CITATION:	*Australian Fisheries Management Authority v Farrell* [2010] NTMC 001
PARTIES:	AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY v MICHAEL PHILLIP FARRELL
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Darwin
FILE NO(s):	20920642
DELIVERED ON:	5 January 2010
DELIVERED AT:	Darwin
HEARING DATE(s):	18 November 2009
JUDGMENT OF:	Melanie Little SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Prosecution:	Mr McCarthy
Defendant:	Mr Hopgood

Solicitors:

Prosecution:	Commonwealth DPP
Defendant:	Cocks Macnish

Judgment category classification:	B
Judgment ID number:	[2010] NTMC 001
Number of paragraphs:	35

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20920642

[2010] NTMC 001

BETWEEN:

AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY
Plaintiff

AND:

MICHAEL PHILLIP FARRELL
Defendant

REASONS FOR JUDGMENT

(Delivered 5 January 2010)

Ms Melanie Little SM:

1. The defendant is charged that between 23 January 2009 and 16 February 2009 he committed an offence pursuant to s 105C(1) of the *Fisheries Management Act* 1991 (Cth) ("the FMA"). The defendant has pleaded not guilty to the charge and has raised two matters as preliminary points prior to the taking of evidence. Submissions were made and written submissions provided. I reserved decision on the preliminary issues. This is now the decision on the preliminary issues.

2. Section 105C is contained with Division 5A of the Fisheries Management Act. This division is entitled 'Offences in places beyond the AFZ' (that is the Australian Fishing Zone). Section 105C reads:

> (1) A person is guilty of an offence if:
>
> (a) the person intentionally uses an Australian-flagged boat for fishing; and

(b) the boat is in the exclusive economic zone, territorial sea, archipelagic waters (as defined in the United Nations Convention on the Law of the Sea) or internal waters of a foreign country and the person is reckless as to that fact; and

(c) the law of the country requires the person to have an authorisation (however described) given under the law of the country for the fishing and the person is reckless as to that fact.

(2) The offence is punishable on conviction by a fine not more than 500 penalty units.

(3) Subsection (1) does not apply if the person has an authorisation (however described) issued under the law of the country for the fishing.

(4) The only burden of proof that a defendant bears in respect of subsection (3) is the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter in question existed.

(5) If the person has been convicted or acquitted in the foreign country of an offence involving the fishing, the person cannot be convicted of an offence under this section involving the fishing.

3. The charge alleges that at a specified position in the waters between Australia and Indonesia the defendant did intentionally use an Australian-flagged boat, namely the 'Territory Spirit' for fishing, that the said boat was in the Exclusive Economic Zone of Indonesia and the defendant was reckless as to the fact that the boat was in the Exclusive Economic Zone of Indonesia and that the law of Indonesia required the defendant to have an authorisation given under the law of Indonesia for the said fishing and the defendant was reckless as to the fact that the law of Indonesia required him to have an authorisation given under the law of that country for the fishing. The charge is being dealt with summarily and has a maximum penalty of a fine of not more than 500 penalty units ($55,000).

4. The two preliminary issues raised by the defendant will be dealt with in turn.

5. **1. The Exclusive Economic Zone issue.** Both prosecution and defence provided detailed written submissions with respect to this issue. Notwithstanding the fact that defence have suggested this is a preliminary issue, it is my view that this issue cannot be resolved prior to the finding of certain facts, which in turn can not be made until after evidence has been taken. Defence have provided the Court with a map with a marking as to where they say the Territory Spirit was located at the relevant date and time. It is my view that this issue cannot be resolved as a preliminary issue and I do not make any rulings with respect to this question. To do so would mean making findings on elements of the charge before evidence is received. I note that prosecution did not expressively argue that this point should not be dealt with as a preliminary issue, though they opposed defence submissions. Nevertheless, as the tribunal of fact, it is my view that this issue ought be dealt with following the taking of evidence. The issues raised by defence will then be canvassed.

6. **2. The Constitutional validity issue.** This issue relates to the validity of s105C of the *Fisheries Management Act* (Cth). The prosecution is being conducted in the Court of Summary Jurisdiction of the Northern Territory pursuant to Commonwealth legislation. Defence submitted that this offence created a Constitutional issue. It was submitted by defence that there was an impermissible delegation or abdication of the legislative power of the Commonwealth to a foreign legislation inherent in s 105C of the *Fisheries Management Act* and that, as a consequence, s 105C of the FMA was not a valid law of the Commonwealth, it being contrary to the Commonwealth Constitution. It is submitted that the charge as laid under s105C of the FMA has no legal force and the complaint should be dismissed. The Commonwealth DPP opposed the defendant's submissions and argued that no constitutional point arose.

7. Notices pursuant to 78B of the *Judiciary Act* 1903 (Cth) were forwarded to the Commonwealth Attorney-General and the Attorneys-General of the States and Territories. I am satisfied there was time for the Attorneys-General to consider the notice. Most have replied and in particular I note the Solicitor-General for the Northern Territory has responded on behalf of the Nothern Territory Attorney-General. There were no applications to intervene or to have the question removed to the High Court.

8. It is convenient to set out the terms of the Notice under s 78B of the *Judiciary Act* (Cth) 1903 as the notice succinctly sets out the issue raised by the defendant.

> 1. The accused gives notice that the above proceedings involve matters arising under the Constitution or involving its interpretation within the meaning of s 78B of the *Judicial Act* 1903 (Cth).
>
> 2. The accused is charged with an offence under s 105C(1) of the *Fisheries Management Act 1991* (Cth) (the Act) in that it is alleged between 23 January and 16 February 2009, as master of the Australian-flagged vessel 'Territory Spirit', he used the vessel for fishing in the exclusive economic zone of Indonesia without the necessary permit and was reckless as to that fact.
>
> 3. The accused claims that s 105C(1) is invalid and inoperative in the circumstances insofar as it purports to confer the legislative power of the Commonwealth Parliament upon the legislature and government of a foreign power, namely the Republic of Indonesia (Indonesia) contrary to the Constitution.
>
> 4. The accused claims that to the extent that s 105C(1) of the Act operates:
>
> (a) by virtue of s 105C(1)(b) to allow the geographic extent and ambit of criminal liability under that provision to expand or contract according to the dimensions of the purported "Exclusive Economic Zone of Indonesia" prescribed at any time by the legislature and government of Indonesia; and/or
>
> (b) by virtue of s 105C(1)(c) to permit a relaxation of that liability according to any fisheries permit system

operating from time to time as prescribed and provided by the laws of Indonesia.

s 105C(1) entails an impermissible delegation or abdication of the legislative power of the Commonwealth to that foreign power.

5. In consequence, s 105C(1)(b) and (c) are not "laws of the Commonwealth" authorised by ss 51, 52 or 122 of the Constitution and are therefore of no legal effect in constituting an offence capable of binding the accused or authorising the issue of the Complaint in the instant proceedings.

6. Insofar as the accused claims that s 105C(1)(b) and (c) are beyond the legislative competence of the Commonwealth, this is a matter arising under and involving the interpretation of the Commonwealth Constitution and therefore a matter to which s78B of the *Judiciary Act* 1903 (Cth) applies.

9. During oral submissions, defence submitted that this was a matter which could be determined in the Court of Summary Jurisdiction. Correspondence was then received by the Court from the defendant's solicitors wherein it was acknowledged that there is a practice in lower and intermediate Courts of avoiding the determination of constitutional issues unless necessary. It was also submitted in the correspondence that the Court of Summary Jurisdiction has power pursuant to s 162 of the *Justices Act* 1928 (NT) to refer any point of law for the consideration by the Supreme Court of the Northern Territory. It was suggested that it may be appropriate for this question to be reserved and a Case Stated to the Supreme Court.

10. Section 162 of the *Justices Act* sets out as follows:

(1) The Court may, at discretion, reserve any question of law arising on or out of the hearing or determination of any information or complaint for the consideration of the Supreme Court, and state a special case or cases for the opinion of the Court.

(1A) Any such question may be so reserved at any time during the hearing of the information or complaint, or at any time within

one month after the Court of Summary Jurisdiction has finally determined the information or complaint.

(2) The Supreme Court shall deal with every such special case according to the practice of the Supreme Court on special cases, and may make such order thereon (including any order as to the costs of the proceedings in that Court and in the Courts below) as to the Supreme Court appears just.

(3) The Supreme Court may send any such special case back for amendment, or may itself amend it.

(4) The Justices shall make a conviction or order in respect of the matters referred to the Supreme Court in conformity with the certificate of the Supreme Court.

11. Section 105C of the FMA creates an offence for an Australian-flagged boat to fish in certain waters of a foreign country when that foreign country requires the person to have an authorisation to undertake fishing and no such authorisation has been obtained (and there are mental element aspects of the offence as well). There is a defence to the charge if a person has an authorisation issued under the law of the relevant foreign country for the fishing in the Australian-flagged boat. It may be the case that the relevant foreign country does not require authorisation for the fishing under their laws. In those circumstances, no offence committed if a person uses an Australian-flagged boat for fishing in those waters.

12. Section 105C of the *Fisheries Management Act* relates to any Australian-flagged boat fishing in any waters of a foreign country whether adjoining Australia or not. Before an offence can be proven, certain matters of fact must be found, including whether the relevant foreign country at the relevant time required authorisation for fishing. That is a factual issue. That is an issue which prosecution can call evidence upon. That evidence can be tested by cross examination.

13. Defence suggests that the fact that no offence is committed if the person has an authorisation issued under the law of the relevant foreign country for the

fishing entails an impermissible delegation or abdication of the legislative power of the Commonwealth to a foreign legislation and is therefore contrary to the Commonwealth Constitution. Defence points to the potential for the FMA to have a variable operation from time to time, depending upon the provisions of Indonesian law and the administration of that law. While I accept that there may be some variation from time to time, in my view this is also a factual issue which can be dealt with by evidence and tested by cross-examination. S 105C must be capable of applicability to all foreign jurisdictions where people can fish. For that reason, there will be variable operation as between jurisdictions, as well as from time to time within each jurisdiction.

14. Subsection 105C(5) of the FMA was not raised in submissions. In my view this is a relevant subsection when considering the preliminary issue. Subsection 5 sets out that there can not be a conviction for an offence under s105C of the FMA involving *the* fishing if the person has been convicted or acquitted in the foreign country of an offence with respect to *the* fishing (my emphasis). Subsection 5 operates to ensure the fishing is not the subject of successful prosecution in Australia, if it has been prosecuted in the foreign jurisdiction. This is another factual issue which can be the subject of evidence if a hearing proceeds (though in practice is likely to affect the exercise of the prosecutorial discretion).

15. An element of the offence in s 105C of the FMA is that the boat used must be an 'Australian-flagged boat'. An Australian-flagged boat is defined in s 4 of the FMA as "an Australian ship as defined in the *Shipping Registration Act* 1981 or would be an Australian ship as defined in the *Shipping Registration Act* 1981 if it were a ship as defined in that Act". The *Shipping Registration Act* 1981 (the SRA) is Commonwealth legislation which, inter alia, regulates the registration of Australian owned ships. Section 3 of the SRA says that an Australian-owned ship means a ship having Australian nationality by virtue of section 29. Section 29 of the SRA sets out that

registered ships and those Australian owned ships referred to in s 13 of the SRA (and some others not relevant in this case) are taken to be Australian ships and to have Australian nationality. Every Australian-owned ship shall be registered under part 2 of the SRA (section 12 of the SRA). Ships less than 24 metres in tonnage length, Government ships, *fishing vessels* (my emphasis) and pleasure craft are exempt from the requirement to be registered under s 12 of the SRA (see s 13 of the SRA). Fishing vessel is defined in s 3 of the SRA and, without the court making a formal finding on this question (given that no evidence has been taken as yet), this definition would appear to include a boat such as the 'Territory Spirit'. The SRA then sets out the national colours and other flags for Australian-flagged ships. If a ship is registered under the law of a foreign country, it can not be registered as an Australian ship (s 17 SRA).

16. The Commonwealth has legislative power to enact the *Shipping Registration Act* 1981 by virtue of section 51(i) of the Constitution – that is the power to make laws for the peace order and good government of the Commonwealth with respect to trade and commerce with other countries and among the states and section 98 of the Constitution where the trade and commerce power is expressly stated to extend to navigation and shipping (as well as another unrelated matter). There may be other powers which are also relied upon, to empower the Commonwealth to enact the SRA.

17. Australian-flagged ships can and do travel outside of Australian waters to foreign waters and foreign ports. Section 6 of the SRA sets out that "This Act extends to every external Territory and to acts, omissions, matters and things outside Australia, whether or not in a foreign country".

18. While there are inherent responsibilities and obligations upon the owners and users of Australian-flagged ships, there are also protections and privileges that attach to the fact that the ship is an Australian-flagged ship.

19. I will now consider the *Fisheries Management Act* 1991 (Cth). The Constitution grants the Commonwealth Legislature express power with respect to fishing. Section 51 of the Constitution sets out that "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:- ....

20. **(x.)** Fisheries in Australian waters beyond territorial limits".

21. The 78B notice pursuant to the *Judiciary Act* also refers to section 122 of the Constitution, the Territories Power.

22. Prima facie the *Fisheries Management Act* 1991 (Cth) has been enacted by the Commonwealth Parliament pursuant to the express power in section 51 (x) of the Constitution. Section 3 of the FMA sets out the objectives which the Minister and the AFMA must pursue and subsection (1) of those objectives relates to what could be described as national objectives. Subsection 2 of the objectives relate to what could be described as both national and international objectives.

23. Fish stocks do not by nature recognise national and international boundaries. To achieve sustainable management of fish stocks and ensure orderly regulation of fishing, there must be an international response. The FMA takes account of international agreements and obligations. Australian-flagged ships traverse beyond Australian waters. Some of those will be involved in fishing beyond Australian waters.

24. If the power in section 51(i) of the Constitution is not found to be capable of conferring power on the Commonwealth Legislature to lawfully enact s 105C of the FMA, there are other powers in the Constitution which can be considered. Section 105C of the FMA relates to activities outside the Australian fishing zone. Section 105C of the FMA could be based upon (in its entirety or in part) the powers granted to the Commonwealth Legislature

by section 51 (xxix) the External Affairs power – by virtue of international agreements and arrangements made with respect to fisheries and fish stocks. The power of Trade and Commerce between other countries and among the states in s 51(i) of the Constitution is another source of potential power for s 105C of the FMA to be enacted. This power is also supplemented by s 98 of the Constitution, as set out above. These powers anticipate international implications of the exercise of Commonwealth legislative power.

25. The Northern Territory has enacted the *Fisheries Act* (NT) and the Territory legislation refers to, and is subordinate to, the Commonwealth legislation. Wherever the Territory legislation is inconsistent with Commonwealth legislation, the Commonwealth legislation prevails. The *Fisheries Act* (NT) regulates fishing in the waters of the Northern Territory (as well as conserving and managing fisheries and fishery resources in the NT). The AFZ does not include the coastal waters of, or the waters within the limits of, a State or internal Territory (s 4 of the FMA), leaving the *NT Fisheries Act* to legislate with respect to waters within the NT.

26. The licensing and regulation of fishing through Commonwealth legislation does not permit or authorise, and arguably cannot permit or authorise, a person to fish in the waters of a foreign country. As stated, s 105C of the FMA is in the division entitled 'Offences in places beyond the AFZ'. Section 105C of the FMA makes it unlawful for a person who has an Australian-flagged boat that is used for fishing, to fish in waters of a foreign country unless authorised, provided that the relevant foreign country requires authorisation. Section 105C of the FMA does not prohibit fishing outside Australian waters by an Australian-flagged ship.

27. As the FMA does not prohibit fishing outside Australian waters by an Australian-flagged ship, it anticipates that fishing may occur outside Australian waters by an Australian-flagged ship. The legislation does not purport to directly regulate the fishing but acts as regulatory safety net to

ensure that an Australian-flagged boat is not free to fish in foreign waters with impunity. The offence in s 105C of the FMA takes account of both the authorisation and prosecution systems of the foreign jurisdiction. If it did not, then an Australian-flagged ship could be indirectly prohibited from fishing in foreign waters, even in circumstances where they were authorised to fish by the foreign country.

28. In my view s 105C of the FMA can be characterised as an offence which relates to fishing by Australian-flagged ships in waters in foreign waters. It does not relate to fishing by all ships in foreign waters. The operation of s105C of the FMA is limited to those ships which are subject to the responsibilities and obligations *and* the protections and privileges of an Australian-flagged ship. If the relevant foreign country elects to prosecute for an offence with respect to the fishing by the Australian-flagged ship, then irrespective of the outcome (whether there is an acquittal or a conviction), there can be no conviction under s 105C of the FMA involving that fishing (ss 105C(5) of the FMA).

29. Defence have submitted that there is no certainty if an offence depends on (in part) the law of a foreign country. It is accepted that this offence can result in significant penalties. Having said that, I am of the view that the matters which relate to a foreign country are factual matters and capable of being made the subject of evidence. Other areas of Commonwealth law will be impacted upon by the laws of other countries. I note that in his text *Australian Federal Constitutional Law*, Howard expressly refers to the taxation, marriage and divorce powers in this context.

30. Defence submitted that the Exclusive Economic Zone of Indonesia may expand or contract at any time and therefore the criminal liability of a person will similarly expand or contract. Defence submitted that this leads to uncertainty which was not consistent with criminal liability. For the

section to work, s 105C must be capable of applicability to all countries where ships can travel.

31. Many offences rely upon certain facts or circumstances being found before the question of liability can be determined. Those facts and circumstances may vary and change over time. It is accepted that in this case the facts and circumstances are the subject of foreign legislation, outside of the Commonwealth's jurisdiction.

32. My preliminary view of s 105C of the *Fisheries Management Act* (Cth) is that the legislation does not confer legislative power on the foreign country the subject of the alleged offence (in this case, Indonesia but the same issues apply irrespective of which foreign country is involved). I must stress that it is my preliminary view only.

33. I have considered the question of whether to state a case to the Supreme Court and it is my view that a stated case is the more prudent course of action in the circumstances of this matter. A question can be reserved at any time during a hearing. A stated case can generally be dealt with speedily. I note that the alleged facts are now nearly one year old. The first mention of the case did not come before the Court until 22 June 2009. Nevertheless there is now some significant delay in the matter and it is my view that a stated case is a preferable course of action. This question has not been decided by a superior court. Any ruling made in this court is not binding on any other court and, while not an everyday occurrence, Northern Territory Courts regularly hear matters pursuant to the *Fisheries Management Act* (Cth). Further, the question may have applicability to other legislation. It is the practice in lower Courts, such as the Court of Summary Jurisdiction, of avoiding a determination of constitutional issues. In my view, this is a matter which is more appropriately dealt with in the Supreme Court of the Northern Territory. The outcome of the stated case will determine whether this matter then proceeds to the taking of evidence.

34. In accordance with usual practice I will seek counsel's assistance in the drafting of the stated case.

35. I now publish these reasons.

Dated this 5th day of January 2010

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Melanie J Little
STIPENDIARY MAGISTRATE