

**COMMENTARY ON THE PAPER -
THE ROLE OF NAVAL FORCES IN PROTECTING
FISHING ZONES IN AUSTRALIA & NEW ZEALAND
BY COMMANDER ROBIN WARNER, RAN**

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Commentary on the Paper -
*The Role of Naval Forces in Protecting Fishing Zones
In Australia & New Zealand*
by Commander Robin Warner, RAN

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At the time of writing this paper I only had a draft paper to be used by Commander Robin Warner in preparing her paper on the above topic available to me. Accordingly, this paper purports to be no more than a commentary on certain issues raised in that draft paper and may well miss certain issues in Commander Warner's final paper which normally would or should have been dealt with.

Further, the focus of my commentary is on issues relevant to the role of the Royal Australian Navy ('RAN') in respect of protecting fishing zones around Australia and does not cover issues that may be relevant to the position in New Zealand.

The issues which I have identified in Commander Warner's draft paper and which I have chosen to comment on, are the following:

- a. Legality and validity under the Australian Constitution of certain actions taken by RAN in protecting Australian fishing zones.
- b. Hot Pursuit.
- (c) The incorporation of international law into domestic law.

Legality of RAN's Actions in Protecting Australian Fishing Zones

Over the past few years a number of foreign fishing vessels have been apprehended by the Australian Fisheries Management Authority ('AFMA') with the assistance of RAN in the vicinity of Heard Island. Heard Island is far south of the Australian mainland but located in waters which comprise part of the Australian Fishing Zone ('AFZ') and is within the outer limits of Australia's Exclusive Economic Zone ('EEZ').

The fishing vessels involved differed from many of the vessels which are regularly seized off the mainland's northern coastline to the extent that they were generally larger and better equipped with more sophisticated fishing equipment. Further, they were fishing for the

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valuable and much sought after Patagonian Toothfish which is found in the cold waters of the Southern Ocean.

AFMA purported in each case to act pursuant to sub-section 84(1)(k) of the Fisheries Management Act 1991 (Cth) ('FMA') in requiring the masters of the vessels to take the vessels to Fremantle, Western Australia on the basis of there being reason to believe that they had been used in contravention of the FMA.

In these cases, RAN played a major role in terms of both tracking and apprehending the vessels together with their catch and equipment. In all cases the commander of the RAN vessel involved handed the masters of the vessels letters stating that the vessels were being apprehended and seized by the Australian Government and directing the vessels to proceed to Fremantle under direction of a naval steaming officer.

On this basis, the vessels were escorted back to Fremantle through waters on the High Seas and outside the AFZ and EEZ.

The owners of two of the vessels so apprehended chose not to contest the validity and legal basis of the apprehension, seizure and subsequent charges laid under the FMA. This was presumably on the basis that they would better mitigate their losses by paying any fines and forfeiture amounts and then resuming fishing as soon as possible, in order to avoid their vessels being detained in Fremantle for many months whilst the wheels of justice trundled on.

The owner of one of the vessels is however contesting the validity of the apprehension, seizure and charges laid. The following constitutional and international law of the sea issues are being argued in the context of this action:

- First, that the seizure and control of the vessel and the directions given by AFMA and RAN were unlawful to the extent that they purported to exercise control over the vessel when it was on the High Seas and outside the AFZ and EEZ (alternatively, the directions ceased to have any lawful effect once the vessel left the AFZ and the EEZ and entered the High Seas).
- That there was no lawful basis for the control of the vessel by RAN and AFMA during the stage when the vessel was actually on the High Seas being escorted to Fremantle in Western Australia.
- Alternatively, that the actions of the members of RAN in boarding the vessel, giving directions, continuing to exercise control over the vessel and detaining the crew were unlawful and not authorised by any valid law.
- Further and alternatively, the actions of AFMA and RAN had the legal effect of transferring control of the vessel to the Commonwealth of Australia which constituted an acquisition of property for a purpose of the Commonwealth within the meaning of section 51(xxi) of the Constitution. The argument here is that the vessel's owner is therefore entitled to reasonable compensation for losses incurred as a result of that deprivation of property pursuant to section 167(a) of the FMA, which makes the Commonwealth liable to pay reasonable compensation for acquisition of property otherwise than on just terms as a result of the operation of the FMA.

The action proceeded by way of summons in the High Court of Australia seeking the stating of a case as to whether there is any constitutional impediment to RAN personnel assisting in the enforcement of the provisions of the FMA.

The High Court essentially gave the plaintiffs 'short shrift' on the basis that the issue was raised and decided by the High Court in *Li Chia Hsing v Rankin*². In *Li Chia Hsing* the High Court decided that there is no constitutional reason why members of the Defence Forces should not assist in carrying out the provisions of the fisheries legislation. Brennan CJ considered that it would be destructive of the authority of the High Court to entertain an application to revisit *Li Chia Hsing* for the purpose of deciding a question to be raised in a summary prosecution that was pending in the Magistrate's Court of Western Australia and in which no evidence had been taken. His Honour refused to state a case and declined to reserve questions for the opinion of the Full Court and then remitted the matter to the Federal Court of Australia.

Although the Federal Court will be bound to follow the High Court's decision in the *Li Chia Hsing* case on the issue of whether there is any constitutional impediment to RAN personnel assisting in the enforcement of the FMA, the other arguments raised by the plaintiffs remain alive in that forum. The question of the lawfulness of AFMA and RAN personnel maintaining the seizure and control of foreign vessels on the High Seas and outside Australia's EEZ and AFZ certainly raise interesting issues which have wider implications for the role of the naval forces in protecting Australian fishing zones.

Related to this issue is the application of the United Nations Convention on the Law of the Sea ('UNCLOS')³ which came into force in 1994. This Convention sets out the rights and duties of coastal States in relation to their exclusive economic zones. Article 73 deals with the enforcement of laws and regulations of the coastal State and allows a coastal State to exercise its rights to, amongst other things, conserve and manage the living resources in its exclusive economic zone and to take such measures as boarding, inspection and arrest as may be necessary to ensure compliance with the laws and regulations adopted by it.

With UNCLOS came the extension of maritime zones, including the creation of the EEZ. Although this has effectively resulted in the further shrinking of the High Seas, maritime nations continue to have obligations to ensure that traditional freedoms of navigation, in particular those on the High Seas, are protected.

As previously stated, the plaintiffs in the action now before the Federal Court contend that the directions given by AFMA and RAN, along with the continuance of the original seizure and control of the vessel on the High Seas and outside Australia's EEZ and AFZ, were unlawful. They argue that the power of seizure, control and the giving of directions pursuant to section 84(1) of the FMA does not apply outside the AFZ other than in relation to Australian citizens, bodies incorporated in or mainly carrying on business in Australia, and Australian boats or persons thereon.

Alternatively, they argue that the provisions of the FMA in respect of the enforcement of the fisheries laws of Australia and with respect to offences within the AFZ implement the provisions of UNCLOS and are to be read as consistent with and not exceeding the sovereign

2 (1978) 141 CLR 182

3 (1982) 21 ILM 1261, ratified by Australia on 5 October 1994 prior to it coming into force on 16 November 1994

rights derived by Australia from the implementation of UNCLOS. That being the case, absent any Hot Pursuit, it is argued that article 73 of UNCLOS does not permit enforcement powers of a coastal State outside its EEZ and therefore the power of seizure, control and directions terminated when the vessel left Australia's AFZ off Heard Island.

To date, the defendants in the action have responded only by way of bare denial that the legal position is as contended by the plaintiffs. As the matter is sub judice, it is obviously not appropriate to discuss the merits of the plaintiffs' argument on this issue. However, the case highlights some of the vexing constitutional and international law of the sea issues which affect the operation and enforcement of the FMA within Australia's fishing zones.

Irrespective of what the Court may decide on the issue, AFMA and RAN may now consider it preferable to arrest and possibly charge some or all of the crew of apprehended vessels before leaving the EEZ and AFZ for the return trip to the mainland. Section 84(1)(j) of the FMA empowers an officer to arrest without warrant a person whom the officer has reasonable grounds to believe has committed an offence against the FMA. Arresting crew members within the EEZ and AFZ who are suspected of contravening the provisions of the FMA may have the effect of lending more legitimacy to the actions of AFMA and RAN in escorting vessels back to Australia through waters outside Australia's EEZ and AFZ.

Hot Pursuit

As pointed out by Commander Warner, RAN is able to extend the jurisdictional nexus onto the High Seas provided it is involved in a chase which in every respect constitutes a 'Hot Pursuit'.

The origins of the doctrine can be traced to the 19th Century. The conditions required to be present for a 'Hot Pursuit' to exist are codified in Article 111 of UNCLOS.

Article 111 provides, inter alia, that the 'Hot Pursuit' of a foreign ship may be undertaken when:

- The competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State.
- The pursuing vessel is a warship or military aircraft, or a ship or aircraft clearly marked and identifiable as being on government service and authorised to that effect.
- The pursuit is commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State.
- The pursuit has been continuous up to and after the foreign vessel leaves the territorial sea or the contiguous zone and enters the High Seas.
- The pursuit is commenced only after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

The right of Hot Pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a third State.

Interestingly, Article 111(7) of UNCLOS provides that the release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the EEZ or the High Seas, if the circumstances rendered this necessary. This can be contrasted with the case presently before the Federal Court where it is argued by the plaintiffs that there was no Hot Pursuit (and therefore no scope for the application of this Article) and that accordingly the seizure of the vessel under the FMA terminated as soon as the vessel left the AFZ.

An inspection of a map showing the Australian EEZ boundary in the Southern Ocean off Heard Island shows that the 200 nautical mile limit is interrupted short of that distance to the north-east of the island where the French and Australian exclusive economic zones converge.

AFMA and RAN clearly have the challenge of ensuring that any apprehension and seizure of foreign vessels suspected of fishing illegally in Australian waters is carried out *before* such vessels leave the Australian EEZ. There is no High Sea along this boundary and therefore no Hot Pursuit can be effected when the foreign vessel crosses into French waters.

Commander Warner points out that section 87 of the FMA explicitly provides for the right of Hot Pursuit from Australia's AFZ. She further correctly raises the point that section 87 does not fully mirror the conditions and requirements stipulated in Article 111 of UNCLOS.

It would seem therefore that to the extent that RAN needs to pursue any foreign vessel on the High Seas whilst policing Australia's offshore zones, it would be best advised to ensure that the conditions articulated in Article 111 of UNCLOS are adhered to.

Disparity/Potential Areas of Conflict between International and Domestic Law

Commander Warner has raised certain difficulties in relation to Australia's rights and obligations under international law and their incorporation in the relevant Commonwealth legislation. She points to the FMA and the Australian Customs Act 1901 as being examples in this regard.

As stated by Commander Warner, the Australian High Court decision of *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*⁴ held that Australia's ratification of, or accession to, an international covenant does not of itself create legal obligations under Australian domestic law. Although the Court recognised that Australia has an obligation to conform with the provisions of an international treaty, in order for such provisions to become effectively binding the treaty has to be incorporated into both Commonwealth (and often State) legislation pursuant to Australia's federal system.

Although not relevant to RAN's role in the policing of Australia's off-shore fishing zones, the conflict between international and domestic law was demonstrated quite poignantly during negotiations between AFMA and the representatives of the owners of the fishing vessels apprehended near Heard Island who chose not to contest the seizure and subsequent charges laid under the FMA.

Australia has treaty obligations under UNCLOS to promptly release arrested vessels and their crews upon the posting of reasonable bond or other security⁵. This applies to all fishing vessels which are detained by the coastal State in accordance with Article 73(1). Article 73 of UNCLOS has recently been enacted as part of a schedule of the Seas and Submerged Lands Act 1973 (Cth), along with Parts II, V and VI of UNCLOS⁶. Article 73 is therefore now not only an international obligation for Australia but also part of its domestic law.

Article 292 of UNCLOS allows the flag state of an arrested vessel to make an application to the International Tribunal for the Law of the Sea after 10 days if Article 73 has not been complied with. It is submitted that the effect of these two articles when read together is that there is a requirement to release vessels and their crews within 10 days upon the posting of reasonable bond or other security.

'Reasonable bond or security' is not defined, however the commentary makes it clear that the policy behind the provision is that the release of the vessel by the detaining State, upon payment of a reasonable bond, is in lieu of keeping the vessel as security for payment of damages or monetary penalties which may be imposed as a result of the violation of domestic laws.

Section 88 of the FMA however provides, inter alia, that where any property is under the control of an officer because of the exercise by an officer of powers under section 84 of the FMA, AFMA may direct that the property (boat or other property seized) be released to owner or master, on such conditions (if any) as AFMA thinks fit, including conditions as to the giving of security for payment of the value of the property if it is forfeited and for the payment of any fines that may be imposed under the FMA in respect of the offences that AFMA has reason to believe had been committed with the use of or in relation to that property (emphasis my own).

This appears in conflict with Article 73(2) of UNCLOS and also the corresponding provision in the Seas and Submerged Lands Act 1973, as it arguably provides a discretion to AFMA as to whether or not the boat or property will be released on the giving of security. The question arises as to whether the power of AFMA to release a vessel 'on such terms as it thinks fit' as contained in section 88 of the FMA must be read in the context of the broader obligation to release the vessel on a reasonable bond as contained in the Seas and Submerged Lands Act 1973.

Further, section 88(1) of the FMA provides that the security for the boat and/or property released shall be 'the value of the property if it is forfeited and for the payment of any fines that may be imposed under the Act'. Article 73(2) of UNCLOS (as incorporated in the Seas and Submerged Lands Act 1973) only stipulates release of an arrested vessel upon the posting of 'reasonable bond or other security', which may not always be the full value of the vessel.

Unfortunately, even if the courts are able to reconcile the above inconsistencies, there appears to remain a difficulty in that AFMA may still apply such conditions as it thinks fit under section 88 of the FMA before agreeing to the release of a boat or property seized. On the basis of the 1994 amendments to the Seas and Submerged Lands Act 1973 which incorporated the provisions of UNCLOS, a court faced with trying to reconcile this legislation may apply the

5 Article 73(2).

6 By s 13 of the Maritime Legislation Amendment Act 1994 (Cth)

principle that the later Act must prevail⁷ and hold that no additional conditions for the release of the vessel may be imposed by AFMA, or that any such conditions must be reasonable and not oppressive.

In any event, there is certainly scope for judicial and legislative intervention to address the apparent inconsistencies between international and domestic law with respect to the protection of Australia's fishing zones.