

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

No. W73 OF 2004

**On Appeal from the Federal Court of Australia,
Western Australia District Registry, WAG No. W151 of 2002**

BETWEEN:

OLBERS CO LTD

Appellant

and

**THE COMMONWEALTH OF
AUSTRALIA**

First Respondent

and

**AUSTRALIAN FISHERIES
MANAGEMENT AUTHORITY**

Second Respondent

**WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR
WESTERN AUSTRALIA (INTERVENING)
(for hearing 11 August 2004)**

Attorney General's position

1. The Attorney General for the State of Western Australia intervenes in this appeal pursuant to section 78A of the *Judiciary Act 1903* (Cth).

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2. The Attorney General's submissions are confined to the issue dealt with in paragraph 6(a) of the Appellant's Notice of Appeal (Appeal Book (AB) 246). That issue is whether certain provisions of the *Fisheries Management Act 1991* (Cth) (FMA) are invalid as a result of inconsistency with the requirements of Chapter III of the *Commonwealth Constitution* (**Constitution**).
3. The Attorney General intervenes in support of the First and Second Respondents and submits that the relevant provisions of the FMA are not inconsistent with the requirements of Chapter III of the *Constitution*.
4. The Attorney General's submissions proceed on the basis that French J's construction of section 106A of the FMA is correct. That is, that section 106A of the FMA operates according to its terms, regardless of whether there has been compliance with section 87 of the FMA (see Reasons for Judgment [74] - [82] (AB 234 - 237)).
5. As a claim has been made under section 106E and proceedings have been instituted under section 106F in this case, no question arises as to the validity of sections 106E(1) and 106G(2) of the FMA.

Basis for assertion of inconsistency with Chapter III of the Constitution

6. It is not immediately clear from paragraph 40 of the Outline of Appellant's Submissions on Appeal, dated 3 August 2004, why it is asserted that the condemnation of the thing resulting under section 106G(3) of the FMA is inconsistent with Chapter III of the *Constitution*. In that circumstance the Attorney General's submissions assume that the Reasons for Judgment of French J identify the issues at [89] and [92] (AB 239 - 241).
7. It appears that the central issue is whether the relevant sections resulted in a process of executive acquisition of property which was not

safeguarded by an effective judicial process resulting in a usurpation of the judicial process contrary to the requirements of Chapter III of the *Constitution* (Reasons for Judgment [89] (AB 239 - 240)).

Submissions

8. There is no executive acquisition of property involved in the application of sections 106A and 106G(3) of the FMA. The forfeiture of things pursuant to section 106A of the FMA and their subsequent condemnation by operation of section 106G(3) are not, as French J correctly found (Reasons for Judgment [91] (AB page 240)), the result of any executive acquisition but occur by operation of law.
9. It is recognised that forfeiture and condemnation of forfeited property is a justified and legitimate means of enforcing certain breaches of law, in particular, fisheries laws.¹
10. It is possible to establish a statutory regime for forfeiture or confiscation of property that is not based upon the conviction of a person for the commission of an offence. For example under the *Customs Act 1901* (Cth) certain property is forfeited to the Commonwealth upon the commission of an offence.²

¹ See for example *Chealey v The Queen* (1972) 127 CLR 291, where, at 296, Barwick CJ said:
"The protection of fishing grounds of the nation from foreign exploitation is somewhat akin to the protection of the country from smuggling. Drastic action in protection of the country's interests in each instance may be regarded as warranted, indeed, if not to be expected: each is an area where pecuniary penalties are unlikely to provide an adequate protection."

See also *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270, where at 275, Mason CJ, referred to the above passage from *Chealey v The Queen*:

"It is evident from the judgment that the majority was of the opinion that the scope of the fisheries power was sufficiently broad to extend to authorising forfeiture of a vessel involved in the commission of an offence against the *Fisheries Act* as a measure for the protection of Australian fishing grounds, even if the owner was innocent of complicity."

And see also Brennan J at 277 - 278:

"There is no doubt but that laws providing for the forfeiture of vessels which are involved in the commission of fisheries and customs offences are laws appropriate and adapted to the vindication of those laws."

See also *Burton v Honan* (1952) 86 CLR 169 at 180 - 181 per Dixon CJ.

² See *Burton v Honan* (1952) 86 CLR 169. The *Customs Act* at the time of that case provided that the forfeited property was not condemned until after conviction for the offence (former section 262). No conviction is required under that Act today: see sections 203 - 205D.

11. It is also possible to establish a regime where forfeiture of property is imposed without there ever being a conviction.³
12. Where, as is the case here, there is no legislative determination of guilt and the forfeiture is attended by the exercise of judicial power, it will not infringe the separation of powers required by Chapter III of the Constitution. The separation of powers would be infringed if the legislation provided for the substitution of a legislative judgment of criminal guilt for a judgment of a court exercising federal judicial power.⁴
13. The exercise of judicial power, while difficult to define exhaustively, involves the determination of a controversy between parties by the application of facts determined to exist to the law as it is.⁵

³ For example, under the now repealed *Crimes (Confiscation of Profits) Act 1988* (WA) a forfeiture order could be made in respect of property belonging to a person charged with a "serious offence" who had died before the charge was finally determined. Under that Act the court had to be satisfied beyond reasonable doubt that the person committed the offence before a forfeiture order could be made. The constitutional validity of that legislation was considered and upheld in *Silbert v Director of Public Prosecutions for Western Australia* [2004] HCA 9; (2004) 78 ALJR 454. It was not suggested in either of the judgments that the absence of a conviction would have been a basis for invalidity.

A State parliament has the legislative power to deprive a person of property without compensation: *Durham Holdings Pty Ltd v New South Wales* (2000) 205 CLR 399.

⁴ See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ and at 70 per McHugh J.

⁵ See *Polyukhovitch v The Commonwealth* (1991) 172 CLR 501 per Mason CJ at 532 who cited with approval Kitto J in *Reg v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 who said, at 374-375:

"Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in the future to be decided as between those persons or class of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified."

See also *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 per McHugh J at 66 - 67; *Fencon v Muller* (1983) 152 CLR 570 per Mason, Murphy, Brennan and Deane JJ at 608 and *Huddart, Parker & Co Ltd v Moorehead* (1909) 8 CLR 300 per Griffith CJ at 357.

14. The FMA provides a regime whereby judicial power of the Commonwealth may be invoked to determine whether the goods apparently forfeited are to be condemned. Upon the institution of proceedings by a claimant, the Court is required to determine a legal controversy between the parties; that is, whether there has been the commission of an offence resulting in a forfeiture under section 106A.⁶ In doing so, the Court is clearly exercising judicial power as it is required to apply a recognised standard of proof⁷ and determines the controversy in accordance with its usual processes and the rules of evidence. Further, the FMA does not dictate to the Court the decision it should reach in a particular case.⁸ An appeal from the decision of the Court is provided.⁹
15. What is material is that the proceedings instituted by the Appellant pursuant to section 106F and 106G of the FMA required the Court to exercise judicial power in the determination of the question whether a declaration should be made that the *Volga* was forfeited pursuant to section 106A.
16. French J was correct in determining that the relevant provisions of the FMA involved no usurpation of judicial power and were not in breach of the requirements of Chapter III of the *Constitution*.

⁶ See Reasons for Judgment [82] (AB 237).

⁷ See Reasons for Judgment [62] and [65] (AB 230 - 231).

⁸ In *Leeth v The Commonwealth* (1992) 174 CLR 455, Gaudron J, at 502, stated that a legislative direction which would require a power vested in the court to be exercised other than in accordance with the judicial process would be invalid because it is "an essential feature of judicial power that it should be exercised in accordance with the judicial process".

See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 where the fact that the legislation effectively directed the court in the result to be found was central to the finding that the legislation was invalid as repugnant to the exercise of judicial power and thus inconsistent with the requirements of Chapter III of the *Constitution*. For example, see McHugh J at 121 and 122 and Gummow J at 134.

See also Kirby J at [43] in *Silbert v Director of Public Prosecutions for Western Australia* [2004] HCA 9; (2004) 78 ALJR 464 at 471.

⁹ Section 106G(4) FMA.

Dated the 6th day of August 2004



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