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

No. WAG No W73 of 2004

On Appeal from a Decision of French J in the Federal Court of Australia In Matter No 151 of 151

BETWEEN:

OLBERS CO LTD — Appellant

and

THE COMMONWEALTH OF AUSTRALIA — First Respondent

and

AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY — Second Respondent

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APPELLANT'S OUTLINE OF SUBMISSIONS IN REPLY

Interpretation of Statute

1. The central point on the appeal is the proper construction of the Act. The nub of the respondents' submissions, and Justice French's reasoning, is that s 106A effects an immediate transfer of title and renders any process under the Act by which property is seized, or notices are to be given before the property is condemned as forfeit, irrelevant (paragraphs 45, 58 and 59 of respondents' submissions). On the respondents' contention the provisions of s 106B – s 106G do not have to be complied with if the Commonwealth detains and apprehends a vessel, but chooses not to issue a notice of seizure (paragraph 45). Similarly the decision by the Judge that there is no relief or remedy for a breach of ss 84 and 87, as well as the suggestion that property may be seized other than under s 84(1)(ga), is an interpretation that effectively makes those provisions redundant.

2. It makes no sense where Parliament has enacted a range of provisions setting out powers of seizure, and a mandatory statutory process for condemnation as forfeit, that those provisions could be ignored at the choosing of the

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Commonwealth. Why enact those provisions if they are in reality irrelevant? It is wrong to interpret the Act so as to remove any consequence of the Commonwealth choosing not to follow the processes set out in the Act. The preferred interpretation is that the provisions as to process have force and, if breached, can lead to orders that the property is not forfeit, or for return of the property or other compensation, even if the property is forfeit (cf ss 106G and 167A).

3. The provisions can properly be read to mean that, if property is to be detained and seized outside Australian territory, such actions must be carried out in accordance with ss 84 and 87. Section 106B is clear that the provisions of s 106B - 106G set out mandatory rules that apply once property is seized as forfeit under s 106A, not at the option of the Commonwealth. Further, before the property is condemned as forfeit, the process under ss 106B – 106G must be carried out. The extra-territorial exercise of power makes this very legislation very different from customs legislation.

Pursuit

4. The ordinary and natural meaning of "pursuit" involves chasing an identified prey or target. The interpretation contended for by the respondents and its application to the facts here, would expand "pursuit" to include the surreptitious stalking of a possible quarry. On any ordinary meaning, turning towards an unidentified contact in order to investigate the contact cannot be seen as being a "pursuit".

5. It is clear on the evidence that at the time the *Volga* was within the AFZ there was no pursuit of the vessel. Instead, the *Canberra* was simply investigating an unknown contact, the pursuit did not begin until the *Volga* was identified and the decision to board and apprehend the vessel was made.

6. The evidence of Commander Boyce shows that initially there was no pursuit (Boyce supplementary statement, annexure "B" of Boyce affidavit, AB 56):

> I ordered the OOW to alter course to **close** the contact. This was at approximately 10.12 local. It was my intention to launch the ship's Seahawk helicopter as soon as practicable thereafter with a Boarding Party embarked to **close** and **investigate** the contact and to be in a position to conduct a boarding **if it became necessary**.
>
> At 1145 I directed the ships Seahawk helicopter with the ships boarding party embarked, be launched to **investigate** the contact...

> At 1204.5 I gave the command approval to conduct fast-rope boarding of the contact **if the aircrew determined that it was an illegal FFV**. Two minutes later I rescinded that order.
>
> I subsequently gave permission for the boarding to proceed at 1220 local.

7. Similarly, the *Canberra's* operations room narrative log (Boyce annexure "f", AB 101) says:

> 0408 CAN REMAIN WITH FFV UNTIL CO DECIDES TO PERSUE (sic).

8. By the time the *Volga* was identified, the vessel was outside the AFZ (AB 63, 71, 88, 101, 126, 140). Similarly, no decision to board or apprehend the vessel was made until after the *Volga* was outside the AFZ (AB, 56, 145, 146). No pursuit can be said to have begun within Australian waters.

9. The Act is not a statute that is unrelated to Australia's international obligations. The Act is directly connected to the United Nations Convention on the Law of the Sea ("**UNCLOS**"). Section 87 was drafted to reflect the provisions of UNCLOS relating to a pursuit on the High Seas (see paragraph 25 of Outline of Appellant's Submissions on Appeal). Where there are two possible interpretations of "pursuit", the Court should chose the interpretation that is consistent with Australia's obligations under UNCLOS. On such an interpretation a pursuit would involve the chasing of a target, after that target has been identified and has attempted to flee. This is shown in Article 111 of UNCLOS, with the requirement for a "stop order" before a pursuit can be said to have begun. The stop order in Article 111, which reflects established customary international law, is a requirement to remove any doubt that a pursuit has begun. Even if it is found that there is no express requirement for a stop order, s 87 requires a "pursuit". This should be interpreted in the same manner as Article 111, that is that there be a chase of an identified fleeing target. Such an interpretation is consistent with a reading of s 87. On the facts there was no pursuit.

Constitutional Validity

10. The appellant no longer contends that the forfeiture of the *Volga* and its associated catch and equipment was under a law for the acquisition of property under s 51(xxxi) of the Constitution.

11. The appellant submits that, on the Judge's interpretation, the Act is invalid as it breaches the separation of powers under Chapter III of the Constitution. The principle of separation of powers holds that only Chapter III courts may

exercise a judicial power (*Polyukhovich v Commonwealth of Australia* (1991) 172 CLR 201).

12. The determination of the appellant's claims arising out of the boarding, apprehension and seizure of the *Volga*, whether the claims are based on the Act or common law rights, is an exercise of judicial power. On the Judge's interpretation of the Act the appellant has no right or remedy under the Act or common law that it can bring in relation to the unlawful seizure (see paragraphs 66 and 95 of judgment of French J; also paragraphs 58 and 61 of the respondents' submissions). The effect of the Judge's interpretation is that the legislature has pre-empted the courts' exercise of judicial power by determining the appellant's claims and depriving the appellant of the right to have its claims heard and tried before a Chapter III court. Such an exercise of judicial power by the legislature is unconstitutional.

Dated 10th August

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