IN THE FEDERAL COURT OF AUSTRALIA WESTERN AUSTRALIA DISTRICT REGISTRY GENERAL DIVISION	)))))	No. WAG No W151 of 2002

B E T W E E N:

OLBERS CO LTD — Applicant

and

THE COMMONWEALTH OF AUSTRALIA — First Respondent

and

AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY — Second Respondent

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OUTLINE OF APPLICANT'S CLOSING ADDRESS

Summary of issues

1. The central issues are:

   (a) How is the power to pursue under s87 to be exercised?

   (b) Was there a breach of the obligations under s87?

   (c) If not, what are the consequences?

2. The Applicant also raises issue with the assertion by the Respondents that they held the necessary reasonable belief as a precondition to the exercise of their powers under s84.

3. The Applicant also makes a claim in detinue for the wrongful detention of its vessel, equipment and catch.

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4. The Applicant says that there was clearly an unlawful seizure in terms of s87 of the FMA. The Applicant is not without remedy. On its proper construction, the statute gives the Court an ability to provide a remedy for such an unlawful seizure. Further, on the facts of the matter, the Applicant can establish a claim in detinue.

Summary of facts

5. In early February 2002, the Australian warship, the *Canberra* was patrolling the waters around the Heard and McDonald Islands.

6. On 7 February, an Australian aircraft reported a radar contact inside the Heard and McDonalds EEZ at position 5151.68S 7755.87E, some 32 miles inside the zone. The aircraft tracked the contact by radar, lost contact, regained contact, lost contact and reported the contact to the *Canberra*. The contact was on a course heading out of the EEZ and was less than 20 nautical miles from the edge of the EEZ when the last radar contact was lost by the aircraft; Holder affidavit.

7. At approximately 10.12 local time (2.12GMT), the *Canberra* altered course towards the contact reported by the aircraft. The reported distance between the *Canberra* and the contact was 49nms; Venables affidavit. The commander of the *Canberra* directed that a seahawk helicopter be launched to investigate the contact; Boyce affidavit

8. At 0300 GMT, the helicopter was readied to conduct a surface search to locate the contact which, by this time, was estimated to be within 25nms from the *Canberra*. At 0345 GMT on 7 February 2002, the helicopter was launched. After initially making radar contact with an object 15nms to the south west of the Canberra and investigating this contact, the helicopter made radar contact with the *Volga* to the north east of the *Canberra*. The helicopter altered course towards the vessel and reported the contact's position as 51 38.6S 078 43.8E. At 0404.5 GMT, the *Canberra* gave the helicopter approval to board the contact if it was deemed by the aircrew to be a suspected foreign fishing vessel. The *Canberra* informed the helicopter that the contact was 1nm inside the

zone. At 0405 GMT, the helicopter issued a challenge to the vessel in the following terms:

> Unidentified fishing vessel in position 51 36.36S 078 44.10E, this is an Australian Navy Helicopter 15nms to the west of your position. In accordance with our powers contained in the Australian Fisheries Act of 1991, you are about to be boarded by Australian officers exercising those powers.

9. As noted in the challenge itself, and stated in the Respondents' answers to request for particulars (answer 1(1)), this challenge was made when the *Volga* was in position 51 36.36S 078 44.10E ("**challenge position**"); Dickfos affidavit

10. At 0406 GMT, the commander of the *Canberra* rescinded the instruction to board; Boyce affidavit. The helicopter reported receiving further instructions to continue to intercept the contact and to standby for further instructions. Visual contact by the helicopter was established at 0410 GMT; Dickfos affidavit.

11. Between 0413 and 0418 GMT, the helicopter broadcast radio requests to the *Volga* to divert towards the *Canberra*. No response came from the *Volga* and at 0420 GMT, the *Canberra* instructed the helicopter to board the *Volga*. The helicopter crew proceeded to board the vessel; Dickfos affidavit.

12. On 7 February, shortly after boarding, the Master of the vessel was presented with a notice of apprehension signed by Commander Boyce and the Australian officials took control of the vessel; Leydon affidavit.

13. On 7 February, the Applicant's lawyers wrote to the Department of Foreign Affairs protesting the legality of the seizure and requesting that the vessel and crew be released. Further correspondence was sent by the Applicant's Australian solicitors on 12 February 2002 protesting the seizure; exhibits "OS 6" and "OS 7", Sizov affidavit.

14. On 15 February, the legal branch of the Department of Foreign Affairs and Trade responded by letter asserting that the *Volga* had been

apprehended "under Australian law and in accordance with international law" for committing breaches of the FMA; exhibit "OS" 11, Sizov affidavit.

15. While still at sea en route back to Australia, the vessel was investigated for evidence of fishing inside the Australian AFZ. Fisheries officer Ferris recommended apprehending the *Volga*; Ferris affidavit.

16. The vessel was escorted back to Fremantle arriving on 19 February 2002. Fisheries officer Morris came onto the vessel and on the same day served a notice of detention pursuant to s84(1)(ia) of the FMA on the Master. After discussions with fisheries officer Ferris, officer Morris formed the belief that there was sufficient evidence to show that the *Volga* had been used by the Master and officers contrary to s100(1) of the FMA and that the vessel, its equipment and catch was accordingly forfeit under s106A of the FMA. On 20 February 2002, officer Morris served a notice of seizure under s106C of the FMA on the Master; Morris affidavit.

17. On 22 February, the Master of the *Volga* made formal protest that the *Volga* had been boarded without any prior warning being received by the vessel and was in his view in breach of international law; exhibits "OS21" and "OS22", Sizov affidavit. The Master subsequently died on 16 March; paragraph 20 Sizov affidavit.

18. On 25, 28 February and 6 March, the Applicant's solicitors responded to the 15 February letter from Foreign Affairs outlining the basis for the Applicant's protest in detail and again requesting release of the vessel, its cargo and crew; exhibits "OS14", "OS15" and "OS23", Sizov affidavit.

19. On 21 March, the Applicant's solicitors responded to the s106C notice on behalf of the Applicant. On the same day, the managing director of AFMA responded with a notice to condemn the vessel, its catch and equipment; exhibits "OS25" and "OS26", Sizov affidavit. These proceedings were subsequently commenced, *inter alia*, in response to AFMA's notice of 21 March.

20. On 26 March, the office of international law of the Attorney General's Department responded to the protests of the Applicant's solicitors in the following terms:

> I reiterate the point made by the Department of Foreign Affairs and Trade in its letter to you of 15 February 2002 that the apprehension of the FV Volga was made under Australian law and in accordance with international law. The FV Volga was advised that it would be boarded from a helicopter and this information was given to the FV Volga before it left the Australian fishing zone surrounding the territory of the Heard and the McDonald Islands.
>
> In our view, the requirements of article 111 of the United Convention of the Law of the Sea (UNCLOS) were satisfied, and accordingly it is not proposed to release the vessel on the basis that it was apprehended in breach of international law.

Exhibit "OS24", Sizov affidavit

21. On 6 April, officer Morris contacted Colin French of the National Mapping Division to have determined, relative to the Australian EEZ, the challenge position (51 36.36S 78 44.1E) and position 51 38.6S 78 43.8E. The latter position was the reported position of the *Volga* when first detected by the helicopter's radar. Colin French determined that, contrary to the apparent belief of the relevant Australian officers at the time, the challenge position was outside the EEZ; French affidavit. This state of affairs is now admitted by the Respondents – paragraph 8 of Amended Defence and answers 1(1)-(3) of the Respondents' response to request for particulars. See also the diplomatic message of the Department of Foreign Affairs and Trade to the Russian Embassy dated 20 May 2002; exhibit "OS41", Sizov affidavit.

22. The catch on board the *Volga* has been sold by the Respondents for $1,932,579.32 and the proceeds held in trust pending the outcome of these proceedings; exhibit "OS30", Sizov affidavit. The vessel remains under seizure in the Port of Fremantle.

23. The Russian Federation has formally protested the seizure of the *Volga*. On 10 October 2002, it requested that the Australian Government release the ship and pay compensation to the vessel owner in accordance with article 111. There is no evidence that there has been any response from the Australian Government to this request; agreed bundle of diplomatic exchanges.

The FMA – proper approach to construction

24. The FMA, as its name suggests, was enacted to allow for the proper and efficient management of Australia's fisheries resources; s3 FMA.

Relevant legislative background

25. Certain provisions of the FMA (and in particular s87 with which the Court is concerned in this case), were enacted to bring into domestic law rights and obligations of Australia under international law. The explanatory memorandum for clause 85 (which appears to have become section 87 in the FMA) 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 persons (including foreign boats and foreign nationals) where that boat or person has been pursued from a place within the AFZ. This clause allows the officers to exercise the "lot (sic) pursuit" powers available with respect to fishing offences under international law.

Article 111 UNCLOS

26. Australia is a party to the United Nations Convention on the Law of the Sea 1982 ("**UNCLOS**"). Russia, the flag state of the *Volga* is also party to UNCLOS. The right of hot pursuit is contained in article 111 - the equivalent of article 23 in its predecessor 1958 Convention on the High Seas. Perhaps the most remarkable development between UNCLOS and the 1958 Convention was the extension of limited sovereignty (for fishing rights amongst other rights) over a 200 mile zone around a nation's coast.

The conditions of a valid hot pursuit were not significantly altered between the two Conventions other than to extend the right to pursue from the EEZ and not simply from the territorial sea.

27. The right of hot pursuit is an extraordinary right that cuts across the key principle of international law that ships on the high seas are subject to the exclusive jurisdiction of the flag state but are otherwise generally able to enjoy the freedom of the high seas without fear of interference by foreign powers. Only in very exceptional and carefully circumscribed situations can a foreign flagged vessel be subjected to the laws of a foreign state if it is on the high seas. One of the few internationally accepted exceptions is the right of hot pursuit; Reuland, R.C. The Customary Right of Hot Pursuit onto the High Seas: Annotations to Article 111 of the Law of the Sea Convention (1993) 33 Virginia Journal of International Law 557.

28. A copy of article 111 is attached to these submissions. A number of conditions must be met by the pursuing vessel to validly pursue a foreign flagged vessel onto the high seas. What constitutes a pursuit is carefully defined. Article 111 is a codification of customary international law as to what constitutes a valid pursuit. Perhaps the leading case in this area is the decision of the International Tribunal of the Law of the Sea ("**ITLOS**") in The M/V Saiga (No 2) (St Vincent and the Grenadines v Guinea), International Tribunal for the Law of the Sea (1 July 1999) at paragraph 146.It is the most modern and authoritative statement of the law in this area. On the subject of hot pursuit in that case, the Tribunal concluded:

> The Tribunal notes that the conditions for exercise of the right of hot pursuit under article 111 of the Convention are cumulative; each of them has to be satisfied for the pursuit to be legitimate under the Convention. In this case, the Tribunal finds that several of these conditions were not fulfilled.

Judgment, paragraph 146

Applicable general principles of statutory interpretation

29. The Courts must adopt an approach to construction that promotes the purpose or underlying object of the statute in question; s15AA Acts Interpretation Act 1901. Words should be given their ordinary and natural meaning although the context of the words used may well have an influence on how the Court interprets any particular provision or word. Where, as here, a statute seeks to implement an obligation of international law, and the meaning of a provision is ambiguous, the Courts will have regard to the source of international law as an aid to interpreting Australia's domestic legislation:

> We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty

Per Brennan, Deane, Dawson JJ, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 110 ALR 97 at 123.

30. The concept of ambiguity in this context is not to be applied in any narrow sense:

> If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations it imposes on Australia, then that construction should prevail.

Per Mason CJ and Deane J, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 at 362.

31. In *Sellers v Maritime Safety Inspector* [1998] 2 NZLR 44 at 57, the New Zealand Court of Appeal stated:

> New Zealand Courts have for over a century made it plain that legislation regulating maritime matters should be read in the context of the international law of the sea, and, if possible, consistently with that law.

32. The importance of reference to extrinsic materials in appropriate cases is reiterated in section 15AB of the Interpretation Act 1901 which complements the common law principles developed by the Courts in this area.

33. Where the interpretation of a penal statute is concerned, if any ambiguity exists in the language, any doubt should be resolved in favour of the person against whom the statute is being invoked. While this "rule" is perhaps one of last resort, it is of especially strict application where the liberty of persons is at risk; *Grant v The Queen* (1981) 147 CLR 503 at 507 (HCA). There is no doubt that statutory provisions requiring forfeiture of goods used for criminal purposes are penal in nature and any ambiguity ought therefore to be construed in favour of the owner of the goods; *Collector of Customs (NSW) v Traders' Finance Corp Ltd* [1972] ALR 653 at 657 (Menzies J) and 663 (Gibbs J).

Relevant provisions of FMA

34. The central relevant provisions of the FMA for the purposes of this hearing are contained in sections 84, 87, 106A-106G and 167A of the Act. In summary:

(a) Section 84 sets out the various enforcement powers available to a fisheries officer under the Act;

(b) Section 87 empowers a fisheries officer to exercise his section 84 powers outside the Australian Fishing Zone (**"AFZ"**) where the target vessel has been pursued from within the AFZ.;

(c) Section 106A provides for the automatic forfeiture of property used in certain offences under the FMA; and

(d) Sections 106B-G comprise a subdivision of the Act containing a statutory framework for determining the fate of property seized by a fisheries officer under section 84(1)(ga).

(e) Section 167A provides for compensation where property is acquired on unjust terms.

35. The provisions summarised above in relevant part are attached to these submissions.

Pursuit

36. The Applicant's primary submission is that section 87 conditions the exercise of any of the powers under s84. For an officer to validly exercise any powers over the *Volga* on the high seas, he must be able to establish that he pursued the vessel from a place within the AFZ and that the pursuit was not terminated or interrupted. To interpret the legislation in any other way to allow an officer to seize and interfere with property of a foreign party on the high seas without showing a proper pursuit would be to endorse a complete disregard for internationally accepted norms and Australia's obligations under UNCLOS.

37. Pursuit is defined in the Macquarie English Dictionary and in the Shorter Oxford English Dictionary as follows:

> Pursue – follow with the view of overtaking, capturing, killing, etc; chase. To follow in pursuit.
>
> Pursuit – the act of pursuing.

Macquarie Australian English Dictionary

> Pursue – follow with intent to overtake and capture or harm; hunt, chase.
>
> Pursuit – the act of pursuing, with intent to overtake and catch or harm; an instance of this; a chase.

Shorter Oxford English Dictionary

38. It is submitted that simply on its ordinary and natural meaning, a pursuit under s87 can only commence when a fisheries officer elects to chase a vessel with a clear view at the outset of the chase to exercising one of his powers under s84.

39. However, the provisions of section 87 cannot be interpreted in isolation. When considered in their context, and having regard to the principles of

statutory interpretation outlined earlier, it is submitted that the terms "pursue" and "pursuit" must be construed narrowly in light of the internationally accepted principles, embodied in article 111 of UNCLOS, of what constitutes a valid hot pursuit. In particular, a pursuit cannot commence until the quarry is alerted to the pursuer's presence and is given the opportunity to stop.

40. It is submitted that on the question of whether a stop order is required before a vessel can be pursued and boarded, if "pursuit" as used in s87 is construed consistently with its use in article 111 and in customary international law, then a stop order is clearly required.

41. However, it is further submitted that the FMA in any event provides expressly for the requirement that a stop order be issued as a precondition to boarding. Section 84(1)(aa) contains a power available to an officer to require the master of a vessel to stop "for the purposes of boarding a boat that is at a place where the officer may board it under paragraph (a) or (b)". It is submitted that on a proper construction of this part of the FMA, it is a mandatory requirement on an officer to issue a stop order before he may exercise any power to board under s84(1)(a). If ss84(1)(aa) and 84(1)(a), are read together in this way with s87, the FMA provides for the full protections contained in article 111.

42. It is submitted that on a proper interpretation of the FMA, and because of the importance of the principle of the freedom of the high seas, if the Respondents cannot show that they have properly pursued and boarded the *Volga* in terms of the Act, then the only course open to this Court is to order the release of the vessel and proceeds of sale of the catch. The protections of article 111 given effect to by s87 and related sections of the FMA are fundamental to the maintenance of good international order. Because states and their nationals can rely on these protections, the risk of armed confrontation is avoided. It is submitted that in this area, there can be no balancing exercise and the clear import of Australia's international obligations contained in article 111 of UNCLOS, and enacted in the FMA in section 87, should be given effect to by this Court.

Automatic forfeiture provisions

43. It is submitted that the automatic forfeiture provisions of s106A, provided the conditions of the section are met, give rise to an "inchoate" transfer of property to the Commonwealth which is capable of challenge by the owner of the property under ss106B-G; *Whim Creek Consolidated NL v Colgan & anor* (1991) FCR 469. Section 84(1)(ga) provides the link between s106A and s106B-G for this purpose. If the owner of the property makes application, as in this case, under s106G of the Act, the Commonwealth is required to vindicate the actions taken against the owner's property. It is submitted that this is the statutory mechanism by which the owner may, *inter alia*, challenge any impropriety in the procedures adopted by the Commonwealth and seek recovery of his property as a consequence.

44. Under section 106E, the things seized under s84(1)(ga) are automatically condemned as forfeit if not claimed by the owner. However, under s106F, if the owner of the property wishes to claim the thing, it must institute proceedings against the Commonwealth and can claim one or other of two forms of relief:

(a) To recover the thing; or

(b) For a declaration that the thing is not forfeited.

cf Customs Act provisions – only (b) available.

45. Under s106G, the Court can make orders in favour of an applicant for recovery of the thing (or its proceeds) or declaring that the thing is not forfeited. If it is established that the thing was not involved in an offence described in s106A, there must inevitably follow a declaration that the thing is not forfeited. It is submitted that an order for recovery of the thing must follow if there is some disqualifying conduct on the part of the Commonwealth, irrespective of any finding on whether an offence may have been committed. Such an interpretation provides a balance to the otherwise extreme provisions of a statute that purports to forfeit property without any judicial intervention. It gives meaning to the alternative

remedy under s106G, alternative to a declaration of non-forfeiture, to make an order for the recovery of the property seized in favour of a claimant. Put another way, the power of the Court to make orders is express and is not limited to making a declaration that the thing is not forfeited. If the Court's powers were intended to be limited to deciding whether the requirements of s106A had been met, the Act would have said so. The Court would have been limited to declaring whether the thing was forfeited and been directed, in doing so, to have regard only to whether the requirements of s106A had been established. It does not do this and, provides for an order for recovery without reference to forfeiture or s106A.

46. The FMA sets out numerous powers and obligations of AFMA and its officers. If they exceed their powers or fail to discharge their responsibilities under the FMA, the FMA provides no express remedy for the subject or person whose rights are breached. Constitutionally, the Court is the only entity who can vindicate rights and hold the State accountable for its actions. The sole means provided under the FMA is the implied access to the Court for which the FMA provides by ss106F and 106G (and 167A). One would therefore expect that, in exercising its jurisdiction to declare a thing not forfeited or to be recovered by the owner, the Court can and should have regard to whether the Commonwealth has complied with the Act and whether any rights have been breached in the process by which the issues have come before the Court.

47. An approach which allows the Court to use its power to restore property to its owner that has been illegally seized, is common sense and consistent with the principle that rights require vindication to have substance. If a Court is granted power to intervene in a process by which subjects have their property seized and forfeit to the State, it would take the clearest possible words to exclude, from the matters which the Court should have regard, breaches by the State of its powers and obligations in the process by which the State has seized the thing and is seeking to retain it. Courts exist to uphold the law and to protect subjects from abuses of power and illegal conduct by the State.

48. The converse, that s106A completes a transfer of property rights subject only to the original owner showing that the requirements of s106A are not met, is an extraordinary argument. Logically, and as seems to be contended by the Commonwealth, a vessel that at some point in its life had been used in an offence stipulated under s106A would become the property of the Commonwealth and liable to seizure anywhere in the world at any time by Australian authorities, irrespective of its then flag, ownership or persons on board. Such an outcome would make unnecessary most of the powers under s84 where an offence stipulated in s106A is concerned and, most remarkably of all, would render article 87 of no effect.

49. It is submitted that there are neither clear words nor clear basis in principle for the Court to limit its consideration of a claim for an order in favour of the owner of the *Volga* to whether the requirements of s106A have been met. Such an approach would limit, without cause, the power of the Court to vindicate rights, protect the subject from abuse and illegal State conduct and otherwise do justice:

> At common law, a man has a right to his liberty and his goods, and if that right is taken away by statute and power is given to any officer to arrest a man or take his property, in my opinion the whole spirit of the law is that that right should be strictly construed, and should only be upheld if carried out with all the forms and limitations required by the Act which gives the right.

Birmacley y Products Pty Ltd v Holland [1939] VLR 447 at 454-455

50. It is submitted that if the Court accepts that there has been an unlawful pursuit under s87, this should entitle the Applicant to recovery of its vessel and the proceeds of the catch and that orders should issue accordingly.

Applying principles to facts of the matter

51. It is submitted that on a proper consideration of all the evidence, the earliest point at which it could be said that a pursuit was commenced, was

when the *Volga* was in the challenge position outside the Australian AFZ. On the narrower interpretation of the term "pursue" to conform with article 111, it is not possible to say that there was a pursuit at all as no stop order was given and the vessel was boarded on the high seas without any warning being received by the vessel (refer Master's protest). Furthermore, if it is possible to say that the pursuit commenced at any time while the *Volga* was in the EEZ, it was terminated or interrupted when the Commander of the *Canberra* rescinded the order to board. For these reasons, the seizure of the *Volga* was unlawful.

52. The evidence shows that at all times prior to the Commander's initial order to board (when the *Volga* was outside the EEZ), no decision had been made to apprehend or engage the vessel and the *Canberra* was simply investigating and endeavouring to pinpoint a possible suspect vessel. After the initial order to board was revoked, there was further prevarication before a final decision was made to board.

53. Commander Boyce, supplementary statement, annexure "B" of Boyce affidavit, pp2-3

> In any event, based on my operational instructions, it was my intention to **investigate** to the best of my ability any contacts gained within the HIMI EEZ.....
>
> 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. In the interim, the Seahawk broadcast on VHF IMMB

ch 16 to the FFV that it was the intention to conduct a boarding in accordance with the FMA of 1991.

At this stage, I conducted a **final check** with RAN and Fisheries Officers **to ensure that we did have a cause** to conduct a boarding. This took the form of a check of the FFV's position with respect to the EEZ boundary and to further **investigate** an apparent anomaly regarding the actual position of the marked delineation on the chart we were using, a **check** that we were correct under the auspices of the FMA of 1991 and an assurance from the Boarding Officer in the Seahawk that conditions on scene were conducive for a fast rope insertion. I subsequently gave permission for the boarding to proceed at 1220 local.

54. Officer Dickfos, statement, annexure "A" of Dickfos affidavit:

On 7 February 2002 at 0300GMT, TIGER 74 was readied on deck HMAS CANBERRA for launch to conduct a surface **search to locate** a **suspected** foreign fishing vessel (FFV) with an estimated position within 25 Nautical Miles (NMS) of HMAS CANBERRA.

0353 Nothing held on TIGER 74's radar (except HMAS CANBERRA). TIGER 74 altered heading to 240degT and climbed to 500 ft to **investigate** a possible radar contact held briefly after launch, around 15NMS to the south west of the ship at launch time, 0345GMT.

0358 A new contact appeared on TIGER 74's radar screen. The contact appeared to the north east of CANBERRA's position. The appearance of a new contact was reported to CANBERRA, contact's position to follow. TIGER 74 altered heading to the north east and increased speed to 150kts to intercept the contact.....

0404.5 CANBERRA gave TIGER 74 command approval to conduct Fast-Rope boarding of contact **if it is deemed by the aircrew as a suspected FFV**. CANBERRA passed

information that the contact was one (1) NM inside the Australian EEZ.

0405 Challenge Message passed on Marine Channel 16.....

0406 CANBERRA instructed TIGER 74 not to board the contact. TIGER acknowledged the instruction and reported to CANBERRA that the boarding message was passed. CANBERRA further instructed TIGER 74 to continue to intercept the contact and standby for further instructions....

0410 The pilot reported gaining visual contact with a white vessel about three (3) NMS from the aircraft. I also gained visual contact immediately after the pilot.....

0413 ...I made the first divert attempt on Marine Channel 16:

"Fishing vessel Volga, this is the Australian Navy Helicopter hovering on your port beam. Request you alter heading left, 250."

No response was received or noted by TIGER 74.

0418 I made a second divert transmission. No response was received or noted by TIGER 74.

0420 CANBERRA instructed TIGER 74 to insert the first "stick" of the boarding team.

55. Officer Ferris, statement, annexure "A" of Ferris affidavit.

On Thursday morning 7 February at approximately 1030 while stationed onboard the Royal Australian Navy (RAN) frigate HMAS Canberra (FFG 02) I was summoned to the operations room and informed by the Commanding Officer (CO) RL Boyce that **two (2) unidentified contacts** had been detected by Royal Australian Air Force (RAAF) aircraft inside the HIMI AFZ.. One of these contacts was positioned at latitude 51 degrees 47 minutes south, longitude 77 degrees 52 minutes east, which was approximately 40 nautical miles (nm) north of our present position. We at once began to **close** this contact in order to **investigate.**

56. Officer Venables, statement, annexure "A" of Venables affidavit:

> While I was on watch during the forenoon of Thursday 7 February 2002 the on watch Principle Warfare Officer (PWO) Lieutenant Gemma Pumphrey reported to me that the surveillance aircraft held a **contact of interest** believed to be inside the Heard Island/McDonald Island Exclusive Economic ZONE (HIMI EEZ). At 1012 I altered course 344 true and increased speed to 24 knots to **close** the contact at the direction of the PWO.

57. Officer Leydon, statement, annexure "A" of Leydon affidavit:

> On 7 February 2002 I was aboard the guided missile frigate HMAS CANBERRA in my capacity as a boarding officer.
>
> HMAS Canberra was steaming towards a **suspected** illegal foreign fishing vessel (FFV) detected by a Royal Australian Air Force surveillance aircraft.
>
> As HMAS CANBERRA **closed** the contact, I was aboard the TIGER 74.....

58. In none of the statements of any of the Respondents' witnesses is there any suggestion that a decision to pursue or engage the *Volga* in any way had been taken before Commander Boyce first ordered the helicopter to board. The Commander makes no reference in his statements to the effect that he had ever exercised his powers of pursuit under the FMA (cf Commander's statement that the decisions to board and apprehend the vessel were taken under the auspices of the FMA; annexure "A" Boyce affidavit, p4).

59. The only mention of the term "pursuit" or "pursue" in any of the statements of the Respondents' witnesses is to be found in the statement of the senior fisheries officer on board, Mr Mackay, in relation to another vessel, the *Lena*:

> In December 2001, the Civilian Chartered Vessel, Southern Supporter with Fisheries Officers on board, located the

> fishing vessel LENA, inside the Australian Fishing Zone of HIMI.
>
> They consequently challenged this vessel and ordered it to an Australian Port for further investigation. After initially complying with the order a **pursuit** of the vessel ensued and this was eventually broken off after some two weeks. During the course of the **pursuit** LENA was assisted by another foreign fishing vessel FLORENCE to refuel.

60. It is submitted that consideration of the various log entries in the ships' logs exhibited by Commander Boyce supports the evidence given by the witnesses in their statements that there was no pursuit until a point, at the earliest, when the *Volga* was outside the zone. The word "pursuit" (or pursue) appears twice in the operations room narrative log (annexure "F", Boyce affidavit:

> 0232 C130 CANB PASSED TO C130, [HIEROGLYPHIC] IS IN PURSUIT OF CONTACT. ASAC WILL BE CHANGING CIRCUIT IN 10MIN TO TAKE CONTROL OF [HIEROGLYPHIC] TIGER-74
>
> 0407 CAN DO NOT BOARD DUE TO FFV BEING ON EDGE OF EEZ.
>
> 0408 CAN REMAIN WITH FFV UNTIL CO DECIDES TO PERSUE (sic)

61. The first entry is at a time before the helicopter has been launched. The second entry is at the time when the Commander rescinds his original order to board.

62. It is submitted that all the *Canberra* was doing up to the point that the order to board was issued, was approaching a suspect vessel. The witnesses say that the *Canberra* was "closing" on the contact – ie drawing nearer. To "close" on a target is not to pursue it.

63. It is submitted that having regard to all the evidence, and on any approach to the proper construction of what constitutes a proper pursuit under the FMA, the Respondents cannot maintain that there was a pursuit of the

Volga in accordance with the FMA. Any pursuit, such as there was, was unlawful.

Reasonable belief

64. For the purposes of boarding and apprehending the *Volga*, in addition to relying on the provisions of s87, the Respondents rely on s84(1)(g) (refer paragraph 9 Amended Defence, answer 2(3) Response to Request for Particulars) and s84(1)(a) (refer paragraph 16 Amended Defence). Both s84(1)(g) and s84(1(a) require that the officer exercising the powers under these subsections have reasonable grounds to believe that the vessel has been used for fishing in the AFZ.

65. The grounds of reasonable belief must be judged by reference to events existing prior to the time when the powers, which rely on the holding of reasonable belief, are exercised; *Bartlett v Weir & ors* BC9405688 per Beazley J (Federal Court 1994) at 15,16.

66. Reasonable belief requires something more than mere suspicion. The grounds on which the officer or officers acted must be sufficient to induce in a reasonable person the required belief before there can be said to be valid seizure; *W A Pines v Bannerman* (1979) 30 ALR 559 at 571. The belief must be held by the relevant officer. In this context, regard should also be had to the requirement in article 111 of the need for "good reason to believe" before a right of hot pursuit may be exercised.

67. It is submitted that for the purposes of apprehension and boarding, at no relevant time could any of the officers relied upon by the Respondents (Boyce, Ferris and Leydon – refer answer 2(1) to Response to Request for Particulars) have had reasonable grounds to believe that the vessel had been fishing inside the Australian AFZ. The pleaded grounds of belief in the Respondents' Response to Request for Particulars relate mostly to matters discovered after the boarding and cannot therefore form the basis of a reasonable belief prior to boarding.

68. At all times while the *Volga* was inside the zone, the only information on the vessel that the officers had was that there was an unidentified radar

contact within the zone. At the time, the radar contact was not visually identified until it was outside the zone. The Respondents' evidence is that only fishing vessels were likely to be in the zone and that because all legal fishing vessels could be accounted for, the contact must have been an illegal fishing vessel. If this is all that is required to form a reasonable belief in the sense required, then the decision to pursue and board could have been taken when the surveillance aircraft reported the first radar contact. But this did not happen. As the evidence shows, the Commander's intention when the surveillance aircraft reported the contact was to "investigate" the contact.

> In any event, **based on my operational instructions**, it was my intention to **investigate** to the best of my ability any contacts gained within the HIMI EEZ.....

69. The operational instructions were clearly not to assume that a radar contact was automatically to be considered as a target to board on the basis that there were reasonable grounds to believe it was a fishing vessel that had been used to illegally fish in the AFZ. More investigation was required before that could be presumed. Common sense would require that a visual sighting be made. While visual contact with the *Volga* was eventually established, there was no evidence from that sighting that the vessel had been fishing or that it had fish on board. It was in fact transiting.

70. Other relevant evidence includes:

(a) There is no positive averment by any relevant officer that checks were made to determine with the Australian Antarctic Division or AFMA whether known legal vessels were in the area. This is simply assumed because the officers are not aware of any report to the contrary but no evidence is given as to what reporting procedures may exist that would ensure that the knowledge of relevant AFMA/Australian Antarctic Division persons was transmitted promptly to the *Canberra*. Furthermore, the Respondents have given no evidence from AFMA or AAD

confirming that there were, in fact. no known legal vessels in the area.

(b) The contact was not positively identified as the *Volga* until it was outside the AFZ. There was therefore nothing to link the radar contact with any prior sightings of the *Volga* until this point. The *Volga* was at all times on a course taking it outside the AFZ.

(c) Fishing in this area of the world can take place outside the AFZ as well as inside it. Vessels will have to transit between fishing areas and are entitled to transit Australian waters. This fact is not taken into account by any of the relevant officers. The Respondents' evidence suggests that about one third of the catch on board was caught inside the AFZ; Phelan and Smith affidavits and see attached analysis. See also Ferris affidavit, annexure "A", p5 – fishing log entry in vicinity of Williams Ridge outside Australian waters.

71. It is submitted that on the basis of all the evidence, prior to boarding there were no reasonable grounds to believe that the *Volga* had been used for fishing in the AFZ or in contravention of the FMA.

Consequences of unlawful pursuit/breaches of FMA

72. As outlined above, it is has been submitted that sections 106B-106G are the statutory mechanism by which an owner of property can seek recovery of his goods. It is submitted that if the Court finds that the *Volga* was boarded and apprehended in breach of the FMA, an order should issue for recovery of the vessel and the proceeds of the catch in accordance with s106G.

73. Further, the Applicant seeks an order for compensation in terms of s167A. It is submitted that the taking of the *Volga* in breach of the FMA is an acquisition of property otherwise than on just terms. The term "acquisition" in this context has been widely construed to mean the taking of possession. It extends to acquisition of any interest in any property; *The Minister of State for the Army v Dalziel* 68 CLR 261 at 285. While

s106G provides for limited redress for illegal conduct of the State. it does not allow redress for the full losses sustained by the Applicant in the form of consequential losses including loss of profits from the use of the vessel. In a proper case, loss of profits may be taken into account when assessing compensation; *The Minister of State for the Army v Dalziel* 68 CLR 261 at 309. In this case, the thing seized is an income earning chattel so that to deprive the owner of his property without compensation for loss of profits would not be just.

74. The Applicant claims compensation for losses under this head in the following amounts:

(a) Loss in value of the vessel - US$150,000; Leckie affidavit. The quantum of this loss is not disputed.

(b) Costs of repatriating the crew – A$33,402.60; Caputi and Peters affidavits. The quantum of this loss is not disputed.

(c) Fuel on board at time of detention of vessel – A$60,310; Stewart valuation and evidence.

(d) Loss of profits – 18 months profits US$1,107,405 less A$150,000 capital costs; Dixon affidavit. The quantum of this loss is disputed.

Detinue

75. The Applicant claims in the alternative in detinue. A claim in detinue can be made where a person has the immediate right to possession of goods and makes demand for return of the goods against another person who has detained the goods. In determining whether there has been a detention, the Court must ask whether there has been a proper demand by the plaintiff for the return of the Plaintiff's goods and a clear refusal on the part of the defendant to return them; *the Law of Torts in Australia, Trindade and Cane, 3rd ed, 2000*, pp159-170.

76. By reason of the matters already outlined, it is submitted that the vessel was seized without lawful authority. Accordingly, the Applicant at all

times had immediate right to possession of the vessel. The vessel was detained from 7 February 2002 when it was apprehended. The Applicant made demand for return of the vessel, its equipment and catch through its solicitors; "OS11, "OS14" and "OS25", Sizov affidavit. The demand was refused "OS24", "OS26", Sizov affidavit.

77. It is submitted that judgment should be entered in the amount of the value of the things seized together with damages follows:

(a) Vessel, fuel and equipment US$1,075,200; Stewart valuation report, Leckie affidavit

(b) Catch A$1,932,579.32; proceeds of sale as pleaded.

(c) Costs of repatriating the crew – AS33,402.60; Caputi and Peters affidavits. The quantum of this loss is not disputed.

(d) Loss of profits – 18 months profits US$1,107,405 less A$150,000 capital costs; Dixon affidavit. The quantum of this loss is disputed.

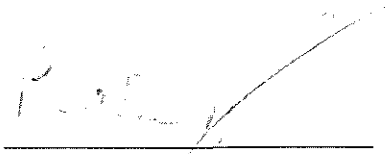
Conclusion

78. The Respondents' approach to the legislation is the most extreme conceivable. A seizure is a necessary step in beginning a process under which the Commonwealth can remove property. The Respondents' submission is that the legislature intended that a seizure in breach of an established legal norm contained in the legislation itself would give rise to no remedy, leaving the Court powerless. For the reasons outlined above, it is submitted that this was not the intent of the legislature.

79. It is submitted that the seizure of the *Volga* on the high seas was unlawful in breach of the specific power under s87. The Act on its proper construction does provide the Court with the ability to remedy the breach. Alternatively, a claim in detinue lies. Where a breach of this kind occurs

which is of a fundamental kind, the things seized should be returned to its owner and orders made for compensation or damages.

Dated: 9 September 2003



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