Muslimin v The Queen [2009] NTCCA 3

PARTIES:	MUSLIMIN v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No CA 10 of 2008 (20814583)
DELIVERED:	29 April 2009
HEARING DATES:	3–4 March 2009
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & MILDREN JJ
APPEAL FROM:	Supreme Court of the Northern Territory SCC No 20814583

CATCHWORDS:

CRIMINAL LAW -- INTERNATIONAL LAW -- APPEAL AGAINST SPECIAL FINDINGS -- APPEAL AGAINST CONVICTION

Statutory construction – fishing for sedentary species (trepang) – whether s 12(2) of the *Fisheries Management Act 1991* (Cth) is capable of extending s 101 of the Act to waters above the Australian continental shelf not within the Australian Fishing Zone - laws of Australia – appeal dismissed.

Churchill and Lowe, *The Law of the Sea* (3rd ed); Lumb, *Australasian Legislation on Sedentary Resources on the Continental Shelf* (1970-1971) 7 UQLJ 111; O'Connell, *Sedentary Fisheries and the Australian Continental Shelf* (1995) 59 AM J of Int Law 185; Pearce and Geddes, *Statutory Interpretation in Australia* (6th ed, 2006).

Criminal Code (Cth) ss 10.3, 379; *Evidence Act* (NT) s 26L; *Fisheries Management Act 1991* (Cth) division 5, part 6, ss 4, 7, 8, 12, 13, 15, 15A, 100, 101; *Seas and Submerged Lands Act 1973* (Cth) ss 11, 12, 106A.

United Nations Convention on the Law of the Sea, opened for signature 10 December 1982 (entered into force 16 November 1994), arts 19, 21, 25, 62, 68, 77, 78, 103.

Al-Kateb v Godwin (2004) 219 CLR 562; *Bloxam v Fauer* (1883) 8 PD 101; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Commonwealth v Yarmirr* (2001) 208 CLR 1; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *New South Wales v The Commonwealth* (1975) 135 CLR 337; *Polites & Kandiliotes v The Commonwealth* (1945) 70 CLR 60; *Yamami v The Commonwealth* (1938) NTJ 237, referred.

REPRESENTATION:

Counsel:

Appellant:	A Wyvill
Respondent:	P Willee QC with L Taylor

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Commonwealth Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Muslimin v The Queen [2009] NTCCA 3
No. CA 10 of 2008 (20814583)

BETWEEN:

MUSLIMIN
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL & MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 29 April 2009)

Martin CJ:

[1] I agree that the appeal should be dismissed for the reasons given by Mildren J. In addition, I wish to add the following observations.

[2] The *Fisheries Management Act* ("the Act") is an Act concerned with the management, exploitation and regulation of Australian Fisheries Resources. The Act contains a number of enforcement provisions, including those in Pt 6 Div 5 which are concerned with offences within the Australian Fishing Zone ("AFZ"). Section 101 is one of the provisions in Div 5.

[3] Through s 12, the legislature chose to extend the ambit of the operation of certain provisions of the Act beyond the AFZ to encompass fishing for

sedentary organisms in an area in or on any part of the Australian Continental Shelf ("the ACS"), but not within the AFZ or the fishery, "as if they [the sedentary organisms] were within the AFZ or the fishery". Section 12 identifies only two criteria which must be met before the operation of a provision is extended beyond the AFZ. First, that the provision be made "in relation to fishing" in the AFZ. Secondly, that the provision be "capable" of extending to fishing for sedentary organisms outside the AFZ, but in or on any part of the ACS. The legislature chose not to subject the extension to any other criteria.

[4] When the enforcement provisions are viewed in their entirety, it is not difficult to discern an enforcement scheme within Div 5 specifically aimed at the operation of foreign fishing vessels within the AFZ. A graduating scale of penalties is created for different levels of offending. Each of the enforcement provisions, including s 101, is a provision made "in relation to" fishing as defined in s 4.

[5] Through the operation of s 12, the legislature did not discriminate between the different types of enforcement provisions for the purposes of the extension of their operation beyond the AFZ. The only test is whether the individual provision is "capable" of such extension.

[6] In my view it is not surprising that the legislature chose to extend the entire enforcement scheme applicable to fishing within the AFZ to fishing for sedentary organisms beyond the AFZ and in or on the ACS. The legislature

chose not to identify any individual provision whose operation was not to be extended in this way. There is no basis, for example, for an inference that the legislature intended to extend the operation of s 100, but not the operation of s 101. Section 100 does not cover the field. It is concerned with the use of a foreign boat within the AFZ. Section 101 is concerned with being in possession or charge of a foreign boat within the AFZ equipped with equipment for fishing. Subject to the prescribed criteria and limitation, it is the enforcement scheme in its entirety that is extended, but only in relation to "fishing" for sedentary organisms in the identified area.

Angel J:

[7] The appellant appeals against his conviction on a charge that on or about 23 April 2008 at a place in the waters above a part of the Australian continental shelf not within the Australian Fishing Zone (AFZ) he had in his possession or in his charge a foreign boat, namely the "Segara 07" equipped with nets, traps or other equipment for fishing for sedentary organisms contrary to s 101(2) *Fisheries Management Act 1991* (Cth).

[8] It is not in dispute that on the day in question the Indonesian vessel "Segara 07" commanded by the appellant was navigating on waters within the Indonesian Exclusive Economic Zone (EEZ) above part of the Australian continental shelf beyond the AFZ with equipment capable of fishing, inter alia, for sedentary organisms. The respondent says the appellant, who had no licence, permit or approval to do so, ipso facto thereby breached s 101(2).

[9] How does Australian domestic law apply to an Indonesian vessel on Indonesian waters? The respondent says the Crown in right of the Commonwealth of Australia has sovereignty over the Australian continental shelf,[1] and s 101(2) when read with s 12(2) *Fisheries Management Act 1991* (Cth) creates an offence relating to the Australian continental shelf. The appellant, on the other hand, says on a proper construction of ss 12, 100 and 101 of the *Fisheries Management Act 1991* (Cth) "the indictment as particularised by the Commonwealth Director of Public Prosecutions does not disclose an offence". The appellant says s 101 does not apply to Indonesian or other foreign vessels on Indonesian waters albeit above the Australian continental shelf, or alternatively, if it does, properly construed, s 101 did not apply to the appellant's admitted activities.

[10] The questions for decision are whether, as a matter of statutory construction s 12(2) extends or purports to extend s 101(2) to the Indonesian waters over the Australian continental shelf beyond the AFZ and if so, whether it applied to the appellant.

[11] Sections 7, 8, 12, 100 and 101 *Fisheries Management Act 1991* (Cth), as at the time of the alleged offence, provided as follows:

> "**7 Application**
>
> (1) This Act extends to all of the Territories and has extra-territorial operation.

[1] *NSW v The Commonwealth* (1975) 135 CLR 337.

Note: Some of the sections of this Act having or dealing with extra-territorial operation outside the AFZ are sections 8, 13, 14, 15, 87, 87A, 87B, 87D, 87G, 87H, 105A, 105B, 105C, 105E and 105F.

(2) In relation to the AFZ and *to fishing for sedentary organisms* outside the AFZ, this Act applies to all persons, including foreigners, and to all boats, including foreign boats.

(3) In relation to fishing activities on waters outside the AFZ, this Act applies:

(a) to Australian boats and to Australian-flagged boats that are not Australian boats; and

(b) to all persons (including foreigners) on boats to which paragraph (a) applies.

This subsection does not limit subsection (2).

(4) Subsections (2) and (3) do not limit the extra-territorial operation of this Act."

(emphasis added)

"**8 Application of Act to areas outside the AFZ**

(1) The regulations may provide that, in respect of specified areas outside the AFZ, or in respect of the high seas generally, this Act applies to:

(a) Australian citizens; and

(b) bodies corporate that are incorporated in Australia or carry on activities mainly in Australia; and

(c) Australian boats and Australian-flagged boats that are not Australian boats; and

(d) persons on board boats to which paragraph (c) applies.

(2) The Act so applies subject to any exceptions or modifications specified in the regulations.

(3) When a provision of this Act applies in relation to such an area, then, subject to the regulations, references in that provision to the AFZ are to be read as references to that area.

(4) This section does not limit the extra-territorial operation of this Act."

"**12 Sedentary organisms—Australian continental shelf**

(1) If the Governor-General is satisfied that a marine organism of any kind is, for the purposes of international law, part of the living natural resources of the Australian continental shelf because it is, for the purposes of international law, an organism belonging to a sedentary species, the Governor-General may, by Proclamation, declare the organism to be a sedentary organism to which this Act applies.

(2) Where by this Act (other than Part 5), or the regulations, provision is made in relation to fishing in the AFZ or a fishery, such provision, *to the extent that it is capable of doing so*, *extends* by force of this section *to fishing for sedentary organisms*, in or on any part of the Australian continental shelf not within the AFZ or the fishery as if they were within the AFZ or the fishery.

(3) Without limiting the operation of subsection (2), a reference in that subsection to making provision in relation to fishing includes a reference to making provision in respect of:

(a) the granting of fishing concessions, scientific permits and foreign master fishing licences; and

(b) the prohibition or regulation of fishing; and

(c) the powers of officers.

(4) A reference in this section to the Australian continental shelf includes a reference to the waters above the Australian continental shelf."

(emphasis added)

"**100 Using foreign boat for fishing in AFZ—strict liability offence**

(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; or

(b) if the boat is a Treaty boat—a Treaty licence is in force in respect of the boat 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 2,500 penalty units.

(2A) Strict liability applies to subsection (2).

(3) An offence against this section is an indictable offence but may be heard and determined, with the consent of the prosecutor and the defendant, by a court of summary jurisdiction.

(4) If an offence is dealt with by a court of summary jurisdiction, the penalty that the court may impose is a fine not exceeding 250 penalty units."

"**101 Having foreign boat equipped with nets etc—strict liability offence**

(1) A person must not, at a place in the AFZ, have in his or her possession or in his or her charge a foreign boat equipped with nets, traps or other equipment for fishing unless:

(a) the use, or presence, of the boat at that place is authorised by a foreign fishing licence, or a port permit; or

(b) a Treaty licence is in force in respect of the boat; or

(c) the boat's nets, traps or other equipment for fishing are stored and secured and the boat is at that location in accordance with the approval of AFMA given under, and in accordance with, the regulations; or

(d) the boat's nets, traps or other equipment are stored and secured and the boat was travelling through the AFZ from a point outside the AFZ to another point outside the AFZ by the shortest practicable route; or

(e) the use of the boat for scientific research purposes in that area is authorised under a scientific permit.

(2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 2,500 penalty units.

(2A) Strict liability applies to subsection (2).

(3) An offence against this section is an indictable offence but may be heard and determined, with the consent of the prosecutor and the defendant, by a court of summary jurisdiction.

(4) If an offence is dealt with by a court of summary jurisdiction, the penalty that the court may impose is a fine not exceeding 250 penalty units."

[12] Section 4(1) of the Act defines "AFMA" to mean the Australian Fisheries Management Authority, "AFZ" to mean the Australian fishing zone and a "foreign boat" to mean a boat other than an Australian boat.

[13] "Fishing" is defined to mean:

"(a) searching for, or taking, fish; or

(b) attempting to search for, or take, fish; or

(c) engaging in any other activities that can reasonably be expected to result in the locating, or taking, of fish; or

(d) placing, searching for or recovering fish aggregating devices or associated electronic equipment such as radio beacons; or

(e) any operations at sea directly in support of, or in preparation for, any activity described in this definition; or

(f) aircraft use relating to any activity described in this definition except flights in emergencies involving the health or safety of crew members or the safety of a boat; or

(g) the processing, carrying or transhipping of fish that have been taken."

[14] In construing these provisions certain matters need be borne in mind –

(a) an Indonesian boat navigating on Indonesian waters is subject to Indonesian law;

(b) it is a canon of construction that unless the contrary is expressed or necessarily implied Australian legislation is not intended to affect the rights of foreign subjects;

(c) it is a canon of construction that every statute is to be interpreted and applied, so far as its language admits, as not to be inconsistent with the comity of nations or with established rules of international law;

(d) in cases of ambiguity the courts should favour a construction

(i) that accords with established rules of international law;

(ii) that accords with the obligations of Australia under an international treaty to which it is a party.

[15] As Dixon J said in *Polites & Kandiliotes v The Commonwealth*:[2]

> "It is a rule of construction that, unless a contrary intention appear, general words occurring in a statute are to be read subject to the established rules of international law and not as intended to apply to persons or subjects which, according to those rules, a national law of the kind in question ought not to include."

[16] Australia is a party to the *United Nations Convention on the Law of the Sea* (UNCLOS), art 78 whereof provides:

> "1. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.
>
> 2. The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention".

[17] The appellant submitted that if s 101(2) *Fisheries Management Act 1991* (Cth) applied to the activities of the appellant, that constituted an unjustifiable interference with his navigation rights as an Indonesian subject on Indonesian waters.

[18] In my opinion s 101(2) *Fisheries Management Act 1991* (Cth) does not operate outside the AFZ such as to apply to the activities of the appellant.

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[2] (1945) 70 CLR 60 at 77.

[19] “Fishing”, whilst widely defined, nevertheless denotes activity beyond the elements of the offence encompassed by s 101 or that alleged or proven against the appellant. Notwithstanding the broad definition of “fishing” the appellant was not “fishing” as defined. He was a foreign national in command of an Indonesian vessel on Indonesian waters. Prima facie he was immune from Australian domestic law.

[20] The Act expressly applies to an Indonesian in an Indonesian boat “fishing for sedentary organisms outside the AFZ”: s 7(2). “In relation to fishing activities on waters outside the AFZ” the Act expressly applies, inter alia, to foreigners on Australian boats and Australian–flagged boats that are not Australian boats: s 7(3). It does not expressly apply to foreigners on foreign boats in relation to fishing activities on waters outside the AFZ. Nor does s 8. True it is, s 7(2) and (3) and s 8 do not limit the extra–territorial operation of the Act. Nevertheless, in my opinion the Act can not apply to the appellant within the EEZ absent some nexus with Australia, or expressing it another way, the appellant, a foreign national, was immune from Australian domestic law absent some real or sufficient nexus with Australia.

[21] Relevantly for present purposes Australian sovereignty begins and ends with its continental shelf. Section 12(2) of the Act only extends provisions, as s 12(2) itself says, “to fishing for sedentary organisms, in or on any part of the Australian continental shelf not within the AFZ …” Section 12(2) only extends the operation of other provisions (in so far as it can) “to fishing ….”

Only an offence "in relation to fishing" or embodying "fishing" as an element of the offence is conformable with being extended by s 12(2) "to fishing ...." Section 101(2) can be said to be a provision "in relation to" fishing which is capable in its terms of being extended by s 12(2) "to fishing for sedentary organisms".

[22] However in my judgment s 12 and s 101(2) can not be construed to have local application to Indonesian waters above the Australian continental shelf outside the AFZ so as to affect Indonesian and other foreign vessels navigating on those waters whose activities are conducted wholly within an area of Indonesian sovereignty and which are unrelated to and have no necessary nexus with "fishing" on the Australian continental shelf. Australian domestic law only operates relative to an area of Australian sovereignty, here, relevantly, by activity in relation to "fishing ... in or on any part of the Australian continental shelf not within the AFZ ..."

[23] This case involves a foreign national outside the Australian area of sovereignty admittedly capable of committing an offence within that area. When outside Australia a foreign national with no intention to commit an offence within Australia is immune from Australian domestic law.
The words "to the extent that it is capable of doing so" in s 12(2) qualify the reach of the Act beyond the AFZ. They accommodate the inapplicability of Australian domestic law to certain circumstances.

[24] Section 101 creates a strict offence concerning foreign vessels "equipped … for fishing", that is, carrying fishing equipment with an ability or capacity to fish. The elements of that offence do not include "fishing" or any purpose or intention to fish on the part of the offender. The offence relates to "equipment for fishing". "Equipment for fishing" is, I think, descriptive. In the context it means "fishing equipment". Being a strict offence the actual purpose for which the equipment was on board the appellant's vessel was irrelevant.

[25] Exhibit P18 at the trial comprised agreed facts, which included:

> "6. The following equipment that was on board the *Segara 07* on 23 April 2008 was equipment for fishing for sedentary organisms, namely Beche–de–mer (also known as trepang):
>
> 6.1. an air compressor;
>
> 6.2. an air accumulation tank;
>
> 6.3. a quantity of air hose;
>
> 6.4. three dive regulators;
>
> 6.5. two dive masks;
>
> 6.6. one pair of dive fins;
>
> 6.7. a quantity of dive weights;
>
> 6.8. two catch bags; and
>
> 6.9. fifteen bags of salt."

[26] At the preliminary hearing in the court below, counsel for the appellant conceded "there was on board equipment capable of being used for gathering trepang". Counsel for the appellant in the court below adopted the submissions of counsel for the appellant's co–accused, who, in relation to similar equipment, said "… whilst it is accepted that each of these items has, as one of its possible uses, fishing for trepang on the Australian continental shelf, its other possible uses include: … fishing generally … fishing for trepang on the Indonesian continental shelf … diving, whether commercial … or recreational". No admission was made at the preliminary hearing or later at trial that the equipment was "for fishing for sedentary organisms" in the sense that was the equipment's sole use or purpose.

[27] Counsel for the appellant on the appeal before us submitted, and as is evident from the nature of the equipment, the appellant's fishing equipment was as suitable for catching crustaceans and fish – "swimmers" – in the waters above the Australian continental shelf as catching sedentary organisms on the shelf itself. The contrary was neither established by evidence nor admitted.

[28] If the appellant's equipment had only been of use to catch sedentary organisms, and nothing else, then some nexus with the Australian continental shelf might have existed. But that is not the evidence in this case. If the respondent is correct, every Indonesian in charge of an Indonesian boat catching fish in the relevant Indonesian waters would be

guilty of an offence against s 101(2) merely from the happenstance that the fishing equipment used was also capable of catching sedentary organisms.

[29] In my opinion, s 101(2) had no operation with respect to the appellant's activities in his Indonesian vessel navigating on Indonesian waters because there was no real or sufficient nexus between those activities and fishing in or on the Australian continental shelf.

[30] The appeal should be allowed and the conviction set aside.

Mildren J:

[31] This is an appeal against conviction. On 14 October 2008 the appellant was found guilty of a charge that on or about 23 April 2008 at a place in the waters above a part of the Australian continental shelf not within the Australian Fishing Zone, had in his possession or in his charge a foreign boat, namely the *Segara 07* equipped with nets, traps or other equipment for fishing for sedentary organisms contrary to s 101 of the *Fisheries Management Act 1991* (Cth).

Facts

[32] The appellant was the Master and in charge of the vessel the *Segara 07* on 22 and 23 April 2008. The vessel was an Indonesian flagged vessel. It did not have a fishing license, port permit, treaty license, approval from the Australian Fisheries Management Authority (AFMA) or scientific permit from Australia that would have permitted fishing for sedentary organisms under s 101 of the *Fisheries Management Act* (Cth) (the Act). On 22 and

23 April 2008, the equipment on the vessel included an air compressor, an air accumulator tank, a quantity of air hose, three dive regulators, two dive masks, a pair of dive fins, a quantity of dive weights, two catch bags and 15 bags of salt. All of this equipment was capable of being used for the fishing of a class of sedentary organisms, namely Beche-de-mer, otherwise known as Trepang.

[33] The appellant and his crew left the waters surrounding West Timor in the Republic of Indonesia on 22 April 2008. At 10:00 am on 23 April 2008, the vessel crossed the seabed boundary between Australia and Indonesia and entered the waters above the Australian continental shelf. Shortly thereafter the vessel was detected by *HMAS Broome*. At about 10:50 am on 23 April 2008 it was boarded and inspected by crew from that vessel. There was no evidence that the appellant or the crew had used the equipment recently or were preparing to use the equipment. No Trepang was found onboard. Following the issue of a notice of apprehension later that day, the vessel was seized and the vessel and crew on board were taken to Darwin.

[34] In an electronically recorded interview between AFMA and the appellant, the appellant stated that he left Kupang and travelled with another smaller fishing vessel from Indonesia, the *Seagara 08*. Whilst outside the AFZ and the waters above the Australian continental shelf, the appellant lost contact with the smaller vessel. The appellant claimed that his intention was to look for this boat and that he was not fishing for or intending to fish for Trepang in the area when he was apprehended by the crew of the *HMAS Broome*.

[35] During the search of the vessel, two AFMA charts were found on board which were tendered as Exhibit D5. The charts were in both English and Indonesian and indicated that fishing for Trepang in the area above the Australian continental shelf was prohibited, but that motorised Indonesian fishing boats as well as sailing boats were able to fish in the area except for those species of fish that do not swim in the water, but permanently live on the seabed. There is nothing in Exhibit D5 to indicate that an offence may be committed merely by sailing in the waters above the Australian continental shelf whilst having equipment capable of being used for the fishing of sedentary species, as maintained by the Crown in this case.

[36] Prior to the trial, the appellant sought a ruling pursuant to s 26L of the *Evidence Act* on a question of law. It was submitted on behalf of the appellant that on the true construction of s 12, s 100 and s 101 of the Act, the indictment as particularised by the Commonwealth Director of Public Prosecutions does not disclose an offence. The preliminary question was dealt with by Riley J, who concluded that the effect of s 101 of the Act, read with s 12 of the Act, is that, subject to any defences which may be open, a person will commit an offence if he or she has a foreign boat equipped for fishing for sedentary organisms in his or her possession or charge at a place in or on, or in the waters above, any part of the Australian continental shelf not within the AFZ.

[37] In October 2008 the appellant's trial commenced before Thomas J and a jury. There was no attempt by the appellant to re-agitate the rulings that had

been made by Riley J. At trial the appellant raised two defences, the first being based on s 10.3 of the *Criminal Code* (Cth) namely that he carried out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency. The second defence was based upon s 101(1)(d) of the Act namely that the equipment had been stored and secured and that the vessel was travelling through the waters above the Australian continental shelf from a point outside the shelf to another point outside the shelf by the shortest practicable route. Her Honour instructed the jury that it was incumbent upon the Crown to disprove these defences beyond reasonable doubt. No point is taken about the way in which Her Honour instructed the jury on these issues.

Grounds of Appeal

[38] The grounds of appeal may be stated succinctly. Ground 1 asserts that s 101 of the Act does not apply to the Australian continental shelf outside the AFZ on the true construction of the Act. Ground 2 raises the question as to the drafting of s 101 and how it should be read in light of s 12. In particular, it was submitted that certain words needed to be added to s 101, that these words were of critical importance, that the jury should have been instructed accordingly and were not so instructed. The third ground also relates to a question of construction namely that the proviso in paragraph (d) of s 101 should be read without the words “and the boat was travelling through the AFZ from a point outside the AFZ to another point outside the AFZ by the shortest practical route”.

Agreed Facts

[39] At the trial the appellant made a number of admissions pursuant to s 379 of the *Criminal Code*. It was not in dispute that the appellant was the Master of the *Segara 07*; that this was an Indonesian boat flagged as such; that the equipment previously referred to was "equipment for fishing for sedentary organisms, namely Beche-de-mer (also known as Trepang)"; that the vessel was recorded as being in an area in the waters above part of the Australian continental shelf not within the AFZ; that the vessel was not authorised by a foreign fishing licence or a port permit; that no treaty licence was in force in respect of *Segara 07*; that the presence of the *Segara 07* was not in accordance with the approval of AFMA; and that the use of the *Segara 07* was not for scientific research purposes and was not authorised under a scientific permit.

Appeal Ground 1

[40] It is perhaps convenient to begin with the *Seas and Submerged Lands Act 1973* (Cth) because it is that Act under which sovereign rights in respect of the continental shelf is claimed by Australia.

[41] Section 11 provides:

> "**11 Sovereign rights in respect of continental shelf**
>
> It is by this Act declared and enacted that the sovereign rights of Australia as a coastal State in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth."

[42] Section 12 provides:

> "**12 Limit of continental shelf**
>
> The Governor-General may, from time to time by Proclamation, declare, not inconsistently with Article 76 of the Convention or any relevant international agreement to which Australia is a party, the limits of the whole or any part of the continental shelf of Australia."

[43] It is not in contest that the place where the appellant's vessel was located was within the area claimed under s 11 and s 12 by Australia. Nor is it in dispute that Indonesia is recognised by Australia as having sovereign rights in respect of an exclusive economic zone which includes the waters above the continental shelf and the airspace above those waters in the area in question.

[44] Section 101 of the Act provides as follows:

> "(1) A person must not, at a place in the AFZ, have in his or her possession or in his or her charge a foreign boat equipped with nets, traps or other equipment for fishing unless:
>
> (a) the use, or presence, of the boat at that place is authorised by a foreign fishing licence, or a port permit; or
>
> (b) a Treaty licence is in force in respect of the boat; or
>
> (c) the boat's nets, traps or other equipment for fishing are stored and secured and the boat is at that location in accordance with the approval of AFMA given under, and in accordance with, the regulations; or

(d) the boat's nets, traps or other equipment (sic) are stored and secured and the boat was travelling through the AFZ from a point outside the AFZ to another point outside the AFZ by the shortest practicable route; or

(e) the use of the boat for scientific research purposes in that area is authorised under a scientific permit.

(2) A person who contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 2,500 penalty units.

(2A) Strict liability applies to subsection (2).

(3) An offence against this section is an indictable offence but may be heard and determined, with the consent of the prosecutor and the defendant, by a court of summary jurisdiction.

(4) If an offence is dealt with by a court of summary jurisdiction, the penalty that the court may impose is a fine not exceeding 250 penalty units."

[45] Various words in s 101 are defined by s 4(1) including AFMA (which means the Australian Fisheries Management Authority); AFZ (which means the Australian Fishing Zone); and foreign boat (which means a boat other than an Australian boat).

[46] Other defined terms include "Australian boat"; "fish"; "fishing"; and "fishing licence".

[47] Section 12 of the Act provides:

"12 Sedentary organisms – Australian continental shelf

(1) If the Governor-General is satisfied that a marine organism of any kind is, for the purposes of international law, part of the

living natural resources of the Australian continental shelf because it is, for the purposes of international law, an organism belonging to a sedentary species, the Governor-General may, by Proclamation, declare the organism to be a sedentary organism to which this Act applies.

(2) Where by this Act (other than Part 5), or the regulations, provision is made in relation to fishing in the AFZ or a fishery, such provision, to the extent that it is capable of doing so, extends by force of this section to fishing for sedentary organisms, in or on any part of the Australian continental shelf not within the AFZ or the fishery as if they were within the AFZ or the fishery.

(3) Without limiting the operation of subsection (2), a reference in that subsection to making provision in relation to fishing includes a reference to making provision in respect of:

(a) the granting of fishing concessions, scientific permits and foreign master fishing licences; and

(b) the prohibition or regulation of fishing; and

(c) the powers of officers.

(4) A reference in this section to the Australian continental shelf includes a reference to the waters above the Australian continental shelf."

[48] The difficulty with the drafting technique employed by the draftsman is that it leaves to the Courts the task of ascertaining first, which of the provisions of the Act or the Regulations are extended to apply to the Australian continental shelf and secondly to make appropriate alterations to the wording of such sections that do apply so as to make them to so apply. This is a drafting technique very much to be regretted. A statute which provides for a criminal offence should do so in the clearest of terms. A failure by the

legislature to set out with reasonable specificity the elements of what amounts to a criminal offence is liable to raise an ambiguity the meaning of which will then have to be determined in accordance with the principles of statutory construction referred to by Pearce and Geddes[3] at paras 9.9-9.10.

[49] Although the offence with which the appellant was convicted is met only with a fine, the offence carries with it forfeiture of the vessel, vide s 106A(1)(a)(vi), as well as loss of liberty by the defendant whilst held in fisheries detention. As was conceded by counsel for the Commonwealth, the construction for which the Commonwealth maintains results in a draconian provision. It is bad enough that the job of actually drafting the offence provision is left to the Courts; but in the context of legislation which requires a knowledge of another Act, namely the Commonwealth *Criminal Code* as well as the terms of the proclamation by the Governor-General in circumstances where the offence is aimed at the Masters of foreign fishing boats who probably do not even speak English, the tired word "draconian" inadequately expresses the sense of outrage which offends one's natural feelings of justice and fairness.

[50] Nevertheless, the Courts must not allow themselves to be sidetracked by such considerations. The duty of the Court is to ascertain the wishes of the legislature as best it can and then carry out those wishes. If there is ambiguity in the provisions of the statute the Court must endeavour to resolve that ambiguity by the application of various principles of

[3] Pearce and Geddes, *Statutory Interpretation in Australia* (6th ed, 2006).

construction that are applicable to all statutes. It is then and only then that if a doubt still remains as to the meaning of a penal provision, that the doubt should be resolved in favour of an accused person.

[51] Some idea of the nature of the problem may be elucidated by consideration of some of the provisions of the Act which the Commonwealth maintains are not made applicable to the Australian continental shelf by virtue of s 12. The list provided was not long and so far as the Act was concerned was limited only to s 13, s 15(1) and s 15A(1). The reason for excluding the former is because s 13 deals with drift net fishing activities which target only swimming species whilst the other two provisions prohibit fishing for specified swimming species which are not sedentary organisms.

[52] It was submitted by Mr Wyvill of counsel for the appellant that the redrafting exercise compelled by s 12, in so far as it applies to s 101(1)(d), required the deletion of some words in the provision and the insertion of others as follows:

> A person must not, at a place in the ~~AFZ~~ *in or on any part of the Australian continental shelf or in the waters above the Australian continental shelf,* have in his or her possession or in his or her charge a foreign boat equipped for fishing *for sedentary organisms in or on any part of the Australian continental shelf unless: (d) the boat's* ~~nets, traps or other equipment~~ *fishing equipment is stowed* ~~are stored and secured~~ and the boat was travelling through AFZ from a point outside the AFZ to another point outside the AFZ by the shortest practicable route

[53] There are some difficulties with that construction. I would have thought that for a start s 101(1)(d) would have required that the boat was travelling

through the waters above the Australian continental shelf rather than through the AFZ. Indeed this was the way in which the provision was interpreted by the learned trial Judge.

[54] I note that the words 'for fishing' in the expression "other equipment for fishing" whilst included in the third line of subs (1) and in subs (1)(c) have been omitted from subs (1)(d). Mr Wyvill, for the appellant, submitted that the words 'for fishing' were omitted from subs (1)(d) by an oversight by the draftsman. Having regard to the context, I consider that one should read the words "other equipment" in sub-section (1)(d) as meaning "other equipment for fishing".

[55] Counsel for the respondent submitted that the relevant changes to s 101(1) were as set out in the indictment. I take this to mean that the Crown's redrafting of s 101(1) would read as follows:

> "A person must not, at a place in the *waters above a part of the Australian continental shelf not within* the Australian Fishing Zone have in his or her possession or in his or her charge a foreign boat equipped with nets, traps or other equipment for fishing *for sedentary organisms*."

[56] The principle difference between the two constructions is that the appellant argues that the words "in or on any part of the Australian continental shelf" should follow from the words "for fishing for sedentary organisms".

[57] The purpose of the additional words in the appellant's case is to require proof of an intent by the person in charge of the vessel to use the equipment

for fishing for sedentary organisms purposes in or on any part of the Australian continental shelf. The difficulty with that construction is that the section is one of strict liability. Counsel for the appellant acknowledges this but says that, were it otherwise, the provisions would be contrary to international law and that the provisions should be construed as not being inconsistent with international law. The way this argument was developed involved two propositions. First, that s 101 should be construed as not applying at all to foreign vessels in the waters above the Australian continental shelf, alternatively, if s 101 did apply to such vessels, the construction of s 101 for which the appellant contends should prevail (Appeal Ground 2).

[58] Mr Wyvill submitted that the relevant principle of construction to be applied in this case is that the Courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty.[4]

[59] Subsequently, in *Minister for Immigration and Ethnic Affairs v Teoh*[5] Mason CJ and Deane J said that the relevant rule was that a statute is to be:

> "…interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law. The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the preceding paragraph should be stated so as to require the courts to favour a construction, as far as the language of the legislation permits, that is in conformity and not in

[4] See *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.
[5] (1994-1995) 183 CLR 273 at 287-288.

> conflict with Australia's international obligations. That indeed is how we would regard the proposition as stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations".

[60] Alternatively, Mr Wyvill submitted that s 12 of the Act should be interpreted so as not to offend an established rule of international law, viz., freedom of the seas. In *Polites & Kandiliotes v The Commonwealth*[6] Latham CJ referred to the principles stated by Sir James Hannen in *Bloxam v Favre*[7] that "every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law".

[61] Dixon J in the same case[8] referred to the rule as being "a rule of construction that, unless a contrary intention appear, general words occurring in a statute are to be read subject to the established rules of international law and not as intended to apply to persons or subjects which, according to those rules, a national law of the kind in question ought not to include".

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[6] (1945) 70 CLR 60 at 68-69.
[7] (1883) 8 PD 101 at 107.
[8] (1945) 70 CLR 60 at 77.

[62] In the same case[9] McTiernan J referred to it as a presumption as did Williams J.[10]

[63] In *Al-Kateb v Godwin & Ors*,[11] McHugh J referred to the principle as a principle of construction that, "so far as the language of a statute permits, it should be interpreted and applied in conformity with the established rules of international law". A similar approach was taken by Hayne J.[12] This approach recognises that the implication must give way where the words of the statute are inconsistent with the implication.

[64] It was submitted by counsel for the appellant that, first, the construction contended for by the Commonwealth was in breach of a treaty to which Australia was a party and, secondly, that it was in breach of an established rule of international law.

The Relevant Treaty

[65] It is well established that the principle so far as it applies to treaties to which Australia is a party, applies irrespective of whether the treaty was entered into before or after the relevant statutory provision was enacted, at least in those cases where the legislation was enacted in contemplation of entry into or ratification of the relevant international instrument.[13]

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[9] (1945) 70 CLR 60 at 79.
[10] (1945) 70 CLR 60 at 81.
[11] (2004) 219 CLR 562 at 589-590.
[12] (2004) 219 CLR 562 at 642.
[13] See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J.

[66] Counsel for the appellant maintained two distinct arguments. First it was submitted that if s 101 were permitted to operate in the manner maintained by the Crown in the waters above the Australian continental shelf, the provisions of the Act should be construed so as not to apply s 101 because it would be contrary to a well established principle of international law, namely the freedom of the high seas, and the contrary intention does not appear. Alternatively, it was argued that s 12 is ambiguous in its application to s 101, that Australia is a party to the *United Nations Convention on the Law of the Sea* (UNCLOS), that extending s 101 to waters above the Australian continental shelf in respect of vessels which are not actually fishing for sedentary organisms would violate the express provisions of the Convention, therefore, the Court should construe s 12 so as to reach the same result, namely that s 101 does not apply to the waters above the Australian continental shelf not within the Australian Fishing Zone.

[67] I think it must now be accepted that the right of innocent passage whether on the high seas or through territorial waters is a well-established principle of international law. The relevant authorities are discussed at some length by Wells J in *Yamami v The Commonwealth of Australia*.[14]

[68] An exception to the right of innocent passage through territorial waters is referred to by Wells J[15] quoting the reply furnished by the Commonwealth government on 9 January 1929 to the questionnaire issued by the Committee

[14] (1938) NTJ 237 at 241-245; see also *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 43 [29] and 60 [75].
[15] (1938) NTJ 237 at 244-245.

of Experts for the Progressive Codification of International Law appointed by the League of Nations:

> "Foreign merchant ships, war ships, and submarines, provided they are navigating on the surface, have a right of innocent passage through territorial waters. Vessels exercising their right of passage are entitled to anchor when it is incidental to navigation and in the case of distress. The right of innocent passage extends to persons and goods carried in the vessel exercising the right, but, the essence of the right being that it is innocent, vessels cannot claim to transport through territorial waters persons or goods whose presence there is prejudicial to the safety, good order, or revenue of the States".

[69] Even on the high seas, the freedom of the sea is subject to a few restrictive rules. This was recognised in the 1958 High Seas Convention which claimed to be "generally declaratory of established principles of international law".[16]

[70] Further, the greater detail of the UNCLOS[17] to which Australia is a party has also led to the subjection of some high seas freedoms for certain additional constraints.[18] So far as the Convention is concerned, it recognises that a State may regulate fisheries in its territorial seas and that the carrying out of fishing activities in breach of such regulations is not innocent passage.[19] Similarly, in relation to the exclusive economic zone, the Convention recognises that States may make laws and regulations relating to the licensing of fishermen, fishing vessels and equipment and generally

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[16] T R R Churchill and A V Lowe, *The Law of the Sea* (3rd ed) 205.
[17] Opened for signature 10 December 1982 (entered into force 16 November 1994).
[18] T R R Churchill and A V Lowe, *The Law of the Sea* (3rd ed) 207. See also Pt VII of the UNCLOS, especially arts 103 - 105, 108 - 109, 111 - 112.
[19] See UNCLOS arts 19(2)(i), 21(1)(e), 25.

regulating and controlling fishing within the zone, except for sedentary species mentioned in art 68.[20]

[71] So far as the continental shelf is concerned, art 78 of the UNCLOS provides:

> "1 The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.
>
> 2 The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation or other rights and freedoms of other States as provided for in this Convention."

[72] Article 77 provides that the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. The natural resources are defined to consist of "the mineral and other non-living resources of the sea bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil".

[73] Although there is no specific provision in Pt XI of UNCLOS which deals with the regulation of fishing, in the way in which that subject is dealt with in Pt V relating to the exclusive economic zone, the reference to "any unjustifiable interference with navigation" in art 78 para 2 strongly suggests

[20] See especially art 62(4).

that some interference with navigation rights is acceptable as long as it is not unjustifiable.

[74] There is a suggestion by Churchill and Lowe[21] that even in a State's EEZ there is some doubt about whether a coastal State may introduce legislation requiring foreign fishing vessels to have gear stowed when passing through the coastal State's EEZ without fishing there. Mr Wyvill submitted that if that is doubtful all the more so in relation to an area in somebody else's EEZ, but in respect of which the rights of sovereignty are claimed only in relation to the seabed.

[75] Be that as it may, I do not think it is contrary to UNCLOS or to international law for a State to take measures to protect its fishing rights. I do not think it can be stated that it is a clear breach of international law that a law which interferes with rights of navigation which require a vessel to have its fishing gear stowed when passing through its EEZ, or to have stowed fishing gear which could be used for sedentary fishing when passing through waters above the continental shelf.

[76] That being so, I do not think there is room to argue that the Act must be construed in the manner contended for by counsel for the appellant, either under the limb that the Act should be construed in such a way as not to breach an established rule of international law or that the Act should be construed subject to the principle that where the Act is ambiguous it should

[21] T R R Churchill and A V Lowe, *The Law of the Sea* (3rd ed) 292.

be construed in such a way as not to be contrary to any treaty to which Australia is a party.

[77] In so far as it was put that interference with foreign fishing vessels in Indonesia's EEZ could be a breach of international law, art 68 specifically provides that Pt V of UNCLOS, which deals with exclusive economic zones, does not apply to sedentary species as defined in art 77, para 4.

[78] Counsel for the appellant's alternative argument in relation to ground 1 was that in any event s 12(2) of the Act provides that the provisions of the Act only apply to a part of the Australian continental shelf not within the AFZ "to the extent that they [are] capable of doing so". In part the submission depended upon a submission that the word "capable" may refer to something other than a practical capacity, for example, the consideration of whether an entity with limited legal powers is "capable of undertaking, as a matter of law, a particular task". To the extent that this is another way of formulating the same argument based upon international law and treaty considerations, the submission must be rejected.

[79] A further alternative argument which was made by counsel for the appellant was that s 12(2) applies only in relation to the provisions of the Act or the regulations where "provision is made in relation to fishing in the AFZ or a fishery" and it was submitted that s 101 was not such a provision, but was rather a provision which was concerned solely with the possession of equipment for fishing.

[80] This gives rise to a consideration of whether s 101 is a provision made in relation to fishing. The definition of fishing contained in s 4 is very wide:

> "***fishing*** means:
>
> (a) searching for, or taking, fish; or
>
> (b) attempting to search for, or take, fish; or
>
> (c) engaging in any other activities that can reasonably be expected to result in the locating, or taking, of fish; or
>
> (d) placing, searching for or recovering fish aggregating devices or associated electronic equipment such as radio beacons; or
>
> (e) any operations at sea directly in support of, or in preparation for, any activity described in this definition; or
>
> (f) aircraft use relating to any activity described in this definition except flights in emergencies involving the health or safety of crew members or the safety of a boat; or
>
> (g) the processing, carrying or transhipping of fish that have been taken".

[81] Section 101 is plainly a provision made in relation to fishing in the AFZ. It prohibits being in possession or charge of a foreign boat within the AFZ equipped with "nets, traps or other equipment for fishing". A direct relationship exists between the subject matter of "fishing", as defined, and the activity prohibited by s 101.

[82] Once it is accepted that s 101 is a provision made in relation to fishing in the AFZ, s 12 operates to extend s 101 to "fishing" for sedentary organisms

in or on any part of the ACS, but only to the extent that s 101 is "capable" of extending to fishing for sedentary organisms. It is not difficult to postulate an example of circumstances in which s 101 would be capable of so extending. If a foreign boat in the relevant area was equipped with equipment, the sole purpose of which was to search for or take sedentary organisms, s 101 would be capable of extending to that factual situation because the boat was equipped with equipment for fishing for sedentary organisms.

[83] As to whether s 101 was capable of extending to the activities of the appellant and did, in fact, encompass those activities, these questions must be answered by asking whether the appellant's boat was equipped with equipment for fishing for sedentary organisms. Applying the definition of "fishing" as extended to sedentary organisms, the question becomes whether the appellant's boat was equipped with equipment for any one of the following purposes:

- Searching for, or taking, sedentary organisms.
- Attempting to search for, for take, sedentary organisms.
- Engaging in any other activities that can reasonably be expected to result in the locating, or taking, of sedentary organisms.
- Placing, searching for or recovering sedentary organisms aggregating devices or associated electronic equipment such as radio beacons.

- Any operations at sea directly in support of, or in preparation for, any of the activities described in subpara (a) – (d).

- The processing, carrying or transhipping of sedentary organisms that have been taken.

[84] The admitted facts were that the appellant's boat was equipped with equipment for fishing for sedentary organisms and taking such organisms. The appellant had in his possession or charge a foreign boat equipped with equipment for fishing for sedentary organisms. Section 101 was both capable of extending to that factual situation and did so extend. Subject to any application of a proviso found in s 101(1)(a)-(d), the appellant committed an offence against s 101(1).

[85] I therefore do not accept that s 101 is solely concerned with the possession of equipment for fishing in the AFZ. The concern is not with the mere possession of the equipment, but the possibility that the equipment will be used in order to fish illegally in the area. I would therefore reject Ground 1 of the appeal.

Ground 2

[86] Ground 2 raises the question of construction which I have previously mentioned in paragraphs [52]–[57].

[87] The difficulty with the appellant's argument that the words "in or on any part of the Australian continental shelf not within the Australian Fishing

zone" need to be added after the words "for sedentary organisms" is that s 101 is a provision of strict liability. If one were to add the words suggested by counsel for the appellant, it would be necessary to prove the purpose for which the equipment was on the vessel and that that purpose was not only for fishing but also it was for fishing in a particular location. To the extent that this inquiry would lead into delving into the mind of the accused to ascertain what his intentions with the equipment might be, it is difficult to see how this can be reconciled with s 101(2A), the strict liability provision. To the extent that it requires an inquiry into the type of equipment and what capacity the equipment has for fishing purposes, it is difficult to see what it would add to the words "fishing for sedentary organisms". There is nothing to suggest that the equipment which is being used for fishing for sedentary organisms on any part of the Australian continental shelf not within the AFZ is any different from the equipment used for fishing for sedentary organisms elsewhere.

[88] I therefore dismiss this ground of appeal.

Ground 3

[89] The third ground of appeal is that the appellant submits that the proviso in para (d) of s 101 should be read without the words "and the boat was travelling through the AFZ from a point outside the AFZ to another point outside the AFZ by the shortest practical route". It was submitted that this was so whether "AFZ" is replaced with either "the ACS" or "the ACS outside the AFZ". It was submitted that the provision was a nonsense for the

ACS outside the AFZ given the lawful actions which an Indonesian fisherman and others may undertake in the Indonesian EEZ which goes beyond simply navigating from one side of the ACS to the other, for example fishing for swimming fish.

[90] There is no evidence in this case that I am aware of that nets or traps that might be used for fishing for swimming fish could also be used for the fishing for sedentary species. However, there is reference in the literature to the fact that nets can be used to fish for at least some sedentary species, albeit one would not have thought it commercially feasible[22] and as well, dredging can be employed, which could be very harmful to the resource. Alternatively, diving gear can be used to catch fish which are swimmers, such as crayfish or crabs. Therefore the presence of diving equipment on a vessel might have a legitimate purpose.

[91] It was an admitted fact in this case that the relevant equipment was "for fishing for sedentary organisms". As Angel J has pointed out, no admission was made that this was the sole purpose of the equipment. No submission was made either before Riley J or at the trial that the equipment was not equipment for fishing for sedentary organisms because it had some other purpose as well. No clear ruling on that question was made by Riley J at the hearing conducted under s 26L of the *Evidence Act*. His Honour's ruling noted that the equipment may also have other uses (reasons at para [6]). His

[22] D P O'Connell, *Sedentary Fisheries and the Australian Continental Shelf* (1995) 59 AM J of Int Law 185 at 205; R D Lumb, *Australasian Legislation on Sedentary Resources on the Continental Shelf* (1970-1971) 7 UQLJ 111 at 114.

Honour's ultimate ruling was that he accepted the submission of the Crown that the effect of the provisions is "that a person will commit an offence if he or she has a foreign boar equipped for sedentary organisms in his or her possession or charge at a place in or on, or in the waters above, any part of the Australian continental shelf not within the AFZ".

[92] No evidence was led at trial that the equipment had some other possible use. The learned trial Judge did not charge the jury on that question. No ground of appeal raises this question.

[93] The appellant's written outline of argument accepted that such equipment, i.e. "generic diving equipment" which might also have an innocent purpose, would be caught by s 101 as extended by s 12 and, because of that fact, it would operate in such a way as to place Australia in breach of art 78(2) of UNCLOS. Alternatively, at the very least, Australia's position in this respect is likely to be controversial and certainly cannot be said, so it was submitted, with any confidence at all, to be consistent with art 78(2) of UNCLOS.

[94] The question of whether the expression in s 101 "nets, traps or other equipment for fishing" would capture any equipment which might be able to be used for fishing and what implications flowed from that, was raised by the Court during oral argument. Examples were given by Mr Wyvill that if s 101 was given such a broad meaning so as to include any such equipment,

passenger liners or pleasure vessels which were foreign vessels which carried fishing equipment might be at risk.

[95] Counsel for the respondent submitted that it does not follow as a matter of law or logic that every boat which has diving equipment on board has 'equipment for fishing for sedentary organisms'. The thrust of this submission is that whether or not the equipment is for fishing for sedentary organisms will depend on the inferences which can be drawn from the facts in each case. If a cargo ship was carrying a container of diving masks and flippers, still boxed by the manufacturer, the inference, presumably, is that the equipment was being transported to a port for delivery to a buyer for resale and was not for fishing at all. This submission recognises that the expression "…equipment for fishing" involves an enquiry into the purpose for which the equipment is on the vessel having regard to the objective facts.

[96] I consider the expression "…equipment for fishing" is descriptive of the kind of equipment which it is, i.e. is it "fishing equipment"? This is an enquiry into the objective purpose for which the equipment is likely to be used, having regard to all of the circumstances. Whether it is or not will depend on the objective facts, i.e. the nature of the equipment and the circumstances under which the equipment is found. A piece of equipment found on a passenger liner or a submarine may give rise to a different inference from the same piece of equipment found on a fishing vessel. For example, diving equipment found on a fishing vessel, particularly a fishing

vessel which is not equipped with nets or traps, may be properly described as equipment for fishing for sedentary organisms particularly if the vessel is found in waters where that equipment can be used for fishing for sedentary organisms. The same equipment found on a vessel being used to explore the seabed for a sunken vessel or for scientific purposes not connected with catching fish may not be described as fishing equipment, even if theoretically it could be so used. This is a question of fact and degree for the jury to decide, having regard to all of the relevant facts. The jury would also have to consider the equipment as a whole. For example, if the equipment found consisted of flippers, a mask and an underwater spear fishing gun, the inference might be more readily drawn that the equipment was for fishing for swimming fish. If on the other hand the vessel is equipped with the kind of equipment found on the *Segara 07* an inference may be drawn that the equipment was for fishing for sedentary organisms. Because the offence is one of strict liability, the Crown does not have to prove the intention of the person in charge, but any admissions made by him would also be relevant.

[97] That being, in my opinion, the true construction to be given to s 101, there is no tension created by extending s 101 by s 12 to apply to fishing for sedentary organisms. If all that is known is that there is an Indonesian fishing vessel equipped with nets found in the relevant area not within the AFZ but in the waters above a part of the Australian continental shelf which waters are part of the Indonesian EEZ, the inference could not be safely drawn that the equipment was "equipment for fishing for sedentary

organisms" unless the nets were of a kind which are also commonly used for fishing for sedentary organisms. The mere fact that there is a possibility that a single piece of equipment has a dual purpose one of which may be for fishing for sedentary organisms would not be enough. The whole of the objective facts would have to be considered to see if an inference could be drawn that the equipment could properly fit the description "equipment for fishing for sedentary organisms". If there is a reasonable doubt about this, the jury would need to be instructed to acquit.

[98] In the circumstances of this case, given the admissions of the appellant, there was no requirement for the learned trial Judge to give any directions to the jury on the question of whether or not the equipment in this case was equipment for fishing for sedentary organisms.

Conclusion

[99] In my opinion, the appeal must be dismissed.
