to see more flesh added to the constitutional conception of federalism,[84] the Court seems, at least at present, intent upon a minimalist and unelaborated conception. The preference for an unelaborated conception of federalism is reflected in the Court's insistence, reiterated in *Austin*, that the *Melbourne Corporation* doctrine's contours and limits need not be defined with precision.[85] A preference for minimalism might be deduced from other aspects of the case law – for instance, the established view that the *Melbourne Corporation* principle does not protect the States from the erosion of special privileges enjoyed to the exclusion of other legal subjects.[86]

A preference for a minimalist and unelaborated conception of federalism might be thought to militate against any formulation of the *Melbourne Corporation* principle involving more than minimal structure and definition. This, in turn, might seem to explain both the *Austin* majority's rejection of the *Queensland Electricity* two-limbed formulation and its more general refusal to articulate a structured role for considerations of discrimination. However, as I have explained, there are several bases on which the Court might depart consciously from its usual minimalism and instead adopt more detailed and specific rules to govern cases where States are singled out. In this article I have discussed three such bases: concerns about the Court's fact-finding capabilities in this area; furtherance of rule of law values such as doctrinal clarity and certainty; and the need to give appropriate emphasis to the symbolic dimension of the States' constitutional status. It may take some time for the potential deficiencies of a fluid *Melbourne Corporation* test to come into clear focus and for the advantages of a more structured treatment of the discrimination issue to be revisited. Importantly, though, *Austin* does not seem entirely to rule out an ongoing structured role for discrimination. Given the variety of ways in which the discrimination factor could function within State immunity doctrine, and the ready availability of alternate language with which to describe that factor, its re-emergence in some form seems assured.

84. See eg G Hill 'Will the High Court "Wakim" Chapter II of the Constitution?' (2003) 31 FL Rev 445, 447; Twomey above n 18, 534-535, 539.
85. *Austin* above n 4, Gleeson CJ 217, Gaudron, Gummow & Hayne JJ 250, 259, Kirby J 300.
86. See *Queensland Electricity* above n 2, Mason J 217, 220.

Testing the Waters: Fine Tuning the Provisions of the Fisheries Management Act 1991 (Cth) Applicable to Foreign Fishing Boats

RACHEL BAIRD†

Illegal fishing in the Heard and McDonald Islands' Australian Fishing Zone raises significant security and resource management issues for Australia. In the past half decade, the Commonwealth government has expended considerable effort aimed at tightening existing provisions in the Fisheries Management Act 1991 (Cth) and in introducing new provisions focused on increasing the cost of illegal fishing. This paper examines those provisions and concludes that economic opportunities for illegal fishers have decreased, whilst the risks associated with such activities have increased.

IN late 2003, the Federal government announced its intention to commence armed patrols in the Heard and McDonald Islands Fishing Zone, the most southerly region of the Australian Fishing Zone (AFZ).[1] To this end, Cabinet agreed to the allocation of $80-100 million in February 2004.[2] This commitment followed closely upon the May 2003 announcement that $12 million had been reserved for the 2003–2004 financial year to 'enhance the capability of patrols'.[3] In addition to these logistical measures aimed at enhancing surveillance and enforcement, a number of detailed and specific amendments to the Fisheries Management Act 1991 (Cth) were

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1. I Macdonald (Minister for Fisheries, Forestry and Conservation) and C Ellison (Minister for Customs and Justice) 'Permanent Armed Patrols to Toughen up Border Protection in Southern Ocean' (Joint Statement AFFA03/277MJ 17 Dec 2003).
2. I Macdonald (Minister for Fisheries, Forestry and Conservation) and R Hill (Minister for Defence) 'Navy Catches Suspected Illegal Fishing Vessel' (Media Release AFFA04/015MJ 24 Jan 2004). See also *Hansard* (Senate) 10 Feb 2004, 19 609.
3. I Macdonald (Minister for Fisheries, Forestry and Conservation) and C Ellison (Minister for Customs and Justice) 'S12 Million Budget Boost to Fight Illegal Fishing in Southern Ocean' (Joint Statement AFFA03/083MJ 13 May 2003).

passed in April 2004.[4] The amendments were described, inter alia, in terms of 'putting in place a more effective deterrence and compliance regime, particularly in relation to illegal, unreported and unregulated fishing'.[5]

This flurry of activity represents a small fraction of over five years of directed planning by the Federal government and supporting Commonwealth departments, to fine-tune the surveillance, enforcement and regulatory framework applicable to foreign fishing boats seeking to fish, without authorisation, within the AFZ. In particular, it has been the activity of foreign boats[6] within the Heard and McDonald Islands' Fishing Zone that has prompted governmental responses.

This article examines the Fisheries Management Act in the context of efforts to deter and eliminate illegal fishing[7] within this portion of the AFZ. Commercial fishing commenced in the Heard and McDonald Islands' AFZ in 1997. The first two foreign fishing boats were arrested by Commonwealth authorities for fishing without authorisation in October 1997.[8] A third foreign boat was arrested in February 1998.[9] Significant amendments to the Fisheries Management Act were made in 1999.[10] Following four more arrests, two of which were precipitated by costly hot pursuits,[11] additional amendments, specifically aimed at foreign fishing boats, were made in 2003.[12]

A review of the 1999 and 2003 amendments to the Fisheries Management Act in this article is preceded by an explanation of the management of Australian fisheries

4. See *Hansard* above n 2, 19 612; *Hansard* (HR) 22 Mar 2004, 26 828; Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act 2004 (Cth).
5. *Hansard*, above n 2, 19 603. Illegal, Unreported and Unregulated fishing is addressed in Food and Agriculture Organisation *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (IPOA-IUU) (adopted 2 Mar 2001).
6. The term 'boat' is used in this paper in preference to the term 'vessel' (which is adopted in many international conventions) as the Fisheries Management Act 1991 (Cth) frames offences by reference to the term 'foreign boats'. Table 1 details the offences applicable to foreign boats: see below p 70.
7. Illegal fishing is defined in the IPOA-IUU above n 5. It is fishing in contravention of applicable coastal state conservation measures within the exclusive economic zone of that particular coastal state or fishing by a member state of a regional fisheries management organisation (RFMO) in contravention of conservation measures established by the RFMO. For the purposes of this article, reference will be made to illegal fishing rather than to the broad term 'IUU fishing' because it more accurately describes the particular nature of non-compliant fishing in the AFZ.
8. The *Salvora* was arrested on 16 Oct 1997 and the *Aliza Glacial* on 17 Oct 1997.
9. The *Big Star* was arrested on 21 Feb 1998.
10. Fisheries Legislation Amendment Act (No 1) 1999 (Cth).
11. The *South Tomi* was arrested on 12 Apr 2001 following a 14-day hot pursuit; the *Lena* on 6 Feb 2002; the *Volga* on 7 Feb 2002; and the *Viarsa* on 28 Aug 2003. The *Maya V* was arrested on 23 Jan 2004.
12. Above n 4.

generally. The particular difficulties created by illegal fishing in the Heard and McDonald Islands' AFZ follows. The analysis of the Fisheries Management Act commences with an examination of offences applicable to foreign fishing boats, including the additional offences introduced in 1999, and increases to maximum fines. The forfeiture provisions applying to foreign fishing boats used in relation to a proscribed fisheries offence are then analysed. These provisions were amended in 1999 following the *Aliza Glacial* litigation, in which the Federal Court ruled against the Commonwealth's interest in the boat. The post-1999 forfeiture provisions, intended by the government to ensure the Commonwealth's interests would not be defeated again, have been the subject of sustained litigation.[13]

Whilst the 2003 amendments to the Fisheries Management Act increased maximum fines, two new provisions, specifically targeting the persistent problem of illegal fishing, were also introduced. Under the first, the Commonwealth is now empowered to recover, as a debt, the attendant costs of any hot pursuit undertaken to secure the apprehension of a foreign fishing boat. Whilst the intention of the amendment is commendable, the practicalities of actually recovering any monies from the owners of arrested foreign fishing boats may prove frustrating. The second amendment alludes to the difficulties encountered in policing the remote and often hostile Southern Ocean and relates to the requirement that Commonwealth officers show identification to foreign boats.

The effectiveness of the above-mentioned amendments has not, with the exception of the forfeiture provisions, been tested. The main obstacle to their impact in terms of enhancing Australia's enforcement capabilities within the Heard and McDonald Islands AFZ (and in deterring illegal fishing boats) lies in the very nature of illegal fishing. The industry is controlled by highly organised corporate entities driven by profit margins. The Commonwealth must expect the Fisheries Management Act to be challenged at every opportunity.[14] Whether it can withstand these challenges is a matter for the courts; however, the most recent amendments to the Act evince a clear commitment on the part of the Commonwealth to construct a rigorous regulatory framework which is not limited simply to increasing the applicable maximum fines.

13. *Olbers v Commonwealth (No 4)* (2004) 205 ALR 432; *Olbers v Commonwealth* [2004] FCAFC 262 (16 Sep 2004).
14. As it has been in the past (eg, the Master of the *Big Star* appealed the fine of $100 000 imposed when convicted on charges under ss 100(1) and 100(2) of the Fisheries Management Act 1991). His fine was reduced to $24 000: see *R v Perez* (1999) 21 WAR 470. The Master of the *South Tomi* pleaded not guilty to a charge under s 108(c) – refusing or neglecting to comply with an order given under s 84 – and was acquitted. Evidence was led by him that the order was non-specific, requiring the vessel to 'head to port' and as such could not be complied with: AFMA Officers (personal communication, 14 Feb 2002). Most recently the owners of the *Volga* appealed the decision of the Federal Court, which upheld the validity of the forfeiture provisions in the Fisheries Management Act. See *Olbers v Commonwealth (No 4)* ibid.

I. THE MANAGEMENT OF COMMONWEALTH FISHERIES

Commonwealth fisheries are managed under the Fisheries Management Act 1991 (Cth) and Fisheries Administration Act 1991 (Cth). The Australian Fisheries Management Authority (AFMA), a statutory authority established in February 1992, is responsible for the management of Commonwealth fishery resources.[15] In 1979, the government declared a 200 mile AFZ around Australia and all external territories.[16] It was not until 1994 that Australia formally declared an exclusive economic zone (EEZ) pursuant to the 1982 Law of the Sea Convention (LOSC).[17] The EEZ was formally proclaimed via an amendment to the Seas and Submerged Lands Act 1973 (Cth).[18] Section 10A of the Act reads:

> 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 right of the Commonwealth.

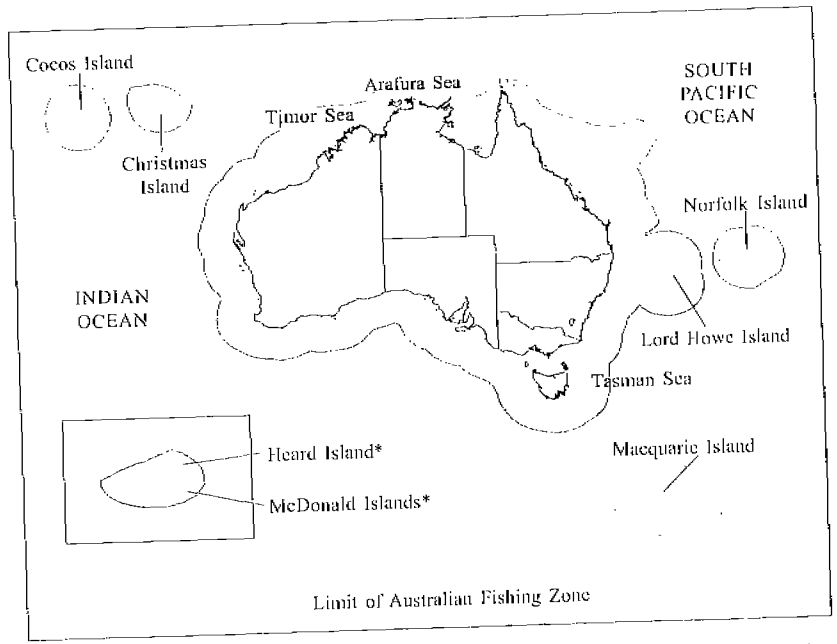
Section 10B of the Act states that an EEZ may be declared by the Governor-in-Council not inconsistently with Articles 55 or 57 of the LOSC. Article 55 recognises the existence of an EEZ as a 'specific legal regime' affording rights and obligations to coastal and other states in accordance with Part V of the LOSC. Article 57 stipulates that the EEZ 'shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured'. The EEZ is defined in section 3 of the Seas and Submerged Lands Act to reflect the LOSC definition.[19]

It is important to note that the Australian declaration of an EEZ in 1994 did not involve a revocation of the AFZ declared 15 years earlier.[20] The Maritime Legislation Amendment Act 1994 (Cth) did, however, specifically amend the definition of the AFZ, as it was established by the Fisheries Management Act.[21] For practical purposes, the AFZ and EEZ now 'mirror' each other. The amended definition of the AFZ is:

> (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.[22]

15 Fisheries Administration Act 1991 (Cth) s 6.
16. Fisheries Amendment Act 1978 (Cth) s 3.
17. UN Convention on the Law of the Sea (10 Dec 1982) 21 ILM 1261 (entered into force 16 Nov 1994).
18. A new Div 1A of Part II was inserted by the Maritime Legislation Amendment Act 1994 (Cth).
19. 'Exclusive economic zone has the same meaning as in Articles 55 and 57 of the Convention': Seas and Submerged Lands Act 1973 (Cth) s 3.
20. Notwithstanding that, the Maritime Legislation Amendment Act 1994 (Cth) did delete the definition of the AFZ from both the Sea Installations Act 1987 (Cth) and the Whale Protection Act 1980 (Cth), substituting the term 'exclusive economic zone'.
21. Maritime Legislation Amendment Act 1994 (Cth) sch 1.
22. Fisheries Management Act 1991 (Cth) s 4.

The Australian Fishing Zone



* Heard Island is located 4 100 km south-west of the Australian continent and 1 500 km north of Antarctica. Heard Island (53°06'S, 73°30'E) and the McDonald Islands (53°03'S, 72°36'E) lie 40 km apart.

The declaration of a 200 mile EEZ adjacent to mainland Australia and her external territories afforded Australia an expanded jurisdiction under international law over matters such as off-shore installations, living and non-living natural resources, marine scientific research and the protection of the marine environment.[23] The actual management and administration of Commonwealth fisheries, however, is properly a matter for domestic law.[24]

The end result of the 1994 legislative amendments is that although under international law Australian enjoys a 200 mile EEZ adjacent to the Heard and McDonald Islands, the term 'AFZ' has been retained for the purposes of Commonwealth fisheries management under the Fisheries Management Act. Offences under this Act refer, for example, to the offence of fishing without a licence within the AFZ rather than

23. LOSC Art 56.
24. Although the right to declare an exclusive economic zone is recognised under international law, Part V of the LOSC imposes a number of rights and obligations on both coastal states and other states.

fishing without a licence within the EEZ. For the purposes of this article, references hereafter will be made to the AFZ.

II. DIFFICULTIES PRESENTED BY ILLEGAL FISHING

Eight foreign fishing boats have been arrested since 1997 within the Heard and McDonald Islands' portion of the AFZ and various members of the crew have been charged with a range of fisheries offences under the Fisheries Management Act.[25] Whilst this figure seems insignificant in comparison with the hundreds of foreign fishing boats arrested each year in Australia's northern waters, it is the value of the fish targeted around the Heard and McDonald Islands which compels attention. The target species is the Patagonian Toothfish, also referred to a 'Black Gold'. The Toothfish is a valued commodity on both the Japanese and US markets and can fetch prices between US$5 000–7 000 per tonne.[26] It is traded under a variety of names, which acts against efforts to track the illegal trade in Toothfish. On the Asian market it is known as 'Mero'. It is sold as 'Chilean Sea Bass' or simply 'Sea Bass' in the US. In southern Chile, fishermen refer to it as 'Merlusa Nigra' (black hake).[27]

The Toothfish is known to exist in good quantities on the Kerguelen Plateau, a continental shelf upon which the Kerguelen Isles (France) and Heard Island and the McDonald Islands are situated. Commercially valuable populations straddle areas of high seas adjacent to both the French declared EEZ adjacent to the Kerguelen Isles and the AFZ offshore to the Heard and McDonald Islands. This makes management of the Toothfish stocks somewhat problematic for the coastal states because fishing activities in areas of high seas can have an adverse impact on the portion of a straddling stock located within adjacent coastal waters.[28] However, a more pressing concern for both Australia and France is the regular incursions into their respective maritime zones by foreign fishing boats.

The presence of unauthorised foreign fishing boats within the Heard and McDonald Islands' AFZ has been reported by the legal Toothfish operators since commercial

25. Above nn 8, 9, 11.
26. AAP 'Valuable Fish Species Being Plundered in the Southern Ocean' (Press Release 001PAC 18 May 1997).
27. Antarctic and Southern Ocean Coalition 'Patagonian Toothfish: Going to Hell in a Fishing Basket' (Press Release 29 Oct 1999).
28. It is not within the scope of this paper to discuss straddling fish stock management under international law. There are many articles which examine this area of fisheries management: see eg M Christopherson 'Toward a Rational Harvest: The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Species' (1996) 5 Minnesota Journ Global Trade 357; L Juda 'The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique' (1997) 28 Ocean Dev't & Int'l Law 147; R Rayfuse 'The United Nations Agreement on Straddling and Highly Migratory Fish Stocks as an Objective Regime: A Case of Wishful Thinking?' (1999) 20 Aust Yearbook of Int'l Law 253.

fishing commenced in 1997.[29] The estimated annual illegal catch currently sits close to the annual legal catch.[30] The Federal government committed $15.8 million over the four years preceding June 2003 to enhancing surveillance and enforcement in the Heard and McDonald Islands region.[31] An additional $12 million was allocated in the 2003-2004 budget to enhance the capability of patrols. $1.8 million of this was allocated to improving post-arrest procedures.[32] The most recent offensive taken by the Federal government has been the announcement of the commencement of armed patrols in the Southern Ocean.[33] It is intended that the patrol boats be equipped with one deck-mounted machine gun.[34] The boarding party will be armed with handguns.[35] The capability of the armed patrols to arrest an uncooperative foreign fishing boat in the high seas has not yet been tested. Given that the *Maya V* was apprehended in January 2004 with the assistance of a Naval boarding party from HMAS Warramunga,[36] there remains a real likelihood that the armed patrols will require the support of Defence personnel to secure an arrest.

III. FISHERIES OFFENCES APPLYING TO FOREIGN FISHING BOATS

The offences created by the Fisheries Management Act which are applicable to foreign fishing boats have been extracted in Table 1, below. The Fisheries Management Act was significantly amended in 1999 when intentional offences were introduced to compliment the existing strict liability provisions.[37] Sections 100A, 101A and 101B, details of which are included in the Table, were inserted into the principal Act. At that time, penalties for foreign fishing offences were doubled.[38]

29. Austral Fisheries (personal communication, Dec 2001). In the earlier years of the development of the Heard and McDonald Islands' fishery, dozens of illegal fishing boats were sighted. With increased surveillance and enforcement efforts, this number has dropped; however, the boats continue to operate in groups as indicated by the fact that, on two occasions, two boats have been apprehended within a day of each other.
30. See eg I Macdonald 'The Howard Government's Efforts to Deter Illegal Fishing Activities' (Canberra: National Press Club, 19 Aug 2003).
31. Department of Agriculture, Fisheries and Forestry 'Global Fisheries Issues Affecting Australia' (Fact Sheet, undated).
32. Macdonald & Ellison, above n 3. This would include drafting changes and s 106C notices, assessing the value of the vessel's catch and gear, and ensuring procedural requirements of the Fisheries Management Act are met.
33. I Macdonald (Minister for Fisheries, Forestry and Conservation), C Ellison (Minister for Customs and Justice) and S Stone (Parliamentary Secretary to the Minister for the Environment) 'Armed Southern Ocean Patrol Trials Launched from Hobart' (Media Release DAFF04/132MJ 29 Jun 2004).
34. Ibid.
35. Ibid.
36. The sailors were 'fast-roped' on board the *Maya V* from the ship's helicopter. Macdonald & Hill above n 2.
37. Fisheries Legislation Amendment Act (No 1) 1999 (Cth).
38. Ibid, sch 1.

Table 1: Offences under the Fisheries Management Act 1991 (Cth) in relation to foreign fishing boats[a]

Section	Offence	Maximum Penalty
100	Strict liability offence of using foreign boat for commercial fishing within the AFZ without a foreign fishing licence.	$175 000 if dealt with on indictment; $27 500 if dealt with summarily.
100A	Intentionally using foreign boat for commercial fishing within the AFZ without a foreign fishing licence.	$825 000 if boat is 24 metres or more; $550 000 if boat is less than 24 metres.
101	Strict liability offence of having a foreign boat within the AFZ equipped with nets, traps or other equipment for fishing without a foreign fishing licence, port permit, or approval.	$275 000 if dealt with on indictment; $27 500 if dealt with summarily.
101A(1)	Intentionally having a foreign boat within the AFZ equipped with nets, traps or other equipment for fishing without a foreign fishing licence, port permit, or approval.	$550 000.
101B[b]	Intentionally using a support boat from outside the AFZ to directly support a foreign boat within the AFZ in contravention of ss 100, 100A, 101 or 101A.	$550 000.
106A	Boats used in an offence under sections 95(2), 99, 100, 100A, 101, 101A or 101B are condemned as forfeited unless the owner or person in control or possession provides written notice of a claim.	Forfeiture.
108[c]	Obstruction of officer including failing to facilitate by reasonable means the boarding by officer; refusing without reasonable excuse an authorised search; refusing or neglecting to comply with order under s 84 without a reasonable excuse; and resisting or obstructing officer in exercise of his powers.	Imprisonment for 12 months.

(a) Ss 100A, 101A, 101B and 106A were inserted into the principal Act by the Fisheries Legislation Amendment Act (No 1) 1999 (Cth), which came into force on 3 Nov 1999.

(b) Although no charges have been laid under this section (inserted in 1999), there has been evidence of support boats assisting foreign fishing boats fishing illegally within the AFZ. This point was considered in *M/V Saiga (No 2)* (1999), *St Vincent and Grenadines v Guinea* (1 Jul 1999) ITLOS Case No 2 paras 56-59. The Tribunal noted that arguments could be advanced to support bunkering of a fishing vessel as an activity within LOSC art 73.

(c) 'Officer' means a section 83 officer including an AFMA employee, member of Australian Federal Police or State police or member of the Australian Defence Force: s 4.

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).[39] Current maximum penalties are noted in Table 1. An indication that the 2004 amendments specifically target large-scale illegal fishing operations can be gleaned from the wording of the amendments. Only those boats exceeding 24 metres in length are subject to the new maximum fine of $875 000.[40]

Given the anecdotal evidence that a single illegal fishing expedition can net corporate owners in excess of $1 million, one might ponder whether even this increased maximum fine is enough to deter the steady stream of illegal fishers.[41] In circumstances where the illegal activity can net offenders such high returns, fines may be regarded as simply a cost of doing business. Whilst Australian courts have been conservative in awarding fines to date,[42] the increase to maximum fines is evidently intended to provide an improved deterrent to illegal fishing.

Other amendments introduced by the Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other Matters) Act and the Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Act 2004 are reviewed in more detail below.[43] The key provisions of the Fisheries Management Act as they relate to both foreign boats and the fishers operating them, including the forfeiture provisions, are also considered below.[44]

The term employed by the Fisheries Management Act is 'foreign boat' and not 'foreign vessel', which is the term often used in international law. A 'foreign boat' is defined as a 'boat other than an Australian boat'.[45] Division 5, Part 6 of the Act outlines the offences pertaining to foreign boats. The central element in many of the offences is fishing within the AFZ without a foreign fishing licence. Section 34 of the Act governs the granting of such licences. 'Fishing' has been broadly defined in section 4 of the Act to mean:

(a) searching for, or taking, fish; or
(b) attempting to search for, or take, fish; or

39. Sch 1, s 26. This Act commenced on 6 Aug 2004.
40. Ibid.
41. See ABC 'The Toothfish Pirates' *Four Corners* 30 Sep 2002. One of the interviewees stated that perhaps the 'easiest way to make a million bucks is to put together a boat and go fishing for a season in the Southern Ocean'.
42. The fines imposed on persons convicted of offences under ss 100–100A of the Fisheries Management Act 1991 (Cth) range from $1 000 (with a 5 year, $4 000 good behaviour bond) imposed on each of the 32 junior crew members on board the *Maya V*, to a total of $136 000 imposed on the Master of the *South Tomi*.
43. See below pp 78-81.
44. See below pp 72-78.
45. Fisheries Management Act 1991 (Cth) s 4. The term 'vessel' is used in the LOSC: see eg LOSC Art 292. The International Tribunal for the Law of the Sea (ITLOS) also adopts the term 'vessel'. LOSC does use the term 'ship' in some articles: see eg LOSC Art 17 on the right of innocent passage.

(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 definition, except flights in emergencies involving the health or safety of crew members or the safety of a boat; or
(g) the processing, carrying or shipping of fish that have been taken.

IV. THE FORFEITURE PROVISIONS OF THE FISHERIES MANAGEMENT ACT

A significant amendment introduced by the Fisheries Legislation Amendment Act (No 1) 1999 (Cth) relates to the making of a forfeiture order in relation to seized boats, fishing equipment and fish. Section 106A was inserted into the Fisheries Management Act in 1999. Under this section any fishing boat used in an offence under sections 95(2), 99, 100, 100A, 101 or 101A is forfeited to the Commonwealth.[46] A boat used in an offence against section 101B (a support boat) is also forfeited.[47] Nets, traps, equipment and catch on board a boat at the time of the offence are forfeited under sections 106A(c) and (d). Fisheries officers are authorised, under section 84(1)(ga), to seize items forfeited under section 106A.[48]

Under section 106C, written notice of the seizure of items must be given to the Master of the boat, or to the person whom the officer has reasonable grounds to believe was the Master of the boat immediately before seizure. In circumstances where the officer cannot conveniently give the notice to the Master, the requirement to provide written notice can be satisfied by fixing the notice to a prominent part of the thing seized. In what is an amusing piece of legislative drafting, it is noted in section 106C that the notice cannot be fixed to a thing seized, if that thing is a fish.

Unless the owner or person in possession or control of the boat, 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' under section 106E. The giving of a claim by the boat's owner does not amount to

46. Fisheries Management Act 1991 (Cth) s 95 creates the general offence of engaging in commercial fishing within the AFZ without authorisation; s 99 creates the offence of using a foreign boat for recreational fishing.
47. Fisheries Management Act 1991(Cth) s 106A(b).
48. S 84(1)(ga) of the Fisheries Management Act was inserted by the 1999 amendments and reads as follows: 'An officer may ... seize all or any of the following that are forfeited to the Commonwealth under section 106A or that the officer has reasonable grounds to believe are forfeited under that section: (i) a boat; (i) a net, trap or other equipment; and (iii) fish.'

proceedings to recover the boat and the Managing Director of AFMA may, on receipt of a claim, give 'a claimant written notice stating that the thing will be condemned if the claimant does not institute proceedings against the Commonwealth within two months.'

Prior to the 1999 amendments, the Commonwealth did possess the right of forfeiture. However, that right was dependent upon a conviction of a member of the crew in relation to one of the prescribed fisheries offences listed in section 106, as it then was. Furthermore, the forfeiture only became effective upon the making of a forfeiture order. The nature of the Commonwealth's contingent interest in arrested foreign boats is explained in the Federal Court decision in *Bergensbanken ASA v The Ship 'Aliza Glacil'*.[49]

The *Aliza Glacial* litigation

The *Aliza Glacial* was arrested within the Heard and McDonald Islands' AFZ on 17 October 1997. The owner of the boat defaulted on loan repayments shortly after its arrest. Bergensbanken, the Norwegian mortgagee, instituted proceedings in the Australian Federal Court under the Admiralty Act 1988 (Cth) to recover the boat. The 1999 amendments to the operation of section 106, mentioned above, were formulated principally in response to the successful application by Bergensbanken for the recovery and sale of the boat. The Federal Court ordered the sale of the *Alizia Glacial* notwithstanding the seizure of the boat by the Commonwealth authorities under section 84(1)(g) of the Fisheries Management Act.[50]

The wording of section 84(1)(g) is quite different from section 84(1)(ga), which has been discussed above. The difference between the two sections is that section 84(1)(g) provides a right of seizure of listed items, the right being contingent on the contravention of the Fisheries Management Act. Section 84(1)(ga) provides for seizure of items forfeited, by virtue of section 106A, to the Commonwealth. As mentioned, prior to the 1999 amendments to the Fisheries Management Act, no actual right of forfeiture could accrue to the Commonwealth until such time as a conviction, under specified sections of the Act, was recorded against a crew member of the arrested boat. To take effect, the forfeiture had to be ordered by the judge before whom the crew members were convicted. The wording of section 106, prior to the 1999 amendments, stated:

49. *Bergensbanken ASA v Ship Aliza Glacial* [1998] 1642 FCA 4 (17 Dec 1998).
50. S 84(1)(g) states: 'An officer may ... subject to subsection (1A), seize, detain, remove or secure: (i) any fish that the officer has reasonable grounds to believe has been taken, processed, carried or landed in contravention of this Act; or (ii) any boat, net, trap or equipment that the officer has reasonable grounds to believe has been used, is being used or is intended to be used in contravention of this Act; or (iii) any document or other thing that the officer has reasonable grounds to believe may afford evidence as to the commission of an offence against this Act.'

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

The Commonwealth's interest in the *Aliza Glacial* in 1998 was, therefore, no more than a potential interest, and, consequently, subject to the existing property rights of a mortgagee. Furthermore, both of the crew members charged with offences – Captain Andreassen and Master Miranda – had left Australia and there was little likelihood of either of them returning to face the charges. This fact was relevant to Ryan J's observation that he was not inclined to delay the order sought by the mortgagee for the sale of the boat.

This need for an actual order of forfeiture reflects the legal process followed in relation to the arrest of the *Big Star* in 1998. Master Perez was convicted under sections 100 and 100A of the Fisheries Management Act and a court order was subsequently made for the forfeiture of the boat to the Commonwealth. However, as the boat had already been released on a bond settled under Article 73 of the LOSC, it could not be recovered. To date, the Commonwealth has been unable to exercise its proprietary rights.[51]

The government's intention that its legitimate interests in arrested foreign fishing boats not be defeated is apparent in the parliamentary debates on the Fisheries Legislation Amendment Act (No 1), which introduced sections 106A–106H. The Minister for Fisheries stated in his Second Reading speech:

> The amendment makes clear third party interests will not prevail over Commonwealth enforcement action by virtue of the Admiralty Act. Amendments under schedule 1 will provide for a more effective catch, gear and boat forfeiture scheme to deter illegal fishing in the Australian Fishing Zone.[52]

In order to remove any possible doubt about the priority of the Commonwealth's interest in boats seized under the new section 106A, and perhaps to avoid a repeat of the political embarrassment of 'losing' the *Aliza Glacial* to a Norwegian bank,[53] section 108A was also inserted by the 1999 amendments.[54]

51. *R v Perez* above n 14, 470. Owen J noted that the security documents were executed on 14 May 1998 and that the boat sailed from Fremantle that day.
52. *Hansard* (HR) 1 Sep 1999, 9 566.
53. *Hansard* (Senate) 8 Jul 1998, 5 229: Senator Murphy was critical of the government for 'allowing a Norwegian bank to repossess the vessel' and noted that the government was 'liable for the costs associated with this fiasco.' The Senator also inquired as to the 'steps the government will be taking to ensure that in the future we are not confronted with this sort of situation.'
54. S 108A reads:

To appreciate why the Federal government has been so intent on making the enforcement and forfeiture provisions of the Fisheries Management Act as water-tight as possible, one needs to reflect on the problem of illegal fishing. Although section 106 had been in force since 1991, it was not tested until the *Aliza Glacial* litigation in 1998. When the legislation was found wanting, the government took decisive steps to ensure that future illegal foreign fishing boats could be validly forfeited under the Fisheries Management Act. These amended provisions were tested in 2002 by Olbers Ltd, the owners of the *Volga*, who attempted to claim their boat in legal proceedings. In April 2004, the Federal Court dismissed Olbers' application.[55] In September 2004, the Full Federal Court dismissed Olbers' appeal with costs.[56]

The *Volga* litigation

The *Volga* was apprehended on 7 February 2002 and was something of a bonus to authorities who were pursuing the *Lena*.[57] Olbers Ltd commenced proceedings in the Federal Court on 21 May 2002 challenging the validity of the forfeiture provisions under sections 106A-106H of the Fisheries Management Act.[58] The main thrust of their argument was that before section 106A could operate to effect a forfeiture of the boat, the gear and catch on board, it was necessary that there be a conviction for one or more of the offences upon which such forfeiture was said to be based. This line of argument was based on the reasoning of Ryan J in the *Aliza Glacial* litigation; however, in the former case the legislation supported that argument. The post-1999 legislation does not require either a conviction for a fisheries offence or a court order to make the forfeiture effective.

The parties to the *Volga* case appeared before French J on three occasions prior to his determination of the substantive issues.[59] In *Olbers v Commonwealth*

> (1) The seizure, detention or forfeiture of a boat under this Act has effect despite any or all of the following events: (a) the arrest of the boat under the Admiralty Act 1988; (b) the making of an order for the sale of the boat by a court in proceedings brought under the Admiralty Act 1988; and/or (c) the sale of the boat under an order made by a court in proceedings brought under the Admiralty Act 1988.
> (2) Subsection (1) has effect regardless of whether the seizure, detention or forfeiture, or the event that was the basis for the seizure, detention or forfeiture, occurred before or after the arrest, making of the order or sale (as appropriate).

55. *Olbers v Commonwealth (No 4)* above n 13.
56. *Olbers v Commonwealth* above n 13.
57. The *Lena* was arrested on 6 Feb 2002 after previously evading arrest in Dec 2001.
58. *Olbers v Commonwealth (No 4)* above n 13.
59. *Olbers v Commonwealth* [2002] FCA 1269 (16 Oct 2002). This matter involved a request for security for costs by the Commonwealth, which was not granted. *Olbers v Commonwealth (No 2)* [2003] FCA 177 (11 Mar 2003) involved a request by Olbers for a stay of proceedings pending the disposition of criminal charges against crew members of the *Volga*. The stay was refused. *Olbers v Commonwealth (No 3)* [2003] FCA 651 (26 Jun 2003) involved a motion by Olbers for a separate trial on four issues of law. French J determined that it was not appropriate to have a separate trial: see paras 30-38.

(No 4),[60] His Honour referred to the opportunity for the owners of forfeited boats to contest the forfeiture under section 106F before concluding:

> Absent the institution of such proceedings within 30 days of a notice of seizure under section 106C the asserted forfeiture will be put beyond question by operation of section 106E. That process requires no conviction to have been recorded. I reject the contention that section 106A depends for its application upon a conviction for one or more of the offences mentioned in it.[61]

In essence the vessel, equipment and fish were forfeited from the time the events occurred which gave rise to the offence.

The win at first instance was heralded as a victory for the Federal government, in that the intended effect of the legislation was confirmed. Shortly after French J had dismissed the application by Olbers Ltd, the 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 the McDonald Islands.... This is now the third legal case that the owners of the Volga 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 boat 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.[62]

The effectiveness of forfeiture provisions

On appeal to the Full Federal Court, Olbers agreed that there is no forfeiture under section 106A until the steps required in sections 106B–106G have been completed. Olbers submitted that these steps could only be complied with if the vessel was lawfully seized under sections 84 and 87 of the Fisheries Management Act.[63]

The Full Court, without deciding whether officers had complied with sections 84 and 87, rejected Olbers submissions and held the *Volga* was forfeited to the Commonwealth upon commission of the offence. Officers boarding the boat were acting as agents for the Commonwealth, the new owners of the boat.[64]

The scuttling of forfeited foreign fishing boats is proving to be an effective method of removing them from the illegal fishing industry. The evidence shows that released

60. *Olbers v Commonwealth (No 4)* above n 13.
61. Ibid, 454.
62. I Macdonald 'New Chapter in Maritime Law: Attempt to Claim Back the *Volga* Rejected' (Media Release DAFF04/42M 13 Mar 2004).
63. *Olbers v Commonwealth* above n 13.
64. Ibid, para 22.

Table 2: Fate of foreign boats apprehended in the Heard and McDonald Islands AFZ

Vessel	Date of arrest	Fate of vessel after apprehension
Salvora	16 Oct 1997	Released under bond with Vessel Monitoring System condition attached; continued to fish illegally.
Aliza Glacial	17 Oct 1997	Released to mortgagee under Federal Court order.
Big Star	21 Feb 1998	Court order for forfeiture under s 106 (*before* 1999 amendments) following conviction of crew member. Vessel had already been released on payment of bond with Vessel Monitoring System condition attached. Failed to return.
South Tomi	12 Apr 2001	Forfeited under s 106A Fisheries Management Act 1991. Scuttled.
Lena	6 Feb 2002	Forfeited under s 106A Fisheries Management Act. Scuttled.
Volga	7 Feb 2002	Appeal to Full Federal Court from decision of French J dismissed.
Viarsa	28 Aug 2003	Owners have filed an application to challenge the notice of forfeiture under s 106C. Listed for trial in Oct 2004.
Maya V	23 Jan 2004	Forfeited under s 106A Fisheries Management Act 1991 (Cth). Scuttled.

boats are quickly re-equipped and sent back to the Southern Ocean fishing grounds by their corporate owners.[65] The case of the *Salvora* illustrates the point. That vessel was arrested in October 1997 by Australian authorities. In the months prior to her arrest, she reportedly unloaded three separate catches of Toothfish in Mauritius. Following the *Salvora's* release by the Australian authorities, the Vessel Monitoring System (installed on the boat as a condition of the release) was switched off (or somehow became inoperative). The boat was subsequently detected fishing illegally within South African waters off Prince Edward Island. The *Salvora* was arrested by the French for fishing illegally within French sub-Antarctic waters in May 2001.[66] Whilst the French authorities have in the past scuttled arrested foreign fishing boats on the grounds of safety, it is only in the last few years that Australian authorities have taken decisive action in relation to seized boats. The fate of the eight boats arrested to date is shown in Table 2.

65. ABC 'Court Dismisses Poachers' Boat Appeal' *News Online* 12 Mar 2004.
66. See eg ISOFISH '*Salvora*' (Fact Sheet, undated); Greenpeace 'The Case of the *Salvora*' (undated).

Notices under section 106C of the seizure of the boat, equipment and fish have been made in relation to the arrest of the *South Tomi, Lena, Volga, Viarsa* and *Maya V*. The owners of the *South Tomi* instituted proceedings in the Federal Court challenging the forfeiture order. However, the application was withdrawn and the boat, equipment and fish were condemned and forfeited.[67] The *South Tomi* was sunk off the Western Australian coast on 18 September 2004 with the intention that it would be used as a diving wreck.[68] The *Lena* was sunk off Bunbury in 2003 for similar purposes.[69] The owners of the *Maya V* did not challenge the forfeiture order within the statutory time period. The boat was condemned and forfeited. It will be used for simulated boarding training in Western Australia.[70] As noted, the owners of the *Volga* appealed to the Full Federal Court. That appeal was dismissed.

Before proceeding to examine the most recent legislative amendments relating to the Fisheries Management Act, it is appropriate to consider briefly the link between the application of sections 106A-H of the Act and Australia's international obligations under the LOSC. Under article 73(2), there is an obligation on coastal states to 'promptly release arrested vessels and crew upon the posting of a reasonable bond or security.' Thus, even though there may be a forfeiture order under the Fisheries Management Act, it would seem that Australia's obligations under international law to release the boat, on the payment of a reasonable bond, prevail. It is unlikely that authorities could retain the bond and also exercise forfeiture rights under the Fisheries Management Act. It would also appear that, even if the preference of the authorities was to retain possession of the arrested boat and exercise proprietary rights vested by the operation of sections 106A-H, the payment of a bond under article 73(2) of the LOSC would preclude this. However, if the owners of an arrested boat choose not to pay the bond, the forfeiture could proceed.

In late 2002, Russia, the flag State of the *Volga*, lodged an application with the International Tribunal for the Law of the Sea (ITLOS) under Part XV of the LOSC for the prompt release of the *Volga*.[71] It is sufficient for the purposes of this article to note that, in essence, the bond set by Australia was reduced by ITLOS.[72] However, at the time of writing, the bond had not been paid by the boat's owners and the *Volga* has remained tied up in Fremantle pending a decision by the Federal Court.[73]

67. J Davis, AFMA Officer (email correspondence, 14 Feb 2002).
68. AAP 'Illegal Fishing Vessel Becomes a Dive Wreck' 9 Sept 2004.
69. Macdonald above n 62.
70. I Macdonald (Minister for Fisheries, Forestry and Conservation) and C Ellison (Minister for Customs and Justice) 'New Role for Toothfish Pirate' (Media Release DAFF04/94MJ, 21 May 2004).
71. *Russian Federation v Australia* (*Volga* case) ITLOS Case No 11 (23 Dec 2002).
72. Ibid, para 95.
73. ITLOS set the bond at $1 920 000, down from the original amount calculated by Australia of $3 332 500. Russia has sought a bond of just $500 000: *Volga* case ibid, paras 53-54, 95.

V. FURTHER LEGISLATIVE RESPONSES

The amendments to the Fisheries Management Act passed in March 2004 via the Fisheries Legislation Amendment (Compliance and Deterrence Measures and other Matters) Act 2004 (Cth) and the Fisheries Legislation Amendment (High Seas Fishing Activities and Other Matters) Act 2004 (Cth), are principally a response to the increasingly bold behaviour of illegal fishermen. In addition to increased maximum fines, a number of changes have been introduced which are aimed at improving the overall effectiveness of the regulatory framework.

The recovery of costs incurred in pursuit

One of the more significant amendments has been the introduction of provisions for the recovery by the Commonwealth of the costs involved in the hot pursuit and apprehension of foreign fishing boats.[74] The reference to the recovery of the costs of apprehension comes after the expensive 21 day hot pursuit of the *Viarsa* in August 2003. The boat was ultimately arrested with the assistance of both South African and UK boats. Australia is, reportedly, expecting to meet the costs incurred by South Africa and the UK in coming to her assistance.[75] The costs incurred are uncertain. The Minister for Fisheries has stated: '[T]he chase of the *Viarsa* was very expensive. The final figures are not in yet'.[76] The estimates given range from a vague 'it was something in the vicinity of four, five, six, seven, eight or nine million dollars'[77] to the more definite statement made in the Second Reading Speech for the Fisheries Legislation Amendment (Compliance and Deterrence Measures and Other matters) Bill 2003, in reference to the arrest of the *Viarsa:*

> After the passage of this legislation, [costs will] be able to be recovered from the owners of that vessel.... So the $4 million or $5 million costs that the Australian taxpayer was put to, to eventually apprehend that vessel will be able to be recovered in the future.[78]

The procedural requirements for recovering the pursuit costs in relation to foreign boats are contained in sections 106-106S, with further details for working out the actual costs incurred by, or on behalf, of the Commonwealth to be prescribed by regulation. A reading of subsections 106L(1) and (2) shows three evidentiary issues must be satisfied before pursuit costs can be claimed as a debt. The first and third

74. Fisheries Legislation Amendment (Compliance and Deterrence and other Matters) Act 2004 (Cth) sch 1, which inserts Subdiv CA into Div 6 of Part 6 of the principal Act. Ss 106J-106S detail the procedure to be followed for the recovery of the costs.
75. 'Customs Closes in on Poachers' *The Australian* 28 Aug 2003; 'Cold Pursuit Finally Reels in Toothfish Poachers' *The Australian* 29 Aug 2003.
76. *Hansard* above n 2, 19 609.
77. Ibid.
78. Ibid.

requirements are linked to the successful conclusion of the pursuit undertaken by authorities. First, the foreign boat must be forfeited to the Commonwealth under section 106A; that is, it must have been used in one of the offences listed in that section. Secondly, the Master of the boat must fail to stop the boat in accordance with orders under section 84(1)(aa) or to bring the boat to a place as directed under sections 84(1)(k)or (l). Thirdly, if as a result of the failure, pursuit activities are undertaken with the result that the boat arrives in Australia, the owner of the boat is 'liable to pay to the Commonwealth, by way of penalty, all pursuit costs incurred in respect of that boat'.[79]

The term 'pursuit costs' has been defined in section 106J by reference to 'costs reasonably incurred by or on behalf of the Commonwealth in respect of pursuit activities conducted in respect of a foreign boat'. This phrase is defined as meaning all costs –

> (a) that the Commonwealth is liable to pay in respect of such activities; and
> (b) that are directly attributable to the conduct of those activities;
> and, without limiting the generality of the above, includes:
> (c) costs incurred by any Commonwealth agency or body in respect of such activities; and
> (d) costs incurred by any arm of the Australian Defence Force that provides assistance in respect of such activities; and
> (e) costs incurred by the government of any foreign country that provides assistance or facilities in respect of such activities, being costs so incurred on the basis that those costs will be reimbursed by the Commonwealth.[80]

The intention that costs incurred by foreign governments assisting in the successful resolution of a hot pursuit is evident from the broad definition. The provision will also enable the Commonwealth to recover the costs of a pursuit which are additional to the routine patrols provided for in annual budget estimates. Thus, the figure of $1.23 million provided as an approximation of costs incurred over and above routine patrol costs in the apprehension of the *South Tomi* in 2001[81] would be recoverable as a debt under the new legislation.

The recovery of pursuit costs works in a similar fashion to the forfeiture provisions examined above. A preliminary written notice of debt must be given to the Master of the boat, or, if this cannot be conveniently done, the notice may be fixed to a prominent part of the boat itself.[82] Full particulars of the pursuit costs are to be provided within 10 days of the preliminary notice of debt.[83] In the event that the

79. Fisheries Management Act 1991 (Cth) s 106L(2).
80. Ibid, s 106J.
81. *Hansard* (Senate) Answer to Question on Notice No 730, 10 Dec 2002, 7 659.
82. Fisheries Management Act 1991 (Cth) s 106M.
83. Ibid, s 106N.

owners fail to give notice of an intention to contest the debt claimed within 30 days of receipt of the notice of full particulars, the debt becomes due and payable.[84] As with the forfeiture provisions in sections 106F-G of the Fisheries Management Act, the owner must institute proceedings in the Federal Court within two months.[85] Section 106Q(1) specifies the two orders that may be sought – namely, that the debt is not payable because the boat was not forfeited to the Commonwealth or that the debt or part thereof was not reasonably incurred.

Finally, as to the burden of proof in relation to section 106L, the owner of the vessel has to establish, on balance of probabilities, that the boat was not used in an offence against any of the provisions listed in section 106A. The Commonwealth has to establish, on balance of probabilities, that the Master of the boat failed to stop or to bring the boat to a place in Australia, as directed, and that successful pursuit activities commenced as a result.[86]

Relaxation of obligation to show identification

Prior to the amendment of section 84(6) of the Fisheries Management Act, a person required to do something under section 84(1) (eg, to stop a boat as directed, or bring a boat to a directed place) was only obliged to comply with the requirement if the officer giving the order produced written identification or an identity card. In the Southern Ocean where the seas are wild and the weather extreme, producing such identification for inspection often presents difficult practical problems.

Section 84(6), as amended, and the newly inserted section 84(6A), will allow for circumstances where it is impossible to produce written proof of identity. In such a case, the officer must produce identification at the first available opportunity (eg, when boarding a foreign fishing boat).

The rationale for this amendment appears to be linked to the amendments relating to the recovery of pursuit costs. As already stated, the onus of proof to establish that the Master of the boat did not comply with a section 84(1)(aa), (k) or (l) requirement in relation to the recovery of pursuit costs is on the Commonwealth. If the owner of a foreign vessel can show that no identification was produced for inspection, notwithstanding the practical difficulties in doing so, there would be no obligation on the Master to comply with a section 84(l) requirement to stop. Correspondingly, no liability would arise to pay the costs incurred in any pursuit required to arrest the boat. In light of the increased willingness of the owners of foreign fishing boats to litigate in both international and domestic courts, the risk of a challenge by AFMA

84. Ibid, s 106P.
85. Ibid, s 106Q.
86. Ibid, s 106S.

officers based on non-compliance with section 84(6) is very real.[87] Following the amendment, the officer is able to produce the required identification on boarding a boat without negating the legal effect of the section 84(1) requirement to stop.

VI. CONCLUSION

Recently, the Minister for Fisheries said:

> Australia is determined to do everything in its power to protect [its] borders and sovereignty from poachers who target Australian Patagonian Toothfish stocks.[88]

Specific amendments to the Fisheries Management Act aimed at deterring the incidence of illegal fishing within the AFZ have been passed in 1999 and 2004. The fact that this legislation has withstood legal challenges will be an encouragement to those who over the past seven years, in particular, have attempted to fine-tune the enforcement procedures applicable to foreign fishing boats. Whilst the forfeiture provisions have been upheld by the Full Federal Court, the provisions allowing for the recovery of the costs associated with them have not been tested. The practicalities of extracting monies from corporate owners for removal from the domestic jurisdiction are significant. The relaxation of the obligation to show officer identification until the first available opportunity may well pre-empt challenges to the validity of section 84(1) orders and in this regard can be viewed as a further initiative in deterring the incidence of illegal fishing in the Heard and McDonald Islands' AFZ. Whilst it would take a bold person to assert that the authorities have now 'got it right' in the fight against illegal fishing, there is reason to believe that the tide has turned. The owners of apprehended foreign fishing boats risk significant financial penalties, including the loss of their boat and liability for costs incurred in the event of a pursuit. They also face an increase in maximum fines for crew members convicted of offences relating to foreign fishing boats. Time will tell if the cost of illegal fishing in the Heard and McDonald Islands' AFZ outweighs the potential profits.

87. See eg action by Olbers Ltd, the owners of the *Volga*, in the Federal Court and via an application to ITLOS: *Volga case* above n 71.
88. Macdonald above n 64.

When Will a Mediator Operating Outside the Protection of Statutory Immunity be Liable in Negligence?

MELINDA SHIRLEY & TINA COCKBURN†

A recent interlocutory decision, Tapoohi v Lewenberg (No 2), *raises interesting questions regarding the potential liability of a mediator in negligence.*

THERE is currently no binding Australian authority setting out the extent of the legal obligations owed by a mediator to the parties in dispute. Whilst there has been speculation about potential liability on contractual, tortious and equitable grounds,[1] there remains no clear judicial guidance on the issue. Where mediation takes place outside the protection of statutory immunity,[2] the potential for liability is increased and the situation is further complicated by the emergence of various models of mediation practice which challenge the traditional definition of the mediator's role.

In the recent interlocutory decision in *Tapoohi v Lewenberg (No 2),*[3] it was alleged that a mediator operating outside the court referral system was in breach of various contractual and tortious duties. In jurisdictions where court-annexed mediation is funded by the disputants and mediation outside the court system is common, it is becoming increasingly important that the potential liability of such mediators is clarified. If *Tapoohi v Lewenberg* proceeds to trial, it may well become the first Australian authority on the common law liability of mediators practising without the benefit of statutory immunity.

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1. For a discussion of equitable obligations, see T Cockburn & M Shirley 'Setting Aside Agreements Reached at Court-Annexed Mediation: Procedural Grounds and the Role of Unconscionability' (2003) 31 UWAL Rev 70.
2. Legislation throughout Australia confers immunity on mediators operating within the court system: Supreme Court Act 1970 (NSW) s 110R; Supreme Court of Queensland Act 1991 (Qld) s 113(1); Supreme Court Act 1935 (SA) s 65(2); Alternative Dispute Resolution Act 2001 (Tas) s 12; Supreme Court Act 1986 (Vic) s 27A; Supreme Court Act 1935 (WA) s 70.
3. [2003] VSC 410 (21 Oct 2003).