

IN THE HIGH COURT OF AUSTRALIA)
PERTH OFFICE OF THE REGISTRY)

NO. P71 of 2004

BETWEEN: OLBERS CO LTD

Applicant

and

THE COMMONWEALTH OF AUSTRALIA

First Respondent

and

AUSTRALIAN FISHERIES MANAGEMENT
AUTHORITY

Second Respondent

**APPLICANT'S REPLY TO RESPONDENTS' SUBMISSIONS IN
OPPOSITION TO THE GRANT OF SPECIAL LEAVE**

Counsel makes the following points in reply:

Leave Criteria (Paragraphs 1 – 7 of Respondents' Summary)

1. It is of public importance in this case, and generally, to determine the scope of the powers of the Commonwealth, whether under the Fisheries Management Act 1991 ("Act") or otherwise, to seize property by force outside Australian waters on the High Seas. The source and any limits of the powers of the Commonwealth arise on the facts of this case. The effect of the judgments below is to give a broad power to seize property on the High Seas to the Commonwealth where it is outside Australian waters. Whether a person has been lawfully dispossessed of property by the Commonwealth is also a question of fundamental importance to the administration of justice, both generally and in this particular case.

**Argument on Appeal (Paragraphs 13 – 20 of Respondents'
Summary)**

2. The decisions in the Federal Court, and the submissions by the respondents opposing the grant of special leave on the basis of the

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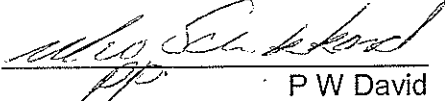
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approach to the Act adopted in those decisions, relies on an approach to the legislation and, in particular s106A of the Act, which does not have proper regard to the general principles of statutory construction, the provisions of the Act as a whole, and in particular, sections of the Act which should properly be interpreted as limiting rights of seizure on the High Seas (ss 84 and 87) and providing remedy for owners whose property is seized (ss 106A – 106G). The respondents do not address the effect and role of sections 84 and 87. The effect of this approach to the Act is to give the Commonwealth a power to seize, by force, a foreign vessel on the High Seas without complying with s 87. Ultimately, the approach leads to the Commonwealth being afforded a common law right to self-help to seize property by force on the High Seas, which, it will be contended, it does not have. In reply to certain points made by the respondents on the argument on appeal, the applicant further says:

- (a) In supporting its approach to s106A of the Act the respondents rely on *Whim Creek Consolidated NL v Colgan* (1991) 31 FCR 469 (see paragraph 14 of respondents' summary). The customs' legislation operates in a different context to the Act. It does not give rise to the same issues concerning the extra-territorial seizure of property. Nor does it contain sections comparable to the provisions of ss 84, 87 or 106G. Further, in *Whim Creek* the Court observed that forfeiture of a thing by legislative provision does not prevent a prior owner from challenging a seizure so as to obtain recovery (p 489). The Applicant will contend that such a process is available under the Act in this case when the Act is properly interpreted.
- (b) The respondents also rely on a claim of failure to plead rights of possession by the applicant (paragraphs 18 – 19 of respondents' summary) to resist a claim at common law. Possession at the time of seizure was pleaded (refer paragraph 29A of amended statement of claim). The claim, as pleaded, is for seizure in breach of the statutory provisions. It is submitted that the pleading adequately

raises a claim for breach of statutory duty but appropriate amendment should be permitted if that is necessary to permit the Court to determine the questions on the appeal (s 77J(ii) of the Judiciary Act 1903).

Dated the 7th day of December 2004


P W David
Counsel for the Applicant