SEMAPHORE
NEWSLETTER OF THE SEA POWER CENTRE - AUSTRALIA ISSUE 11, JUNE 2006

HOT PURSUIT AND AUSTRALIAN FISHERIES LAW

Hot pursuit, which permits a coastal state to extend its jurisdiction beyond its normal legal limits, is a long-standing maritime principle, which finds its modern expression in the 1982 United Nations Law of the Sea Convention (LOSC). However, due in part to the challenges of policing its extensive maritime jurisdiction, the requirements of Australian fisheries law are considerably different to those of many other States.

As a general principle, one State cannot exercise its jurisdiction beyond the reach of its maritime zones over another State's flagged vessels. One of the most important exceptions to this general rule is the doctrine of hot pursuit, which allows a State to extend its jurisdiction over a vessel beyond the reach of its maritime zones. The doctrine permits a State to pursue a vessel which is fleeing from the maritime zone to which the legal jurisdiction applies. The rationale behind this doctrine is obvious: if a vessel has breached a coastal State's law (for example by smuggling drugs ashore, or illegally fishing) it should not be able to escape the legal consequences of its act simply by sailing into the high seas.

The first expression in treaty form of the doctrine of hot pursuit appeared in Article 23 of the 1958 *Geneva Convention on the High Seas*. By this time, the hot pursuit doctrine had been recognised as customary international law[1] and a judge in one case noted that the Geneva Convention 'was merely declaratory' of this pre-existing right.[2]

The modern articulation of the doctrine of hot pursuit is found in article 111 of LOSC. It states that:

> 'hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone.'[3]

Hot pursuit may only commence after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.[4] The pursuit must cease as soon as the pursued vessel enters the territorial seas of its own or a third state.[5] Pursuit may only be exercised by warships or military aircraft or other ships or aircraft clearly marked and identifiable as being on government service and authorised as such.[6] Pursuit may be handed over between pursuing ships and aircraft provided that the pursuit is not interrupted.

Unlike some other Commonwealth countries, international law is not automatically incorporated into Australian domestic law unless it is specifically implemented by legislation. However, the High Court explicitly recognised that 'the fact that [a] Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law.'[7] International law can help guide the interpretation of a domestic law and it can also play some part in the development of the common law in Australia.

The doctrine of hot pursuit has been implemented in certain Australian legislation dealing with maritime law enforcement. There are subtle differences between the Acts,[8] however only the *Fisheries Management Act 1991* (Cth) ('the FMA') will be examined. The FMA contains a power to pursue under section 87 which enables an 'officer' to exercise certain powers over a vessel outside the Australian Fisheries Zone[9] (AFZ) but not within another country's territorial sea, provided:

> (1)…
> (a) one or more officers (whether or not including the officer exercising the power) have pursued the person or boat from a place within the AFZ to such place; and
> (b) the pursuit was not terminated or interrupted at any time before the officer concerned arrived at such a place with a view to exercising that power.
> (2) … a pursuit of a person or boat is not taken to be terminated or substantially interrupted only because the officer or officers concerned lose sight of the person or boat.
> (3) A reference in subsection (2) to losing sight of a person or boat includes a reference to losing output from a radar or other sensing device.

These provisions largely mirror the requirements under Article 111 of LOSC. However, there is one notable exception. Although section 84 of the FMA allows an officer to 'require the master to stop the boat' to facilitate boarding, there is no explicit requirement for an officer to give an order to stop.

Australia has immense maritime areas and these cover some desirable fishing grounds. The EEZ surrounding Heard and McDonald Islands (HIMI) in the Southern Ocean contains Patagonian Toothfish and other species that attract illegal fishing from distant nations. This has resulted in Australia undertaking some spectacular hot pursuits in its efforts to police its waters.[10] Naturally enough, the flag states and masters of the fishing vessels have denied any involvement in illegal activity and these matters have come before Australian courts for adjudication.

The *Volga* litigation arose from a hot pursuit that took place near the HIMI AFZ in 2002.[11] A Russian flagged fishing vessel, the MV *Volga*, was detected on 7 February approximately 30nm inside the AFZ. A Royal Australian Navy frigate, HMAS *Canberra*, was in the area but beyond visual range. *Canberra* launched her helicopter to investigate while altering course to intercept. By the time the helicopter was in radar range of the *Volga*, she was outside the AFZ. Only at that point did the helicopter inform the *Volga* that she was about to be boarded. *Volga* did not acknowledge but was subsequently boarded outside the AFZ. More than 120 tonnes of Patagonian Toothfish was found on board. The

vessel and its catch were automatically forfeited to the Commonwealth under FMA provisions.

Olbers Co Ltd (Olbers), the Russian owner of the *Volga* prior to the forfeiture, commenced proceedings against the Commonwealth in the Federal Court. It challenged the forfeiture provisions of the FMA and argued that the boarding and seizure of the *Volga* outside the AFZ was unlawful.

Section 106A of the FMA automatically forfeits to the Commonwealth any vessel that is illegally fishing. There is no requirement to prove that the vessel was in fact conducting illegal fishing activities at the time though a judicial determination to this effect may be made later if the forfeiture is contested in subsequent proceedings. Thus,

> '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 in any jurisdiction in which Australian title will be recognised.'[12]

This judgement has far reaching implications. If any vessel engaged in illegal fishing in the AFZ is automatically forfeited to the Crown then it may be that there is no need to conduct hot pursuit at all. The Commonwealth could simply wait until the vessel reaches a port and then lay claim to it. Of course, seizing the vessel by means of hot pursuit may be administratively simpler than attempting to persuade a foreign State that it has a Commonwealth vessel in its jurisdiction. Nevertheless, this also gives considerable power to Australia as a port State. For any vessel that may have committed an illegal act in Australian waters the chance of being apprehended during a port visit is too great. In other words, the 'risk to the owner …[is that] the boat will leave the AFZ with an insecure title.'[13]

The Court ultimately found that *Volga* had been fishing illegally, based on evidence from the Australian Fisheries Management Authority officer who boarded *Volga* and reconstituted data from *Volga's* computers.[14]

Olbers argued that the hot pursuit requirements under Article 111 for a warning to stop were not adhered to and thus the hot pursuit and apprehension of *Volga* was unlawful. The court rejected the argument on the ground that the vessel had been duly forfeited to the Commonwealth, and that therefore the hot pursuit requirements did not apply. The court found that the Commonwealth had merely followed and boarded its own vessel as a result.

However, the Court did turn its mind to the constitutional issue concerning the construction of the section 87 requirement to pursue a boat 'from a place within the AFZ'. Justice French noted that the term 'must have regard to the practical exigencies of the circumstances in which pursuit might have to be taken.' He concluded that the language in section 87 'cannot accommodate the requirement of a stop order specified in Article 111'.[15] Nevertheless, because the Court found that *Volga* had been illegally fishing, and was thus forfeited to the Commonwealth, adherence to any hot pursuit requirements was not relevant.

The Federal Court approach to hot pursuit is logical based on the interpretation of the current legislation and the standing of international law in Australian law. If then, the forfeiture provision is unassailable, it is curious that the FMA requires a power of hot pursuit at all. Once a vessel is engaged in illegal fishing, it is automatically forfeited to the Commonwealth rendering the doctrine of hot pursuit little more than confirmation that the Commonwealth can pursue and seize its own property. Any claims by vessel owners that the requirements of hot pursuit have not been met will necessarily fail.

Likewise, appeals to the requirements of international law in the Australian context will likewise fail. Justice French noted that although legislation may be interpreted to accord with Australia's international obligations, where those obligations have arisen before the enactment of the relevant legislative provisions, 'such construction can only occur where the language permits it'.[16] Here, the FMA does not permit recourse to the wording of Article 111 of LOSC.

It seems unlikely that the FMA will be amended to more closely align with the requirements of Article 111. Certainly the current construction is advantageous to Australian authorities trying to stem the trade in illegal fishing. Challenges to the law within the Australian legal system will not bring about the required change as the *Volga* litigation demonstrates. Such change may only be effected if an Australian hot pursuit is successfully challenged in an international forum. Interestingly, Russia, the relevant flag State, did take Australia to the International Tribunal for the Law of the Sea over *Volga's* capture. However, the challenge was not for the failure to conduct hot pursuit in accordance with international law requirements, but rather the bond and prompt release requirements under LOSC. The Tribunal noted that the circumstances of the seizure of the *Volga* were not relevant to the proceedings for prompt release.[17] Unless the circumstances of a hot pursuit conducted in accordance with FMA provisions is found to be incompatible with international law, there is no reason for the Act to be amended.

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1 See for example, *Claim of the British Ship "I'm Alone" v United States* "Reports Of The Commissioners" 1935, 29 American Journal of International Law 327

2 Devonshire, J in *R v Mills and Ors* (unreported) cited in Gilmore, William "Hot Pursuit: The Case of R v Mills and Others", 1995, *The International and Comparative Law Quarterly*, Vol 44, No 4, 949 at 954.

3 This principle is extended to the EEZ or continental shelf by virtue of Article 111(2)

4 Article 111(4)

5 Article 111(3)

6 Article 111(5)

7 Mason, CJ and Dean J, *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* [1995] HCA 20 at 26. The *Teoh* case involved the impact of Australia's ratification of the Rights of the Child Convention on the decision-making process in deciding to deport a convicted drug dealer who was the father of Australian children.

8 For example, section 184B of the *Customs Act 1901 (Cth)* allows a 'commander' to 'chase' a boat.

9 The AFZ is defined in section 4 of the FMA as: (a) the waters adjacent to Australia within the outer limits of the exclusive economic zone adjacent to the coast of Australia; and (b) the waters adjacent to each external territory within the outer limits of the exclusive economic zone adjacent to the coast of the external Territory; but does not include: (c) coastal waters of, or waters within the limits of, a State or internal Territory; or (d) waters that are excepted waters.

10 For example, the pursuit of the *South Tomi* in April 2001 was conducted over 15 days and 3300nm. In August 2003, the *Viarsa* was pursued for 21 days across 3900nm.

11 The litigation involved five separate Federal Court decisions.

12 *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229, per French, J, para 77.

13 *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229, per French, J, para 77.

14 *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229, per French, J, para 77.

15 *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229, per French, J, para 96.

16 *Olbers v Commonwealth of Australia (No 4)* [2004] FCA 229, per French, J, para 77.

17 The "Volga" Case (Russian Federation v Australia), Application for prompt release, Judgement. International Tribunal For The Law Of The Sea, 23 December 2002 at paragraph 83.