An Aspect of Fishing Management on the Continental Shelf outside the Australian Fishing Zone

Introduction

1. The constitutional source of Commonwealth power to legislate in respect of fisheries lies in Section 51(x) of the Constitution, providing:

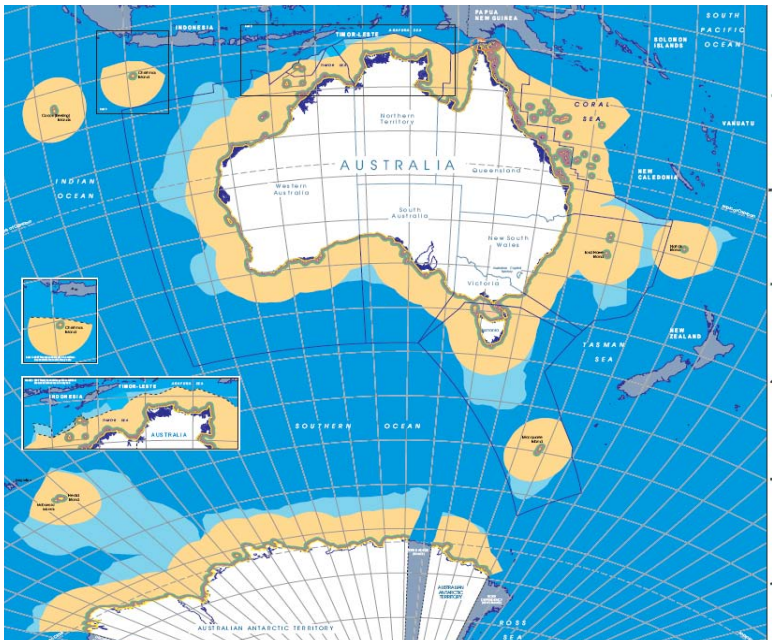
> *'The Parliament shall, subject to this Constitution have power to make laws for the peace, order and good government of the Commonwealth with respect to;*
> *...*
> *(x) fisheries in Australian waters beyond territorial limits .'*

2. "Australian waters" beyond territorial limits, and the limits of Australia's fisheries jurisdiction were dealt with long ago in New South Wales v. The Commonwealth (1975) 135 CLR 337, commonly known as "the Seas and Submerged Lands Case" (SSL) concerning the Act dealing with the rights of the Commonwealth over the territorial sea and the Australian Continental Shelf (ACS). Six years earlier, the High Court had decided the case which provides even greater assistance as to the meaning of "Australian waters" and the scope of the power in s.51(x) or the Constitution: *Bonser v. La Macchia* (1969) 122 CLR 177. It did so very much in both political and geographical terms as to what were the outermost boundaries of "Australian waters". As Barwick CJ put it (at 194) "*the framers of the Constitution doubtless had in mind a legislative power to enable the Commonwealth to protect and regulate fisheries...*" but also "*the possible participation of foreigners in those fisheries*".

3. His Honour expressed the view that "Australian waters" for the purposes of s.51(x) include "*at least as far seaward from the Australian coast as the limits of the proclaimed waters*", and, significantly for this region, that there is "*no reason why waters should not for Australian constitutional purposes be considered Australian waters though for its own domestic and for that matter*

international purposes part of those waters may be regarded by another nation as its own waters" (at 195; Menzies J at 210). Further, Chief Justice Barwick noted that the limits of Australian Waters for the purpose of S. 51(x) of the constitution ""*will extend, for example as the capacity to exploit fisheries yet further afield develops with increased technology*" (at 196).

4. In 1979 the boundary of the fisheries zone was extended seawards to 200nm from the coastal base line, to what is now the "exclusive economic zone" (EEZ). The area encompassed by that extension of approximately 9 million square kilometres was more than 1.2 million square kilometres larger than the Australian land mass. This is what the 10 million square kilometres of Australian maritime jurisdiction looks like:



5. Last year the Australian Fisheries Management Authority's (AFMA) total net resourcing (pun intended) was just short of $65 million. That figure does not include the cost of Border Protection Command operations, conducted by the Royal Australian Navy and the Australian Customs & Border Protection Service on behalf of various agencies including the AFMA.

6. In 1991 the *Fisheries Management Act* (FMA) introduced a new definition of fishing, to include a wider range of activities connected with fishing, in response to the evolution of illegal fishing, for example from small traditional boats to the modern concept of mother-ships which although not spawning the vast progeny of so called traditional fishing vessels which enjoy some immunity under Australian Fishing Laws (as a result of an Memorandum of Understanding between Australia and Indonesia concerning fisheries enforcement in the Ashmore Reef area) certainly adopted, victualled and provisioned those boats and vastly increasing their combined ability to remain at sea for longer periods.

7. Section 4 of the FMA defined that:

> ***fishing*** means:
>
> (a) searching for, or taking, fish; or
>
> (b) attempting to search for, or take, fish; or
>
> (c) **engaging in any other activities that can reasonably be expected to result in the locating, or taking, of fish;** or
>
> (d) placing, searching for or recovering fish aggregating devices or associated electronic equipment such as radio beacons; or
>
> (e) **any operations at sea directly in support of, or in preparation for, any activity described in this definition;** or
>
> (f) aircraft use relating to any activity described in this definitio**n** except flights in emergencies involving the health or safety of crew members or the safety of a boat; or
>
> (g) the processing, carrying or transhipping of fish that have been taken.
>
> ***take***, in relation to fish, means catch, capture, take or harvest.
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> ***processing***, in relation to fish, includes the work of cutting up, dismembering, cleaning, sorting, packing or freezing.
>
> ***receive*****,** in relation to fish, means receive fish for any purpose other than:
>
> (a) personal or domestic consumption; or
>
> (b) solely for transportation.

And:

> ***fish*** includes all species of bony fish, sharks, rays, crustaceans, molluscs and other marine organisms, but does not include marine mammals or marine reptiles.

A Challenge to the new regimen

8. These provisions enabled the expansion of enforcement operations into new areas, which in due course led to challenges in relation to whether the 1991 Act actually authorised those expanded operations. Some of those challenges have resulted in significant decisions with respect to fisheries laws. The FMA also contained the following provisions which are germane to perhaps the most significant of those challenges to date viz: Muslimin v R (2009) NTCCA 3

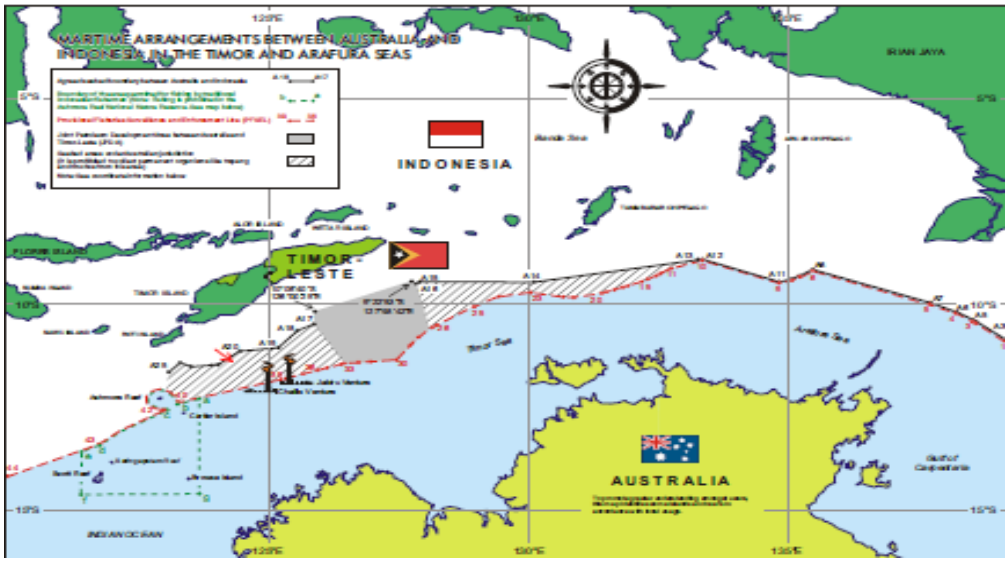
> ***101 Having foreign boat equipped for fishing—strict liability offence***
> *(1) A person must not, at a place in the AFZ,* ***have in his or her possession or in his or her charge a foreign boat equipped for fishing*** *unless:*
> *(a) the use, or presence, of the boat at that place is authorised by a foreign fishing licence, or a port permit; or*
> *(b) a Treaty licence is in force in respect of the boat; or*
> *(c) the boat's fishing equipment is stowed and the boat is at that location in accordance with the approval of AFMA given under, and in accordance with, the regulations; or*
> *(d) the boat's fishing equipment is stowed and the boat was travelling through the AFZ from a point outside the AFZ to another point outside the AFZ by the shortest practicable route; or*
> *(e) the use of the boat for scientific research purposes in that area is authorised under a scientific permit.*
> *(1A) For the purposes of paragraphs (1)(c) and (d), a boat's fishing equipment is not stowed unless all of the boat's:*
> *(a) nets, traps and other fishing equipment; and*
> *(b) associated equipment, including buoys and beacons;*
> *are disengaged and secured, and where practicable stored inside the boat, in such a manner as not to be readily available for fishing.*
> *(2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 2,500 penalty units.*
> *(2A) Strict liability applies to subsection (2).*
> *(3) An offence against this section is an indictable offence but may be heard and determined, with the consent of the prosecutor and the defendant, by a court of summary jurisdiction.*
> *(4) If an offence is dealt with by a court of summary jurisdiction, the penalty that the court may impose is a fine not exceeding 250 penalty units.*

9. Subsection 101(2A) means that the prosecution no longer has to prove that the fishermen, or even the master of the fishing boat, knew or intended that the boat would be in the Australian Fishing Zone (AFZ), which is a significant difference from the position under the 1952 Act. The extent of this difference might have also thought to have been increased in circumstances where Section 12 of the 1991 Act applies. It provides:

> ***12 Sedentary organisms—Australian continental shelf***
>
> *(1) If the Governor-General is satisfied that a marine organism of any kind is, for the purposes of international law, part of the living natural resources of the Australian continental shelf because it is, for the purposes of international law, an organism belonging to a sedentary species,* ***the Governor-General may, by Proclamation, declare the organism to be a sedentary organism to which this Act applies****.*
>
> ***(2) Where by this Act (other than Part 5), or the regulations, provision is made in relation to fishing in the AFZ or a fishery, such provision, to the extent that it is capable of doing so, extends by force of this section to fishing for sedentary organisms, in or on any part of the Australian continental shelf not within the AFZ or the fishery as if they were within the AFZ or the fishery****.*
>
> *(3) Without limiting the operation of subsection (2), a reference in that subsection to making provision in relation to fishing includes a reference to making provision in respect of:*
>
> > *(a) the granting of fishing concessions, scientific permits and foreign master fishing licences; and*
> >
> > *(b) the prohibition or regulation of fishing; and*
> >
> > *(c) the powers of officers.*
>
> ***(4) A reference in this section to the Australian continental shelf includes a reference to the waters above the Australian continental shelf****.*

10. On 22 and 23 April 2008 a Mr. Muslimin was the master and in charge of an Indonesian flagged boat the *Segara 07* (the Vessel). It did not have a fishing licence, port permit, treaty licence, approval from Australian Fisheries Management Authority or scientific permit from Australia that would have permitted fishing under section 101 of the FMA. At about 10:00 on 23 April the vessel crossed the sea bed boundary between Australia and Indonesia and

entered the waters above the ACS not within the AFZ, which was actually a place in Indonesian waters. Australia has fisheries jurisdiction over the seabed that is the ACS, but not over the waters above it. That area is depicted in the following chart.



11. Shortly thereafter the Vessel was detected by HMAS Broome 3.1 nautical miles to the south of the sea bed boundary between Australia and Indonesia, boarded and inspected by a boarding party from *HMAS Broome*. In the place where Muslimin was apprehended, Indonesia has fisheries jurisdiction in relation to the waters above the ACS. In so far as the vessel was equipped with items suitable for fishing for sedentary organisms, namely Beche-de-mer or Trepang (an organism whose habitat is on the seabed but not in the waters above it); such equipment was not stowed in any manner which satisfied the conditions of subsections (d) or (e) of Section 101 of the FMA, nor was its passage by the shortest possible route through those waters. There was no evidence that Mr. Muslimin or his crew had used the fishing equipment recently or were preparing to use it and it was not alleged that he intended to take trepang from the ACS. A notice of apprehension was issued, the Vessel seized and along with the crew taken to Darwin. In a record of interview the Mr. Muslimin claimed that he entered the waters above the ACS to search for another fishing vessel with which he had lost contact, that he was not fishing for or intending to fish for trepang in the area where he was apprehended by the crew of the HMAS Broome. If

accepted, such circumstances might have provided a defence to the subsequent charge preferred against him on indictment namely: Of having in his possession or in his charge a foreign boat equipped for fishing[1].

12. Mr. Muslimin was found guilty by a jury in the NT Supreme Court and appealed to the NT Court of Criminal Appeal essentially on the grounds that the conviction of an offence occurring on an Indonesian flagged vessel in the Indonesian Exclusive Economic Zone (albeit above the ACS) contrary to s.101(2) of the FMA as extended by s.12(2) of the FMA, constituted an unjustifiable interference with Indonesia's sovereignty and was contrary to article 78(2) of the United Nations Convention on the Law of the Sea (UNCLOS). That article relates to freedom of Navigation on the High Seas. Further, it was contended that where the Commonwealth legislates ambiguously in the exercise of its sovereignty over the ACS and one or more of the available constructions will or may amount to an unjustifiable interference under article 78(2) of UNCLOS, the Court is bound to adopt the construction, as far as the language permits, which reflects the most complete observance of Australia's obligations under international law. The appeal was dismissed by a majority of the Northern Territory Court of Criminal Appeal[2] and Mr. Muslimin then appealed this judgement to the High Court.

13. For the participants, the Application for special leave was if anything more interesting than the final judgment. The same grounds of appeal were argued as in the court below. The High Court was having none of it. Finally, despite the stout resistance of counsel for the Mr. Muslimin the court determined that the appeal would not proceed by a consideration of international law principles but on the basis of a proper construction of what was a domestic statute.[3]

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1 Response to a sudden or extraordinary emergency: s.1O.3 of the Criminal Code (Cth).
2 Muslimin v R (2009) NTCCA 3
3 Before pronouncing that there would be special leave on the very narrow ground that in its terms section12(2) does not effect the extension of operation of 101 over the continental shelf because it is not relevantly a provision which is extended to fishing, the Chief Justice said: "There is unfortunately a chronic problem in advocacy in areas involving international law that people seem to want to enter the debate at the level of international law when they are talking about domestic statutes. That is an inversion. All right. Thank you." Muslimin v The Queen [2009] HCATrans 240 at 249

14 In written submissions for the Crown relied on at the hearing of the matter in March of this year on this point we submitted that:

14.1 There is a long and substantial line of authority concerning the breadth of the fisheries power[4].

14.2 The concept of a fishery relates to activities rather than waters and the control and regulation of "fishing operations" extended to "methods, tackle or equipment". (Bonser v La Macchia (1969) 122 CLR 177 at 212)

14.3 Section 101 of the FMA is a law regulating fishing equipment. It does not prohibit the carriage of such equipment. It only prohibits such equipment being carried otherwise than stored or secured. It prohibits a boat equipped for fishing being in a state of readiness for the taking or attempted taking of fish.

14.4 In Cheatley v R (1972) 127 CLR 291 the Court considered the construction of subsection 13AA(3) of the *Fisheries Act 1952 (Cth)*. authorising the forfeiture of any boat used in the commission of an offence against section 13AA (1) and (2) establishing offences in terms similar to those of sections 100 and 101 of the FMA and exempting an accused using a foreign boat if the fishing equipment was stowed and secured and processing of the catch was not being carried out on the boat. Accordingly, an accused would – without more – be guilty of the offence if he had, without licence, a "foreign boat for fishing" in his possession or charge in the nominated area on which the fishing equipment was not stored and secured. Further, that it was implicit in the observations of both Barwick CJ and Mason J that the offence

4 Bonser v La Macchia (1969) 122 CLR 177; Cheatley v R (1972) 127 CLR 291; New South Wales v The Commonwealth (1975) 135 CLR 377 (the Seas and Submerged Lands Act case); Pearce v Florenca (1976) CLR 507; Raptis & Son v South Australia (1977) 138 CLR 346; Li Chia Hsing v Rankin (1978) 141 CLR 182; Port Macdonnell Professional Fishermen's Association Inc v South Australia (1989) 168 CLR 340; Re Director of Public Prosecutions; Ex Parte Lawler (1994) 179 CLR 270; and Olbers Co Ltd v Commonwealth of Australia (2004) 143 FCR 449.

in the 1952 Act and re-enacted in section 101 of the FMA, concerned fishing. Their Honours considered that the entire section, including the forfeiture provision of subsection 13AA(3), regulated fishing.

14.5 Re Director of Public Prosecutions; Ex Parte Lawler (1994) 179 CLR 270 followed Cheatley, in relation to the forfeiture provision in section 106(1)(a) of the FMA and whether it amounted to acquisition of property otherwise than on just terms vis-à-vis section 51(xxxi) of the Constitution in circumstances where the owner of the forfeited boat had no knowledge of the commission of the offence. The Court held that it did not and that the forfeiture was incidental to the fisheries power conferred by section 51(x). That is, it was a law with respect to fisheries.

14.6 The Court has taken an expansive view of matters which can be said to be the subject matter of "fishing" regulation under the rubric of the fisheries power. Section 4 of the FMA also defines "fishing" very widely. This springs from both common experience and the section 3 objectives of the FMA as to the proper conservation and management of Australian fisheries.

14.7 The act of catching fish is but one element of the total concept of fishing. Fishing is an activity rather than a result. An afternoon spent fishing may yield not a single fish. Indeed it may involve no more than meandering travel on a boat, fishing equipment on deck, attempting to locate fish. One fishes even though a catch is a mere possibility. The regulation of the manner in which one may pursue that possibility is, therefore, regulation of fishing. The possibility that a catch may become a reality, in turn makes such regulation an important tool in the conservation and management of fisheries. Paragraphs (a) and (b) of the section 4 definition of fishing in the FMA recognise that fishing short of actually capturing fish is just as much as an activity as a successful result or an attempt to secure it. Paragraph (e) of the definition includes supporting and preparatory matters done at sea for any

other activity in the definition. A foreign boat in the AFZ which has, at sea, unstowed its fishing equipment has completed an operation in preparation for the activity of searching for or taking of fish or the attempt to do so. The concern of the legislature with the possibility that the equipment will be used for illegal fishing in the AFZ is because the equipment has been primed for such use.

14.8 The activity proscribed by section 101 of the FMA is not merely having in one's possession or charge a foreign boat equipped with items of equipment for fishing. An offence will be committed only if such equipment is not "stored and secured" and the boat is not taking the shortest practicable route through the AFZ. In other words the offence is made out when the fishing equipment has been taken out of storage and is unsecured – or in a position of readiness – and the boat transits the AFZ whilst the equipment is so primed.

14.9 Section 4 of the definition in the FMA, admits of no hierarchy whereby some activities are more akin to "fishing" than others. The point may be illustrated by comparing sections 99, 100, 100A and 100B "use a foreign boat for fishing" offences with sections 101, 101A and 101AA "having a foreign boat equipped for fishing" offences. It is a false dichotomy to view the former as relating to "fishing" and the latter more akin to "going equipped" offences. Both concern fishing as defined by section 4. Indeed on the same set of facts a person may be guilty of both a "use" offence and an "equipped" offence.

14.10 Subsection 12(3) of the FMA is another indicator that a broad view should be adopted of what amounts to a "provision in relation to fishing in the AFZ or a fishery". Without limiting the operation of subsection 12(2) it specifies that the phrase encompasses the granting of fishing concessions, scientific permits and foreign master fishing licences; the prohibition or regulation of fishing; and the powers of officers.

14.11 This construction promotes the purpose and object of the FMA: Mills v Meeking (1990) 169 CLR 214 at 235.

14.12 As section 101 of the FMA is a provision “made in relation to fishing in the AFZ or a fishery” it triggers the threshold requirement for extension to fishing for sedentary organisms in or on any part of the ACS not within the AFZ in section 12(2).

15 Again a reasonable construction of the section 101(1) prohibition when extended by s.12 might well have been thought to be expressed as: **A person must not, at a place in or on any part of the ACS not within the AFZ, have in his or her possession or in his or her charge a foreign boat equipped for fishing for sedentary organisms** unless... (any of the section’s exceptions permitting that activity are extant). As is their habit it didn’t take the justices of our High Court long to inform me of the fallacy of such a conclusion.

16 Even so, in a short judgment of seventeen paragraphs they did it without a single reference to these submissions, finding by a tiny majority of six to none that:

> “15. It is trite to say that s 12(2) must be construed as a whole with proper regard to the context provided by the entire Act. It is no doubt important to observe that s 12(2) identifies the provisions whose operation is extended by describing those provisions as ones "made in relation to fishing". The words "in relation to" are to be read with their ordinary meaning. But the observation that s 12(2) identifies the subject of the extension worked by the sub-section as provisions "made in relation to fishing" must not be permitted to obscure two further features of the sub-section. First, its central concern is "fishing" as defined in the FMA – one or more forms of identified activity. Second, the extension worked is an extension of provisions made about the activity of fishing in one area (the Australian Fishing Zone) to the same kinds of activity in another area (the continental shelf).
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> 16. Section 101 appears in Pt 6, Div 5 (ss 99–105) of the FMA. Division 5 is headed "Foreign boats – additional enforcement provisions" and creates a range of offences. Several of the provisions, notably ss 99, 100, 100A and 100B, are directed expressly to the activity of fishing. By contrast, s 101 is directed not to that activity but to the existence

> of a state of affairs, namely having possession or charge of a particular kind of boat: a foreign boat equipped for fishing. Section 101 is not directed to the activity of fishing. Section 101 is directed to having possession or charge of a particular kind of boat: a foreign boat equipped for fishing. Section 101 is not a provision of the FMA "made in relation to fishing in the AFZ". It is a provision in relation to having possession or charge of a particular kind of boat. More particularly, and contrary to the respondent's submissions, it is not a provision in relation to "operations at sea directly in support of, or in preparation for" any of the activities described in the definition of "fishing" in s 4 of the FMA. Section 101 is thus not a provision that is the subject of the extension which is worked by s 12(2).
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> 17. This being the proper construction of s 12(2), it is neither necessary nor appropriate to go on to consider whether extension of operation of a provision like s 101 to areas outside the Australian Fishing Zone would be consistent with international law generally or UNCLOS in particular."

Muslimin v The Queen [2010] HCA 7 10 March 2010.

17. It would expose serious intellectual flaws to say that at first I was somewhat bemused by this decision until my ever helpful and assiduous instructor[5] emailed me two days later with another of his intelligent insights:

> "In the cold light of day, I think I understand what the court is saying, namely: Section 101 is solely concerned with the defendant's status as the master of the boat, and that state of affairs, i.e. being the master, does not fall within the definition of "fishing". In addition, the phrase "in relation to" does not extend the meaning of "fishing", even when read as "in relation to the prohibition or regulation" of "fishing". In effect, s.12(2) should be read as only extending provisions in relation to the prohibition or regulation of any of the activities in the definition of fishing, and as such does extend the offence of merely being the master."

I think he is clearly correct.

[5]Mark McCarthy,Senior Assistant Director,Commonwealth DPP, Darwin

18. Still, I have difficulty accepting the difference between the master of a fishing vessel (foreign or otherwise) not being engaged in an "activity" but rather being in some sort of dissociated – "state of affairs"; or even why it is that an activity cannot encompass a state of affairs. To determine on the basis of that distinction however it is described, that the circumstance is not one relating to fishing, seems to mean that the High Court may not so much have interfered with the hitherto somewhat expansive definition[6] of the phrase 'in relation to" but rather to have continued the trend of increasing the range of considerations to be taken into account in determining the sufficiency of the connection or association to be established by that phrase (and similar expressions). Perhaps adding to those teased out by the Federal Court in such cases as HP Mercantile Pty Limited v Commissioner of Taxation [2005] FCAFC 126 (8 July 2005) at paragraph 35[7]. (Cited with approval in Travelex Ltd v Commissioner of Taxation [2010] HCA 33 (29 September 2010) at paragraph 25)[8].

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[6] See for example Victoria v The Commonwealth (1971) 122 CLR 353 at 399 per Windeyer J

7 It was common ground that the words "relates to" are wide words signifying some connection between two subject matters. The connection or association signified by the words may be direct or indirect, substantial or real. It must be relevant and usually a remote connection would not suffice. The sufficiency of the connection or association will be a matter for judgment which will depend, among other things, upon the subject matter of the enquiry, the legislative history, and the facts of the case. Put simply, the degree of relationship implied by the necessity to find a relationship will depend upon the context in which the words are found. So much appears from the various cases referred to by the Tribunal when discussing the meaning of these words: Tooheys Ltd v Commissioner of Stamp Duties (NSW) [1961] HCA 35; (1960) 105 CLR 602 at 620 per Taylor J; Joye v Beach Petroleum NL (1996) 67 FCR 275 at 285 per Beaumont and Lehane JJ; and Australian Competition and Consumer Commission v Maritime Union of Australia [2001] FCA 1549; (2001) 114 FCR 472 at 487 per Hill J. It appears also in more recent High Court authority such as North Sydney Council v Ligon 302 Pty Ltd [1996] HCA 20; (1996) 185 CLR 470; Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355 at 387 and O'Grady v Northern Queensland Co Ltd [1990] HCA 16; (1990) 169 CLR 356 at 374 per Toohey and Gaudron JJ.

8 It may readily be accepted that "in relation to" is a phrase that can be used in a variety of contexts, in which the degree of connection that must be shown between the two subject matters joined by the expression may differ[21]. It may also be accepted that "the subject matter of the enquiry, the legislative history, and the facts of the case"[22] are all matters that will bear upon the judgment of what relationship must be shown in order to conclude that there is a supply "in relation to" rights.

19. I am also advised that that there are no amendments to the FMA planned in relation to the Muslimin type of problem. Perhaps AFMA will content itself with only pursuing cases from outside the AFZ if an actively conducted fishing offence is made out.

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Owen Dixon Chambers
October 2010.