

IN THE FEDERAL COURT)
OF AUSTRALIA)
WESTERN AUSTRALIA)
DISTRICT REGISTRY)

No. W151 of 2002

B E T W E E N :

OLBERS CO LTD

Applicant

- and -

THE COMMONWEALTH OF AUSTRALIA

First Respondent

**AUSTRALIAN FISHERIES
MANAGEMENT AUTHORITY**

Second Respondent

MINUTE OF PROPOSED AMENDED DEFENCE

1. The Respondents admit paragraph 1 of the Amended Statement of Claim.
2. With respect to paragraph 2 of the Amended Statement of Claim, the First Respondent is a sovereign nation established by the *Commonwealth of Australia Constitution Act (UK)*.
3. The Respondents admit subparagraphs 3(a), (b), (c) and (e) of the Amended Statement of Claim.
4. With respect to subparagraph 3(d) of the Amended Statement of Claim, the Respondents say that the Second Respondent exercises the functions given to it pursuant to the *Fisheries Management Act 1991 (Cth)* ("the Fisheries Management Act").

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5. The Respondents deny subparagraph 3(f) of the Amended Statement of Claim. The Respondents further say that in carrying out its functions under the Fisheries Management Act the Second Respondent is only obliged to have regard, and give effect, to any international treaty, agreement or protocol entered into by the First Respondent, to the extent it is required to do so by the provisions of the Fisheries Management Act or any regulations made there under, and any other applicable Commonwealth legislation.
6. The Respondents deny paragraph 4 of the Amended Statement of Claim. The Respondents further say that the Vessel, the Equipment and the Catch are forfeited to the First Respondent pursuant to s.106A of the *Fisheries Management Act 1991 (Cth)* ("the Fisheries Management Act"), that forfeiture occurred prior to the boarding of the Vessel on 7 February 2002 as pleaded in paragraph 6 of the Amended Statement of Claim, and that upon forfeiture, title to the Vessel, the Equipment and Catch vested in the First Respondent.
7. The Respondents admit paragraphs 5, 6 and 7 of the Amended Statement of Claim. The Respondents further say that the first component of the boarding party comprising seven Royal Australian Navy personnel fast roped from the helicopter from HMAS Canberra onto the Volga at 1220 hours on 7 February 2002.
8. The Respondents admit that no direct order to stop was issued to the Vessel within the Australian Fishing Zone ("AFZ"), but otherwise deny subparagraphs 8(a) and 8(b) of the Amended Statement of Claim. The Respondents further say that prior to the boarding of the Vessel, the helicopter from HMAS Canberra transmitted three messages to the Vessel on VHF Marine Channel 16, the first of which notified the Vessel that it was about to be boarded by Australian officers exercising powers under the Fisheries Management Act, and was transmitted at 1205 ~~1204.5~~ hours when the vessel was approximately 0.5 nautical miles outside the AFZ ~~while the Vessel was approximately 0.1 nautical miles inside the AFZ~~. The Vessel did not transmit an acknowledgment of any of these messages, but after transmission of the first message the Vessel immediately altered course by over 90° to approximately 120° true being a course which

~~would take the vessel away from the boundary of the AFZ, being the shortest route to the edge of the Australian Fishing Zone (“the AFZ”).~~

9. The Respondents admit paragraphs 9 and 10 of the Amended Statement of Claim. The Respondents further say that the Vessel was apprehended pursuant to the powers granted by ss.84(1)(g) and 87(1) of the Fisheries Management Act to detain or secure any boat that an officer has reasonable grounds to believe has been used in contravention of that Act.
10. The Respondents admit subparagraph 11(a) of the Amended Statement of Claim, and therefore do not plead to subparagraph 11(b).
11. The Respondents admit paragraph 12 of the Amended Statement of Claim, and further say that on 7 February 2002 the Master of the Vessel was served with a notice pursuant to s.84(1)(k) of the Fisheries Management Act requiring him to bring the Vessel to Fremantle.
12. The Respondents admit that on 20 February 2002 Western Australian Department of Fisheries Officer Tom Morris, an officer for the purposes of the Fisheries Management Act, served the Master of the Vessel with a notice of seizure pursuant to s.106C of the Fisheries Management Act giving notice that the Vessel, the Equipment and the Catch had been seized, but otherwise deny paragraph 13 of the Amended Statement of Claim. The Respondents further say that officer Morris seized the Vessel, the Equipment and the Catch on 20 February 2002 pursuant to s.84(1)(ga) of the Fisheries Management Act immediately prior to serving the notice of seizure on the Master of the Vessel.
13. The Respondents admit paragraphs 14, 15 and 16 of the Amended Statement of Claim.
14. The Respondents do not plead to paragraph 17 of the Amended Statement of Claim.
15. The Respondents admit paragraph 18 of the Amended Statement of Claim, and further say that the Catch was sold for an amount of \$1,932,579.28 on or about 20 May 2002.

16. The Respondents admit paragraph 19 of the Amended Statement of Claim, but further say that pursuant to s.84(1)(a) of the Fisheries Management Act a foreign vessel outside the AFZ may be boarded provided that an officer has reasonable grounds to believe that it has been used for fishing in the AFZ.
17. The Respondents admit that no direct order to stop was issued to the Vessel within the AFZ, but otherwise deny paragraphs 20 and 21 of the Amended Statement of Claim. The Respondents further say that the exercise of powers by officers under the Fisheries Management Act was authorised by ss.84(1)(a), (g), (ga), (ia), (k) and (t), 87(1), 106A, 106C and 106F of that Act.
18. The Respondents deny paragraph 22 of the Amended Statement of Claim. The Respondents further say that the physical evidence found on board the Vessel, the admissions made by the Master of the Vessel on 7 February 2002, and the files recovered from the hard drive of the Vessel's computer equipment, show that in the period leading up to its boarding on 7 February 2002, the Vessel had been engaged in extensive long line fishing in the AFZ, contrary to the provisions of the Fisheries Management Act.
19. The Respondents deny paragraph 23 of the Amended Statement of Claim. The Respondents further say that the Catch was seized pursuant to s.84(1)(ga) of the Fisheries Management Act, and was not seized pursuant to s.84(1)(g) of that Act, and accordingly, no notice of seizure of the Catch was required to be served pursuant to s.84(1A) of that Act.
20. The Respondents deny paragraph 24 of the Amended Statement of Claim. The Respondents further say that the Vessel, the Equipment and the Catch were forfeited to the First Respondent pursuant to s.106A of the Fisheries Management Act prior to the boarding of the Vessel on 7 February 2002, and that title to the Vessel, the Equipment and the Catch vested in the First Respondent immediately upon forfeiture.
21. Further, or alternatively, the effect of the Applicant having given notice in writing pursuant to s.106E of the Fisheries Management Act claiming the Vessel, the

Equipment and the Catch is that the Applicant must be taken to have proceeded on the basis that there had been a seizure of the Vessel, the Equipment and the Catch, and as if there had been effective service of the notice of seizure, by utilising the rights given to it under s.106E of that Act.

22. The Respondents deny paragraph 25 of the Amended Statement of Claim. The Respondents further say that the Vessel, the Equipment and the Catch were forfeited to the First Respondent pursuant to s.106A of the Fisheries Management Act prior to the boarding of the Vessel on 7 February 2002, and that title to the Vessel, the Equipment and the Catch vested in the First Respondent immediately upon forfeiture.
23. The Respondents deny that they owed the Applicant any duty of care as alleged in paragraph 26 of the Amended Statement of Claim.
24. The Respondents deny that the Second Respondent breached any duty of care to the Applicant, and further deny that the Applicant has suffered any loss and damage, as alleged in paragraph 27 of the Amended Statement of Claim. The Respondents further say that if, which is denied, it breached any duty of care owed to the Applicant as alleged in paragraphs 26 and 27 of the Amended Statement of Claim, the Applicant has suffered no loss and damage because the Vessel, the Equipment and the Catch were forfeited to the First Respondent pursuant to s.106A of the Fisheries Management Act prior to the Vessel being boarded on 7 February 2002, and title to them had vested in the First Respondent immediately upon forfeiture.
25. The Respondents deny paragraphs 28 and 29 of the Amended Statement of Claim and say that the Catch was sold pursuant to s.84(1)(t) of the Fisheries Management Act. The Respondents further say that if, which is denied, the Catch was not forfeited to the First Respondent pursuant to s.106A of the Fisheries Management Act, the Applicant would be entitled to an order for the proceeds of the sale of the Catch to be paid to it pursuant to s.106G(3)(b) of that Act.
26. The Respondents deny paragraph 30 of the Amended Statement of Claim. The Respondents further say that the Vessel, the Equipment and the Catch were lawfully

seized pursuant to s.84(1)(ga) of the Fisheries Management Act as the Vessel, the Equipment and the Catch were all forfeited to the Commonwealth pursuant to s.106A of that Act. Alternatively, if, which is denied, the Vessel, the Equipment and the Catch were not lawfully seized pursuant to s.84(1)(ga) of the Fisheries Management Act, there was no misfeasance in public office as the Vessel, the Equipment and the Catch were all forfeited to the Commonwealth pursuant to s.106A of that Act, and title to them had vested in the First Respondent immediately upon forfeiture.

27. The Respondents deny that the Applicant is entitled to any of the relief claimed or to any relief at all.

Amended: 7 November 2002

H. BURMESTER

H. BURMESTER QC

P. MACLIVER

P. R. MACLIVER

COUNSEL FOR THE RESPONDENTS

IN THE FEDERAL COURT)
OF AUSTRALIA)
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BETWEEN:

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**THE COMMONWEALTH OF
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First Respondent

**AUSTRALIAN FISHERIES
MANAGEMENT AUTHORITY**


Second Respondent


MINUTE OF CONSENT ORDER

The parties consent to orders in the following terms:

1. The respondent have leave to amend its defence in accordance with the minute of proposed amended defence filed herewith.
2. The minute of proposed amended defence stand as the amended defence, and service thereof be dispensed with.

Date: 7th November 2002


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Solicitors for the Applicant


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