 of the decision of French J, AB 231).

9. The Judge dismissed the application. The main findings of the Judge were:

(a) The *Volga* was forfeited in January 2002 when it was involved in illegal fishing within the AFZ (AB 237, paragraph 80).

(b) The effect of forfeiture was that there could be no complaint about the exercise of powers under ss 84 and 87 as the Commonwealth was seizing its own property (AB 231, paragraph 66; and AB 241, 95).

(c) On a proper construction of s 106A, no relief was available to the appellant from a finding that the powers to detain and apprehend the vessel (as set out in ss 84 and 87) had not been properly used (AB 242, paragraph 95). Further, no relief was available to the appellant under s 106G(3) (AB 237, paragraph 83).

(d) The Judge also stated that he was inclined to say (*obiter*) that on the question of pursuit under s 87 a stop order would not be required (AB 242, paragraph 97).

10. The appellant contends that the Judge's decision to dismiss its application is wrong on a proper interpretation of the Act. The findings of the Judge are not consistent with, and fail to give effect to, provisions of the Act. Further, the appellant says that the Judge was wrong to reach an interpretation that is not consistent with Australia's fundamental international obligations and which is contrary to good international order.

The interpretation of Fisheries Management Act 1991

11. The questions that the Court has to decide are: what is the correct construction of s106A; and, how does it operate in conjunction with other provisions of the Act, in particular ss 84 and 87 and 106B – 106G?

12. The fundamental principles of statutory interpretation are well established. An Act of Parliament should be read as a whole and each section interpreted in its context.

K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 60 ALR 509 (p 514, ln 5).

Different sections must be read in such a way that they fit together. Where a particular construction is consistent with the terms of Australia's international obligations, that construction should be preferred.

Minister for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353 (p 363, ln 25).

Where a provision is penal in its effect, any doubts will be resolved in favour of the person against whom the statute is being invoked.

13. Section 106A is directed at foreign boats and provides that the boats, together with nets, traps and fish, used in the commission of certain offences against the Act "*are forfeited to the Commonwealth*". This can be contrasted with s 106 which provides for forfeiture on conviction. Sections 106B to 106G provide for a process dealing with things seized under s 84(1)(ga).

14. Section 84 sets out the powers of an officer under the Act. The relevant powers exercised in relation to the appellant's property are:

(a) Section 84 (1)(aa) and s 84 (1)(a): the power of an officer to board and search a vessel.

(b) Section 84 (1)(g): the power of an officer to detain or secure.

(c) Section 84 (1)(ga): the power to seize property forfeit under s 106A.

(d) Section 84 (1)(k): the power of an officer to require the master of a vessel to bring the vessel to a place in Australia.

The respondents used these powers to apprehend the *Volga* and bring it back to Fremantle. The exercise of the powers can properly be described as effecting a seizure of property.

15. The powers under s 84 are expressly limited by s 87, insofar as they are to be exercised outside the AFZ. That is consistent with the basic principle of the law of the sea reflected throughout the Act that the High Seas belong to no State and that, save in exceptional circumstances, no State can apprehend vessels on the High Seas. Section 87 (1) states:

> (1) An officer may exercise, with respect to boats (including foreign boats) and persons (including foreign nationals) at a place at sea outside the AFZ but not within the territorial sea of another country, a power conferred on the officer under section 84 if:
>
> (a) one or more officers (whether or not including the officer exercising the power) have pursued the person or boat from a place within the AFZ to such place; and
>
> (b) the pursuit was not terminated or interrupted at any time before the officer concerned arrived at such a place with a view to exercising that power.

Different possible Interpretations

16. Section 106A and its relationship with ss 84 and 87 might be construed in 4 possible ways:

(a) The vessel is automatically and immediately forfeited on commission of an offence, passing title to the Commonwealth and, as a result, allowing the Commonwealth to take any action in respect of the vessel as its own property. There are no further requirements for the Commonwealth to do what it wants with the property.

(b) The vessel is forfeit on the commission of an offence, but any steps to exercise powers against the vessel on the High Seas,

including boarding and apprehension, must be taken in accordance with s 84 and s 87.

(c) The vessel is forfeit on the commission of an offence, but any forfeiture does not take place until the steps in Subdivision C (ss106B to 106H) have been complied with. Only at the end of the process does the Commonwealth have its title by forfeiture. In this sense the forfeiture is inchoate. Any exercise of powers against the vessel on the High Seas must be taken in accordance with s 84 and s 87.

(d) Forfeiture of the vessel only takes place after there has been a criminal conviction for one of the offences referred to in s106A. (The argument for this construction is not pursued in this appeal).

The Judge's construction ignores express provisions regulating the powers of the Commonwealth

17. The Judge chose the first construction under paragraph 16(a) above and construed s 106A as immediately passing title to vessel to the Commonwealth. On this interpretation the officer's right to board and apprehend the vessel arose out of the Commonwealth's title and not the provisions of s 84. The Judge said that, once the vessel is forfeit *"there can be no complaint, relevant to the relief sought in this case, about the purported exercise of powers under ss 84 and 87 for the Commonwealth was merely seizing its own property"* (AB 231, paragraph 66).

18. This construction makes the following of the process under ss 106B – 106G irrelevant. If no notice of seizure was issued under s 106C, the Judge's interpretation would still hold that the property was already forfeit and the former owner had no remedy.

19. The Judge's construction also ignores ss 84 and 87. It is clear that Parliament intended that an officer's powers in regard to a vessel on the High Seas arise out of, and are limited to, those powers in s 84, as limited by s 87. For example, s 84(1)(ga) specifically refers to the right to seize property that is forfeit under s 106A. Yet, on the Judge's interpretation s 84(1)(ga) is redundant. Moreover, on the Judge's analysis, the limitations in s 87 do not apply. The Judge says that a vessel could be seized at any time and anywhere, even on the High Seas, if once it had been forfeited by its earlier activities (AB 236, paragraph 77). This suggestion is in direct contradiction to the provisions of s 87 which say that detention on the High Seas is only available in certain circumstances.

20. The Judge also found that the effect of forfeiture under s 106A is that there can be no remedy for a breach of ss 84 and 87 and that those sections are of no consequence. A sensible interpretation of the Act should harmonise its provisions and give a proper role to these sections. It is submitted that a sensible interpretation requires that the powers to board and apprehend can only be exercised in accordance with s 84 and s 87, and that a remedy is available, if the powers are not properly exercised. A forfeiture of property under the Act cannot be seen in isolation. The Commonwealth has to take a number of steps to reduce the property to its possession and perfect its title. The Act sets

these matters out. The Judge was wrong to ignore them. The consequence of his interpretation is that any process is irrelevant, whether under s 87 or under s 106B-G.

Interpreting the Act Consistently with International Law

21. Further, the Act as a whole and, in particular, s 87, should be interpreted consistently with Australia's international obligations, especially UNCLOS, wherever that is possible. These obligations are of particular importance where the actions of the Commonwealth directly affect the rights and interests of another state. As a Russian flagged vessel on the High Seas, the *Volga* was under Russian jurisdiction at the time of boarding. It is unlikely that the Commonwealth's right of forfeiture, found by the Judge as being of a penal nature, would be recognised by a Russian court. The boarding and apprehension was illegal under international law (Art. 111 of UNCLOS) and has been the subject of an official protest from the Russian Federation.

22. The freedom of navigation on the High Seas, and the exercise of authority by one state over the vessel of another state, is a matter affecting the interests of all nations, including Australia. Such interests include matters of trade, commerce and state sovereignty. The importance of UNCLOS lies in regulating these interests, and any conflict between them, through common rules by which all nations abide. The international ramifications mean that this is an area where a Court interpreting domestic legislation should strive to maintain comity with the international norms.

Sellers v Maritime Safety Inspector [1999] 2 NZLR 44 (CA) p 57, ln 15).

23. Under international law, only the flag state may exercise jurisdiction or otherwise interfere with a vessel on the High Seas. Only in limited and exceptional circumstances can a foreign state exercise jurisdiction or otherwise interfere with a vessel on the High Seas. These exceptions, such as actions in times of war or the right of self-defence, are set out in UNCLOS. One exception is the right of hot pursuit under Article 111. Article 111 states that a pursuit must begin within the seas of the pursuing state and continue, without interruption, onto the High Seas. Under Article 111 a pursuit only begins once there has been an order to a vessel requiring it to stop given inside the EEZ or AFZ.

24. The Act, by its express terms, throughout reflects accepted principles of international law regulating claims to exercise power at sea, as one would expect where the Commonwealth is itself taking advantage of the extended rights of the AFZ provided for by UNCLOS. There are many sections in the Act which carefully delimit the exercise of powers by reference to location or the nationality of the vessel involved. The limits on the exercise of powers on the High Seas in the statute are consistent with the established protections under international law for a foreign flagged vessel on the High Seas. The Judge's approach effectively disregards these important principles.

25. The role of UNCLOS was specifically recognised in relation to sections 87. The *explanatory memorandum* for clause 85 of the bill (which appears to have become section 87 in the Act) states:

> This clause allows an officer to exercise powers under clause 79 outside the AFZ (but not within the territorial sea of another country) in respect to boats and person (including foreign boats and foreign nationals) where the boat or person has been pursued from a place within the AFZ. *This clause allows the officer to exercise the "lot (sic) pursuit" powers available with respect to fishing offences under international law.* (emphasis added).

26. In adopting his interpretations of the Act, the Judge relies on the public policy behind the Act, that is the problem of illegal unregulated and unreported fishing. However, the Judge ignores both s 87 and the significant policy considerations that underlie Australia's commitment to, and obligations under, UNCLOS. By finding that the forfeiture of the vessel means the exercise of powers on the High Seas is valid whether or not the vessel had been pursued, the Judge has failed to interpret the Act in a manner that is consistent with Australia's obligations under UNCLOS.

Proper Construction of the Act

Forfeiture

27. There are two alternative constructions of s 106A which give proper weight to the limits on the powers contained in the Act: that forfeiture under s 106A does not take place until the steps in ss 106B – 106G are complied with; or that forfeiture takes place at the time of the offence, but powers can only be exercised to seize the forfeited property in accordance with the provisions of the Act. Both constructions mean that the Court can provide remedies where property is seized in a way which is not within the powers under the Act. Both constructions are to be preferred to that adopted by the judge.

28. The first construction of s 106A is that the Act sets out a process by which the Commonwealth can seize property (on the High Seas or otherwise) and take possession of it and thereafter by the process under 106B-G bring about the result in s 106A. Forfeiture is not complete until the steps in ss 106B – 106G are complete. The Judge's approach is to start and end with s 106A. This approach, as already noted, makes following any process irrelevant. There is no need for notices to the person in charge of the property seized. There is no need to hotly pursue a vessel to seize it. A vessel which fished 10 years earlier can be seized on the High Seas by a passing Commonwealth frigate.

29. It is submitted that, having regard to the effect of ss 106B – 106G, forfeiture is not complete until the process set out in those sections is complete. Read as a whole, the Act provides a scheme under which failures to follow the process in the Act (whether s 84 and s 87 or under s 106B-G) can result in orders under 106G that property is not forfeit.

Power to Apprehend and Seize

30. The alternative construction is that, even if s 106A effects immediate forfeiture in the sense of passing title, the Commonwealth still has to exercise its powers to apprehend a vessel in accordance with the Act.

If it does not do so, the Act (s 106G, s 167A) provides for a remedy which will vindicate the important rights breached by the Commonwealth, if it has not followed ss 84 and 87.

31. On a proper construction of the statute it is clear that Parliament intended that the powers to apprehend a vessel on the High Seas can only be exercised in accordance with ss 84 and 87 (whether or not the vessel is immediately forfeited as found by the Judge). A vessel can, it is submitted, only be boarded and apprehended on the High Seas where it has been pursued from within the AFZ in accordance with s 87 as that section is properly interpreted.

32. Section 84 sets out the powers of an officer. It is clear that the powers in s 84 apply in connection with s 106A, however it is interpreted (cf s 84 (1)(ga)). The presence of s 84 precludes the existence of any other powers, unless otherwise provided in the Act. For the acts of the officer in boarding and apprehending the vessel to be lawful, they must have been done in accordance with the officer's powers under s 84.

33. The powers under s 84 were exercised over the *Volga* on the High Seas outside Australian waters and outside Australian jurisdiction. Section 7 of the Act acknowledges that some provisions of the Act will have extra-territorial effect, and a note to s 7(1) identifies s 87 as one such section. Section 87 expressly limits the exercise of powers under s 84 to situations where a vessel on the High Seas has been pursued from a place within the AFZ. In enacting s 87 Parliament has reflected the provisions of UNCLOS, which allow for action to be taken against a foreign vessel on the High Seas in cases of "hot pursuit". No other provisions allow for the general exercise of powers under s 84 on the High Seas over foreign flagged vessels (cf Australian vessels and FSA vessels). The Court should not find an extra-territorial effect that Parliament did not intend. Section 87 provides for a limited exception giving extra-territorial effect. It would be inconsistent with the terms of s 87 to allow a vessel to be boarded and apprehended in a manner other than that prescribed. Indeed, such a construction makes s 87 completely worthless. Even on the "automatic" forfeiture approach, the Act should be interpreted to provide a remedy for this breach of the powers to seize a vessel on the High Seas.

Pursuit under s 87

34. The appellant submits that there was no valid pursuit under s 87 so as to justify the boarding and apprehension of the vessel on the High Seas. Section 87 should be interpreted consistently with Article 111 of UNCLOS which it is drafted to reflect. There is no basis to read down s 87 given that it clearly is intended to reflect the international requirements for hot pursuit.

R v Lijo & Ors [2004] WADC 29.

For there to be a valid "hot pursuit" a stop order must be given in the AFZ and the pursuit must start in the AFZ. This is consistent with the provisions of s 84 (1)(aa), under which power the boarding of the *Volga* would have been exercised, which refers to the requirement to order a vessel to stop within the AFZ. At no time was the *Volga* ordered to stop. All radio communications to the *Volga* ordering it to divert were made once the *Volga* was on the High Seas.

35. Even without regard to the provisions of UNCLOS, an ordinary and natural interpretation of the term "pursuit" in s 87 would require "chasing" the vessel with intent to exercise the powers under s 84. The *Shorter Oxford English Dictionary* defines pursuit as "*the act of pursuing, with intent to overtake and catch or harm; an instance of this; a chase*". Section 87 (1)(b) supports this interpretation. It requires that the pursuit not be interrupted "*before the officer concerned arrived at such a place with a view to exercising that power*" (emphasis added). No pursuit began within the AFZ: initially the Canberra was only moving to investigate, not pursue, an unknown contact (Boyce; AB 56, 4th para; AB 101, 0408). Only when the *Volga* was identified outside the AFZ at 1212 could there be a pursuit in any proper sense of the word (Dickfos; AB 145, 0412). (Even if a pursuit could be said to have begun within the AFZ, that pursuit was interrupted before the *Volga* was boarded (Boyce; AB 56, 8th para)).

Relief for Unlawful Seizure

36. The appellant submits that the Act should be construed to provide a remedy for a detention, apprehension and seizure made wrongly and not in accordance with ss 84 and 87. If there is no remedy, there is no consequence for a failure to follow a proper process. Conduct in breach of the statute itself (and the international legal order) will go unremedied under Australian law, notwithstanding Parliament's intention to control the exercise of powers on the High Seas consistently with International law. (Such an interpretation would also be consistent with Article 111 (8) of UNCLOS which provides for compensation where the right to pursue is improperly exercised).

37. If the scheme under 106B to 106G is a process by which the Commonwealth can arrive at the outcome under s 106A, then under s 106G(3), a failure to follow the requirements of the Act relating to the exercise of powers means that an order should be given that the property is not forfeit.

38. If there is an automatic forfeiture, the remedy provisions still provide for a statutory mechanism to give a remedy where a person has been deprived of property by a process which breaches the Act. Section 106G (3) provides that a court may make orders for recovery of the thing forfeited, payment of any proceeds of sale of a forfeited thing, or payment of compensation. Alternatively, the appellant has common law rights which apply where property has been wrongfully seized in breach of statutory powers.

39. In his decision the Judge found that the provisions of s 106G did not apply where property had been wrongfully seized, but was instead directed at other claims for possession of the property (paragraph 83). There is no basis for reading the provisions of s 106G in this limited way. Similarly, the Court should not construe the Act so as to deny the appellant the right to bring common law claims in negligence, detinue and misfeasance where it was deprived of possession of the vessel by the detention and seizure.

Brimacley Products Pty Ltd v Holland [1939] VLR 447 (at 454 – 455).

Constitutional Invalidity

40. While limiting the Act to allow no remedy for a breach of s 87, the Judge also found that there is sufficient judicial protection to allow the Act not to infringe the Constitution. It is submitted that the judge was wrong to hold that there were adequate safeguards in the form of effective judicial process. Under the Act the effect of the Judge's approach is to allow any manner of seizure and detention on the High Seas (or indeed elsewhere) in breach of international law and the leave the person from whom property was improperly taken without remedy. It is submitted that this is incompatible with the requirements of Chapter III of the Constitution.

Polyukhovich v Commonwealth of Australia (1991) 172 CLR 501 (at 532).

41. It is further submitted that on the Judge's interpretation the Act is *ultra vires* Parliament's powers to legislate. On the Judge's interpretation the extra-territorial aspects of the Act are outside the powers granted under s 51(x) of the Constitution which empowers Parliament to make laws in relation to fisheries "*in Australian waters*" only.

Conclusion

42. The Judge's approach to the statute, which is expressed to be based on a purposive approach, overlooks express protection given foreign flagged vessels on the High Seas and has no regard for the purpose of those provisions, namely to uphold the important international principles upon which the statute is founded. The decision by the Judge, while understandable on one policy level, ignores fundamental principles and, if adopted, sacrifices those principles and the important established international order which they represent, to the need to support the detention of the *Volga*. The decision should be set aside and the matter referred back to the Judge to determine the proper relief under the Act and/or at common law for the wrongful seizure of the *Volga*.

Dated 3rd August 2004.

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