FORFEITURE OF FISHING VESSELS IN AUSTRALIA AND NEW ZEALAND

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FORFEITURE IN FISHERIES LAW IN AUSTRALIA AND NEW ZEALAND - THE IMPLICATIONS FOR MARITIME LAWYERS

A. INTRODUCTION

Two recent events, in Australia and New Zealand, have served to place breaches of fisheries laws in the headlines and to underline the respective governments determination to be seen to effectively respond. Most recently in Australia, the Howard Government heralded its determination to protect fishery resources, even in the most remote areas, with the apprehension of the Honduran fishing vessel *Big Star*, which was alleged to have been fishing in the Australian exclusive economic zone (EEZ) around Heard and the McDonald Islands. The apprehension was made by Australian fisheries officers operating from HMAS Newcastle, and followed the earlier seizures of the fishing vessels, *Salvora* and the *Aliza Glacial*.

In New Zealand, five charted Russian fishing vessels (the FV's *Om, Osha, Olenino, Orlovka and Ognevka*) collectively referred to as the "5-O vessels" , were seized by the Ministry of Fisheries in mid 1996 following the laying of numerous charges alleging the New Zealand charterers had systematically falsified fishing returns under-declaring and misreporting quota species taken from the vessels[1]. This particular case has received a high level of publicity in New Zealand, both in terms of the resulting prosecution and the ongoing plight of the Russian crewman who are continuing to resist attempts to deport them back home to Russia. A number of the crew have also commenced proceedings to enforce a claim to wages and to protect their interests in the vessels that have been forfeited to the Crown. These proceedings, amongst others in both Australia and New Zealand, have thrown up interesting and fundamental issues relating to the nature and effect of forfeiture which will be examined in this paper.

B. THE ORIGINS AND ROLE OF FORFEITURE IN FISHERIES LAW

Reflecting the commitment of both jurisdictions to protection of their fisheries resources, forfeiture of vessels, equipment and catch may be invoked for serious breaches of the respective legislation. The reason for this reliance on forfeiture, giving the legislation real economic teeth, is not difficult to discern. In one of those classic pronouncements that are so beloved of prosecutors Barwick CJ in *Cheatley v. The Queen*[2] observed:

> "The protection of the fishing grounds of the nation from foreign exploitation is somewhat akin to the protection of the country from smuggling. Drastic action in protection of the country's interests in each instance may be regarded as warranted, indeed, if not to be expected: each is an area where pecuniary penalties are unlikely to provide an adequate protection." [3]

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[1] Refer *Ministry of Fisheries -v- Abel Fisheries Limited and Others* , Unreported, District Court, Wellington CRN 7085005665, 23 February 1998.

[2] (1972) 127 CLR 291

[3] Ibid, at 296

Similarly in a early decision under the Fisheries Act 1983, Casey J in *Jones and Haldane* v *Ministry of Agriculture & Fisheries*[4], in dealing with an appeal against sentence and the consequences of forfeiture, said:

> "..... the Learned Judge... emphasised the seriousness of a breach of these regulations. That has been amply demonstrated by the difficulties that have surrounded this case, and which make it quite clear that the Court must by its approach on penalty impress upon others the gravity of the matter, it may be unfortunate in individual cases that offenders have to suffer drastically if they are caught, but it is well known that in Regulations of this type, the penalties imposed by Parliament are purposely made Draconian because policing can be so difficult. The Court must pay regard to that in sentencing".[5]

In addition to the views expressed by the Courts, a past New Zealand Minister of Fisheries in recent judicial review proceedings attested that:

> "The [Quota Management System] QMS requires a high degree of honesty and self-policing to ensure its integrity and to maximise the effectiveness of expenditure of public funds on enforcement and administration measures. In the economic environment prevailing at the time of my decision the Government was unable to devote a sufficient level of resources to the enforcement of the QMS to ensure that fear of detection would be in itself an adequate deterrent against the commission of quota management offences. Even in an improved economic environment the cost of a fully effective detection system (as opposed to self-policing backed by firm and certain penalties) is likely to be beyond the capacity of any Government to fund adequately ..... The fear of the repercussions from a loss of substantial assets such as quota and vessels, is the single most effective deterrent against the commission of quota management offences"[6]

These sentiments are also reflected, at least in New Zealand, in the view of fisheries compliance personnel and prosecutors that it is the consequences of forfeiture that are the real penalty that fisheries offenders fear the most.[7]

What is clearly discernable from the above is that, given the remoteness of fisheries resources, the potential scale of the rewards to be had and the difficulty and cost of enforcing laws at sea, deterrence forms the principal rationale in both countries for the provision and invocation of forfeiture in modern day fisheries legislation. This emphasis on deterrence, while explaining the nature of the penalty, does not fully explain why under fisheries legislation in both countries forfeiture is not solely directed at offenders ownership or legal interests in the property, but rather operates as forfeiture of the property itself irrespective of such considerations. [8]

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[4] Unreported, High Court, Whangarei, 3 May 1983, M103/81, M104/81

[5] Ibid, at page 7

6 Affidavit of Douglas Lorimar Kidd, Minister of Fisheries, sworn 16 November 1994, *Saunders v MAF*, High Court, Wellington, CP No. 81/94.

[7] Supra note 4, Enforcement revision of new fisheries Bill, A Ministry of Agriculture and Fisheries internal report to the Ministry of Fisheries 24 March 1995, page 87.

[8] *Cheatley v. The Queen* (1972) 127 CLR291, followed in *Re Director of Public Prosecutions; Ex Parte Lawler and Another* (1994) 179 CLR 270 (1994) 119 ALR 655, (1994) 68 ALJR 289 F.C. 94/008, *Fisheries Inspector v Turner* [1978] 2 NZLR 233 and *Equal Enterprise Ltd v Attorney - General* 24/8/95, CA229/94.

In order to explain this focus on the property rather than the offenders interest, it is necessary to look back to the origins of forfeiture which are deeply rooted in the historical traditions of the Common Law. The forfeiture of things by which offences are committed goes back to the tradition of outlawry and the law of deodands . Outlawry gave legal title to all an outlaw's property to the person killing him, and later, to the Crown. Deodand was the confiscation of the object causing a person's death[9]. Property could be forfeited even if its owner was not involved in the crime[10]. Its surviving principle today is that property can be held accountable for crime regardless of its owner's guilt or knowledge[11]. Forfeiture at common law was abolished in England in 1870 and thereafter in Australia and New Zealand[12]. Statutory powers of forfeiture have, however, remained in certain areas and, indeed, have been expanded upon both in Australia[13] and New Zealand[14].

Modern statutes which provide for the forfeiture of property owned by an innocent person are now, however, more likely to be justified on the footing that the liability to forfeiture enlists the owner's participation in ensuring the observance of the law and precludes future use of the thing forfeited in the commission of crime. In *Goldsmith-Grant Co. v. United States*[15], the Supreme Court of the United States said:

> "In breaches of revenue provisions some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong. In such case there is some analogy to the law of deodand by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited. To the superstitious reason to which the rule was ascribed, Blackstone adds 'that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture but whether the reason for the forfeiture be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[16]

In *Calero-Toledo v. Pearson Yacht Leasing Co*[17], the Court cited Goldsmith-Grant and said:

> " Plainly, the Puerto Rican forfeiture statutes further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents. Forfeiture of conveyances that have been used - and may be used again - in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the

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[9] Freiberg, "Criminal Confiscation, Profit and Liberty", (1992) 25 Australian and New Zealand Journal of Criminology 44

[10] Mitchell v. Torup (1766) Parker 227 at 232-234 (145 ER 764 at 766); Rolle, Un Abridgement des plusieurs Cases et Resolutionsdel Common Ley, (1668) at 530.

[11] Some commentators however regard attempts to relate modern day concepts of forfeiture and in rem claims to medieval and Roman sources as nothing more than unhelpful legal fiction. See The Law of Admiralty, Gilmore G. and Black C., 2nd Ed , Foundation Press Inc., 1975, pages 590 &591.

[12] See,e.g., Forfeitures for Treason and Felony Abolition Act 1878 (Vict.).), **s Crimes Act 1908**

[13] See,e.g., Customs Act 1901(Cth); Crimes(Confiscation of Profits) Act 1986 (Vict.).

[14] See,e.g., Proceeds of Crimes Act 1991

[15] (1921) 254 US 505

[16] Ibid, at 510-511

[17] .(1974) 416 US663

> conveyance and by imposing an economic penalty, thereby rendering illegal behaviour unprofitable. ... To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."[18]

It is therefore a combination of history and expediency that have served to justify laws forfeiting vessels and other property used in fisheries offences irrespective of the owners or interest holders participation or guilt. As Mason J observed *R. v. Cheatley:*[19]

> " Historically forfeiture has been regarded as a 'mulct or fine - a punishment for an offence' (*R. v. The Mayor of Dover* ((23) (1835) 1 C M and R 726 at 736 (149 ER 1273 at 1277).)per Parke B.). But it is not an essential element in the legal concept of forfeiture as a penalty that its imposition is confined to forfeiture of goods owned by a convicted offender. Forfeiture of goods may be prescribed as the penalty or consequence of offences or acts committed or done by persons other than the owner of the goods. There is a variety of circumstances such as the nature of the goods, the need for a deterrent penalty or the difficulty of enforcing provisions against foreign owners which may make it appropriate to provide for forfeiture although the owner is not the offender. Notable examples are the forfeiture of firearms as a consequence of unlawfully possessing firearms and the automatic forfeiture under s228and 229 of the Customs Act 1901 (as amended) of ships used in smuggling and goods unlawfully imported. In the latter instances forfeiture does not occur by means of judicial order. Nevertheless they are a striking illustration of a context in which forfeiture occurs to the disadvantage of the owner although he may not be a party to the prohibited transaction."The need for drastic penalties to vindicate the laws governing customs and fisheries exists in part by reason of the difficulty in policing these laws and ensuring that foreign owners of vessels (or other conveyances) do not permit their use in breaching those laws.....The difficulty of enforcing compliance along the length of the Australian coastline called for a stern deterrent if observance of the provisions was to take place. There were obvious difficulties in laying obligations upon foreign owners and taking proceedings against them."[20]

C. CURRENT FORFEITURE REGIMES IN AUSTRALIA AND NEW ZEALAND

1. CRIMINAL LAW

Both Australia and New Zealand (along with other British common law countries) have historically used a criminal law model in fisheries legislation. This model sets out the prohibited behavior and imposes criminal penalties in respect of the prohibited behavior. In the authors experience, the reliance on the criminal law in regulatory environments can generally be traced to either the theory that people who might otherwise disobey the law will comply with it in order to avoid the stigma of a criminal conviction or the practical convenience of the model and the familiarity of those enforcing the rules with its procedures. There are however, alternative models

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[18] Ibid, at 686-688
[19] (1972) 127 CLR 291
[20] Ibid, at 310 and 311

available to regulate industry based commercial activity. In the United States an administrative model is employed in fisheries[21], avoiding the complications associated with the criminal law while avoiding the deficiencies associated with a purely civil law approach. Recently, Canada, which had a similar approach to Australia and New Zealand, has moved to adopt the American administrative model[22].

2. AUSTRALIAN FEDERAL FISHERIES LAW

Within Australian federal jurisdiction, the Fisheries Management Act 1991 provides for a forfeiture regime that is much simpler than its counterpart in New Zealand. In Australia, the decision to forfeit the catch, gear or vessel "used in the commission of the offence" is entirely within the discretion of the judge hearing the criminal matter. Forfeiture may only occur upon conviction of the offender.[23]

Unlike New Zealand, quota units or quota holdings are not subject to forfeiture by the Courts. They are, however, subject to cancellation by the Australian Fisheries Management Authority (AFMA) upon conviction of the offender.[24] AFMA's decision to cancel quota units after conviction is, however, then subject to internal review, Administrative Appeals Tribunal review and ultimately, review by the Federal Court.

Similar to the New Zealand legislation, however, forfeited property becomes the property of the Commonwealth and is disposed of in accordance with the direction of the Minister[25].

3. NEW ZEALAND FISHERIES LAW

The position in New Zealand is somewhat more complicated. There are currently two Fisheries Acts in force, the Fisheries Act 1983 and the Fisheries Act 1996. The Fisheries Act 1996 is the result of a lengthy review of fisheries legislation that began with the appointment of the Fisheries Task Force in 1991 and its April 1992 report to the Minister of Fisheries. The original purpose of the new Act was to simplify the management and operation of the quota management system. However, the new Act is significantly larger and more detailed than its predecessor. It is clear that the Fisheries Act 1983 will continue to be the primary Act for some time. The 1996 Act is to be brought into force in incremental stages as and when the supporting systems, procedures, forms, and regulations are developed to support it.

Fisheries Act 1983

The offence and penalties regime under the Fisheries Act 1983, when first enacted, were virtually indistinguishable from that previously set out under the Fisheries Act 1908. This was reflected in the simplistic nature of the offences and relatively low Maximum penalties . The Act did, however, retain the traditional on forfeiture of illegal fishing gear and vessels used in the commission of the offence, although it did ameliorate the traditionally harsh forfeiture provisions of the 1908 Act[26] by conferring

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[21] Refer Federal Administrative Procedures Act 5U>S>C. ss 501-706 and Magnuson Fishery Conservation and Management Act 16 U>S>C 1801-1882

[22] Fisheries and Oceans Canada, New Release, 3 October 1996, NR-HQ-96, 76E.

[23] s 106 Fisheries Management Act 1991

[24] s 39 Fisheries Management Act 1991

[25] S 106(3) Fisheries Management Act 1991

[26] Section 53 Fisheries Act 1908 had itself been amended by the Fisheries Amendment Act 1948, by providing that forfeiture was deemed to take place ``on conviction of the offender". There was before

on the Courts a discretion to make an order for non-forfeiture in the event that the Court found there to be "special reasons" relating to the offence. The Act has undergone a number of revisions since its introduction. In particular these have included:

i) The introduction of Forfeiture of Quota in 1986
ii) The increase in maximum penalties to $250,000
iii) The introduction of forfeiture as a minimum penalty
iv) The reclassification of forfeitable offences into 3 distinct categories
v) The introduction of more specific statutory guidelines in the exercise of the Ministers discretion to redeem forfeit property.

The cumulative effect of these amendments has resulted in the following structure to the forfeiture provisions of the Fisheries Act 1983 :

(1) *Quota management offences and offences relating to returns and records* which carry:

(a) A maximum penalty of $250,000 per offence;
(b) A minimum penalty of forfeiture of:

(i) Quota held by the offender at the time of the commission of the offence;
(ii) Property used in respect of the commission of the offence;
(iii) Any fish in respect of which the offence was committed (or the proceeds of the sale of such fish under s 80(6)),
unless the Court finds ``special reasons" relating to the offence.[27]

(2) *Medium level offences* which carry:

(a) A maximum penalty of $250,000 per offence;
(b) A minimum penalty of forfeiture of:

(i) Property used in respect of the commission of the offence;
(ii) Any fish in respect of which the offence was committed (or the proceeds of the sale of such fish under s 80(6)),
unless the Court finds ``special reasons" relating to the offence.[28]
(iii) Quota held by the offender at the time of the commission of the offence may be forfeited at the discretion of the Court.

(3) *Minor Level offences*, which carry:

(a) A maximum penalty of $5,000 per offence;
(b) A minimum penalty of forfeiture of:

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that amending Act no proceeding by way of condemnation or otherwise upon which forfeiture depended.

[27] Section 107B(2) FA 1983

[28] Section 107B(3) FA 1983

(i) Any fish in respect of which the offence was committed (or the proceeds of the sale of such fish under s 80(6));
(ii) Any illegal fishing gear in respect of the offence was committed,

unless the Court finds ``special reasons" relating to the offence.

In addition the 1983 Act also provides that in respect of those offences that fall into the minor offence category forfeiture shall apply even on the discharge of any person without conviction under s 19 Criminal Justice Act 1985.[29]

Counterbalancing these draconian provisions, under the 1983 Act the Minister may on application within 30 days of conviction release the forfeit property to any person having a legal or equitable interest in the property on such payment as the Minister considers fit. [30] The Act also prescribes certain matters the Minister shall have regard to when determining whether quota or any interest in quota should be released.[31]

While such draconian provisions had been feasible under government administered and tightly controlled fisheries management regimes, in which wide (and largely unchallenged) discretion was vested in bureaucrats, and Ministers, the introduction of the ITQ system in New Zealand in 1986 has served to completely alter the both the dynamics of fisheries management and the viability of the traditional management regimes.[32] Both from a Ministry and Industry perspective, the Fisheries Act 1983 proved to be wholly inadequate on a number of fronts. In recent reviews of the system, the general consensus has been that the QMS in New Zealand needs substantial modification to simplify its day to day operation.[33] In the context of forfeiture, however, the challenges have come in a more concrete form. As was to be expected in a system based on presumptive forfeiture ameliorated by the right to make application to the Minister to redeem the forfeited property, the Ministers decisions came to be closely scrutinized and applications for judicial review of the Ministers

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[29] Section 107B(4) FA 1983

[30] Section 107C FA 1983

[31] Section 107C(3). FA 1983 These include:
(a) The management and conservation of fisheries and fishery; (b) The need for adequate deterrents; (c) The effect of the offence on the fishery and other fishermen; (d) The effect of the type of offending on the relevant fishery and other fishermen; (e) The social and economic effects on the person who held the quota or interest in quota, and persons employed by that person, of non-release of the forfeited quota or interest; (f) Previous offending history; (g) The economic benefits that accrued or might have accrued through the commission of the offence; (h) The interest of any other person in the quota concerned; (i)Such other matters as the Minister considers relevant. The considerations that may be taken into account in respect of forfeit property are probably even wider in nature, *Roach v Kidd* (Minister of Fisheries) 12/10/92, HC Wellington CP715/91, McGechan J, p 11.

[32] Since the early 1980s Since the early 1980s the New Zealand fishing industry has experienced almost two decades of sustained growth in terms of both value and volume. The New Zealand Ministry of Foreign Affairs and Trade, extrapolating the "market" value of quota to the entire QMS, determined that prior to 1993, over a half a billion NZ dollars had been freely transferred to the fishing industry. The Ministry of Agriculture and Fisheries calculated that the total value of quota (including resource rentals) to be NZ$ 1.32 billion. Licensed Fisheries Access and Joint Ventures/Charters: A comparison over Time, Economic Division, Ministry of Foreign Affairs and Trade, January 1993, pg 15. Industry restructuring has also taken place with quota holdings becoming concentrated in fewer hands. The top 30 companies held under 70% of the quota in 1987. In 1995 that trend to consolidation of quota has continued and approximately 90% of the ITQ is held by 30 companies OECD. Fisheries Committee Report, Ministry of Fisheries, 1995, pg 51.

[33] See Sustainable Fisheries, Fisheries Task Force, Wellington, April 1992, pgs 32-35: Building on Progress, Fisheries Policy Development in New Zealand, P H Pearse, Wellington 1991 pgs 6-7.

decisions have become increasingly more frequent[34].

Fisheries Act 1996

The Fisheries Act 1996 introduced a number of substantial changes to the offences and penalty structures for fisheries offences which were designed to address the compliance problems that plagued the Fisheries Act 1983. With respect to penalties and offences under the 1996 the more radical changes have occurred in the penalty regime. For the first time since the Fisheries Act 1908, a category of fisheries offences now attract substantial levels of imprisonment. In addition while the forfeiture regime previously provided for under the Fisheries Act 1983 has been substantially retained, it has been fine tuned to remove some of the inequities.

The level of forfeiture, similar to the Fisheries Act 1983, is directly linked to the nature of the offences and the maximum penalties imposed[35]. The forfeiture of quota, however, is limited to the most serious category of offences The most significant change with respect to the forfeiture regime is the substitution of the discretion previously vested in the Minister to redeem forfeit property, on such terms and conditions as the Minister saw fit, with a provision that persons with registered interests in quota or legal or equitable interests in property that is forfeit to the Crown may apply to the Court within 35 days of the date on which the forfeiture occurred, for relief from forfeiture.[36]The Act sets out the factors that the Court must consider before it may order relief from forfeiture. The Court is required to determine whether the person making application has an interest in the property or quota and whether the interest was created solely or principally for the purposes of avoiding and application of the Act in respect of forfeiture. No order may be made under this provision unless the Court is satisfied that it is necessary to avoid manifest injustice. In addition, where the owner of the forfeit property or quota was the person convicted of the offence in respect of which forfeiture arose, only a maximum of 60 percent of the value of the forfeit property may be returned by the Court.

D. THE LEGAL NATURE AND OPERATION OF FORFEITURE.

Forfeiture, in simple terms, is a mechanism by which ownership and possession of an item is transferred to another by way by operation of law[37]. There are, however, fundamental differences between the nature of the forfeiture mechanisms under the Australian and New Zealand legislation. Forfeiture under the Fisheries Management Act 1991 is at the discretion of the sentencing court and arises by way of an actual order of the court[38].

In New Zealand, the principal starting point in examining the nature of forfeiture is the decision of the Court of Appeal in *Fisheries Inspector v Turner*[39]. In that case the Court of Appeal, in examining s 53 Fisheries Act 1908, took the view that forfeiture under that section (which was automatic on conviction) was a collateral and entirely independent consequence of conviction — the property was not forfeited by any

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[34] For example see *Roach v Kidd* (Minister of Fisheries) 12/10/92, HC Wellington CP715/91, McGechan J, *Valdosta Investments Ltd v Kidd* 14/10/97, Ellis J, HC Wellington CP147/93 and *Esplanade No 1 Ltd v A-G* 20/2/98, Doogue J, HC Wellington CP109/97.

[35] Section 255 FA 1996

[36] Section256 FA 1996

[37] *Equal Enterprise Ltd v Attorney General (1995) 3 NZLR 293 at 298*

[38] s 106(1) Fisheries Management Act 1991

[39] [1978] 2 NZLR 233

subsequent formal decision of the Court; instead it was deemed to be forfeited automatically. The sole role of the Court in the forfeiture process was to provide a judicial determination of unlawful activity culminating in a conviction before forfeiture occurred[40]

Subsequently, in *MAF v Schofield*[41], Fraser J was called upon to review the forfeiture provisions of the 1983 Act which conferred on the sentencing court a discretion to make an order for non-forfeiture in the event that the court found that there "special reasons relating to the offence". Fraser J, held that forfeiture continued to result not from an order of the Court but from the operation of the statute itself. The power given to the Court to order otherwise was a separate and collateral matter which did not derogate from the essential feature that forfeiture under New Zealand fisheries legislation remains a statutory consequence of conviction[42]. In addition, that actual question as to whether property or quota is forfeited as a matter of law is not something for the sentencing Court to determine as a matter of special reasons, rather it is a matter between the affected party and the Crown[43]. In order to overcome the practical difficulties of this last determination the 1996 Act now requires, at the time of conviction of any offence against this Act, that the sentencing Court determine what, if anything, is automatically forfeit under the Act[44].

The Court of Appeal in *Fisheries Inspector v Turner*[45], while holding that that forfeiture could not be regarded as part of the penal consequences contemplated under the provisions of s 242(1) Criminal Justice Act 1954, did acknowledge what is undoubtedly the penal nature of forfeiture[46]. As already noted earlier in this paper, both the High Court of Australia and the Supreme Court of the United States have also clearly recognised forfeiture as constituting a "punishment for an offence" [47] furthering "the punitive and deterrent purposes" [48] of the legislation under which it is imposed. With the introduction in New Zealand of forfeiture as a minimum penalty[49] there can be no doubt as to its essential nature.

E. THE PRIORITY OF THE INNOCENT OWNER/ INTEREST HOLDER

1. THE POSITION OF THE INNOCENT INTEREST HOLDER

In *Equal Enterprises Limited and Another v Attorney General*[50] the New Zealand Court confronted the contentious issue as to whether or not the Crown took ownership of a vessel under forfeiture, subject to existing encumbrances. The first appellant, Equal Enterprises Ltd, was the owner of a large fishing vessel called the *Perseverance* worth over $1m. The company also held valuable fishing quota. It had given a debenture and a mortgage over the vessel to the second appellant, Bank of New Zealand. The indebtedness of Equal Enterprise Ltd to the bank under the debenture and the mortgage was some $4.5m. The vessel was registered under the Ship Registration Act 1992 under

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[40] per Somers J, at p 245
[41] [1990] 1 NZLR 210, 217
[42] Apart, that is, from the provisions of s107B(3)(b) FA 1983
[43] *Hare v MAF* 17/12/91, Neazor J, HC Wellington AP12/91
[44] , s255(7) FA 1996
[45] [1978] 2 NZKR 233
[46] per Richardson J, at p 236
[47] *Cheatley v the Queen*: (1972) 127 CLR at 310 and 311
[48] *Calero-Toledo v. Pearson Yacht Leasing Co.* (1974) 416 US663 at 686-688
[49] s107B(5) FA 1983 as inserted by s 52(1) Fisheries Amendment Act 1990 (1990 No 29).
[50] [1995] 3 NZLR 293

the name of the first appellant as owner and the mortgage given to the bank was registered under s39 of the Act. The first appellant and its two directors pleaded guilty and were convicted on number of charges in respect of making false statements in the documents required to be furnished under the quota management system established under the Fisheries Act 1983, and taking fish for sale otherwise than in accordance with the quota. The amounts of fish involved were huge.

Following forfeiture, the Bank sought relief under s107C(2) of the Fisheries Act 1983. The Minister of Fisheries refused the application but left open the possibility of further discussions after the bank had taken all reasonable steps to recover the outstanding debt. Both the first appellant and the bank instituted civil proceedings against the Attorney-General and the Registrar of Ships seeking:

(a) a declaration that each of the mortgage and debenture charge continued to subsist as a security against the vessel after and despite the forfeiture and/or that the forfeiture took effect so as to transfer the vessel to the Crown subject to the mortgage and/or debenture charge;

(b) a declaration that the Registrar of Ships had no power or right to transmit, discharge or release the mortgage, or otherwise interfere with the registration of the mortgage, solely because of the forfeiture.

In turn, the Attorney General sought a declaration that the mortgage ceased to subsist on forfeiture and an order that following forfeiture the continued presence of the entry of the mortgage in favour of the Bank wrongly existed on the register and/or was the an error or defect in the register and should therefore be removed from the register by rectification in terms of s69 of the Ship Registration Act 1992

On behalf of both applicants it was submitted that an interpretation that third party interests in forfeited property subsisted after and despite forfeiture of the property was supported by:

(i) the express wording of s107C(2) of the Fisheries Act 1983 (providing for the property or quota may be returned to those who have legal or equitable interests in the property or quota)
(ii) other legislation, which expressly provides for forfeited property to vest "absolutely" in the Crown and/or "free of encumbrances" or words to that effect (Criminal Justice Act 1985, s84(8); Misuse of Drugs Act 1975, s32(5); Proceeds of Crime Act 1991, s15; and Customs Act 1966, s286;
(iii) the general rule that a transferee of a property cannot acquire a better title to it than the transferor had and that a maritime lien survives a change of ownership;
(iv) the Ship Registration Act, which has no express provision allowing for the deletion of a mortgage from the register in the event of the forfeiture;
(v) principles of statutory interpretation providing that penal provisions should be interpreted strictly and, in the case of an ambiguity, in favour of the citizen, and that rights are not to be taken away or tampered with by mere implication; and
(vi) the New Zealand Bill of Rights Act 1990, which affirms the right to be secure against unreasonable seizure of property.

The Court of Appeal, however, concluded that upon forfeiture of the vessel to the Crown, the Bank lost its interest in the vessel secured under the mortgage and debenture. In reaching its decision the Court of Appeal took the view that the forfeiture provisions of the 1983 Act are neither difficult nor complex and that what is forfeit under s107B(2) is property, i.e. the actual vessel, not interests in property. The Court of Appeal noted that forfeiture expressly turned on whether the property itself was used in respect of the commission of the offence, not who owned it or whether it was mortgaged, the only means provided for avoiding forfeiture being where the Court sees fit to order otherwise "for special reasons relating to the offence.". The Court of Appeal also noted that the property used in the offending is forfeit even if not owned by the offender and that forfeiture extinguishes all ownership interests, even where the vessel had been stolen. The Court of Appeal could find no justification in principle for differentiating between ownership interests and financial interests and preferring encumbrances to innocent owners. The Court of Appeal also attached considerable significance to the fact the Minister's ability under s107C(1) of the Act to "dispose of that property as the Minister thinks fit" is inconsistent with the continued existence of mortgagee's rights in relation to the property [51].

While there is no equivalent to s107C of the Fisheries Act 1983 in the Fisheries Management Act 1991, nonetheless s.106of the later Act would also seem to be clearly directed at the forfeiture of the property itself rather than any interest and that such property thereby becomes the absolute and unencumbered property of the Commonwealth[52]. The essential similarity in the requirement under s.106 of the Fisheries Management Act 1991 that the forfeit property "must be dealt with or disposed of in accordance with the directions of the Minister" with the corresponding provision under s107C of the Fisheries Act 1983 Act to "dispose of that property as the Minister thinks fit" points to both Acts resulting in forfeiture of an identical legal nature.

The Court of Appeal also went on to hold that s. 61 of the Ship Registration Act provided sufficient authority for the Registrar of Ships, following receipt of a declaration of forfeiture to the Crown and entry of ownership in the register, to enter a notation in the register to the effect that as a consequence of the forfeiture of the vessel to the Crown, it was no longer security for the mortgage to the bank [53].

Notwithstanding the forfeiture of the property in question, however, the Court of Appeal affirmed observations in the Court below[54] that the contractual rights between the owner and any mortgagee still remain in force and if the owner obtains the release of the forfeited property from the Minister the mortgage and the interest in the property it creates would continue in full effect. The Court of Appeal went on however, to observe that it is also not inapt to describe the statutory right under s107C(2) to apply for relief in respect of the property as a contingent legal or equitable interest. The Court noted that in *Williams* v *Attorney General*[55] the statutory right to apply for a waiver of forfeiture was a sufficient interest in the vessel forfeited under the Customs Act 1966 to allow an action in negligence to be brought against the Minister for

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[51] Ibid, at 297

[52] Section 106 relevantly provides, in sub-s.(1): "Where a court convicts a person of an offence against section ... 100 the court may order the forfeiture of: (a) a boat, net, trap or equipment used in the commission of the offence".Sub-section (3) provides: "Any boat or other property (including fish) ordered by a court to be forfeited becomes the property of the Commonwealth and must be dealt with or disposed of in accordance with the directions of the Minister

[53] pgs. 298 & 299

[54] *Equal Enterprise Ltd v A-G* 22/8/94, Ellis J, HC Wellington CP111/94, pp 9, 10

[55] [1990] 1 NZLR 646

damage suffered during the period of forfeiture. While such statutory machinery did not give an interest holder a reversionary property, the appellant had "an analogous contingent interest"[56].

2. THE CONSTITUTIONAL POSITION OF INNOCENT OWNERS

In *Cheatley v. The Queen*[57] the court held that s. 13AA of the Fisheries Act 1952 (Cth) authorised an order of forfeiture of a boat used in the commission of an offence which was the property of a person other than the person committing the offence. The argument rejected by the Court was one of statutory interpretation and did not depend upon any suggestion of lack of legislative power or collision with the just terms requirement of s. 51 (xxxi) of the Constitution, though Walsh J, who dissented on the question of statutory construction, noted[58]:

> "The question is not, of course, a question as to whether the Parliament could have enacted either that a boat or other property connected in some way with the commission of an offence should be forfeited or that such property might be forfeited at the discretion of a court. In other enactments provisions of that kind have been made. Examples are provided by ss. 228, 229 and 262 of the Customs 1901-1971 (Cth). Such enactments are within the power of the Commonwealth Parliament, whether or not persons innocent of any offence or of complicity in any offence are thereby deprived of property and the power to enact them is not limited by s.51 (xxxi) of the Constitution: see Burton v. Honan ((4) (1952) 86 CLR 169.) and Forbes v. Traders Finance Corporation Ltd. ((5) (1971) 126 CLR 429.)."

The High Court has subsequently, however, directly confronted the issue of whether forfeiture of a boat used in the commission of an offence under Section 100 of the Fisheries Management Act 1991(Cth) amounted to "acquisition of property" within the meaning of Section 51 of the Constitution. *In RE: Director of Public Prosecutions (Cth); Ex-parte Lawler* [59]the master of a New Zealand vessel "Jay Angela" was convicted of an offence under s.100(1) of the Act of fishing without a licence in the Australian fishing zone. He was fined $9,000 and the respondent Stipendiary Magistrate ordered forfeiture of the vessel. That order was made under s.106(1)(a)of the Act[60] which empowers the court convicting a person of an offence against, inter alia, s. 100 of the Act[61] to order the forfeiture of a boat used in the commission of the offence. The "Jay Angela" had been leased by the owners Messrs Lawler and Penrose, the applicants, to Bario Enterprises Limited under an agreement for the hiring and sale of the vessel to Bario. The Master was a director of Bario. Shortly before the Court sat to hear the application for forfeiture, the owners purportedly terminated the leasing agreement. The Stipendiary Magistrate found that the lessors

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[56] [1993] 3 NZLR 293, at 297 to 298

[57] (1972) 127 CLR 291

[58] ibid. at 307-308

[59] (1994) 179 CLR 270

[60] Section 106 relevantly provides, in sub-s.(1): "Where a court convicts a person of an offence against section ... 100 the court may order the forfeiture of: (a) a boat, net, trap or equipment used in the commission of the offence".Sub-section (3) provides: "Any boat or other property (including fish) ordered by a court to be forfeited becomes the property of the Commonwealth and must be dealt with or disposed of in accordance with the directions of the Minister."

[61] Section 100 relevantly provides: "(1) A person must not, at a place in the AFZ, use a foreign boat for commercial fishing unless: (a) there is in force a foreign fishing licence authorising the use of the boat at that place; ... (2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding $250,000."

"were not aware of the fishing in the Australian waters by the Defendant" and that they were not interested in any catch from the unlawful use of the vessel. A relationship of master and servant did not exist between the Defendant and the lessors. The applicants argued in the High Court that, in so far as s106 (1)(a) of the Act authorises an order for the forfeiture of the property of "innocent third parties", it was invalid by reason that it authorised an acquisition of property without the provision of just terms in breach of the constitutional guarantee of just terms contained in s. 51(xxxi) of the Constitution[62].

In dismissing their application the High Court held that a power:

> i. Which effects or authorises forfeiture of property in consequence of its use in the commission of an offence against the laws of the Commonwealth stands outside Section 51(xxxi) of the Constitution;
>
> ii. Authorising forfeiture of a foreign boat used for unlawful commercial fishing, notwithstanding that its owner was not involved in that unlawful fishing, is one that is reasonably incidental to the protection and preservation of the subject matter of Section 51(x)) of the Constitution.

The court saw no reason to depart from the view previously taken in Cheatley v. The Queen[63] and reiterated the position that if the owner of forfeited property is innocent of complicity in the unlawful use, his remedy lies in an action for damages against the user whose wrongful conduct deprived him of his property[64].

In a similar vein, the United States Supreme Court in *Bennis v. Michigan*[65] recently held that there is no constitutional prohibition to the forfeiture of property that another has put to an illegal use without the knowledge of the owner. In *Bennis*, the petitioner jointly owned an automobile with her husband, who was caught by police in a sexual act with a prostitute in the car. Even though the petitioner was an innocent owner of the automobile, the Court upheld the forfeiture of both the husband's and the petitioner's interest in the vehicle pursuant to a nuisance abatement statute aimed at curbing prostitution. The Court rejected the petitioner's due process claim, relying on what it called a long and unbroken line of cases holding that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.

E. CAN ANY COMPETING CLAIMS SURVIVE FORFEITURE ?

In light of the above authorities, which evidence a consistent line across jurisdictions as to both the effect and constitutionality of forfeiture of innocent owners and interest holders rights in property, the issue arises as to whether any form of pre-existing claim or interest in such property can survive forfeiture.

Where any claim or interest in or over the property is based upon unbroken ownership or possession, it would appear that the position is settled and such claims or interests can not continue to be successfully asserted upon forfeiture occurring, whether against the

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[62] By s.51(xxxi) of the Constitution, the Commonwealth Parliament has power, subject to the Constitution, to make laws with respect to: "The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

[63] (1972) 127 CLR 291

[64] For an early example of this principle see Blewitt v. Hill (1810) 13 East 13 (104 ER 270).), a case of a hired vessel used for smuggling

[65] 58 Crim. L. Rep. (BNA) 2060 (U.S. 1996)

Crown or any other party. In the event forfeiture takes place, however, underlying contractual obligations and other *in personam* claims will continue to be enforceable as between the respective parties.

In New Zealand at least, in light of the provisions of s107C of the Fisheries Act 1983 and the comments of the Court of Appeal[66], the formal instruments of security over the property may re-attach, unaffected, if it is redeemed back to the owner or interest holder. Notwithstanding the substitution under s 256 of the Fisheries Act 1996[67] of the discretion vested in the Minister with a provision that persons with registered interests in quota or legal or equitable interests in property may apply to the Court for relief from forfeiture, the position would appear to remain the same, but for one scenario. Section 256 of the 1996 Act provides that where the owner of the forfeit property or quota was the person convicted of the offence, only a maximum of 60 percent of the value of the forfeit property may be returned by the Court. In such circumstances, unless the property is inherently divisible in nature (for example quota), then the formal instruments of security clearly cannot reattach, if only from a practical point of view.

In addition, in light of the redemption process in the New Zealand legislation, the owner or interest holder in the forfeit property would appear to continue to hold a contingent legal or equitable interest in the property, which in the event of redemption, would be sufficient to found an action for damage suffered by the property during the period of forfeiture. [68] Given the absence of a redemption process, there would not appear to be any such analogous subsisting contingent legal or equitable interest in property forfeited under the Fisheries Management Act 1991. Any such interest holder would be in no better position with respect to the property than any other person, even in the event they were to reacquire the property by some means, post forfeiture.

In maritime law, however, there are certain claims in respect of which an action ***in rem*** is available and which may be brought against a ship or other property in connection with which the claim arises, irrespective of who owns the property at the time the action is commenced, and irrespective of who may be liable on the claim ***in personam.*** Such claims may be considered to be truly ***in rem.*** The following claims fall into this category:

(i) any claim to the possession or ownership of a ship or to the ownership or possession of any share therein;

(ii) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;

(iii) any claim in respect of a mortgage or charge on a ship or any share therein;

(iv) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried or have been attempted to be carried in a ship, or for the restoration of a ship or any such goods after seizure or for droits of Admiralty;

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[66] *Equal Enterprises Ltd v Attorney General* [1995] 3 NZLR 293 at 297 to 298

[67] which at the date of this paper is not yet in force

[68] *Equal Enterprises Limited v Attorney General*, [1995] 3 NZLR 293 at 297 to 298

(v) any case in which there is a maritime lien or other charge on any ship, aircraft or other property.[69]

In particular, a maritime lien has been defined as :

> "having its origin in the rule of the civil law, a maritime lien is well defined by Lord Tenden, to mean a claim or privilege upon a thing to be carried into effect by legal process Mr Justice Story explains that process to be a proceeding *in rem* and adds, that wherever lien of claim is given upon the thing, then the Admiralty enforces it by a proceeding in and indeed is the only Court competent to enforce it..... This claim or privilege travels the thing into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding *in rem* relates back to the period when it first attached."[70]

In addition, a maritime lien "adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged, either by being satisfied or from the latches of the owner, or in any other way which, by law, it may be discharged. It commences and there it continues binding on the ship until it comes to an end."

A maritime lien may also be discharged by the following:

(i) the total and permanent destruction of the *res;*
(ii) the capture of the *res* and its condemnation as prize
(iii) the sale of the *res* by Court in proceedings *in rem;*
(iv) the sale of the *res* to the Crown or to a foreign sovereign in circumstances where they will have immunity from suit.[71]

In *Valeriy Prokofyev & Others v Ministry of Fisheries & Another* [72] , the New Zealand High Court delivered an interim ruling in a further case in the ongoing saga of the "5-O vessels". At issue in the substantive proceedings is whether the crew of the "5-O vessels" have a legal or equitable interest in the vessels, within the meaning of s 107C(2) and the competing priorities between the original "innocent owner" Karelrybflot, and the crew that had been on board the vessels until they were seized by the Ministry of Fisheries and subsequently forfeited to the Crown[73]. It was clear, however, that before forfeiture the seamen had a maritime lien over the vessels for money owed to them. That a maritime lien could have been enforced *in rem* against the vessels and in that sense, had priority to the interests of Karelrybflot as owner. The lien could also have been be enforced irrespective of any subsequent sale of the vessel. In a purely *obiter* aside, however, the High Court expressed the view that it seemed likely that those claims were extinguished by forfeiture and it referred to the decision of the Court of in *Equal Enterprises Ltd v Attorney General* [74] in support of this proposition. In addition the High Court also cast doubt on the proposition that if the vessels were restored to Karelrybflot then the claims in rem may be revived.

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[69] Admiralty Jurisdiction and Practices, Merson N, Lloyds of London Press Ltd 1993, pg 70
[70] **"The Buccleugh"**
[71] The **"Two Ellens"** (1872) LR 4 PC 161
[72] Unreported, High Court, Christchurch, 23 April 1998, Young J, AD 91/98
[73] At the time of preparing this paper, the substantive proceedings had not been concluded.
[74] [1995] 3 NZLR 293

While the High Court in *Valeriy Prokofyev v Ministry of Fisheries* did not decide the point, the basis of the Court of Appeal decision in *Equal Enterprises Ltd v Attorney General* (that the Fisheries Act 1983 is directed at forfeiture of the property rather than any interest in it and that the property vests in the Crown absolutely and free of all encumbrances) would appear to be inconsistent with the continued enforceability, in either jurisdiction, of a maritime lien or other claim by an action *in rem* following forfeiture. This would also, logically, seem to be the case even in respect of persons subsequently obtaining title from the Crown. Such a transferee's right to undisturbed ownership and possession , would , on its face, be derived from the statutorily based free and unencumbered nature of the transferor's title. Yet when one looks to support for these propositions, there is a dearth of pronouncement in the authorities and academic texts on this point.

A number of points do, however, appear to be beyond serious contention. Firstly, no action *in rem*, whatever its character, may be maintained against the Crown or a foreign sovereign in its public capacity[75]. Secondly no maritime lien or other *in rem* right will attach, at the time in question, to property of the Crown or property of a foreign sovereign operated in its public capacity[76]. Thirdly, the subsequent sale of the property to a private third party does not give rise to a right to enforce a maritime lien or other *in rem* claim, the basis for which arose while the property was under the exclusive control or ownership of the Crown or foreign sovereign in its public capacity[77].

The issue therefore remains as to what happens to pre-existing *in rem* claims (that are not otherwise dependant on unbroken ownership or possession) upon the property passing to the Crown or a foreign sovereign. There is some support for the view that as the Crown is immune from all *in rem* proceedings, "it follows that any purchase or requisition by the Crown of a ship or other *res* incumberanced by a maritime lien operates to extinguish the maritime lien"[78]. This conclusion is based on the decision in *Five Steel Barges*[79], which, on closer examination, appears somewhat less than authoritative on the point. In that case the plaintiffs, owners of a steam tug, entered into a contract with the defendants, who were in possession of five steel barges, by which the tug was to tow the barges to Portland for a specified sum. During the course of the journey to Portland a number of the barges broke free and had to be salvaged by the tug. At the end of the towage two of the salvaged barges were given up to the Crown , with whom the defendants were under a contract to build and deliver the barges. In holding that the plaintiffs were entitled to salvage and that an action *in personam* would lie against the defendants the Probate Court simply observed in respect of the barges given up to the Government that:

> "it is perfectly clear on the authorities that an action in personam lies against the owners of a vessel which has been saved, even though the property has been transferred to others, and the lien lost."[80]

The issue was peripheral to the right to maintain the in personam proceedings and does not appear to have been the subject of considered analysis. By way of contrast, a more

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[75] Five Steel Barges (1880) 15 P.D. 142,.
[76] The Tervate [1922] P. 259 and The Sylvan Arrow ([1923] P. 220
[77] Ibid
[78] British Shipping Laws Series, Sweet & Maxwell, Vol. 14, Maritime Liens, D. R. Thomas, , Chapt 3, para 127, Sweet & Maxwell
[79] (1880) 15 P.D. 142
[80] Ibid, page 146

recent decision of the English Court of Appeal in *The Tervate* [81], a case concerning a collision between a British vessel and at a foreign state owned vessel, Bankes LJ opined that:

> "This is quite a different case from a case where a maritime lien attached to a vessel at a time when she was privately owned, and which vessel afterwards passed into Government ownership, and then into private ownership again. It may well be that in such a case the maritime lien is dormant during the period of Government ownership."[82]

Again, however, the comment is purely *dicta* and no authority was cited for the proposition. Nor was the earlier decision *Five Steel Barges*[83] apparently referred to the Court. The decision of the Court of Appeal against the plaintiff turned on the fact that the vessel, at the relevant time, was owned by a foreign sovereign in its public capacity and no maritime lien could therefore attach.

In order to determine the status of pre-existing maritime liens and other *in rem* claims post forfeiture, it is necessary to go back to basics and consider the essential nature of the forfeiture process. It is now well established that a sale by the order of a Court of competent jurisdiction in proceedings *in rem* operates to extinguish all liens attaching to *the res* and to convey a valid title to the purchaser which is free of all encumbrances and good against the whole world[84]. Similarly a sale by a port, dock, harbour or other statutory body by virtue of a power to detain and sell a ship in respect of dues or debts by virtue of some private or public statute does not sell the res free of liens that have attached prior to sale[85].

The same applies in respect of Court ordered sales under general statutory provisions. In a recent decision of the Pakistan Court of Appeal, *Semco Salvage Pte Ltd v The "Kaptan Yusuf Kalkavan Turkish"* and Anr [86] the plaintiffs had provided salvage services to the first defendant vessel under Lloyd's Standard Form after the vessel had run aground at the southern end of the Red Sea off Port Salif in North Yemen. After salvage, the owners also failed to meet certain financial obligations incurred at Port Suez, which was where the salvage services had terminated. As a result of the owners continuing defaults and abandonment of the vessel, the Port Suez authorities, following an administrative procedure according to Egyptian law, sold the vessel to the second defendant purchasers in 1987. The Egyptian port charges having been deducted, the balance of the sale proceeds were deposited in the Egyptian Court. The plaintiffs subsequently obtained an attachment order in the sum of US $200,000 against the proceeds of sale in the Egyptian Court. The purchasers brought the vessel to Pakistan where they planned to break her up. The plaintiffs then brought an action in rem in Pakistan requesting that the vessel be arrested so that it be sold for recovery of the plaintiff's dues. The plaintiffs argued that they had a maritime lien for salvage remuneration. They also argued that regarding the proceedings in Egypt there was a distinction between proceedings in rem directed against the res, namely the vessel, and proceedings in personam which were directed against the shipowners. The

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[81] [1922] P. 259
[82] Ibid, page 264
[83] (1880) 15 P.D. 142
[84] The Tremeont (1841) 1 W. Rob. 163; The Saracen (1846) 2 W. Rob. 451; The Optima (1905) 10 Asp. Mar. Law Cas. 147, The Acrux [1962] 1 Llyod's Rep. 405.
[85] The Queen of the South [1968] P. 499; The Countess [1923] A. C. 345.
[86] Court (Iftikhar Muhammad Chaudry and Mir Muhammad Nawa Marri JJ) 1 December 1994

proceedings in Egypt had been directed against the former Turkish owners of the vessel and were in personam whereas the present proceedings were in rem, falling within the exclusive jurisdiction of an Admiralty Court. The plaintiffs therefore submitted that they had a maritime lien against the vessel and were entitled to proceed against the purchasers of the vessel notwithstanding the in personam proceedings in Egypt.

At first instance, the High Court held that the statutory sale by the Egyptian Court had the same effect as that of a Court ordered sale and rendered the vessel free from all encumbrances regarding title. Accordingly, the defendant purchasers had obtained the vessel free from all encumbrances as per Egyptian law. The plaintiffs then appealed to the Appeal Court, which held that in English law only an action against the res under a judicial sale by a competent Court could wipe the ship from encumbrances. As far as statutory functionaries were concerned, they could direct action on the administrative side, but the sale by an administrative authority could not be equated to a sale by an Admiralty Court either exercising its jurisdiction in Egypt or in Pakistan. In the absence of a judicial sale by the competent Court, the plaintiffs maritime lien continued against the vessel. In reaching its decision , the Pakistan Court of Appeal relied on the decision in *The Goulandris*[87].

In The Goulandris[88] the plaintiffs rendered salvage services to the steamship under a standard form "no cure no pay" agreement conferring a maritime lien. The vessel was taken to Turkey and then subsequently to Egypt. In the course of the voyage to Egypt the owners became bankrupt and on arrival in Egypt the vessel was seized by the trustee in bankruptcy and was subsequently sold to the defendant under the authority of the Egyptian Court. The sale form purported to transfer the vessel to the defendant free of all charges and encumbrances. On a motion to set aside the writ *in rem* filed by the plaintiff on the vessels arrival in England, Bateson J held that the sale under the authority of the Egyptian Court was not the equivalent to a sale in an action in rem and the plaintiffs could enforce their rights against the vessel.

It is clear from an analysis of these and other similar decisions[89] that the principle reason why such judicial and administrative sales do not confer title free and unencumbered from pre-existing maritime liens is that such sales are in the nature of a sale "cum onere". A sale by a Court as the result of *in rem* proceedings, however, is a disposition of the *res* with the proceeds of sale being substituted for the res itself[90]. The essential nature of forfeiture to the Crown under both the Fisheries Act 1983 and the Fisheries Management Act 1991 is of a wholly different nature to a sale "cum onere". As the decision of the New Zealand Court of Appeal makes clear in *Equal Enterprises Ltd v Attorney General*[91] such statutory provisions constitute a transfer to the Crown of the *res* rather than the title or other interest of the defendant. Such a transfer, if the decision in *Equal Enterprises Ltd v Attorney General*[92] is correct, is on the basis that the Crown obtains free and unencumbered title. It would be inconsistent with the legal nature of forfeiture under both Acts that pre-existing maritime liens or other *in rem* claims continue to subsist in the res but cannot be asserted while the property of the Crown or foreign sovereign. The only means by which the Crown can obtain

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[87] [1927] P. D. 182.
[88] [1927] P. D. 182
[89] *The Charles Amelia* (1868) LR 2 A & E 330; *Castrique v Imrie* (1870) LR 4 HL 414.
[90] Buxton v. Snee (1748) 1 Ves. Sen. 154; The Neptune (1835) 3 Kn. 94.
[91] [1995] 3 NZLR 293, at 297
[92] Ibid

unencumbered title is if, on forfeiture, any maritime lien or other such in rem claim is extinguished. If extinguished, it cannot then be resurrected (as is possibly the case in respect of other forms of transfer of title to the Crown or foreign sovereign) upon sale to another private third party or even the original owner. As Bateson J observed in *The Goulandris*[93], in order for an *in rem* claim in the nature of a maritime lien to be extinguished there must be " a decision in an action *in rem* or something equivalent to it". Forfeiture to the Crown under both the Fisheries Act 1983[94] and the Fisheries Management Act 1991 falls within such parameters[95].

The observation in *Valeriy Prokofyev v Ministry of Fisheries* that *in rem* claims[96] may not be revived even in the event of redemption would, however, appear to conflict with the decision in *Equal Enterprises Ltd v Attorney General*[97]. In light of the New Zealand Court of Appeals view that upon redemption occurring a mortgage or debenture and the interest in the property they create would continue in full effect, it is difficult to see the basis on which a truly *in rem* claim could not also survive[98]. The decision in *Equal Enterprises Ltd v Attorney General* on this point may be explainable on the basis that, until a determination on redemption is made under s107C, the chain between the res and the pre-existing title is not finally severed. This is particularly the case where the New Zealand legislation recognises that the owner or other interest holder continues to retain, prior to any decision on redemption, a contingent legal or equitable interest in property. In such circumstances, there is a world of difference between free and unencumbered title to forfeited property being transferred in a subsequent sale or disposition to another "innocent" party and the redemption back to the original owner of his forfeited property. The Australian legislation, by virtue of its operation, is clearly different

F. CONCLUSION.

Forfeiture under the Fisheries Act 1983 in New Zealand and the Fisheries Management Act 1991 in Australia reflect each countries determination to protect their valuable fishery resources from unscrupulous exploitation. The draconian nature of forfeiture is regarded as warranted because pecuniary penalties, in of themselves, are unlikely to provide an adequate protection. Forfeiture of property under these statutes is, by its nature, a penal consequence visited upon the *res* rather than the offender. Consequently both the guilty and innocent with interests in the property may suffer the consequences. The reasons for this approach are rooted in the historical origins of forfeiture in English common law, but in today's environment continues to be justified on practical and policy grounds.

The constitutionality and practical effect of forfeiture of innocent owners and other third party interests in property forfeited to the Crown under such legislation is now

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[93] [1927] P. D. 182.

[94] And Fisheries Act 1996.

[95] A point expressly recognised by the US Supreme Court in *The Palamyra* 25 US (12 Wheat.) 1 at 14, where Justice Story in considering the *in rem* nature of forfeitures and seizures noted that "The thing is here [i.e. under such statutes] primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty".

[96] That are not otherwise dependant on unbroken ownership or possession.

[97] [1995] 3 NZLR 293

[98] Particularly given that in respect of a maritime lien, there is strong support for the view that such claim is in the nature of a "substantive right". *The Tolten* [1946] P 135, per Scott LJ at 145; *The Strondhill v Walter W. Hodder Co. Inc.* [1926] 4 D.L.R. 801, *The Halcyon Isle* [1978] 1 M. L. J. 189,191.

relatively settled. The forfeiture operates in respect of the *res* itself rather than of the interests in the *res*. Those who are deprived of their rights and interests in the forfeited property are left to a claim in damages against those whose actions have deprived them of their rights and interests. The decision of the New Zealand Court of Appeal clarifies the position under both statutes that the Crown takes title of the forfeit property free of all pre-existing encumbrances and interests.

While under maritime law there are certain types of *in rem* claims that continue to attach to the res irrespective of changes in ownership and possession, forfeiture of property under either the Fisheries Act 1983 or the Fisheries Management Act 1991is in 1991 is of a wholly different nature to a sale "cum onere" and would appear to extinguish even claims of a truly *in rem* nature.

Under the New Zealand legislation, however, those who have a pre-existing legal or equitable interest in the property, continue to retain, " contingent interest" analogous, though not equivalent, to a reversionary property. In light of the continuation of "contingent interests" post forfeiture, it may well be the case that maritime claims and other in rem claims are not extinguished until a decision is made not to redeem the forfeit property.

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s 5(2)(b) Admiralty Act 1973 (NZ)

ss 17-19 Admiralty Act 1988 (Cth).

Forfeit Property repurchased by the person who would be liable in an action in personam prior to the forfeiture - the lien survives the forfeiture & repurchase - (this entirely a matter of wording of the Admiralty Act).

The Eliza Gloria (?) - Ryan J. Sept. 1998.

- could Fisheries Management Authority restrain sale of vessel by the Crown, where the Crown had a substantial act of forfeiture & the mortgagee was taking steps to sell the vessel beforehand. [Martin Davies].