

Australia's Response to Illegal Foreign Fishing: A case of winning the Battle but losing the Law?

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Introduction

Incursions by illegal foreign fishing vessels into Australia's Fishing Zone (AFZ)¹ are of concern to the Federal Government on many fronts. The sustainable management of marine resources and the rights of domestic fishers are compromised. Fishers and their vessels carry considerable quarantine risks.² The need to protect State sovereignty and in doing so, deter further incursions is also a priority. In response to the increasing numbers of such vessels entering the northern AFZ, the Government has injected considerable energy and funds to the monitoring, controlling and surveillance (MCS) of the zone.

The increased funds have been directed to the acquisition of dedicated patrol vessels, the recruitment of additional fisheries and enforcement officers, the conduct of regular patrols (with past emphasis on the Southern Ocean and more recently on northern sectors of the AFZ) and the building of additional detention centres and boat burning facilities. These MCS initiatives have been supported by continued legislative amendments aimed at removing the financial incentives that flow from involvement in the illegal fishing trade. In particular, penalties were increased in 1999 and 2004³ and an automatic forfeiture regime, with respect to the fishing vessel, gear and catch, has been in operation since 1999.⁴

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¹ The term Australian Fishing Zone (AFZ) has been used in this paper in preference to the Exclusive Economic Zone (EEZ) because Australian fisheries management legislation is drafted to create the offence of fishing within the AFZ without a license. See, for example, the *Fisheries Management Act 1991* (Cth) ss99, 100. Australia declared an AFZ in 1979 and an EEZ in 1994. The EEZ was formally proclaimed via an amendment to the *Seas and Submerged Lands Act 1973* (Cth). Section 10A states: '[it] is declared and enacted that the rights and jurisdiction of Australia in its exclusive economic zone are vested in and exercisable by the Crown in the right of the Commonwealth.'

² Commonwealth of Australia Parliamentary Hansard (House of Representatives) 31 May 2006, 69 (per member for Corio). Quarantine risks include diseases such as rabies and the avian flu. See also, Australian Labour Party Transport and Maritime Security Taskforce, 'Maritime Security and Illegal Fishing: A National Disgrace' June 2006, 21. This Report refers to evidence of an increasing number of landings by foreign fishing vessels increasing risks of many diseases including, from the Indonesian fishers: cholera, hepatitis, dengue fever, tuberculosis, polio, malaria and from the animals and pest on board the vessels: foot and mouth disease, rabies, Newcastle disease. The threat of introduced invasive pests such as the black striped mussel was also raised. The economic consequences of the spread of disease and the introduction of pests are considerable.

³ *Fisheries Legislation Amendment Act (No1) 1999* (Cth) and *Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act 2004* (Cth). The maximum fine for a foreign fishing vessel, more than 24 metres in length, is AU\$825,000. In practice, the maximum fine awarded to date was AU\$124,000 to the Master of the *South Tomi*.

⁴*Fisheries Legislation Amendment Act (No1) 1999* introduced new sections 106A-10F. The amendments are discussed below.

Australia's rights to manage the fish stocks within the AFZ⁵ are derived from international law. With these rights come obligations. It is generally agreed that the wording in Article 73 of the United Nations Convention on the Law of the Sea (LOSC)⁶ struck a 'fair balance' between, on the one hand, the rights of the coastal State to take measures, as appropriate, to ensure compliance with the laws and regulations adopted in respect of its EEZ and in conformity with Part V of the LOSC and, on the other hand, the interest of the flag State in securing the prompt release of apprehended vessels and crew.⁷

That balance was struck in 1982. The environment in which the marine fisheries industry is now conducted has changed dramatically.⁸ The transformation of the industry has been the product of overlapping legal, political and economic factors⁹ and it is arguable that the conditions of the 21st century were unforeseeable in the 1970s and 1980s. The single biggest factor affecting the management of marine fisheries in the 21st century is the practice of Illegal, Unreported and Unregulated (IUU) fishing.¹⁰ Illegal fishing is a subset of the IUU phenomenon. This practice has led to a dramatic change in the nature of the fishing industry, its members and their conduct and has prompted suggestions that, 'a new balance has to be struck between vessel owners, operators and fishing companies on the one hand, and coastal States on the other.'¹¹

The argument for an adjustment of the balance within Article 73 of the LOSC does have merit. However, there are many risks associated with revisiting the competing rights of coastal and flag States and that day of reckoning is still some way in the future. This article examines one aspect of the Federal Government's legislative and policy response - the automatic forfeiture regime- in the context of the regime's compliance with international law. First, the way in which the legislative provisions operate, as originally drafted and after the 1999 amendments, is examined. Relevant judicial review of the pre and post 1999 law is also considered. The article then proceeds to a comparative analysis of forfeiture provisions in other States (Canada,

⁵ See discussion next section re AFZ and EEZ.

⁶ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 19 ILM 1261 (entered into force on 16 November 1994).

⁷ See, eg, judgement in *The Monte Confurco Case (Seychelles v France)* ITLOS Case No.6 (18 December 2000) paragraph 70. Judge ad hoc Shearer confirms the existence of this balance in his dissenting opinion in *The Volga Case (Russian Federation v. Australia)* ITLOS No.11 23 December 2002, paragraph 19. Although he expresses the opinion that the balance struck in 1982 should be considered in light of changed circumstances, such as privately owned fishing vessels and greater financial incentives to participate in illegal fishing in regions where detection is difficult.

⁸ For an analysis of the environment of IUU fisheries see R. Baird, 'Corporate Criminals and their Involvement in IUU Fishing: An Australian Perspective' (2005) 1(3) *International Fisheries Law and Policy Review* 170-187. See also, *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* OECD 2004.

⁹ R. Baird, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors relevant to its Development and Persistence' (2004) 5(2) *Melbourne Journal of International Law* 299-334; W.T. Burke, *The New International Law of Fisheries (UNCLOS 1982 and beyond)* (1994); A.O. Elferink and D. Rothwell, *Oceans Management in the 21st Century* (2004).

¹⁰ *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)* adopted by the 25th session of the FAO Committee on Fisheries on 2 March 2001. Section II, 3 contains a working definition of the terms.

¹¹ Judge ad hoc Shearer, Dissenting opinion in *The Volga Case*, above n 6, paragraph 19.

and New Zealand) before evaluating the extent to which the Australian legislation can be said to meet the objective criteria of compliance with the rule of law.

The Australian Fishing Zone and the Extent of Illegal Fishing

The AFZ spans some nine million square kilometres and is the third largest in the world. The Australian Fisheries Management Authority (AFMA) manages over 20 Commonwealth fisheries within the AFZ.¹² Production from these fisheries is worth more than AU\$2.2 billion to the Australian economy each year.

Under international law, rights over fisheries are expressed in terms of the EEZ. Australia declared an Exclusive Economic Zone (EEZ) in 1994.¹³ Notwithstanding that amendment, under the *Fisheries Management Act 1991* (Cth), fisheries within the territorial sea and EEZ remained jointly managed under the AFZ. The AFZ extends seaward to the outer limits of the EEZ but does not include coastal waters of the states or territories.

Coastal waters are a domestic creation under the Offshore Constitutional Settlement 1979.¹⁴ The fact that the AFZ encompasses parts of the territorial sea as well as the EEZ was expressly recognised by Parliament in 2006 when sections 100B and 101AA of the *Fisheries Management Act* were introduced. These two sections create offences of being within the territorial sea and either using a boat for commercial fishing (s 100B) or being in possession of a boat that is equipped for fishing (101AA). Both sections impose a jail term as the penalty and were initially enacted as intentional offences. In 2007 the sections were amended so that they are now strict liability offences.¹⁵

Although provisions for territorial sea offences now exist, the author is not aware of any prosecutions there under to date. The vast majority of arrests occur within that part of the AFZ that is truly the EEZ and as such the rights and obligations under Art 73 apply in full.

¹² Under the Offshore Constitutional Settlement (see n.14 below) the Commonwealth generally manages fisheries from three nautical miles to the outer edge of the 200mile AFZ. See the *Coastal Waters (State Powers) Act 1980* and the *Coastal Waters (State Title) Act 1980*.

¹³ The *Maritime Legislation Amendment Act 1994* (Cth) amended the *Seas and Submerged Lands Act 1973* (Cth) and inserted new sections 10A to 10C.

¹⁴ The Offshore Constitutional Settlement was entered into between the states and the Commonwealth after the unsuccessful challenge by the states to the validity of the Commonwealth *Seas and Submerged Lands Act 1973* under which the Commonwealth declared a 12 mile territorial sea. See, (NSW v. The Commonwealth (1975) 135 CLR 337. Although the High Court upheld the authority of the Commonwealth to exercise jurisdiction over the maritime zones which had traditionally been managed by the states (from the time of the colonies), the Offshore Constitutional Settlement was a practical solution to the day to day management of Australia's vast coastline and littoral areas. Under the Settlement the states and territory have jurisdiction seaward to 3 nautical miles. The Commonwealth governs the waters from 3 to 200 n miles.

¹⁵ *Fisheries Legislation Amendment Act 2007* (Cth), Schedule 2, *Fisheries Management Act 1991* – items 4 and 5.

Although Australia's maritime areas are governed by the state and federal governments through the Offshore Constitutional Settlement,¹⁶ it is predominantly the Commonwealth legislation with which this article is concerned. Commonwealth fisheries are managed under the *Fisheries Management Act 1991* (Cth) and the *Fisheries Administration Act 1991* (Cth). The authority of the Commonwealth Parliament to legislate for the governance of fisheries is contained in section 51(x) of *The Constitution* (Cth).

During the 1990s and early years of the present century, the focus of Australian authorities was on the Southern Ocean AFZ adjacent to the Heard and MacDonal Islands. The target species, the Patagonian Toothfish, became the 'poster fish' of IUU fishing and several high profile arrests were made.¹⁷ Since 2004 there has been a discernible increase in illegal fishing activity in the northern regions of the AFZ.¹⁸ Whilst there is a history of traditional fishing¹⁹ in these waters, each week during 2006 generated reports of new sightings or arrests of commercial foreign fishers in this part of the AFZ.²⁰ Further, there has been a documented increase in anti-boarding behaviour on the part of foreign fishers.²¹

¹⁶ The Offshore Constitutional Settlement 1979 under which the states have sovereignty to the three mile limit and the Commonwealth has authority to legislate over marine areas claimed under international law from 3 to 200 nautical miles. For further information, including a discussion of relevant High Court of Australia case law see, M. White, *Pollution Laws of the Australasian Region* (1994), Section 7.1.

¹⁷ The *South Tomi*, for example, was pursued for 14 days in 2001 before being apprehended south of Cape Town, South Africa, and the *Viarsa* was pursued for 21 days before arrest, although the five crew members charged in the case of *Viarsa* were eventually acquitted of all fisheries offences by a jury. For further commentary on this period see, R. Baird, 'Coastal State Fisheries Management: A Review of Australian Enforcement action in the Heard and McDonald Islands Australian Fishing Zone' (2004) *Deakin Law Review* 11.

¹⁸ It is arguable that this fishing activity has always been present to some degree and the increased detection and apprehension is explained partially by the increased surveillance. The incursions by illegal fishers have been reported from the northern coastline of Western Australian coast eastwards to Torres Strait. Hence, the term 'northern AFZ' has been adopted in this article.

¹⁹ This statement is made in reference to an agreement reached in 1974 between Australia and Indonesia to allow subsistence fishing by Indonesian fishers in a specified area ('the MOU Box') within the Australian EEZ. The area is roughly in the vicinity of the Ashmore Islands, Scott Reef and Browse Reef. Reports suggest the MOU Box is not being used as envisaged and many commercial fishers are flouting the terms of the agreement.

²⁰ There were 607 reported interceptions of foreign fishing boats in northern waters in 2005. This is a dramatic increase from the figure of 289 reported for 2004. I. Macdonald, Australian Minister for Fisheries, Forestry and Conservation, 'Record arrest for northern illegal fishing' 3 January 2006 <www.mffc.gov.au/releases/2006> (30 January 2006). In one two week period in late March/early April 2006, the Australian Government apprehended 23 foreign fishing vessels (with 197 crew in toto). See, E. Abetz, Australian Minister for Fisheries, Forestry and Conservation, B. Nelson, Australian Minister for Defence and C. Ellison, Australian Minister for Justice and Customs, 'Operation Breakwater- protecting our waters while netting 23 suspected illegal fishing vessels' 5 April 2006 <www.mffc.gov.au/releases/2006/06022aj.htm> (7 April 2006).

²¹ See, for example, the sentencing remarks in *The Queen v. Gunawan aha Aba and Congge aka Age* (Northern Territory Supreme Court, Martin A/J 2 December 2005) <www.nt.gov.au/ntsc/doc/sentencing_remarks/2005/12/20051202gunawan_cong> (16 June 2006). The defendant Gunawan was reported to have been involved in a number of anti-boarding activities including lowering steel poles out from the port and starboard sides of the Indonesian fishing vessel, holding a hammer and machete at the stern of the vessel where the RAN boarding party attempted to board the vessel and hurling concrete filled plastic bottles at RAN officers boarding the vessel. See also, Commonwealth of Australia Parliamentary Hansard (House of Representatives) 31 May 2006, 69 (per member for Corio).

The Table below illustrates the increase in apprehensions and legislative forfeitures, under the post 1999 regime, in the northern AFZ in recent years.²²

Year	Vessels Apprehended	Legislative Forfeitures
2000	78	23
2001	80	39
2002	109	35
2003	138	56
2004	161	128
2005	280	327
2006	365	No figure available ²³

Table 1- Foreign Fishing Vessels intercepted in the northern AFZ

Table 1 represents vessels only. Further insight into the severity of the problem posed by illegal fishing can be gleaned from the number of individual fishers apprehended. Over 2,600 individual fishers were apprehended in the 2005-2006 financial year.²⁴ Immigration Department reports suggested that up to 6000 illegal fishers may be caught in the AFZ in the 2006-2007 financial year²⁵. Numbers have proven not to be as high as this estimate and there have been varying suggestions as to why reported

²² Some figures for this Table were extracted from Macdonald, 'Record arrest for northern illegal fishing' above n 16.

²³ Note the practice of legislative forfeiture at sea whereby the vessel's gear and equipment was seized as forfeited and the vessel shepherded out of the Australian EEZ is no longer undertaken by the Australian authorities. Now most if not all vessels are brought back to Darwin (unless unseaworthy or hazardous) and are usually forfeited and/or destroyed.

²⁴ G. McLean, 'One tenth of illegal fishers are minors' *Northern Territory News*, 12 June 2006 <www.new.com.au/story/print/0,10119,19444098,00.html> (23 June 2006). Note that the number of interceptions reported was as high as 607 vessels in 2006 but it is not clear whether 'interception' means sightings, in which case the same vessel may be sighted more than once. Additionally, fleets of illegal fishing vessels can be sighted just on or inside the EEZ and these may be included in the statistics.

²⁵ ABC News Online, '6000 illegal fishers expected in year ahead' 23 May 2006, referring to the 2006-2007 financial year. <www.australiandefencereport.com.au/29-5-06/6000_illegal_fishers_expected_in.htm> (29 June 2006). Numbers have not proven to be as high and there have been varying suggestions as to why reported incursions have been lower during the 2007 calendar year including the simple assertion that the concentrated efforts of Australian authorities to apprehend, seize and destroy the illegal fishing vessels has led to a marked decline in fleet numbers. In reality, given the complexity of the

incursions have been lower during the first half of the 2007 calendar year than in previous years. One theory is that the concentrated efforts of Australian authorities to apprehend, seize and destroy the illegal fishing vessels has led to a marked decline in fleet numbers. The operation of the vessel forfeiture regime as a component of the Australian offensive against illegal fishing has had a significant impact on fleet numbers.²⁶

Australian Fisheries Law applicable to Foreign Fishing Vessels

Before examining the forfeiture provisions as they apply to foreign fishing vessels, it is helpful to consider the continued efforts of the Federal Government to both increase the maximum fines and ‘close the net’ around the fishers and vessel owners. This will assist in understanding the Government’s commitment to eradicating illegal fishing and perhaps explain, though not justify, the way in which the forfeiture provisions operate.

Penalties

The offences created by the *Fisheries Management Act* which are applicable to foreign fishing vessels and crew are contained in Part 6 of the Act. The *Fisheries Management Act* was significantly amended in 1999 when intentional offences were introduced to complement the existing strict liability provisions.²⁷ Consequently, sections 100A, 101A and 101B, were inserted into the principal Act. At the same time, penalties for foreign fishing offences were doubled. In 2006 the *Fisheries Management Act* was amended to provide for the imposition of custodial sentences for offences relating to illegal foreign fishing committed within the confines of the territorial sea.²⁸ It is not necessary to prove that fishers intended to be within the territorial sea, the fact of this element of the offence is now one of strict liability.²⁹

Penalties relating to the intentional offences were increased again with the passage of the *Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act 2004* (Cth).³⁰ The maximum penalty that may be imposed depends upon the offence and whether the defendant is dealt with summarily or on indictment. Strict liability offences carry a maximum of AU\$275,000 if the matter is dealt with on indictment and AU\$27,500 if the matter is dealt with summarily. The offences of intentionally fishing within the AFZ without a licence, being equipped to fish, or using a support vessel from outside the AFZ to support a foreign fishing vessel; can be heard on indictment only and carry maximum fines of up to AU\$875,000, depending on the size of the vessel.³¹

²⁶ In reality, given the complexity of the problem and the many factors driving the illegal activity, the reduction in fleet numbers would be just one consideration.

²⁷ *Fisheries Legislation Amendment Act (No.1) 1999* (Cth).

²⁸ *Fisheries Management Act*, ss 100B and 101AA.

²⁹ *Ibid*, ss 100B(1)(d) and 101AA(1)(d).

³⁰ An indication that the 2004 amendments specifically targeted commercial large scale illegal foreign fishing vessels can be gleaned from the wording of the amendments. Only those vessels exceeding 24 metres in length are liable for the new maximum fine of AU\$875,000.

³¹ If the vessel is more than 24 metres in length the maximum penalty is AU\$875,000. All other vessels attract a maximum penalty of AU\$550,000. Section 101A (intentionally having a boat equipped to fish within the AFZ) carries a maximum penalty of AU\$550,000 regardless of the length of the vessel.

There is no sentencing history of large fines under the foreign fishing vessel offences in the *Fisheries Management Act*. That many matters were in past years dealt with summarily before local Magistrates is relevant. The maximum allowable penalty for summary offences is low (compared to the value of the fish caught illegally), matters are not reported (giving Magistrates no written record of sentences for like offences) and the Magistrates may deal with a fisheries offence after a drink driving charge and before a disorderly conduct matter. Attaching significant gravity to the fisheries offence has been problematic. Australian courts have been conservative in awarding fines to date.³² This is true even of matters before higher courts, which have rarely led to significant penalties. In the past, some fines have even been reduced on appeal.³³ The fact that many fishers and vessels owners viewed fines as a cost of doing business was a factor in the 1999 amendments to the vessel forfeiture regime,

Vessel Forfeiture

Australian courts have consistently recognised that pecuniary penalties alone will not adequately deter IUU fishing or ‘protect Australian fishing grounds from foreign exploitation.’³⁴ The general deterrent factor of a forfeiture regime has been acknowledged by the High Court of Australia which stated:

Forfeiture of goods may be prescribed as the penalty or consequence of offences or acts committed or done by persons other than the owner of the goods. There is a variety of circumstances where the need for a deterrent penalty or the difficulty of enforcing provisions against foreign owners which may make it appropriate to provide for forfeiture although the owner is not the offender.³⁵

The Pre-1999 Vessel Forfeiture Regime

Until 1999 legislative amendments, the forfeiture regime under the *Fisheries Management Act* relied upon conviction under specified sections of the Act. To take effect, the forfeiture had to be ordered by the convicting judge. The wording of the relevant section before the 1999 legislative amendments is reproduced below.

³² The fines awarded to persons convicted of offences under sections 100-100A of the *Fisheries Management Act 1991* (Cth) range from AU\$1000 (with a 5 year, AU\$4000 good behaviour bond) awarded to each of the 32 crew members on board the *Maya V*; to a total of AU\$136,000 awarded to the Master of the *South Tomi*. In April 2005 it was reported that Indonesian fishers caught with more than AU\$10,000 worth of fish were fined just AU\$10 on conviction. See, <www.divester.com/2006/04/12/in-australia-10-000-of-illegal-fishing> (2 May 2006).

³³ The Master of the *Big Star* appealed the fine of AU\$100,000 imposed when convicted on charges under ss100(1) and 100(A) of the *Fisheries Management Act*. His fine was reduced to AU\$24,000. See, *Perez v The Queen* [1999] 21 WAR 477; *Perez v The Queen* [1999] WAR 470, 483-487. Relevant to the Western Australian Supreme Court’s decision was the operation of section 16C(1) of the *Crimes Act 1914* (Cth) which requires that before imposing a fine, the court must take into account the financial circumstances of the offender, per 485.

³⁴ M. White and S. Knight, ‘Illegal Fishing in Australian Waters – The Use of UNCLOS by Australian Courts’ (2005) 11 *Journal of International Maritime Law* 110, 118. See also, *Chiou Yaou Fa v Morris* (1987) FLR 36, 63 (Asche J); *Gayfer v Bere* (1998) 102 A Crim R. 208, 215 (Parker J).

³⁵ *Cheatley v The Queen* (1972) 127 CLR 291, 310.

Fisheries Management Act 1991 (Cth)

Section 106

(before the 1999 amendment)

Upon conviction of a person under sections 95, 99 or 100 the court may order the forfeiture of all or any of the following:

- (a) the vessel, net, trap or equipment used in the commission of the offence;
- (b) fish on board such a vessel at the time of the offence;
- (c) the proceeds of the sale of any such fish.

The requirement for both a conviction and a court order was highlighted in the high profile *Aliza Glacial* litigation.³⁶ The case arose out of the arrest of the *Aliza Glacial* within the Heard and McDonald Islands' Fishing Zone on 17 October 1997. The owner of the vessel defaulted on loan repayments shortly thereafter. The Norwegian mortgagee, Bergensbanken, instituted an action in the Federal Court of Australia under the *Admiralty Act* 1988 to recover the vessel. At the time of hearing, evidence suggested that the two crew members, who had left Australian jurisdiction whilst on bail, seemed unlikely to return to answer the charges against them. Justice Ryan accepted this evidence and found that it was even more unlikely that the crew members would return to plead guilty to facilitate an early conviction (thus enabling a court order for forfeiture).³⁷ Accordingly, the judge was not inclined to further delay his order of 20 March 1998 for the sale of the vessel to satisfy the debt secured by the mortgagee.³⁸ Consequently, the Commonwealth lost the potential to forfeit the vessel on conviction for illegal fishing.

The Path to the 1999 amendments

Whilst the result of the above case was an unwelcome one for the Commonwealth, the requirement for conviction under the *Fisheries Management Act* prior to forfeiture becoming effective provided certainty for owners of foreign fishing vessels outside the coastal State jurisdiction and/or their mortgagees. With the advent of IUU fishing on a global scale, one characteristic of which is the beneficial owners purposely staying well outside coastal State jurisdiction, many would argue that the owners do not deserve such protection. Notwithstanding this common feature in IUU fishing vessel ownership, there are compelling reasons for a forfeiture regime which requires

³⁶ *Bergensbanken ASA v The Ship Aliza Glacial* Federal Court of Australia (unreported order and reasons for judgement of Ryan J) [1998]. The loss of the *Aliza Glacial* to the Norwegian mortgagee was the subject of discussion in Parliament (Senate Hansard, 8 July 1998, 5229), the catalyst for the 1999 legislative amendments and was also raised in the *Australian National Plan of Action to prevent, deter and eliminate IUU Fishing*, July 2005, 12.

³⁷ *Bergensbanken ASA v The Ship Aliza Glacial* Federal Court of Australia (unreported order and reasons for judgement of Ryan J) [1998].

³⁸ *Ibid.*

conviction before the forfeiture can take legal effect. These include principles of equity, due process and above all compliance with the rule of law.

In 1999 the forfeiture provision in the *Fisheries Management Act* was substantially amended. As it now reads, forfeiture becomes operative upon the allegation of illegal fishing by a fisheries officer. The requirement for judicial determination and conviction has been removed. It is the impact of this stark difference between the pre- and post- 1999 regimes with which this paper is concerned.

The Current Forfeiture Regime

Section 106A of the *Fisheries Management Act* provides that any fishing vessel used in an offence under sections 95(2), 99, 100, 100A, 101 or 101A, is forfeited to the Commonwealth.³⁹ A vessel used in an offence pursuant to section 101B (which addresses support vessels) is also forfeited.⁴⁰ Nets, traps, equipment and the catch on board a vessel at the time of the offence are forfeited.

Forfeited items are first seized. Fisheries officers are authorised, under section 84(1)(ga), to seize items forfeited under section 106A. This includes a boat, net, trap or other equipment and fish. The *Fisheries Management Act* was amended in June 2007 to widen the scope of items that fisheries officers can seize as forfeited.⁴¹ Under the new section 84(1)(gb) a fisheries officer can seize additional items (such as nets, equipment or nets and fish) which are on a boat that has been forfeited under section 106A but was not seized immediately consequent upon the section 106A forfeiture. At the time the boat is later seized under section 84(1)(ga), (providing it is within two years of the section 106A forfeiture) these additional items are forfeited. Similar provisions apply in relation to fish caught by a boat after it is deemed to have been forfeited under section 106A and anything on, in or attached to the boat subsequent to a 106A forfeiture but before the actual seizure. These 2007 amendments are premised upon the passing of title to the Commonwealth under section 106A upon the alleged commission of the offence. Anything on the vessel after the section 106A legislative forfeiture can be seized as forfeited without having to determine when that thing or fish was placed on the boat. This 2007 amendment is an extraordinary infringement of the rights of the owner of the fish or equipment and provides further illustration of the deficiencies in the legislation.

It is significant that under sub-sections 84(1)(ga) and (gb), an officer may seize a vessel forfeited under section 106A without any mechanism for an assessment of the evidence which supports the fact of the 'use'. The only safeguard for owners is the procedural mechanism for contesting the forfeiture. First, a notice of the seizure is required. Under section 106C of the *Fisheries Management Act*, written notice of the seizure of items must be given to the Master of the vessel, or to the person whom the officer has reasonable grounds to believe was the Master of the vessel immediately before seizure. In circumstances where the officer cannot conveniently give notice to the Master, the requirement to provide written notice can be satisfied by fixing the

³⁹ *Fisheries Management Act*, s95 creates the general offence of engaging in commercial fishing within the Australian fishing zone without authorisation and s99 creates the offence of using a foreign vessel for recreational fishing.

⁴⁰ *Fisheries Management Act*, s106A(b).

⁴¹ *Fisheries Legislation Amendment Act 2007* (Cth).

notice to a prominent part of the thing seized. Somewhat amusingly, the legislation states the notice cannot be fixed to a thing seized, if that thing is a fish.

The onus then shifts to the owner of the vessel (or other seized items) to contest the forfeiture. Unless the owner (or person in possession or control of the vessel, gear or catch before seizure) provides written notice of a claim against the forfeiture, within 30 days of receipt of a section 106C notice, the thing is ‘condemned as forfeited’.⁴² The making of a claim by the vessel’s owner does not actually amount to proceedings to recover the vessel or other things. On receipt of a claim, the Managing Director of AFMA may give ‘a claimant written notice stating that the thing will be condemned if the claimant does not institute proceedings against the Commonwealth within 2 months.’⁴³ The condemnation amounts to a final pronouncement of forfeiture.

Olbers Co. Ltd. Challenge to the Forfeiture Provisions

The validity of the automatic forfeiture regime has been unsuccessfully challenged by Olbers Co. Ltd. (‘Olbers’), the owner of the *Volga*, a Russian flagged vessel arrested outside the Heard and McDonald Islands’ fishing zone, in February 2002. The *Volga* was apprehended on 7 February 2002 and was something of a bonus to authorities who were pursuing the *Lena*.⁴⁴ Olbers commenced proceedings in the Federal Court of Australia on 21 May 2002, challenging the validity of the forfeiture provisions under sections 106A-106H of the *Fisheries Management Act*.⁴⁵

The main thrust of the applicant’s argument was that a conviction was required for one or more of the offences upon which such forfeiture was said to be based. This argument is similar to the reasoning of Justice Ryan in the *Aliza Glacial* litigation. However, in the former case the legislation supported such an argument whereas the post 1999 legislation does not require either a conviction in relation to a fisheries offence, nor a court order, to make the forfeiture effective.

At first instance, Justice French, in a decision which has been upheld by the Full Federal Court,⁴⁶ dismissed the application. French J held that on a proper interpretation of section 106A, title of the foreign fishing vessel transfers to the Commonwealth at the time it is used for a relevant fisheries offence.⁴⁷ A so called ‘automatic forfeiture’ regime. French J stated that section 106A:

[C]reates a real risk for any fishing vessel whose boat enters the AFZ. The risk to the owner is that, even if not apprehended at the time of any illegal fishing...or presence... in the AFZ, the boat will leave the AFZ, with an insecure title. While apprehension may not be immediate, the Commonwealth

⁴² *Fisheries Management Act*, s106E.

⁴³ *Fisheries Management Act*, s106F.

⁴⁴ The *Lena* was arrested on 6 February 2002 after previously evading arrest in December 2001.

⁴⁵ This is the finding of French J in *Olbers Co Ltd v The Commonwealth of Australia* (No 4) 205 ALR 432 and the Full Federal Court in *Olbers Co Ltd v The Commonwealth of Australia* [2004] FCAFC 262 (unreported J of Black CJ, Emmett and Selway JJ).

⁴⁶ *Olbers* [2004] FCAFC, *Ibid*. A Special Leave application to the High Court was refused. *Olbers Co Ltd. v Commonwealth of Australia* [2005] HCA Transcript 228 (HCA Hayne and Callinan JJ, 22 April 2005).

⁴⁷ *Olbers* (No 4) above n 41, 432, 456.

may be in a position to assert that, under Australian law, it has become the legal owner of the boat. Escape to the high seas will not shed that status under Australian law or in any jurisdiction in which Australian title will be recognised.⁴⁸

French J also referred to the opportunity for owners to contest the forfeiture under section 106F of the *Fisheries Management Act*, and concluded:

Absent the institution of such proceedings within thirty days of a notice of seizure under s 106C the asserted forfeiture will be put beyond question by operation of s 106E. That process requires no conviction to have been recorded. I reject the contention that s 106A depends for its application upon a conviction for one or more of the offences mentioned in it.⁴⁹

In essence, Justice French found that although the question of whether property has been forfeited under section 106A remains contestable ‘until the exhaustion or non-invocation of mechanisms for contesting it’, this does not delay the transfer of title.⁵⁰ The force of Justice French’s judgment is that the vessel is forfeited upon commission of the offence and the act of seizure under section 84(1)(ga) and subsequent provision of written notice of seizure under section 106A, simply sets in train the process where by the thing becomes condemned. Whilst the owner may contest the forfeiture, title has already passed when the vessel is used for the offence. This potential conflict between the domestic automatic forfeiture regime and the right under the LOSC of the vessel owner to seek prompt release of the vessel is reviewed below.

Olbers appealed the decision of Justice French. In September 2004 the Full Federal Court upheld the decision at first instance⁵¹ when they confirmed that the vessel was forfeited to the Commonwealth upon commission of the offence. Officers boarding the vessel were therefore acting as agents of the Commonwealth, the new owners of the vessel.⁵² Application by Olbers for special leave to appeal to the High Court of Australia was refused in April 2005.⁵³

The win at first instance before French J was heralded as a victory for the Federal Government, in that the intended effect of the legislation was confirmed. Shortly after Justice French dismissed the application by Olbers, the then Minister for Fisheries stated:

...in the epic legal process that Olbers have pursued, the Government has shown its determination to uphold Australian law to defeat pirate operations in our territorial waters around Heard Island and McDonald Islands ... This is now the third legal case that the owners of the *Volga*

⁴⁸ *Ibid*, 453.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*. French J stated, ‘the characterisation of a thing as ‘condemned as forfeited to the Commonwealth’ under section 106E does not involved the final transfer of title in something which was forfeited by operation of section 106A.’

⁵¹ *Olbers* [2004] FCAFC, above n 41.

⁵² *Ibid*, paragraph 22.

⁵³ *Olbers* (2005), Special Leave Application, above n 42.

have brought against the Commonwealth ... On each occasion the courts have decided that the Australian Authorities have acted correctly. Yesterdays' landmark ... decision ... supports the Government's view that if a foreign vessel is sighted illegally fishing in Australian waters then that vessel, its equipment and catch is automatically forfeited to the Commonwealth and becomes the property of the Commonwealth.⁵⁴

The Minister continued to state he would seek:

Further legal advice on whether a number of other foreign fishing vessels sighted in the AFZ over recent years, but not apprehended, might be able to be seized anywhere on the globe on the basis that they are now actually Australian property having been automatically forfeited to Australia on the actual date of fishing in the AFZ.⁵⁵

This last statement was perhaps as much about sending a message to would be illegal fishers to be on notice as it was about an intention by Australia to enforce rights created under domestic law outside Australia. However, the decision and operation of the forfeiture provisions raise important questions. The international law issues relevant to the operation of the automatic forfeiture regime are examined below.

Article 73, LOSC

Whilst coastal States may 'in the exercise of sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ, take such measures, including boarding, inspection, arrest and judicial proceedings'⁵⁶ they may not do so without observing applicable rules of international law. As a party to the *LOSC*, Australia is bound to act in accordance with its provisions and to perform obligations in good faith.⁵⁷ Notwithstanding any frustrations with the perceived inability of international law, and particularly Article 73 of the *LOSC*, to keep pace with the fluid nature of international marine fisheries, the Commonwealth Government is obligated to ensure Australia fulfils its international obligations whilst also enjoying its international rights.

The applicable international law, in terms of coastal State rights and obligations, is found in Article 73 of the *LOSC* which is reproduced in full below.

⁵⁴ I.Macdonald, Minister for Fisheries, Forestry and Conservation, 'New Chapter in maritime law- Attempt to claim back the *Volga* rejected' 13 March 2004, <www.mffc.gov.au/releases/2004> (15 March 2004).

⁵⁵ *Ibid.*

⁵⁶ *LOSC*, Article 73(1).

⁵⁷ *Vienna Convention on the Law of Treaties*, Article 26, opened for signature 23 May 1969 (entered into force 27 January 1980).

Article 73, LOSC 1982

Enforcement of laws and regulations of the coastal State

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.
4. In cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.

Determination of 'use' in section 106A

A system under which ownership of a vessel can vest in a coastal State upon the deemed commission of a fisheries offence is open to abuse. The decision of Justice French does not elaborate on how the 'use' of the vessel in the commission of the offence is determined. Possibly, this is because the legislation provides no guidance on the matter. Section 106A states that any fishing vessel used in an offence (as listed) is forfeited to the Commonwealth, yet, it is silent as to how that 'use' is determined. This is a significant weakness of the legislation. In this paper, it is argued that determination of 'use' is a question of fact that can only be answered by the courts after hearing all admissible evidence.

Discretion v Judicial Decision

The *Fisheries Management Act* leaves a significant discretionary power in the hands of the fisheries officers onboard patrol vessels to determine that the fishing vessel has been used in an offence. For example, a foreign fishing vessel located within the AFZ and possessed of fishing equipment that is not stowed or secured is 'equipped for fishing' as specified within the meaning of section 101(2) of the *Fisheries Management Act*. Under section 106A such a vessel becomes an Australian vessel at the time it enters the AFZ by virtue of the fact that it has been 'used' in an offence under section 101(2). The legislation as drafted creates an environment where the word of a fisheries officer alleging that section 101(2) has been breached, operates to

set in train the forfeiture and subsequent seizure (if the vessel is arrested). It is submitted that this improperly removes the important question of fact to be tried from the judicial process.

Of even greater concern is the fact that section 106A also operates to forfeit vessels used in the commission of intentional offences. To establish that a vessel has been used in an intentional offence requires proof of the element of intention. Evidence of this element of proof is a matter for the judicial process in a decision on the merits.

Transfer of Title without a Decision on the Merits

In defence of the forfeiture provisions it has been argued that the section 106A forfeiture is not determinative until the seized item has been condemned as forfeited. However, as noted above, the onus is placed on the owner to first lodge a claim and then institute proceedings challenging the forfeiture. It is understood the owners of the *Viarsa* instituted an action to recover the vessel after the jury acquittal of the crew in 2005, however that this has been withdrawn.⁵⁸

The determination of whether the elements of an offence have been made out is a function of the judicial system, not the executive, and, for good reason. Whilst there is a mechanism for contesting the forfeiture, title to the vessel passes without a judgment on the merits. It is the deemed passing of title without due process that causes concern. Further, the owner's rights have been infringed by the very fact that the owner has to defend its title to the seized vessel and other items least they are condemned as forfeited.

Whilst in practice,⁵⁹ Australia has complied with international obligations under the *LOSC* by posting bonds and notifying the flag State, the increasingly aggressive stance being adopted in relation to illegal fishers could provide a catalyst for systemic abuse. For example, a group of foreign fishing vessels may be sighted within the AFZ and given the high likelihood of their involvement in illegal fishing, an order for seizure may be given in relation to all five under section 84(1)(ga) without an investigation of the circumstances of each individual vessel. Admittedly, this paints a worst case scenario, but testing the adequacy of legislative provisions and susceptibility to abuse is a valid and important function of scholars. It is noted this scenario presupposes that all five vessels can be apprehended and brought to port.

The Effect of Forfeiture on the right to Prompt Release

An important legal issue raised by the Federal Court's confirmation of the forfeiture provisions relates to the duty under Article 73(2) of the *LOSC*, to 'promptly release arrested vessels and crew upon the posting of a reasonable bond or security.' The International Tribunal for the Law of the Sea (ITLOS) stated in the *Monte Confurco* case that:

⁵⁸ Further to discussions with the Commonwealth Department of Public Prosecutions and Government agencies.

⁵⁹ This is certainly the case with respect to the eight vessels arrested in southern waters (the *Taruman* in waters adjacent to Macquarie Island). The notification of the flag State in the case of hundreds of fishing vessels arrested in northern waters is presumed to take place.

Article 73 establishes a balance between the interests of the coastal State in taking appropriate measures as may be necessary to ensure compliance with laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crew upon the posting of a bond or other security on the other.⁶⁰

In its most recent decision involving the arrest of the Japanese flagged 53rd *Tomimaru*, the Tribunal confirmed its statement in *Monte Confurco* and added that:

It is the view of the Tribunal that confiscation of a fishing vessel must not be used in such a manner as to upset the balance of the interests of the flag State and of the coastal State established in the Convention.⁶¹

The case involved the arrest of the *Tomimaru* after an inspection revealed the vessel held unaccounted for fish. The vessel was confiscated under Russian law and requests by Japan that a bond be set were refused on the basis that the vessel had been confiscated under Russian law. In this instance there had been a decision by the relevant lower Court which had been upheld on appeal by the District court and Supreme Court of the Russian Federation. The flag State filed an application under Article 292 of the *LOSC* seeking the release of the vessel.⁶² On the facts of *Tomimaru*, there had been a judicial decision on the merits. The Tribunal found that:

A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object.⁶³

However the Tribunal also noted in passing that this decision should not:

[b]e taken in such a way as to prevent the ship-owner from having recourse to available domestic remedies, or as to prevent the flag State from resorting to the prompt release procedure set forth in the Convention, nor should it be taken through proceedings inconsistent with international standards of due process of law. In particular, confiscation decided in unjustified haste would jeopardise the operation of article 292 of the Convention⁶⁴

This approach in balancing States' rights has been consistently applied by the Tribunal. In the *Juno Trader* Case considered that the obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of

⁶⁰ *Seychelles v France*, above n.7, paragraph 70.

⁶¹ *Japan v Russian Federation* Case No 15, ITLOS 6 August 2007, paragraph 75.

⁶² The facts of the case in terms of a timeline of judicial proceedings against the Master and the petition of the owner for the release of the vessel have been quite effectively laid out in the Separate Opinion of Judge Lucky. *Ibid*, paragraphs 1-8.

⁶³ *Ibid*, paragraph 76.

⁶⁴ *Ibid*. It is noted here that in the separate opinion of Judge Jesus he disagreed that the Tribunal had the authority to question the timing of the confiscation of a fishing vessel. He did however link the imposition of a penalty such as confiscation, to the merits of the case implying that there should be a decision by a competent court. This would support the author's argument that the automatic forfeiture without judicial consideration is not a decision which can render the detention at an end such that the right to prompt release is extinguished. Separate Opinion of Judge Jesus, paragraph 9(c) and (d).

law.⁶⁵ One commentator on the Tribunal's approach to prompt release cases has observed that:

Certainly, to insist upon the prompt release of vessels and crews under any domestic circumstances may nullify the rights of the coastal State to 'take such measures as may be necessary to ensure compliance' with its laws. ...[but] to allow the coastal State to claim that any domestic decision on the merits terminates its duty of prompt release by putting an end to 'detention' would disturb the balance established in the Convention.⁶⁶

The Australian legislation must be examined in light of this jurisprudence. The Full Federal Court has deemed there is a transfer of ownership under the *Fisheries Management Act*, at the *time* the vessel is used for an offence. However the Tribunal has consistently held that the right of prompt release under Article 73(2) must continue to exist until there has been a judgement on the merits by a domestic court.⁶⁷ In other words, until there has been a decision, the vessel remains in detention for the purposes of Article 73 and the procedure for prompt release remains available. Furthermore, legislation, which purports to transfer ownership of a fishing vessel without any determination of the merits of the case, must by its very nature upset the balance of interests between the coastal State and flag State.

The analysis of the forfeiture regime under the *Fisheries Management Act* indicates that it operates in the absence of a judgement of any kind, whether procedural or on the merits. It has been observed by Bantz that 'only such decisions as are final under the domestic legal order would qualify as decisions on the merits for the purposes of article 292, and would be the only ones capable of putting an end to detention and, thereby extinguish the duty of prompt release.'⁶⁸ Under the Australian legislative regime, there has been no judgement, let alone one that can be examined to determine its finality. Moreover, the vessel can be condemned as forfeited without resort to judicial proceedings.⁶⁹ In no way can the operation of the forfeiture provisions be viewed as a judgement on the merits.

Nor would it be a defence to an application under Article 292 by the flag State to argue that a decision on the release of a vessel would prejudice the merits of any case before the domestic courts. This is because the automatic forfeiture regime operates in isolation to any judicial process. Even if crew members were before the domestic courts, their conviction is not required for the forfeiture to be put into effect.

⁶⁵ *Saint Vincent and the Grenadines v Guinea Bissau Case No 13*, ITLOS, 23 November 2005, paragraph 77.

⁶⁶ V. Bantz, 'Views from Hamburg: The Juno Trader Case or How to make sense of the Coastal State's rights in light of its duty of prompt release' (2005) 24(2) *The University of Queensland Law Journal* 415, 432.

⁶⁷ *Saint Vincent and the Grenadines v Guinea Bissau*, above n 65 and *Japan v Russian Federation* above n.61. The nexus between the finality of a judgement on the merits and the duty of (and right to) prompt release is thoroughly examined in Bantz, *ibid*, 415, 433. See also V.Bantz, 'The Grand Prince Case' (2002) 96 *American Journal of International Law* 219, 233.

⁶⁸ Bantz, 'Views from Hamburg' above n 66, 424.

⁶⁹ With respect to the condemnation process, it is argued that the right of an owner to apply for prompt release cannot be extinguished by failure to lodge a claim within 30 days against the forfeiture notice. Such a conclusion would arguably amount to the acquisition of property without due process.

Accordingly there is not case, let alone one with any merits that would be prejudiced by any application for prompt release.

The Effect of Forfeiture on the Rights of the Flag State

Whenever coastal State fisheries officers exercise the right of boarding and arrest under Article 73(1), there is a duty to promptly notify the flag State through appropriate channels.⁷⁰ If the force of the Full Federal Court decision is applied, the foreign fishing vessel is forfeited to Australia at the time of the commission of the offence, such that ownership passes. To quote the Court, ‘officers boarding the vessel were acting as agents of the Commonwealth, the new owners of the vessel.’⁷¹ However, whilst ownership has passed, can the nationality of the vessel be affected?

One consequence of the forfeiture regime is that a wide net is cast throughout the entire AFZ. Given that over 607 vessels were intercepted in the northern AFZ in 2005, one wonders how many hundreds more were undetected.⁷² In an extreme application of the legislation, Australia is now potentially the owner of several hundred fishing vessels which have been ‘used’ on a fisheries offence.⁷³ This creates many practical problems. A significant issue is that of flag status given that ownership of a vessel and its nationality (or flag status) are not necessarily linked.

The nationality of vessels is governed by Article 91 of the LOSC which states:

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

In the *Juno Trader Case*, the respondent, Guinea-Bissau, argued that its decision to confiscate the vessel⁷⁴ meant that Saint Vincent and the Grenadines was no longer the flag State. On this basis Guinea-Bissau challenged the admissibility of the application for prompt release by Saint Vincent, as such an application is only able to be brought by, or on behalf of, the flag State of the vessel.⁷⁵ Whilst the Tribunal did not address the issue directly, it did observe that the change in ownership needed to be a definitive change.⁷⁶ Arguably a deemed automatic forfeiture and transfer of title is not a

⁷⁰ LOSC, Article 73(4).

⁷¹ *Olbers Co. Ltd v Commonwealth of Australia* [2004] FCAFC, above n 41, paragraph 22.

⁷² One report suggests 8000 vessels were sighted in 2005. V. Mills, ABC Kimberley WA, ‘Poached fish: keep foreign fishing vessels out’ 25 February 2006. See also, Commonwealth of Australia Parliamentary Hansard, (House of Representatives) 31 May 2006, 71 (per member for Chisholm who cites figures of 8000 for 2004 and 13000 for 2005). <www.abc.net.au/kimberley/stories/s1578007.htm> (17 June 2006).

⁷³ Though they have not been condemned as forfeited for no notice under Federal Court of Australia (unreported order and reasons for judgement of Ryan J) [1998] s106C would have been given.

⁷⁴ For a summary of the facts surrounding the domestic decision see Bantz, ‘Views from Hamburg’ above n 66, 417-418.

⁷⁵ LOSC, Article 292(2).

⁷⁶ *Saint Vincent and the Grenadines v Guinea Bissau*, above n.65, paragraph 63.

definitive change. Whether a compulsory acquisition of title at sea on the basis of the alleged commission of a fisheries offence would be judged a case of ‘real transfer of ownership’ is doubtful.⁷⁷

Even if the change of ownership was recognised, it cannot equate to a change in flag. This view is consistent with determination by ITLOS in the *Tomimaru* Case on the question of whether ‘confiscation results in an automatic change of the flag or its loss.’⁷⁸ The Tribunal held that:

Confiscation changes the ownership of the vessel but ownership and the nationality of a vessel are different issues.⁷⁹

It is for each State to determine the conditions of the grant of nationality to a vessel.⁸⁰ The owner of a vessel may seek registration of a vessel with a chosen State, but it is also the owner (new or otherwise) who must seek a change of registration. A change in ownership will not of itself effect a change in registration and flag status.⁸¹ Hence the situation may arise where a vessel is deemed to be Australian property yet is sailing under the flag of another State or perhaps worse- a flag of convenience. The rights of the flag State remain, including the right to bring an action for the prompt release of the vessel and the crew.

That being said, the reality of a transfer of ownership in a foreign fishing vessel to the Commonwealth of Australia, is that there will be a de-registration of the flag. Most forfeited vessels are intended for destruction. Many now form diving wrecks.⁸² The burning of the hundreds of Indonesian fishing vessels is starting to raise environmental concerns about the levels of air pollution.⁸³ In the unlikely event the vessel is not destroyed, it is even more unlikely Australian authorities would wish to have an Australian vessel registered with a foreign State, whether a flag of convenience State or not.

The Effect of Forfeiture and the Rights of Third Parties

A further difficulty with the legislation as drafted and interpreted by the Federal Court is that it does not account for innocent parties with a proprietary interest in the forfeited goods (i.e. a mortgagee). As discussed above, the rights of the mortgagee of the *Aliza Glacial* were protected under the pre - 1999 legislation.

Whilst it is accepted that there is a high degree of corporate criminal involvement behind IUU fishing and arguable that this has infiltrated the Indonesian fishing

⁷⁷ Notwithstanding the fact that the change of ownership is recognised by the domestic courts. See *Olbers Co. Ltd v Commonwealth of Australia* [2004] FCAFC, above n 41 and *R v. Amoedo and Dominguez* [2006] NSWDC (unreported decision of Justice Norrish, 21 August 2006 and 25 August 2006). This latter case is discussed further below.

⁷⁸ *Japan v Russian Federation*, above n.61, paragraph 70.

⁷⁹ *Ibid.*

⁸⁰ Article 91, LOSC.

⁸¹ This point is also discussed and confirmed by Bantz, ‘Views from Hamburg’ above n 66, 425-426.

⁸² For example, the *South Tomi* was sunk off the Western Australian coastline near Geraldton in late 2004 and is used as an underwater diving attraction. The *Lena* was sunk off Bunbury in 2003. See, AFMA Newsletter, ‘Fishing Future’ Vol. 2, Issue 4, December 2004, 16.

⁸³ See, I. Gerard, ‘Burning boats ‘risk to the environment’’ *The Australian* (28 June 2006) 5.

industry (in that the fishers being apprehended are increasingly aggressive and targeting specific species such as shark) this is not a valid basis for arbitrarily acquiring property belonging to those unconnected with the crime. The principle behind forfeiture is that the property is accountable for the crime irrespective of the actual owner's complicity in the crime.⁸⁴ The fact that innocent owners of fishing vessels might be deprived of their property was condoned by the High Court in *Cheatley's Case* in the following terms:

Forfeiture of goods may be prescribed as the penalty or consequence of offences or acts committed or done by persons other than the owner of the goods. There is a variety of circumstances such as the nature of the goods, the need for a deterrent penalty or the difficulty of enforcing provisions against foreign owners which may make it appropriate to provide for forfeiture although the owner is not the offender.⁸⁵

The High Court further stated that:

The difficulty of enforcing compliance along the length of the Australian coastline called for a stern deterrent if observance of the provisions was to take place.⁸⁶

That said there still needs to be some protection accorded to innocent parties. In *Cheatley's Case* section 13AA of the *Fisheries Act 1952-70* (Cth) listed offences for foreign fishing boats, with the final paragraph stating:

3. A person who contravenes sub-section (1.) of this section is guilty of an offence punishable -
 - (a) upon summary conviction - by a fine of not more than One thousand dollars or imprisonment for a period of not more than six months, or both ; or
 - (b) upon conviction on indictment - by a fine of not less than One thousand dollars and not more than Ten thousand dollars or imprisonment for a period of not more than twelve months, or both,and, if the court so orders, by the forfeiture of any boat used in the commission of the offence and its equipment and contents (other than the personal effects of members of the crew) and any fish found on the boat or the proceeds of the sale of any such fish.

Thus, the forfeiture required an order to take effect. This is the main difficulty with the current section 106A of the *Fisheries Management Act*. By circumventing the procedure and the need for a conviction, before the forfeiture can take place, the rights of innocent parties have been infringed. The Federal Court in *Olbers Case* suggested that the owners of forfeited goods have the right to contest the forfeiture under section 106F. Contesting amounts to actually filing proceedings under section 106C. Furthermore, proceedings must be commenced within two months whilst the initial notice of claim against the forfeiture must be provided to the government within 30

⁸⁴ Based upon the law of deodands which involved the confiscation of the object causing a person's death. See also, *R. v. The Mayor of Dover* (1835) 1 C, M & R 726, 736 which states forfeiture has historically been regarded as a penalty or fine for an offence.

⁸⁵ *Cheatley v The Queen* (1972) 127 CLR 291, 310.

⁸⁶ *Ibid*, 311.

days of receipt of the notice of forfeiture. Not only is the owner arbitrarily deprived of his/her property rights, any challenge to the seizure needs to be made within the specified time frame.

Application of the Olbers Ltd Decision

In August 2006 a single judge of the New South Wales District Court applied and followed⁸⁷ the decision in *Olbers' Case*. Justice Norris had before him two crew members of the *Taruman*, a Cambodian flagged fishing vessel which was boarded by Australian authorities on the high seas. Although there was evidence of a consented boarding,⁸⁸ the Crown case relied upon the authority in *Olbers* arguing that 'the authority to repossess the boat as property forfeited to the Commonwealth existed whereby the boarding ... was the act of the Commonwealth in recovering its own property which had been forfeited...' under section 106A. Judge Norrish accepted this submission and found that 'section 106A as construed in *Olbers*...made the *Taruman*, at law, the property of the Commonwealth...and thus Commonwealth officers were entitled to board...seize that property and its equipment.'

The significance of this finding is that the Judge was prepared to overlook the fact that the boarding was not in accordance with section 184A(8) of the *Customs Act 1901*.⁸⁹ That is the agreement with the flag State did not authorise the inspection, crew detention and enforcement action on the high seas. However this infringement of the flag State's authority was remedied by the finding that the *Taruman* was as a matter of fact and law, the property of the Commonwealth.⁹⁰ In reaching this decision the Judge did note that the full impact of the common law rights of self help of the Commonwealth (to recover its property) on the rights of the owners under Australian law was 'a grey area that had not been full debated before him.'⁹¹

The decision does not address the impact of breaches of international law, namely flag State authority on the high seas. Quite apart from the issues discussed above, namely, prompt release, the duty to notify the flag State and the change of ownership; the decision purports to rely upon domestic law to validate a breach of international law. The decision illustrates the deficiencies in the legislation and the clear disconnect between Australian domestic law and the international law of the sea.

State Practice

Whilst there is widespread State practice in relation to the forfeiture of fishing vessels, gear and catch, there is no State practice supporting the automatic forfeiture regime

⁸⁷ *R v. Amoedo and Dominguez* [2006] NSWDC (unreported decision of Justice Norrish, 21 August 2006 in relation to an application for a permanent stay of proceedings).

⁸⁸ *Ibid.* The flag State reached an agreement with Australia on boarding however the Judge found that the master did not voluntarily consent to boarding or search/inspection.

⁸⁹ This section provides for a request to board foreign ships on the high seas when there is an agreement in place with the flag State.

⁹⁰ *R v. Amoedo and Dominguez* [2006] NSWDC, above n.87. See also the judgement on the merits, unreported decision of Justice Norrish, 25 August 2006.

⁹¹ *R v. Amoedo and Dominguez* [2006] NSWDC, unreported decision of Justice Norrish, 25 August 2006.

operating under the Australian *Fisheries Management Act*. An FAO survey of State legislation details the regulatory and enforcement legislation of many coastal States.⁹² A review of a sample of seven of the participating coastal States reveals that for all States, the forfeiture of vessel, gear and/or catch requires a court order to become effective.⁹³ The legislative framework in Canada and New Zealand, two States which have taken a strong stance against illegal fishing, is reviewed below.

Canada

Canadian legislation provides for the seizure of items on arrest.⁹⁴ In comparison to the Australian legislation however, it does provide a number of important safeguards for the fishers. Under section 71(3) of the Canadian *Fisheries Act* if proceedings are not instituted in relation to any fish or other things seized, that fish or other thing shall be returned to the person from whom it was seized. The obligation to return seized items arises either on the Minister's decision not to implement proceedings or on the expiration of ninety days after the day of seizure. Hence, there is no onus upon the owner to institute proceedings for the recovery of the item.

Section 72(2) of the *Fisheries Act* (CA) provides for forfeiture on or after conviction. The section states that the court may 'in addition to any punishment imposed, order that anything seized under this Act by means of or in relation to which the offence committed, or any proceeds realized from its disposition, be forfeited to Her Majesty.' Thus, unlike the Australian model, Canadian legislation does create an automatic forfeiture. Rather, forfeiture is a possible (though not necessary) outcome of an actual conviction for a fishery offence as determined by a judicial decision on the merits.

Furthermore, the Canadian legislation provides specific safeguards for persons (other than those convicted of the offence) who may hold an interest in forfeited items. Under section 75 of the Act: "any person who claims an interest in the thing as owner, mortgagee, lienholder or holder of any like interest, other than a person convicted of the offence that resulted in the forfeiture or a person from whom the thing was seized, may, within thirty days after the forfeiture, apply in writing to a judge' for a determination of whether his/her interest is affected by the forfeiture and a declaration regarding "the nature and extent of his interest." This proviso usefully prevents the confusion between the rights of illegal fishers and owners (or interest holders) of vessels which have arisen in Australia in absence of a provision by which interest holders may challenge forfeiture.

New Zealand

⁹² FAO Legislative Study 21 (1996) <www.faolex.fao.org> (16 May 2006).

⁹³ Those States are: Kenya, Jamaica, Indonesia, Congo, Chile, Belize, Argentina and are representative of the other States in the FAO Study. This study has been referred to by ITLOS judges in the context of the act of confiscation in itself being common amongst States. See, Oxman and Bantz, 'The Grand Prince' above n 66, 233 per Judge Anderson in *The Grand Prince Case* (Belize v France) Case No 8 ITLOS, 20 April 2001, 4.

⁹⁴ *Fisheries Act* 1985 (Canada), section 70.

The New Zealand fisheries legislation also contains the offence of illegal foreign fishing in New Zealand's exclusive economic zone.⁹⁵ Under s207 of the *Fisheries Act* (NZ) fisheries officers have the power to seize any catch, fishing gear or vessel which is, or is suspected of being, used in the commission of an offence against the Act. Thus, both actual and suspected illegal foreign fishing gives rise to the powers of seizure. Regarding the relationship between seizure and forfeiture however, New Zealand follows the Canadian model. That is, in New Zealand, forfeiture is a consequence of conviction for an offence under the *Fisheries Act*, rather than a consequence of a deemed use of a vessel for a fisheries offence.

The relevant section of the *Fisheries Act* (NZ) states that forfeiture occurs *only* on conviction of an offence.⁹⁶ This is re-iterated in section 255E which states that it is "at the time of conviction" of an offence that the court must determine "what, if any" of the catch, gear or vessel involved in the commission of the offence should be forfeited. This contrasts sharply with the current Australian provisions which have been upheld to pass title to the Commonwealth upon 'use', with the question of that use being determined outside the judicial processes.

Under the New Zealand legislation the crown holds custody of all seized fishing property only until: a decision is made not to lay a charge;⁹⁷ or, if a charge is laid, the 'completion of such proceedings';⁹⁸ or until the "acquittal of all persons charged with any offence for which forfeiture of the property or proceeds is a consequence of conviction."⁹⁹

Conclusions

It has been argued, that there is a need to re-adjust the balance between coastal State and flag State rights with respect to the management of maritime resources in the EEZs and the enforcement of coastal State rights. As stated in this paper, whilst there is merit in the argument for a re-evaluation of the balance between coastal State and fishing State rights and obligations, there are many uncertainties in undertaking such negotiations and outcomes are not guaranteed. Further, there is little to be gained in seeking to shift the pendulum unilaterally through the force of domestic legislation. Consequently, at present States must work within the international legal order as it stands.

Whilst there is and has been an urgent need to address the persistent influx of illegal fishers into Australian waters, one questions the legislative method that has been selected. There are a number of compelling reasons for reconsidering the forfeiture provisions of the *Fisheries Management Act* as they are currently drafted. In summary, the forfeiture provisions do not rely upon a judgement on the merits, that is, a hearing in relation to the offences the crew are charged with. Forfeiture as a concept is not contrary to international law and it is commonly used by States to deter illegal fishers. However, a forfeiture regime which automatically transfers title and is subsequently relied upon to bar an action for prompt release, is contrary to

⁹⁵ *Fisheries Act* 1996 (New Zealand), section 84.

⁹⁶ *Ibid*, section 255C.

⁹⁷ *Ibid*, sections 209(a), section 210(1)(a).

⁹⁸ *Ibid*, section 209(b).

⁹⁹ *Ibid*, section 210(1)(b).

international law.¹⁰⁰ Legislative forfeiture does not limit or extinguish the rights of the flag State to seek prompt relief of the vessel, a judgement of the merits does.

The fact that the Commonwealth's interest was defeated in *Bergensbanken* does not justify such a far reaching regime of property acquisition as encompassed in section 106A. In that particular case the judge was reluctant to continue to postpone the interest of the mortgagee, given that the two accused were outside the Australian jurisdiction and unlikely to return to face the charges. Ryan J made his final order more than 12 months after the arrest of the *Aliza Glacial*. With the benefit of hindsight, one can observe that if the two accused had been expeditiously brought before the courts, the Commonwealth may well have achieved a conviction and subsequent court order for forfeiture, if not before Admiralty proceedings were instituted by the mortgagee, at least during the proceedings. In this way the property rights of the Commonwealth would have been accorded more priority.

Australia must act in accordance with international law and in relation to seized foreign fishing vessels:

- Promptly notify the flag State of the arrest
- Set a reasonable bond taking into account the value of the vessel, gear and catch and the possible penalties that might be imposed under Australian law¹⁰¹
- Until such time a judgement on the merits of the case (the offences), respond to request for prompt release for the flag State retains its rights under international law.
- Taking note of the above points, exercise caution in relation to seeking to assert her rights as the new owner of a vessel, gear and fish and under domestic law so that the rights of the flag State are not infringed as they were in the *Taruman* case,

In continuing the battle against illegal fishing it is important that the Federal Government ensures that legislative and policy responses are in accordance with the rule of law. In this paper, it has been suggested that the current forfeiture regime exposes the Federal Government to the unnecessary risk of international opprobrium and possible legal action.¹⁰² In addition, Australia's actions create an opportunity for the very States - whose actions the global community is attempting to modify- to use international law to their advantage. In breaching the international law of the sea, Australia potentially casts flag States, of prematurely forfeited vessels, in the role of the victim. In a climate of increasingly credible evidence of the corporate involvement in IUU fishing,¹⁰³ such a role reversal can be expected to be exploited by IUU fishing

¹⁰⁰ It is not suggested that the Federal Government is engaging in such activity.

¹⁰¹ Noting that failure to set a bond will give rise to a flag State application for prompt release. See the Tribunal in the *M/V Saiga* Case (St Vincent and the Grenadines v. Guinea) (prompt release) Case No 1 ITLOS, 4 December 1997, paragraph 77. The Tribunal noted that there may be an infringement of Article 73(2) even when no bond has been posted.

¹⁰² Although it is noted here that any action for prompt release must be brought without delay by the flag State and before the due process of the coastal State has commenced. This was commented on by Judge Lucky in his Separate Opinion in *Japan v Russian Federation* above n61, page 5. Arguably therefore a delay in bringing an action for prompt release, or a delay in petitioning the coastal State for the vessel's release would diminish the flag State's rights .

¹⁰³ See Baird, 'Corporate Criminals' above n 7.

companies.¹⁰⁴ It matters not that Australia has engaged in legislative forfeitures for some years now without international challenge. Although it might be argued that the absence of challenge indicates an acceptance of evolving State practice on the matter of balancing States' rights in the release of fishing vessels, it is submitted that the Tribunal would look at the individual facts of the case. A refusal to post a reasonable bond on the basis that the vessel or gear is forfeited under domestic law without evidence of any decision on the merits, would in all probability be found to be contrary to Article 73 of the LOSC. Arguably so would a legislative regime which passes title upon the commission of an offence, where the fact of commission is not determined judicially.

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¹⁰⁴ It argued that a flag State or State of nationality would, given the right circumstances, have grounds to institute proceedings under Part XV of the LOSC, alleging a breach of the terms in Article 73.