



**Caught: hook, line and sinker -
the prosecution of fish poachers in
Australian waters**

Presented by

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This paper briefly reviews the Commonwealth's approach to the arrest and prosecution of people charged with offences relating to the use of foreign fishing vessels in Australian waters. Specifically, the paper reviews the Commonwealth's action with respect to:

- 1 the imprisonment of foreign crew found guilty of offences pursuant to the *Fisheries Management Act* (FMA); and
- 2 the reliance on the domestic forfeiture provisions of the FMA to justify the boarding and detaining a foreign ship and crew on the high seas.

These actions are reviewed in light of Australia's treaty obligations pursuant to the United Nations Convention on the Law of the Sea 1982, **UNCLOS**¹.

The two key offences proscribed by the FMA and for which foreign fishermen are routinely charged are:

- using a foreign boat for commercial fishing in the Australian Fishing Zone (AFZ) - ss. 100 and 100A; and
- having a foreign boat equipped with nets, traps or fishing equipment within the Australian Fishing Zone, (whether the fishermen are actually fishing is irrelevant) - ss 101 and 101A.

However, for reasons I will discuss below, there is a suggestion² that there is now an increased tendency to charge fishermen with offences under the Commonwealth *Criminal Code* for offences relating to the obstruction of Australian officers who are attempting to perform an arrest. The FMA has its own offences in relation to the obstruction of officials, so it is unclear why the Commonwealth has now moved to rely on the Criminal Code.

The International context

To understand Australia's fishing laws it is useful to understand something of the law of the sea and how, depending on where you are, a different legal regime may exist.

Amongst other things the UNCLOS convention defined the jurisdictional limits of states over and under the sea. The convention defines five zones:

- 1 The **territorial sea**³, over which coastal states have sovereignty subject to the right of innocent passage through it by foreign vessels. The limits of the territorial sea are no longer defined by the range of a shore based cannon but less romantically by a line connecting points 12 nautical miles from the shore or from proclaimed base lines.
- 2 The **continental shelf**⁴ which comprises all of the seabed to a distance of a maximum of 350 nautical miles from the shore or the baselines of the territorial sea. The distance varies from state to state depending on the formation of its continental shelf. A state does not have sovereignty over the continental shelf but does have the right to explore and exploit mineral and other resources on the sea bed.

¹ United Nations Law Convention on the Law of the Sea 1982, 1833 UNTS 3, 21 ILM 1261 signed by Australia entered into force 16 November 1994).

² Article by Dr Rachel Baird, University of Queensland, soon to be published by the UNSW Law School.

³ Part II, UNCLOS

⁴ Part VI, UNCLOS.

- 3 The **Exclusive Economic Zone**⁵ which extends 200 nautical miles from the shore or the baselines. Within this zone coastal states have jurisdiction over all resource based activities whether in the water or on the sea bed and whether living or non-living.
- 4 A **Contiguous Zone**⁶ which extends up to 24 nautical miles from the shore or the baselines within which a coastal state may exercise jurisdiction to police customs, immigration and other domestic laws.
- 5 The **High Seas**⁷, which are any seas that are not another nations internal waters, territorial sea or EEZ.

UNCLOS is extremely significant because it provides a coastal state such as Australia with the capacity to make laws to do with the use, management, conservation and exploitation of natural resources in its 200 nautical mile zone (Article 56). Fishing, pollution, navigation, the status of ships, scientific research, and exploration and exploitation of natural resources can all be regulated by the coastal state via UNCLOS.

Notably though, it does not give the coastal state the power to prevent other nations' vessels sailing through the EEZ, nor does it give the coastal state sovereignty over the EEZ.

Article 87 of UNCLOS

Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
 - (a) freedom of navigation;
 - (b) ...
 - (c) ...
 - (d)
 - (e) freedom of fishing, subject to the conditions laid down in section 2;
 - (f) ...
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the area.

Article 116 also states that all states' fishermen have the right to fish on the high seas.' In other words, the high seas can be fished by any State and its fishermen, but those fishermen must respect the coastal states' fishing zones.

⁵ Part V, UNCLOS.

⁶ Article 34, UNCLOS.

⁷ Part VII, UNCLOS.

Article 73(1) also provides the coastal state with rights with respect to the protection of assets within the 200 nautical mile zone. Note though sub-articles (2) and (3).

Article 73

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.**

UNCLOS also created the *International Tribunal for the Law of the Sea* (ITLOS). ITLOS is a Court dedicated to adjudicating disputes concerning the interpretation or application of UNCLOS and all matters specifically provided for in any other agreement that confers jurisdiction on it.

In the 10 years since its establishment. ITLOS has heard and dealt with fifteen cases⁸, including two recent cases involving the Japanese and Russian Governments concerning the prompt release of Japanese fishing vessels.⁹

The Australian approach

The three principle, although not exclusive, pieces of legislation governing Australia's fisheries laws are set out in the *Fisheries Management Act*, *Torres Straight Fisheries Act* and the *Fisheries Administration Act*. Those laws then exist in a wider context of international treaties,¹⁰ including UNCLOS.

The FMA provides Australian authorities such as Customs, the navy and AFMA broad powers to board and search a foreign vessel. Section 84(1)(a) of the FMA states:

84 Powers of officers

(1) An officer may:

⁸ http://www.itlos.org/start2_en.html

⁹ *The "Hoshinmaru" Case (Japan v. Russian Federation), Prompt Release The "Tomimaru" Case (Japan v. Russian Federation), Prompt Release*

¹⁰ For example, Treaty on Fisheries between the Government of Certain Pacific Island States and the Government of the United States of America; and Agreed Statement on Observer Programme relating to the Treaty on Fisheries between the Government of Certain Pacific Island States and the Government of the United States of America. of 2 April 1987 (Port Moresby, 2 April 1987) [1988] ATS 42; Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands (Paris, 8 January 2007) [2007] ATNIF 1 and Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Honolulu on 5 September 2000 (17 June 2003) [2003] ATNIA 15.

- (aa) ...
 - (i) ...
 - (ii) *if the master does not stop the boat as required and the boat is not an Australian-flagged boat, use any reasonable means consistent with international law to stop the boat (including firing at or into the boat after firing a warning shot, and using a device to prevent or impede use of the system for propelling the boat); and*
- (a) **board a boat in the AFZ or in Australia or an external Territory or a boat that the officer has reasonable grounds to believe has been used, is being used, or is intended to be used, for fishing in the AFZ and may:**
 - (i) *search the boat for fish, for equipment that has been used, is being used, is intended to be used or is capable of being used for fishing or for any document or record relating to the fishing operations of the boat; and*
 - (ii) *break open any hold, compartment, container or other receptacle on the boat that the officer has reasonable grounds to believe contains anything that may afford evidence as to the commission of an offence against this Act.*

This section provides an authorised Australian officer (for example Australian Customs, naval officer or Fisheries Management Authority officer) the power to board a vessel not only within the AFZ, but also in an 'external territory' providing the officer has reasonable grounds to believe the vessel has been used, is being used, or is intended to be used for fishing in the AFZ.

Section 84(1)(ga) allows an officer to seize a thing that is forfeited under this section or that the officer has reasonable grounds to believe is forfeited.

In addition to the FMA, the Government has also sought to rely on the *Customs Act* to support the boarding and inspection of a foreign vessel in international waters,¹¹ specifically, s. 184A. That section permits the boarding of a ship providing the flag state of the vessel agrees.

The FMA provides forfeiture provisions too:

106A Forfeiture of things used in certain offences

The following things are forfeited to the Commonwealth:

- (a) *a foreign boat used in an offence...:*
- (b) *....*
- (c) *a net or trap, or equipment, that:*
 - (i) *was on a boat described in paragraph..*
 - (ii) *involved in the commission of an offence.*

¹¹ *R v Amoedo & Dominguez*, NSW District Court, 22 August 2006, Norrish DCJ.

These provisions are critical because the Commonwealth has successfully argued that the forfeiture provisions can justify the boarding of a foreign vessel in international waters, without the express authority of the flag state¹².

Domestic v International law

As noted earlier, Article 73(3) of UNCLOS expressly prevents coastal states from imprisoning people convicted of illegal fishing. However, in 2006 the Commonwealth introduced sections 100B and 101AA to the *Fisheries Management Act* creating imprisonment as a possible penalty for fishermen convicted of fishing illegally within Australia's territorial waters for up to two years. However, this is only effective within Australia's territorial sea, that is, the first 12 nautical miles from the Australian coast.

The fact that the law is limited to the territorial sea may be an acknowledgement by the Commonwealth that it would be in clear breach of Article 73(3) of UNCLOS if it sought to imprison offenders whose offences occurred in the AFZ.

When the new laws were enacted, the Commonwealth's inability to imprison people for offences beyond the territorial sea was described by the relevant ministers as "...unfortunate."¹³

The reality has been that people found guilty of fishing offences are still imprisoned, in my view, through a legal backdoor.¹⁴

The imprisonment results not directly from the offence, but because the offender is unable to pay the fine. Often this fine may be \$10,000 to \$15,000, relatively small when the Court could impose fines up to \$825,000 depending on the nature of the offence, but it is still a substantial amount of money if you are a Chinese or Indonesian fishermen.

For reasons to do with the NSW *Fines Act*, imprisonment cannot be a consequence of the non-payment of a fine in NSW, but it certainly can be in the Northern Territory and Western Australia.¹⁵

This is the first issue where, arguably, the Commonwealth is in breach of its obligations under UNCLOS.

It is often the case, including in cases which DLA Phillips Fox have been involved, where fishermen have spent several weeks or months in prison before trial because the vessel's owners have been unwilling or unable to post bail. Even when bail is posted, because the men have no visas, they can be immediately transferred to an immigration detention centre where they can be held indefinitely.

¹² *R v Amoedo & Dominguez*, NSW District Court, 22 August 2006, Norrish DCJ.

¹³ Press release from Australian Minister for Fisheries, Forestry and Conservation - Senator Eric Abetz, Australian Minister for Defence - Dr Brendan Nelson and Australian Minister for Justice and Customs - Senator Chris Ellison, 26 September 2006.

¹⁴ See for example, *Aruli v Mitchell [1999] WASCA 1042*; *Djou v Commonwealth Department of Fisheries*, (2004) 29 WAR 26; *The Queen v Lian Yu Zhong*, Supreme Court of Northern Territory, 12 September 2006.

¹⁵ *Djou v Fisheries and Samide v Munn* 142 A Crim R 434

It has also been suggested that there is an emerging trend¹⁶ in the Northern Territory, where the vast bulk of prosecutions occur, that where there is evidence of resistance to arrest, crews are increasingly charged under the Commonwealth's *Criminal Code*, for resisting arrest, rather than simply offences under the FMA¹⁷

The reasoning may be that the FMA's legitimacy within the AFZ stems from UNCLOS. UNCLOS specifically prohibits imprisonment. Therefore, by characterising the offence as something other than a regulatory fisheries offence, but rather a domestic criminal offence, there may be some legitimacy over the imposition of gaol terms that would otherwise be unlawful under Article 73(3) of UNCLOS.

There are no judgments from ITLOS dealing specifically with imprisonment - perhaps no other country has tried it. However, in case the express wording of Article 73(2) was insufficiently clear, in the August case of the Japanese vessel 'Tomimaru' the Hon. Justice Jesus stated in his judgment that:

*Measures of the coastal States that would not be in conformity with the Convention are, for example ...the imposition of the penalty of imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment, for fisheries violations committed in the EEZ. If such measures were to be taken by a detaining State, they would be considered....as not being in conformity with the Convention.*¹⁸

In 1999 ITLOS heard a dispute relating to the seizure of a vessel (the *MV Juno Trader*) seized by Guinean authorities after it had been found assisting illegal fishing operators fishing in the Guinean fishing zone. The country in which the *Juno Trader* was registered (Saint Vincent and the Grenadines) sought the immediate release of the vessel and its crew. The arrested crew had not been imprisoned, but merely were unable to leave Guinea-Bissau because their passports had been confiscated.

The majority of the judges at ITLOS held:

"The Tribunal considers that article 73, paragraph 2, must be read in the context of article 73 as a whole. The obligation of prompt release of vessels and crews includes elementary considerations of humanity and due process of law."

Given the specific wording though of Article 73(2), in my view, ITLOS may be highly critical of the manner in which the Commonwealth punishes offenders.

The second issue that ITLOS may be interested in is the boarding of foreign flagged vessels in international waters by Australian authorities where there has been no issue of 'hot pursuit'¹⁹. However, as far as I am aware, there is no express authority within UNCLOS

¹⁶ Article by Dr Rachel Baird, University of Queensland, soon to be published by the UNSW Law School

¹⁷This is an observed practice rather than a practice officially confirmed. *Fisheries Management Act 1991* (Cth) ('*Fisheries Management Act*') s 108(1) creates a number of offences under the heading 'obstruction of officers'.

¹⁸ International Tribunal for the Law of the Sea Case No. 15 The *Tomimaru* Case, Justice Jesus paragraph 7, 6 August 2007.

¹⁹ Article 111 of UNCLOS gives a nation state the clear authority to pursue a vessel out of its territorial water where it believes an offence has been committed.

or international law generally which would justify the boarding of a foreign vessel in international waters without the flag states clear authority. In fact, UNCLOS specifically limits the right of a nation's authorities to board other states' vessels.²⁰ Article 110 of UNCLOS states that a ship cannot be boarded on the high seas by another vessel operating on Government service, unless the first vessel is thought to have been participating in an act of piracy, the slave trade, illegal broadcasting, or operating without a proper flag state.

The *Taruman* was a foreign vessel with a foreign crew which was detained in international waters in the Southern Ocean, ten weeks after a fishing offence was committed. Prior to the Commonwealth's officers boarding the *Taruman*, Cambodia had given the Commonwealth specific but very limited rights with respect to searching the vessel for the purpose of establishing its proper registration.²¹

However, the Commonwealth's officers boarded the '*Taruman*', searched it, detained its crew and directed its master to take the vessel to the nearest port on suspicion of illegal fishing. At the time, this action was argued to be justifiable on the basis of the Australian authorities search powers under the *Customs Act* and the FMA.

That action should be considered in light of the proposition that when a vessel is on the high seas it is only subject to the laws of its flag state²² or international law.

In challenging the Commonwealth's actions, Counsel for the *Taruman's* Master and Fishing Master argued that Australia's actions in boarding a foreign vessel in international waters and its subsequent dealing with the vessel and its crew was inconsistent with the limited agreement provided to it by the Cambodian Government, the vessels right of innocent passage on the high seas (Article 87 of UNCLOS) and the rights of the flag state.

It was argued that Australian law did not operate on the high seas, so instead, international law applied. UNCLOS was said to be the relevant law in determining the legitimacy of the boarding, and as the alleged offence was outside Article 110, the Commonwealth's actions in searching and arresting the vessel and crew and the forfeiture of the vessel were all unlawful as a matter of international law.

In response to those arguments the Crown successfully relied on the full Federal Court's decision in the '*Volga*'²³. The owners of the '*Volga*' had challenged the forfeiture provisions of the FMA under which they had lost the vessel, its equipment and catch to the Government. The Federal Court at first instance and then on appeal, had held that the legal ownership of the vessel transferred to the Government at the time an offence was committed, not at the time that the offence may be proved in court.

²⁰ Article 110 of UNCLOS.

²¹ Evidence tendered at the trial of Alfonso Amoedo and Enrique Dominguez, NSW District Court, 15 August - 22 September 2006 before Norrish DCJ.

²² France v Turkey (1927) PCIJ Reports Series A, No.10

²³ *Olbers Co Ltd v Commonwealth & Anor* (2005) 212 ALR 325.

As the Hon. Justice French held when hearing the *Volga* case at first instance²⁴, the FMA's forfeiture provisions:

*Section 106A ... creates a real risk for any [foreign] fishing vessel owner 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 if there is evidence by aerial or other surveillance of the identity, activity and/or presence of the boat the Commonwealth 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 any jurisdiction in which Australian title will be recognised.*²⁵

This was subsequently upheld by the Full Court of the Federal Court²⁶. The High Court denied a special leave application²⁷.

In light of the *Volga*, the Commonwealth becomes the owner of a vessel even before a vessel and its crew are proved to have been involved in an offence.

In the *Taruman*, the Crown's argument was that the vessel had been forfeited to the Commonwealth at the time the offence was committed (even though the offence had not been proved). Consequently, the application of international law did not arise. By boarding the vessel, the Commonwealth was boarding a vessel that had already been forfeited to it because its officers had a reasonable belief that an offence had been committed by the vessel in Australia's fishing zone.

The fact that the NSW District Court applied the *Volga* and the FMA's strict forfeiture and enforcements regime at the expense of UNCLOS is no surprise. Where there are clear domestic laws, a Court can call attention to the Commonwealth's international legal obligations, but such international laws cannot be used to override the application of domestic law. There is a string of authorities on this point including the High Court's decision in *Chow Hung Ching v The King*²⁸ and *Jago v District Court of NSW*²⁹.

Given the absence of significant jurisprudence on the questions, and no direct cases on point from an international tribunal, it is only possibly to speculate based on obiter comments in other matters as to how the automatic forfeiture of a vessel, boarded on the high seas, would be treated by ITLOS.

²⁴ *Olbers Co Ltd v Commonwealth & Anor* [2004] 136 FCR 67 at para.77

²⁵ The owners of the 'Volga' sought leave to appeal the Full Court of the Federal Court's decision to the Australian High Court, Australia's final appellate court. However, leave to appeal was refused, a step which effectively gave the decision the High Court's endorsement.

²⁶ *Ibid.* 17.

²⁷ *Olbers Co Ltd v Commonwealth of Australia* [2005] HCA Trans 228.

²⁸ (1949) 77 CLR 449.

²⁹ (1988) 12 NSWLR 558.

In the recent case of the Japanese vessel, *Tomimaru*, ITLOS examined the issue of forfeiture. In that case the Japanese Government brought an action against the Russian Government regarding the alleged failure of the Russian Government to promptly release the vessel once it had been detained. The only problem for the Japanese was that they had not acted very promptly themselves as there had been a delay of eight months between the vessel's detention and Japan bringing the matter before ITLOS.

During that time the Russian courts had found that the Japanese vessel and its owners had committed various offences, the consequence of which was that the *Tomimaru* was forfeited to the Russian Government. The significance of the forfeiture meant that when the Japanese came to ITLOS to argue the failure of the Russian Government to promptly release it, the Russian's successfully argued along the same lines as the Commonwealth argued in the *Volga* case, that is, that the vessel was now their property so the application for prompt release was moot.

ITLOS accepted the Russian position and stated that a coastal state's approach to forfeiture and its capacity to create laws to protect its own fish stocks³⁰ within its fishing zone was unfettered. However, having said that, the Court held³¹:

A decision to confiscate eliminates the provisional character of the detention of the vessel rendering the procedure for its prompt release without object. Such a decision should not be taken in such a way as to prevent the shipowner from having recourse to available domestic judicial 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, a confiscation decided in unjustified haste would jeopardize the operation of article 292 of the Convention.

The implication from this observation is that a coastal state can develop and enforce its own domestic legislation, but such laws must be consistent with the states obligations under UNCLOS. The automatic forfeiture provision that arise via the operation of section 106A of the FMA would, arguably, be inconsistent with the international standards in light of the obiter comments of ITLOS in the *Tomimaru*.

There are two other cases that make useful comments on the subject.

The first is from a case known as *The Lotus*³² which was decided by the International Court of Justice in 1927. In that matter there had been a collision on the high seas between a Turkish and French vessel resulting in the death of eight Turkish seamen. When the French vessel arrived in Turkey its master was arrested and charged with involuntary manslaughter. The issue was whether a foreign national could be prosecuted for a crime alleged to have been committed elsewhere, specifically, in international waters.

The International Court of Justice held that Turkey could prosecute the master, notwithstanding the fact that Turkish law did not extend to the High Seas. Turkey could

³⁰ International Tribunal for the Law of the Sea Case No. 15 The *Tomimaru* Case, Full Court para 80, 6 August 2007.

³¹ Ibid para 76.

³² *France v Turkey* (1927) PCIJ Reports Series A, No.10

prosecute because, firstly, the master came to its territory and could be arrested there and secondly, because there was no international law to stop Turkey prosecuting such an offence.

The second case is from the US Supreme Court in 1887³³, *Wildenhus's Case*, which held that a coastal states capacity to enforce its jurisdiction over crimes on board a vessel in international waters was only possible where the crimes disturbed the coastal states, 'peace and tranquillity.'

Both of those cases show that a territory's laws may have some effect on the high seas, but neither can be used to support the proposition that a foreign state could be allowed to detain and claim ownership of another nations vessel on the high seas.

Again, it is only possible to speculate about how ITLOS would deal with a case such as the *Taruman* if it came before it. I know from personal experience that ITLOS was certainly very keen to become involved in the *Taruman* case but as a matter of practicality, to bring a matter before ITLOS you need to have support of a nation state, because only nations have a right of appearance, and a client with deep pockets.

Given the absence of law supporting the Commonwealth's actions, and the express wording of Article 110 of UNCLOS regarding the limited circumstances in which a ship can be boarded, my suspicion is that the Commonwealth would have some difficulty justifying its position.

Conclusion

The validity of the Commonwealth's practice of default imprisonment and the future boarding of a foreign vessel on the high seas, may never come to be tested at ITLOS. However, that does not validate the Commonwealth's actions, nor should the Commonwealth draw any false sense of comfort from the blessings of the domestic courts.

While Australian courts are bound by the *Fisheries Management Act* and the 'Volga' decision, ITLOS would review Australia's approach in light of its obligations under UNCLOS and the outcome may be different.

³³ *Wildenhus's Case* 120 US 1 (1887) US Supreme Court.