Aco & Ors v The Queen [2008] NTSC 33

PARTIES:	ACO; RIDWAN; DULAH; FERNANDES; BOGAS (aka Ade); CECEP (aka Sulaiman); FICKHAR; SAHRING; SEMARANI, Arifin; MUSLIMIN; DOKENG, Dewa (aka Muhamed Deokeng); ROSSI, William; v THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	20813785; 20813800; 20813781; 20813798; 20814959; 20814958; 20815194; 20816020; 20814551; 20814583; 20814240; 20814541
DELIVERED:	29 August 2008
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JUDGMENT OF:	RILEY J

CATCHWORDS:

INTERNATIONAL LAW – Statutory construction - fishing for sedentary species (trepang) – laws of Australia – Indonesian Exclusive Economic Zone

Fisheries Management Act 1999 (Cth)
Seas and Submerged Lands Act 1973 (Cth)

Polites v Commonwealth (1945) 70 CLR 60
Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273

United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS, (entered into force 16 November 1994)

Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, opened for signature 12 January 2006, [2007] ATS 12 (entered into force 23 February 2007)

Timor Sea Treaty, opened for signature 20 May 2002, [2003] ATS 13 (entered into force 2 April 2003)

REPRESENTATION:

Counsel:

Applicants Aco, Ridwan, Dulah, Fernandes, Sahring, Bogas, Cecap and Fickhar:	A Wyvill
Applicants Semarani, Muslimin, Dokarni and Rossi:	D Dalrymple
Respondent:	P Willee QC and L Taylor

Solicitors:

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

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Aco & Ors v The Queen [2008] NTSC 33
Nos 20813785; 20813800; 20813781; 20813798; 20814959; 20814958; 20815194; 20816020; 20814551; 20814583; 20814240; 20814541

BETWEEN:

ACO; RIDWAN; DULAH; FERNANDES; BOGAS (aka Ade); CECEP (aka Sulaiman); FICKHAR; SAHRING

ARIFIN SEMARANI; MUSLIMIN; KEWA DOKENG (aka MUHAMED DEOKENG); WILLIAM ROSSI
Applicants

AND:

THE QUEEN
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 29 August 2008)

[1] The applicants in these proceedings have been separately charged with offences under s 100(2) and/or s 101(2) of the *Fisheries Management Act 1999 (Cth)*. Their trials have been set for later in the year. A preliminary hearing was conducted for the purpose of dealing with the submission made on behalf of the applicants that, on a true construction of s 12, s 100 and s 101 of the Act, the joint indictment, as particularised by the

Commonwealth Director of Public Prosecutions, does not disclose an offence. Other submissions were made in relation to other matters and I will deal with those in the course of these reasons.

The primary issue

[2] It was submitted on behalf of the applicants that, so far as possible, Commonwealth statutes should be construed to ensure they operate in a manner consistent with international law: *Polites v Commonwealth*[1] and *Minister for Immigration and Ethnic Affairs v Teoh*[2].

[3] In these cases each of the offences is alleged to have occurred in an area which forms part of the Indonesian Exclusive Economic Zone (EEZ) above the Australian continental shelf and beyond the Australian Fishing Zone (AFZ). The applicants submitted that, properly analysed, the case for the respondent is that the applicants committed offences by possessing equipment, one of the possible uses of which was for fishing for sedentary species (trepang) on the Australian continental shelf. The applicants argued that it would be contrary to international law for the Commonwealth of Australia to attempt to regulate such activity in the Indonesian EEZ without any consideration of the intention of the possessor of such equipment to use it for harvesting sedentary species contrary to the laws of Australia.

[1] (1945) 70 CLR 60 at 68-69, 77, 80-81.
[2] (1995) 183 CLR 273 at 287.

[4] The contention on behalf of the applicants was that the operation of s 100 and s 101 of the *Fisheries Management Act* as extended by s 12 of the Act should, as a consequence of international law implications, be the subject of a restrictive interpretation. It was submitted that for an offence or offences under the sections to be committed in the Indonesian EEZ something more should be required than mere possession of such equipment. For example, there should be present some conduct which necessarily pointed to the taking of sedentary species from the Australian continental shelf. As no such conduct is alleged against the applicants it was submitted that no offence was disclosed.

[5] During the course of the preliminary hearing, and following discussions between counsel as to the nature of the Crown case, Mr Wyvill, who presented the argument on this issue on behalf of all of the applicants, indicated that he no longer pressed his submissions in relation to s 100 of the Act. He maintained the argument regarding s 101 of the Act. I restrict my consideration to s 101 of the Act and, in particular, the contention that s 101(1) should be interpreted so as to have no application beyond the AFZ.

[6] For the purposes of the preliminary proceedings the parties agreed that:

a) the subject vessels were all foreign boats within the meaning of section 4 of the Act;

b) at all material times the subject vessels were located outside the Australian Fishing Zone ("AFZ") but inside the outer limit of the Australian continental shelf, and south of the Australian Seabed Boundary Line;

c) the subject vessels were equipped with fishing accoutrements consistent with fishing for sedentary organisms, namely trepang;

d) the identified equipment may also have had other uses including navigation, diving and fishing generally;

e) no licences, permits or approvals delineated in subsections 100(1)(a) or (b) or 101(1)(a) to (e) inclusive were extant.

The provisions of the *Fisheries Management Act*

[7] Reference to s 101 of the Act reveals that it establishes a strict liability offence relating to the presence of foreign boats in the AFZ. Subject to exceptions, s 101 makes it an offence for a person to possess or have in his charge a foreign boat equipped with nets, traps or other equipment for fishing.

[8] Section 4 provides a very wide definition of "fishing" in the following terms:

> ***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.

[9] By operation of s 12 of the Act, the provisions of the Act and regulations (including s 101) made in relation to fishing in the AFZ or a fishery have application on the continental shelf of Australia beyond the AFZ in respect of sedentary organisms which, for present purposes, include trepang.

Section 12 provides:

(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.

[10] By Proclamation dated 12 December 1995 the Governor-General made a relevant declaration under s 12 of the Act in relation to Beche-de-mer (or trepang).

[11] It will be noted that subsection 12(3) of the Act provides that the extension allows for the making of provision in relation to fishing in the area including making provision in respect of the prohibition or regulation of fishing and also the powers of officers.

[12] The continental shelf is defined within the Act to have the same meaning as in the *Seas and Submerged Lands Act 1973 (Cth)* where the expression is further defined to have the same meaning as in paragraph 1 of Article 76 of the United Nations Convention on the Law of the Sea done at Montego Bay

on 10 December 1982 (UNCLOS)[3]. In UNCLOS the definition of the continental shelf of a coastal State is in the following terms:

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

The application of international law

[13] The respondent claimed that the application of s 12 of the Act to s 101 of the Act has the effect that 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.

[14] The applicants concede that the Commonwealth of Australia has the power to enact legislation such as s 101 of the Act making possession of nets, traps or other equipment for fishing an offence under the law applicable in Australia. It is also conceded that the Commonwealth of Australia has the power to enact legislation such as s 12 of the Act to extend the operation of s 101 to the continental shelf beyond the AFZ. The issue raised by the applicants is one of statutory construction and, in particular, whether the sections should be read down to provide for a limited application in light of

[3] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS, (entered into force 16 November 1994).

what the applicants identified as the obligations of Australia under international law.

[15] The submission on behalf of the applicants was that the Australian Parliament, in providing for the legislative scheme found in s 12 and s 101 of the Act, must be taken to have done so in a manner consistent with its obligations under international law. The provisions should be construed "in a manner consistent with Australia's limited sovereignty in the area".

[16] Counsel for the applicants traced the history of the development of the international law in this area and, in particular, the processes leading up to the creation of the regime now reflected in the provisions of UNCLOS. My attention was drawn to academic articles describing the process. It is apparent that the provisions of UNCLOS regarding sedentary organisms on the continental shelf of a country such as Australia in the area outside the EEZ (the AFZ for the purposes of the *Fisheries Management Act*) reflected a carefully formulated compromise of competing international interests.

[17] Counsel submitted that the sovereign rights of Indonesia in its EEZ as contemplated by UNCLOS recognise a “vast legislative and regulatory capacity”. Similar capacity exists in the Commonwealth of Australia within the AFZ but, so it was submitted, the capacity beyond the AFZ is qualified. It was acknowledged that, in the area of the Australian continental shelf beyond the AFZ, both Indonesia and Australia have legislative capacities which, to some extent, exist "side by side".

[18] The applicants submitted that the regulation of fishing per se in the subject area is a matter exclusively within Indonesian sovereignty. This submission was not challenged by the respondent. Article 56(1)(a) of UNCLOS identifies the sovereign rights enjoyed by a coastal State to include:

> "...sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds".

[19] The provisions of the Convention, and in particular Article 62, make it clear that nationals of other States fishing in the EEZ of a country must comply with the conservation measures and terms and conditions established by the laws and regulations of the coastal State. Those regulations may include the licensing of fishermen, fishing vessels and equipment. However, Article 68 which is in the same Part of the Convention, specifically provides that the Part does not apply to the sedentary species referred to in Article 77.

[20] As is acknowledged by the applicants, under the provisions of UNCLOS, jurisdiction to legislate in relation to trepang and other sedentary organisms on the continental shelf of Australia rests with Australia. Article 77 of UNCLOS provides:

> 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

> 2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
>
> 3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
>
> 4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed 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.

[21] It was argued on behalf of the applicants that s 12 should not be interpreted so as to extend the operation of s 101 to make criminal the possession of fishing equipment for use in harvesting trepang in or on, or in the waters above the Australian continental shelf. It was submitted that to do so would undermine the exclusive sovereignty Indonesia has over its EEZ and would constitute "an invasion of the collective freedoms enjoyed by the international community" to navigate in the Indonesian EEZ above the Australian continental shelf. The exercise of the sovereign power of the Commonwealth of Australia for the protection of its interests in relation to sedentary species on the Australian continental shelf in the Indonesian EEZ should not be interpreted to extend to conduct which is a legitimate exercise of the rights in the Indonesian EEZ enjoyed by citizens of Indonesia or by citizens of other States. It was urged that the effect of s 101, if it applied beyond the AFZ, would be to result in an unjustifiable interference with

navigation and other rights and freedoms of other States contrary to Article 78 of UNCLOS.

[22] In relation to the exercise of powers over the continental shelf Article 78 of UNCLOS relevantly 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 airspace 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.

[23] The applicants relied upon the provisions of s 12(2) of the *Fisheries Management Act* which, as has been noted above, refers to the extension of the Act and regulations to the Australian continental shelf not within the AFZ. In particular the applicants relied upon the words "to the extent that it is capable of doing so" which, it was submitted, qualifies and limits the intended operation of the extension.

[24] The wording of the legislation, for present purposes, is clear and the primary obligation in interpreting the subject sections is to give effect to the legislative intent and promote the object underlying the provisions as revealed in the legislation. In this case there is no ambiguity that needs to be resolved. Section 12(2) which provides that the section shall be read to allow extension of the provisions of the Act "to the extent that it is capable of doing so" should be read and applied according to its terms. Contrary to

the submission of Mr Wyvill, those words do not suggest some concern on the part of the Legislature regarding limitations imposed upon the legislative power by consideration of the principles of international law. The submission of Mr Wyvill in relation to concerns regarding international law did not suggest that the section is not "capable" of doing what its plain language suggests is intended. If that was the submission a constitutional issue would have been raised. Mr Wyvill expressly disavowed any constitutional challenge to any of the relevant provisions of the Act and restricted his argument to questions of construction alone. In my view, for present purposes, s 12(2) of the Act simply makes it clear that any provisions of the Act or regulations which are not capable in a practical sense of having application to fishing for sedentary organisms are not to be imported into those provisions which have application to sedentary organisms on the continental shelf beyond the AFZ.

[25] It is a matter for the Legislature whether it legislates strictly in accordance with international law. Even if Mr Wyvill be correct in his submissions regarding the status of international law and the prospect, which I do not accept, that the section, if not restricted to application within the AFZ, may theoretically cause a dispute of some unidentified kind with Indonesia or some other State, that is a matter for others to resolve and mechanisms are in place under UNCLOS to facilitate that process. Such a circumstance would not require the application of the sections to be narrowly confined as

the applicants submit. In particular it would not require s 101 of the Act to be read as having no application to the continental shelf of Australia beyond the AFZ contrary to the plain intention of the relevant sections of the Act.

[26] Further, there is nothing in the materials placed before me to support the submission of the applicants that the exercise by Australia of rights over the continental shelf beyond the AFZ infringes or result in any unjustifiable interference with navigation and other rights and freedoms of Indonesia or other States as provided for in UNCLOS.

[27] In the course of his submissions Mr Wyvill gave a series of examples of circumstances in which he said s 101 of the *Fisheries Management Act* could operate unfairly. Those examples, which I will not now repeat, go to the operation of s 101 wherever, geographically speaking, it may apply. There was no suggestion based upon those examples that s 101 was invalid. The examples do not assist me in determining the issue at hand in this case namely whether s 101 should be given an interpretation that confined its operation to the AFZ.

[28] In my opinion the interpretation of s 12 and s 101 of the *Fisheries Management Act* for which the respondent contends is not inconsistent with international law. As the respondent submitted, the Commonwealth of Australia has sovereignty over the continental shelf, it has plenary power to legislate with respect to the continental shelf and the *Fisheries Management*

Act, including s 101 as extended by s 12, gives effect to that sovereignty and the exercise of that plenary power.

Semarani

[29] Mr Dalrymple, who appeared on behalf of the applicants not represented by Mr Wyvill, adopted the submissions of Mr Wyvill in relation to the interpretation of s 101 of the *Fisheries Management Act*. For the reasons expressed above the challenge is, in my opinion, not able to be sustained.

[30] A separate application was made by Mr Dalrymple on behalf of the applicant Semarani. The factual circumstances relating to Semarani differ from the other matters. It is alleged that his vessel was apprehended inside an area described as the "Joint Petroleum Development Area" (JPDA) established under Article 3 of the Timor Sea Treaty between Australia and Timor-Leste (there referred to as East Timor). It was within the JPDA that members of the crew of HMAS Maitland boarded the vessel. The vessel was seized and towed to Darwin.

[31] The submissions made on behalf of the applicant Semarani included a challenge to the lawfulness of the boarding of the vessel and the use against the applicant in any trial of any evidence obtained as the result of that boarding. The submission was that the continental shelf of Australia has not been defined, is the subject of dispute and there is no delimitation of the boundary of the continental shelf. It was submitted that the respondent is

not able to establish an essential element of the case against Semarani namely that the relevant activity occurred "in or on any part of the Australian continental shelf not within the AFZ".

[32] Mr Dalrymple observed that in this case there is no treaty or agreement as between Australia and Timor-Leste identifying the boundary of the continental shelf. It was submitted that it "is evident" that Timor-Leste claims the JPDA as part of its exclusive economic zone and that the location of the boundary of the continental shelf is in dispute. I do not accept that submission. Whilst there may not be an identified agreement as to the location of the boundary it does not follow that the location is in dispute for the purposes of UNCLOS or the present proceedings.

[33] The JPDA was established by the Timor Sea Treaty entered into on 20 May 2002[4]. The immediate purpose of the Treaty was to provide a continuing basis for petroleum activities in the area. Whilst the Treaty did not define the boundary of the continental shelf between the two States it did give effect to international law as reflected in UNCLOS. A subsequent Treaty, the "Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in

[4] *Timor Sea Treaty* entered into on 20 May 2002, [2003] ATS 13 (entered into force 2 April 2003).

the Timor Sea"[5] (CMATS), was entered into in 2007 between the two governments.

[34] The definition of the continental shelf for present purposes is to be found in paragraph 1 of Article 76 of UNCLOS. That definition (set out at paragraph 12 above) is adopted in the *Seas and Submerged Lands Act (Cth)* and also in the *Fisheries Management Act*. The CMATS treaty (in Article 2) preserved the legal position of each country relating to the delimitation of their respective maritime boundaries. In the case of delimitation of the continental shelf between States with opposite or adjacent coasts Article 83 of UNCLOS provides that delimitation shall be effected on the basis of international law and, where no agreement can be reached within a reasonable time, procedures are provided for the settlement of disputes in Part XV of UNCLOS. In the present matter there is no suggestion that any relevant dispute exists or that the dispute resolution procedures have or are to be implemented. There being no agreement pursuant to Article 83 to the contrary then, by operation of the *Fisheries Management* Act, the limits of the Australian continental shelf for the purposes of the Act must be determined in accordance with the definition provided for in the Act being that contained in paragraph 1 of Article 76 of UNCLOS. It was not disputed that by virtue of that definition the Australian continental shelf extends to and beyond the northern boundary of the JPDA.

[5] *Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea,* opened for signature 12 January 2006, [2007] ATS 12 (entered into force 23 February 2007).

[35] The CMATS treaty in Article 4(2) provides that a party shall not be prevented from "continuing activities (including the regulation and authorisation of existing and new activities) in areas in which its domestic legislation on 19 May 2002 authorised the granting of permission for conducting activities in relation to petroleum or other resources of the seabed and subsoil." There is nothing in the treaties to which I have been referred which impacts upon the ability of the Commonwealth of Australia to maintain the arrangements provided for in the *Fisheries Management Act* in the JPDA.

[36] The situation is, then, similar to that which has been discussed above in relation to the submissions made by Mr Wyvill. The boarding of the vessel cannot be said to have been unlawful on that account.

[37] A further submission was made that the power to board the vessel which is derived from the *Fisheries Management Act* is ambiguous and could not support the boarding in this case. The power is to be found in s 84(1) of the *Fisheries Management Act* where it is provided:

> (1) An officer may:
>
> (aa) ...
>
> (a) board a boat in the AFZ or in Australia or an external Territory or a boat that the officer has reasonable grounds to believe has been used, is being used, or is intended to be used, for fishing in the AFZ and may:
>
> (i) ...

[38] The submission on behalf of the applicant was that the section contained an inherent ambiguity. It was submitted that, if the first reference to AFZ in the section is understood as meaning "waters above the Australian continental shelf outside the AFZ", that should not automatically lead to a translation of the second reference to AFZ in the same way. It was submitted that it was arguable that the extended power is only exercisable where a boarding officer comes across a vessel in waters outside the AFZ above the Australian continental shelf equipped for gathering sedentary organisms from the seabed and where the officer forms a view that the vessel has either recently been used for fishing in the AFZ or is about to be used for fishing in the AFZ. However, as the respondent points out, the submission treats the parts of s 84(1)(a) as being conjunctive whereas they are, in fact, disjunctive. The section provides power to an officer to board a boat in the AFZ, in Australia or an external territory. It also gives a power to an officer to board a boat that the officer has reasonable grounds to believe has been used, is being used, or is intended to be used, for fishing in the AFZ. No relevant ambiguity arises.

Conclusions

[39] In my opinion s 101 of the *Fisheries Management Act*, read with s 12 of the Act, should not be narrowly interpreted in the manner for which the applicants contend. I accept the submission of the respondent that the effect of those provisions is that 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. In other words s 101 of the Act has, by virtue of s 12, operation on the continental shelf of Australia beyond the AFZ.

[40] For present purposes, and for the reasons expressed, the boarding of the vessel of Mr Semarani has not been shown to be unlawful.

[41] The applications are dismissed.
