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## Comments

Editor: Fiona Wheeler

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### THE TROUBLE WITH FOREIGN FISHING VESSELS AND THEIR CREW: IS A VESSEL IN THE HAND REALLY WORTH TWO IN THE SEA?

#### INTRODUCTION

Foreign fishing vessel (FFV) apprehensions in the northern Australian Fishing Zone (AFZ) represent a significant and growing problem not just for the government authorities charged with the detection, apprehension and arrest, investigation and prosecution of offenders but for the Federal Government and Australian taxpayers. Arrests in 2005 were more than double those reported for 2004.<sup>1</sup> In one two-week period in late March 2006, 23 FFVs were apprehended carrying a combined total of 197 crew.<sup>2</sup> While the apprehensions do, on the one hand, vindicate the decision to divert increasing Commonwealth funds towards the fight against illegal fishing,<sup>3</sup> they also raise a question for which there is no easy answer: What is to be done with the FFVs and their crews? Immediately consequent upon the boarding and seizure of a FFV, a number of issues – logistical, legal and social – arise. The nature of these issues is such that many agencies, companies and individuals are involved in dealing with them. With several different actors involved in the processing of FFVs and their crew, there is a risk that the extent of the combined drain on national resources has been overlooked. This Comment raises some of the issues which might flow from the arrest of a FFV and focuses on the costs involved in processing the FFV and crew. The review concludes by asking whether the arrest and seizure of FFVs is the best use of Australia's resources.

#### ARREST AND IMMEDIATE POST-ARREST ACTION

The arrest and steaming of FFVs, invariably back to Darwin, create immediate logistical difficulties for the government. First, crew must be inspected for human diseases and then mustered and escorted to Berrimah.<sup>4</sup> Culturally appropriate food must be provided and accredited translators (paid for by the government) are required to conduct any interviews of the detained crew members. In the case of charged crew members, the transcript of interview with crew is usually tendered in court as evidence. Hence the interview must be taped and verified as an accurate recording of what occurred. Copies are required for counsel and court.

A medical officer is also required to examine each crew member individually, one purpose of the examination being to determine, in the event that crew members are repatriated (again at government expense), that they are medically fit to fly. Any immediate medical treatment required is provided to the crew.

Immediate concerns are then raised with respect to the FFV itself. The vessels are usually anchored at mid-harbour to assess the inevitable onboard quarantine risks which typically include live animals (dogs or other livestock), borers, rotting food and fish. The FFVs are often overrun by cockroaches, flies, rats and other pests and living conditions on board can only be described as

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<sup>1</sup> See Macdonald I, Australian Minister for Fisheries, Forestry and Conservation, "Record Arrest for Northern Illegal Fishing", *Media release*, 3 January 2006: see <http://www.mffc.gov.au/release/2006> viewed 30 January 2006.

<sup>2</sup> Abetz E, Australian Minister for Fisheries, Forestry and Conservation, Nelson B, Australian Minister for Defence and Ellison C, Australian Minister for Justice and Customs, "Operation Breakwater – Protecting Our Waters While Netting 23 Suspected Illegal Fishing Vessels", *Media release*, 5 April 2006: see <http://www.mffc.gov.au/releases/2006/06022aj.htm> viewed 7 April 2006.

<sup>3</sup> Abetz E, Australian Minister for Fisheries, Forestry and Conservation, Nelson B, Australian Minister for Defence and Ellison C, Australian Minister for Justice and Customs, "\$388.9m Budget Boost in Fight Against Illegal Foreign Fishing in Australian Waters", *Media release*, 9 May 2006: see <http://www.mffc.gov.au/releases/2006/06035aj.htm> viewed 11 May 2006.

<sup>4</sup> The Darwin Detention Centre at Berrimah in the Northern Territory was upgraded (from the former naval barracks, Coonawarra) in 2005-2006.

squalid. The cost of conducting quarantine inspections and disposing of material considered to be a quarantine risk is again borne by the government.<sup>5</sup>

### COLLECTING EVIDENCE OF OFFENCES

Contemporaneously with the quarantine assessment, Australian Fisheries Management Authority (AFMA) officers continue to gather evidence of alleged fisheries offences. Evidence needs to be meticulously gathered in the knowledge that it will, in all likelihood, be scrutinised and tested by the defence counsel the impoverished illegal fishers are managing to fund. Our common law legal system has stood for centuries upon the legal rules that the prosecution must prove the elements of the offence beyond a reasonable doubt and that the accused is entitled to a fair trial,<sup>6</sup> and so it must continue. However, the increasing evidence that corporate money is financing illegal fishing forays into the AFZ<sup>7</sup> must put the Crown and investigating authorities on notice that every shred of evidence will be challenged.

For example, during the recent trial of one master of a Chinese-flagged stern trawler, even the most obvious of matters were disputed by defence counsel.<sup>8</sup> It was suggested that the imposing figure cut by the grey-hulled Australian naval patrol boat which apprehended the FFV (and which incidentally was flying a very large white-coloured naval version of the Australian flag called the battle ensign) was mistaken by the master for a vessel more in the ilk of the type favoured by Captain Jack Sparrow. Alternatively, it was suggested that the Australian vessel (including its crew) was mistaken for an Indonesian naval vessel.<sup>9</sup> This strategy places the Crown in the position of having to conduct a meticulous and laborious prosecution,<sup>10</sup> producing photographs or even videos of the naval vessel at sea to dispute such suggestions and unfurling battle ensigns in court to demonstrate their size.<sup>11</sup> Time and costs continue to mount for the government.

Defence counsel tactics also put the authorities and departments involved in gathering evidence on notice that their good reputations, and the manner in which they serve their nation, will be challenged publicly. Australian Defence Force members and AFMA officers involved in fisheries enforcement are left second-guessing every action to ensure it is well documented, corroborated and “by the book”. While the defence is entitled to test the Crown on every point, one wonders if week-long trials<sup>12</sup> are the best use of government resources.

### ONGOING COSTS

Returning to the vessel, the provision of 24-hour security must be addressed, in addition to attending to any freezer holds on board.<sup>13</sup> Civilian contractors may be engaged to provide vessel security, again

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<sup>5</sup> The Australian Quarantine Inspection Service has published *Processing Protocols for Illegal Foreign Fishing Vessels and their Goods* which detail the procedures to be followed (Version 3, October 2005).

<sup>6</sup> *Jago v District Court (NSW)* (1989) 168 CLR 23.

<sup>7</sup> There is evidence of organised corporate involvement (including via financial backing) in illegal, unreported and unregulated fishing worldwide. See Baird R, “Corporate Criminals and Their Involvement in IUU Fishing: An Australian Perspective” (2005) 9 (4) *International Fisheries and Policy Law Review* 289.

<sup>8</sup> *R v Lan Delin* (unreported, Sup Ct, NT, 28 August 2006). The author was an observer during the entire trial.

<sup>9</sup> The jury rejected both explanations proffered by the accused. See also the sentencing remarks of Martin AJ in *R v Lan Delin* (12 September 2006): [http://www.nt.gov.au/ntsc/doc/sentencing\\_remarks/2006/09/20060912delin.html](http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2006/09/20060912delin.html) viewed 23 September 2006.

<sup>10</sup> This is not to suggest that the Crown would do otherwise. The point being made is that every element of a particular offence must be expected to be tested. For example, under s 149.1(1) of the *Criminal Code Act 1995* (Cth), the offence of resisting a public official in the performance of their functions requires proof of a number of matters, including whether signals to stop were given and whether the vessel was an Australian vessel.

<sup>11</sup> To dispute claims that the ensign was simply not seen.

<sup>12</sup> This is an estimate of average trials. The *Varsa* case (both trials) went over two months.

<sup>13</sup> The fish lying frozen in freezer holds need to be kept frozen until a decision is made on their fate. Typically, fish on board FFVs apprehended in the northern AFZ will not pass Australian food safety and hygiene standards. Sometimes the freezers on the FFVs stop working, creating an even greater problem of disposing of rotting fish.

at government expense. What, then, is to be done with the FFV? The FFV cannot remain at mid-harbour indefinitely. If the crew are released and repatriated, then even if the vessel is not seized, there is no crew to sail it home. If the vessel is sunk at sea, it creates potential navigational hazards and possible environmental problems, in addition to raising the question of compliance with Commonwealth and State sea dumping legislation.<sup>14</sup> International law governs the scuttling of vessels at sea as well as marine pollution<sup>15</sup> and Australian action needs to be in conformity with its international obligations. If the vessel is burnt, there are different, but no less serious, environmental concerns raised, including air and marine pollution.

Meanwhile, the crew remain in detention with the costs mounting for the government. Usually the crew are sent home and if the evidence supports a charge, the master and any recidivist crew members will be charged. All court hearings will require the presence of the requisite court officers, translator and counsel. Prosecution witnesses must be called (often at great government expense and inconvenience for naval personnel who may have been on-posted elsewhere within Australia) and juries sworn.

International law requires that arrested vessels and crew be promptly released upon the posting of a reasonable bond and prohibits the imprisonment of foreign fishers.<sup>16</sup> This limits the way in which the government can deal with the vessels and crew brought to port and processed. Fines may be imposed but, in the corporate world of illegal fishing, they may be shrugged off as little more than a cost of business. While the vessel may eventually be forfeited to the Crown,<sup>17</sup> what is the government to do with a vessel that is unfit for use by the Australian fishing industry and serves no apparent purpose? The cost of “disposal” is added to the mounting costs, and burning is often the only way to destroy the vessel along with quarantine risks.

### IS THERE A BETTER WAY?

The Federal Government has directed funds towards the recruitment of additional government officers to arrest and process apprehended vessels and crew but it might be more cost-effective if the vessels were not brought to Darwin to be processed.

Releasing the FFVs after boarding and inspection at sea is problematic, for the vessel can immediately resume fishing. Confiscating nets will not necessarily prevent the resumption of fishing since the FFV may re-equip itself from a mother ship or from another ship in its “group”. Disabling the fishing equipment may actually stop the FFV from resuming fishing but on what legal grounds can this be done? Is there any basis upon which private property may be damaged or destroyed without the offender being charged and convicted? Further, can fishing gear be disabled practically and safely at sea?

Alternatively, might the government introduce on-the-spot fines for strict liability offences? Concerns about blurring the distinction between the role of the executive and the judiciary can be dealt with by treating the offences as administrative penalties.<sup>18</sup> Such administrative provisions would mean that no conviction is entered against the fishers.<sup>19</sup> The end result may lead to a lessening of the seriousness of illegal foreign fishing offences and this may not be a desirable outcome either.

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<sup>14</sup> *Environment Protection (Sea Dumping Act) 1981* (Cth), s 10A. The States have corresponding legislation to cover coastal waters.

<sup>15</sup> *Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter 1972*, entry into force 1975.

<sup>16</sup> *United Nations Convention on the Law of the Sea 1982*, Art 73(3), entry into force 16 November 1994.

<sup>17</sup> See *Fisheries Management Act 1981* (Cth), s 106A. Under international law, a conviction is required to extinguish the right of prompt release. The legislation gives vessel owners 30 days to contest the forfeiture order.

<sup>18</sup> For example, see the strict liability offences in the *Customs Act 1901* (Cth), Pt XIII, Div 4. It has been said that these provide an “example of an administrative agency being given almost complete powers of enforcement, adjudication, penalty imposition and remission in relation to certain matters”: see Fox R, *Criminal Justice on the Spot* (Australian Institute of Criminology, 1995) p 253.

<sup>19</sup> Which ensures that the judicial power of the Commonwealth is not usurped. See *Attorney-General (Cth) v Abrahams* (1928) 1 ALJ 388.

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Furthermore, administrative or on-the-spot fines would necessarily have to be for lesser amounts. Nevertheless, they may have some merit. French law creates the offence of being in charge of a FFV within the French Exclusive Economic Zone (EEZ) without prior notification to the French authorities.<sup>20</sup> A similar offence could be created for the Australian EEZ and this would obviate the need to prove the elements of intentional offences. It is also acknowledged that the practicalities of extracting any on-the-spot fines may nullify their potential impact. Confiscating catches (and retaining the proceeds of sale) is not an option because the condition of the fish is often questionable, as is compliance with Australian health regulations. As the fishers are invariably impoverished and the well-heeled owners remain safely beyond the reach of Australian courts, levying a significant fine against the owners is generally only successful if the fisher is in actual custody. However, if you bring the crew into custody in order to institute criminal proceedings, what do you do with the vessel?

Unfortunately, there is no simple “fix it” for the very serious problem of illegal fishing. Just as the international community grapples with the wider problem of illegal, unreported and unregulated fishing, the Australian Government is clearly bedevilled by the audacity and persistence of illegal fishers. In the frenetic race to arrest as many FFVs as possible, it might be worth pausing to conduct a strategic review of the problem. If there is a more efficient way of “sending a message” to would-be illegal foreign fishers, the government is obliged to find it.

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*This Comment was written based on personal observations and research into fisheries prosecutions and the analysis is based upon those observations. The views expressed are those of the author.*