

CITATION: *Department of Environment & Heritage –v- Murray [2004] NTMC 014*

PARTIES:

DEPARTMENT OF ENVIRONMENT &
HERITAGE

v

DARREN ROBERT MURRAY

TITLE OF COURT:

COURT OF SUMMARY JURISDICTION

JURISDICTION:

COURT OF SUMMARY JURISDICTION

FILE NO(s):

20312396

DELIVERED ON:

9 March 2004

DELIVERED AT:

DARWIN

HEARING DATE(s):

13 & 14 November 2003, 16 January 2004

DECISION OF:

D LOADMAN, SM

CATCHWORDS:

ALLEGED CONTRAVENTION OF ENVIRONMENT PROTECTION AND
BIODIVERSITY CONSERVATION REGULATIONS 2000 COMPRISING ALLEGED
COMMERCIAL FISHING AND ALLIED ALLEGATIONS FROM ABOUT 17 MAY
2003 AT EAST ALLIGATOR RIVER NORTHERN TERRITORY

Environment Protection and Biodiversity Conservation Act 2000

REPRESENTATION:

Counsel:

Plaintiff:

Ms C Dixon

Defendant:

Mr K Currie

Solicitors:

Plaintiff:

Commonwealth DPP

Defendant:

Morgan Buckley

Judgment category classification:

B

Judgment ID number:

[2004] NTMC 014

Number of paragraphs:

140

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

No. 20312396

BETWEEN:

THE DEPARTMENT OF ENVIRONMENT
AND HERITAGE
Complainant

AND:

DARREN ROBERT MURRAY
Defendant

DECISION

(Delivered 9 March 2004)

Mr David LOADMAN SM:

PRELIMINARY

1. The defendant Darren Robert Murray is charged with 4 alleged contraventions of the *Environment Protection and Biodiversity Conservation Regulations* of 2000, specifically:

(1) On or about 17 May 2003 at East Alligator River in the Northern Territory the defendant used a device that can be used for taking an animal, namely, a gill net, in a Commonwealth reserve, namely Kakadu National Park Contrary to Regulation 12.18(1)(h) of the *Environment Protection and Biodiversity Conservation Regulations 2000*

(2) On or about 17 May 2003 at East Alligator River in the Northern Territory the defendant was in possession of a device that can be used for taking an animal, namely, a gill net, in a Commonwealth reserve, namely Kakadu National Park Contrary to Regulation 12.18(1)(h) of the *Environment Protection and Biodiversity Conservation Regulations 2000*

(3) On or about 17 May 2003 at East Alligator River in the Northern Territory the defendant did carry out commercial fishing in a Commonwealth

reserve, namely Kakadu National Park without being authorised by a law of the Commonwealth or the Northern Territory or a permit issued by the Director of National Parks
Contrary to Regulation 12.34(1) of the *Environment Protection and Biodiversity Conservation Regulations 2000*

In the alternative to count (3)

(4) On or about 17 May 2003 at East Alligator River in the Northern Territory the defendant did carry out a commercial activity, namely commercial fishing, in a Commonwealth reserve, namely Kakadu National Park
Contrary to Regulation 12.36(1) of the *Environment Protection and Biodiversity Conservation Regulations 2000*

2. At the outset the parties handed to the Court factual admissions which were to be part of the material considered by the Court in making its decision in respect of the above charges. Contents of that document are set out hereunder.

The defendant **DARREN ROBERT MURRAY** admits that:

1. Darren Robert Murray (hereinafter referred to as "the defendant") is the person named in the complaint dated 13 October 2003;
2. That on 17 May 2003 the defendant was the temporary transferee of Commercial Barramundi Fishery Licence Number A7/95.
3. The nominated vessel for Commercial Barramundi Fishery Licence Number A7/95 was the "Jolly Roger"
4. That on 17 May 2003 Duane Pring was a nominated assistant under Commercial Barramundi Fishery Licence Number A7/95.
5. That on 17 May 2003 the defendant was not the holder of a permit issued by the Director of National Parks permitting commercial fishing to be carried out in Kakadu National Park.
6. That on 17 May 2003 the defendant was not authorised by a law of the Commonwealth or the Northern Territory to carry out commercial fishing in Kakadu National Park
7. Kakadu National Park is a Commonwealth Reserve within the meaning of the *Environment Protection and Biodiversity Conservation Regulations 2000*;
8. That on 16 May 2003 the tidal information for the Point Farewell and East Alligator River mouth region in the Northern Territory was
 - low tide was at 2:08am (EST) with a height of 0.52m
 - high tide was at 8:22am (EST) with a height of 6m

- low tide was at 2:41 pm (EST) with a height of 1.14m
- high tide was at 8:18pm (EST) with a height of 5.63m

9. That on 17 May 2003 the tidal information for the Point Farewell and East Alligator River mouth region in the Northern Territory was

- low tide was at 2:52am (EST) with a height of 0.28m
- high tide was at 9:06am (EST) with a height of 6.10m
- low tide was at 3:23pm (EST) with a height of 1.40m
- high tide was at 8:58pm (EST) with a height of 5.73m

10. That on 18 May 2003 the tidal information for the Point Farewell and East Alligator River mouth region in the Northern Territory was

- low tide was at 3:34am (EST) with a height of 0.16m
- high tide was at 9:48am (EST) with a height of 6.10m
- low tide was at 4:04pm (EST) with a height of 1.46m
- high tide was at 9:38pm (EST) with a height of 5.76m

It was pronounced at inception that in the event the Court found Count 3 above proved, the prosecution would withdraw Count 4. It was also correctly pointed that admission of Fact No 7 is in fact not what it purports to be. That is a conclusion of law and consequently cannot properly be an admission of fact. It is nevertheless an admission and nothing turns on this distinction.

3. The following summary for reason of convenience and comprehension is set out.

Summary

4. At all times material the defendant was the holder of a commercial barramundi fishing licence.
5. It is alleged that on 16 May 2003 the defendant, then master of the vessel *Jolly Roger* anchored same near the mouth of the East Alligator River at a point approximately 300 metres north of the boundary of the Kakadu National Park. Duwane Pring ("Pring") was a crew member on board the *Jolly Roger*.

6. It is alleged the defendant, in company with Pring, entered Kakadu National Park, that is crossed the boundary the location of which was not in dispute, and entered the East Alligator River. Further that whilst in the East Alligator River and therefore inside the Kakadu National Park the defendant placed a gill net adjacent to the west bank of the East Alligator River at a point approximately 500 to 600 metres inside the park boundary.
7. The net was "secured" with anchors conveniently described as 27 pound anchors.
8. It is alleged that the defendant, in company with Pring, exited the National Park after allegedly setting the net, re-entered the park at 3:15 am on 17 May 2003 and returned the place where the net had allegedly been set.
9. These activities were in a 5.5 metre dinghy powered by 100 horsepower outboard motor.
10. Further that about 3:22 am on 17 May 2003, wardens on duty in the Kakadu National Park approached the defendant's dinghy. It is alleged that upon observing the wardens' approach, the defendant seemed to abandon a gill net (Exhibit P9 "P9") in the water and attempted flight.
11. The wardens located a wet gill net (Exhibit P7 "P7") in the defendant's dinghy.
12. It is further alleged that the wardens successfully apprehended the defendant and Pring about 200 metres south of the boundary of the Park.
13. The defendant was asked for his reason for being inside the Park and the defendant's response was that his net had drifted into the Park and he was looking for it.
14. The wardens then seized the gill net (P7) inside the defendant's dinghy.

15. Subsequently they located and seized the other net (P9) that was still “set” inside the Park.
16. When asked about the net, located within the Park, the defendant said “*no comment*”. He declined to inspect P9 after it had been located by the wardens.
17. Both nets were 150 millimetre gill nets, approximately 100 metres in length.
18. Four anchors, that is the 27 pound anchors, were also seized. Two anchors were at all material times attached each of the to said nets.
19. The prosecutor advised the Court that where allegations in any complaint before the Court postulated “use” that allegation relates to the gill net (P9) found in the water and within the boundary of the Park.
20. Various maps, aerial photographs, diagrams and the like were tendered and it is not proposed to be specific in relation to any of them, particularly in light of the fact there really is and was no dispute about the boundary line which demarcates the entry to the National Park or the fact that the location of the net was found in the Park is within the Kakadu National Park.

EVIDENCE

21. In reciting evidence in this decision the Court will endeavour to recite only evidence relevant to the issues in the case.

Garry Lindner

22. Garry Lindner, an Assistant Project Officer employed by the Department of Environment and Heritage, a delegate under the **Environment Protection And Biodiversity Conservation Act**, a Northern Territory Fisheries Officer and a warden, gave evidence.
23. Lindner said that by GPS reading about 2 am on 17 May 2003 he, in company with Scott Morrison and Andrew Wellings, were on patrol and at

that point in time were a kilometre north-east of Bucket Mouth Creek and about 4 kilometres south of the boundary, as the Court understood it, of the National Park, although it was expressed slightly differently. There was a *"full moon"*.

24. As a consequence of something Morrison said, the witness looked north and saw *"a light off Point Farewell to the north of Point Farewell a bit"*. Further that shortly after making this observation he heard a diesel engine noise *"coming from that direction where the light was"*.
25. Lindner continued under power to travel north and at 2:35 am identified an engine noise *"like a loud outboard engine"* and that noise persisted until about 2:45 am.
26. At 3:15 am the loud noise (the outboard engine noise) started again and he was able to observe the vessel travelling south into the river heading along the mud flats adjacent to the west bank *"then it just went straight to a location and stopped"*. During the course of its travel he said no lights were used *"but a really low dim light came on and it was operating for a while, about 3:20[am] the light was still on"*.
27. Lindner fixed the location at which this vessel became stationary at about half a kilometre to a kilometre inside the boundary of the National Park. He said that whether searching for a lost net or retrieving the net or pulling fish from a net, it was his experience that a spotlight was used by commercial fishermen for such exercises. Sometimes you could see a spotlight from 10 to 20 kilometres away. On travelling to the spot where the activity he observed was taking place, he spotted a dinghy with 2 people in it heading at speed on the plane travelling *"back towards the big light"* (the *Jolly Roger's* lights) and gave chase, which chase endured for 15 to 20 seconds. The dinghy with the 2 people stopped when required. It was then about 200 to 250 metres inside the boundary of Kakadu National Park. The

2 people in the dingy were known to Lindner and he identified them as the defendant and Pring.

28. It was conceded by the prosecutor that the issue of knowledge of the defendant, that is knowledge that he was within the boundary of Kakadu National Park, was a matter on which the prosecution bore the onus of proof. There was some evidence about a prior occasion, the thrust of which was to the effect that some pains were taken to ensure that the defendant was aware of the location of the boundary line and that on that occasion that his nets were outside of it. Exhibit P6, for instance, was a map of Kakadu and the boundaries of the Kakadu Reserve which was given to the defendant by Lindner on 20 March 2003. The defendant conceded such knowledge in any event.
29. This Court does not perceive any large amount of time need be focused on the issue of "knowledge". It is clear that the defence in relation to the net, the subject of the "use" complaints was that it had drifted there and not been set there.
30. Since it was the defendant's evidence that he was always aware of the boundary it must follow that if the Court ultimately comes to the conclusion that the defendant set the net P9 in the location where it was found, he knew that he was setting them using them and indulging in commercial fishing within the boundaries of the Park.
31. Lindner identified himself to the defendant. The defendant stated subsequently to an exchange of words that he needed to travel to a point north of the Park boundary where nets had allegedly been set amongst the rocks which was of concern to the defendant because of the fact that the tide would be coming in shortly. Lindner was content to allow this course of action but advised the defendant that he was seizing the net which was in the dinghy. He observed that the net was "*wet, the anchors had wet mud on it.*"

Mr Pring had like orange plastic overalls on. They were wet down the front". That net was tendered as Exhibit P7.

32. Lindner said that there were no fish at all in the net seized. After the defendant left to retrieve the nets referred to in paragraph 31 of this decision, the wardens travelled to the spot they had observed the dinghy and *"the light activity early in the night"*. This was about 2:20 am. At that spot they located 2 buoys *"with reflectors on it and a length of gill-net in between"*. He said without use of the spotlight this net would not have been seen. It was located on the western side of the river, about 100 metres out from the water's edge. He said that the net was set about 80 to 100 metres parallel to the bank. They tied off to the southern end of the net which was held fast by an anchor and located out of the current line and at that time the tidal movement was *"virtually still"*. At that point the tide was just beginning to come in and the net by GPS fix was 600-700 metres inside the Park boundary.
33. There were *"big black anchor buoys"* attached to the net. The gill net in question did not have numbers. According to legislation it was common cause numbers were required to be located on each side of the net, with one in the middle. There were no numbers, he said, visible on the net floats or elsewhere at all. The licence number would normally expected to be located at the net float, one at each end and one in the middle. There were no other nets located in the vicinity, or at all.
34. Other than the *Jolly Roger*, anchored 200-300 metres north of the boundary of the National Park they did not see any other vessel on the night in question.
35. Once having boarded the *Jolly Roger*, Lindner heard Wellings advise the defendant that a net had been located *"it's set in the water over there – do you want to come over and have a look at it and see if it's yours"*. He recounted the defendant had said *"I am looking for a net, it is drifting*

around somewhere and I am looking for". In relation to the invitation to look at the net, the defendant said "no, no comment".

36. After taking some details of the defendant's dinghy and recording them, Lindner and the others returned to the net which had not moved from the location in which they first observed it. This was between 5:30 and 6 am. The tide was starting to come in. The area where the net was, "*was sort of in the back or sort of dead water part of the river and the main current line was about 50-100 metres over to the east of the main flow of the river and the gill-net*".
37. Two GPS readings were recorded. The point of interception of the defendant by such reading, when he was travelling south towards the boundary when first intercepted was 220 metres south of the boundary. The net was 660 metres south of the boundary (or something like that).
38. Retrieval of the gill net in the water commenced at 7:30 am. "*It was pretty hard to pull up but two of us managed to get it up*". At the downstream anchor they were unable to budge same. With the aid of both outboard motors the downstream anchor was dislodged and the net, anchors and floats were loaded into the Wardens' boat. The only things caught in the net were "*just a couple of jellyfish*". That net was tendered as Exhibit P9 with its appurtenances. There is no evidence of how long it took them to raise the net.
39. Lindner said that in relation to a net which had drifted he would have expected it to be "*sort of balled up, rolled – if it had a – something had drifted into it, that'd – basically the floats are a lot closer together*". In fact his evidence was that this net was not in that configuration when he saw it, it was not consistent with a net that had drifted. "*It would like a full set. It had been – it was strung out.*".

40. A video tape (with no audio) was tendered as Exhibit P11. It emerged that the GPS reading at the point where Lindner intercepted the defendant was 53 2 3 5 1 0 0 (east) and 8 6 6 2 7 9 2 (north). The second GPS reading being the position of the net located in the water is 53 2 3 5 3 0 0 (east) and 8 6 6 2 4 0 8 (north).

41. This Court sees no point in reciting the entire content of what was shown to the Court on the video. Mr Currie did seek to highlight, which is in accordance with this Court's observations, that one of the anchors visibly had a rope located between the flange and the bottom of the anchor. When a buoy became visible on the video there was mud located on same. This was the buoy attached to the downstream anchor.

42. In cross-examination, Lindner said that his first awareness of the defendant's dinghy was when it was travelling to the north west of Point Farewell and at that time no investigations were made as to what activities he was engaged upon. He would not be shaken on his conclusion that the defendant's dinghy had stopped at the point he had indicated in his evidence in chief and that he had observed the vessel becoming stationary from about 4.5 kilometres south. It was put to him that he had said to the defendant (at what stage is not clear) "*there is another net in there, you don't know anything about that do you – any comment*". Lindner was unable to recall making that statement. He also conceded that he did not ask any question of the defendant in relation to the net that was found in the defendant's dinghy.

43. In cross-examination Lindner abided by his evidence in chief that the light that he saw was a "*low light*" but that he did not search for the source of that low light at any stage after stopping or intercepting the defendant. He denied ever seeing a "*bright spotlight*". He did not rule out the possibility that the defendant might have used a spotlight. If he did the appearance of the light was radically different from his observations of the characteristics

exhibited by use of a spotlight in his experience in the course of his employment.

44. Although Lindner said that the lowest depth of the water at the location of the net found by him was 2 or 3 feet, he was not able to offer a satisfactory explanation as how mud (indisputably there was mud on the buoy) came to be there. He conceded that it could have been dragged through the mud by reason of the anchor moving.
45. Lindner said that the location of the net had been indicated by "*some markers, or some reflection*" because it was this fact that caused him to suspect that the reflection was indicative of the existence or location of a net which is what transpired in fact to be the case.
46. At transcript p61 about point 6, the following exchange is pertinent:

*"As the informant in this case, the person that laid the charged - are you aware of any evidence that suggests that the net didn't drift in?--
-No."*

Also significantly at the bottom of that page, the net P7 in the dinghy was wet, but he could not say whether the saturation was indicative of being in water half an hour or 5 minutes before. Similarly Lindner conceded he would be unable to say how long prior to him seeing Pring's wet clothing the clothing had become wet, nor he conceded did he ever ask for an explanation as to why "*their overalls or whatever they had on, looked as if there was water on it*". He also could not recall Wellings asking for an explanation as to the saturation of the net and he himself did not ask any question related thereto.

47. Lindner conceded that he had concluded on the night in question that because the defendant's dinghy was on the plane and heading north at speed "flight" was suggested although the mode of travel was also consistent with someone about to, or seeking to, urgently recover nets.

48. Lindner maintained that the way in which the net in the Park was anchored, engendered his belief that the location which they were first encountered was the place in which they were set (approximately).
49. In re-examination (the buoy with mud on it) he said was dislodged when the motors were utilised to dislodge it *"like it just pulled up out of the mud"*.
50. The Court finds he was an impressive and credible witness.

Andrew Marcus Wellings

51. Andrew Marcus Wellings then gave evidence, he holding a similar position to Lindner. A general description of his evidence is that it was largely corroborative of Lindner's evidence. The corroborative elements are not discretely identified in this decision.
52. He said [at transcript p67] that he saw the defendant's dinghy

"and it was heading upstream. And I could quite clearly see it against the silhouette of the western bank of the East Alligator River. It was past the point. It was coming in - it was coming in on a - it was the plane; it was fairly high speed, just in a straight direction travelling along into the park. My first thought was that it was going to go - you know - keep going past us because it was just running on a straight trajectory. There was no light or anything on that dinghy at that point of time.

... Yeah, it was going straight along the - well, straight towards us but along the bank because we were out a bit from the bank. And then it stopped.

... And then we went to that position or towards that - when I was there, sorry, I should say that I did see a light flash on and off just a couple of times through a period of time. A short period of time."

53. The light flashing on and off, Wellings reckoned was of five minutes duration. [at p68]

"And a small light came on, it was only a small light and it popped on popped off and then I saw that a couple of times then and I saw it

a third time after we started our vessel towards that spot where they were stopped."

54. He estimated the place where (what transpired to be) the defendant's dinghy was stopped was about 500 metres "*down from Point Farewell*", about 500 to 600 metres within the Park boundary along that bank. This observation Wellings made from about 4 kilometres away.

55. Wellings described coming up behind the dinghy, he implied he saw the dinghy take off and

"The dinghy was going fast in a direction away from us towards the white light off Point Farewell".

56. Wellings said that the defendant's dinghy had been a few minutes to 5 minutes in a stationary location when they started moving towards it "*and then at some point while we were heading towards it, it started moving away*". He said it was heading out of the "*Commonwealth reserve in a direct line towards the other light*". After having pursued the dinghy and stopped it, he estimated its position when stopped was about 150 to 200 metres within the boundary of the Commonwealth reserve.

57. Wellings referred to observations in relation to some photographs which are part of Exhibit P12, but there is little purpose in this Court's view in reciting any of those details in this decision.

58. The audio tape [Exhibit P13] of the recorded interview on 17 May 2003 was then played. Due to some transcription difficulty of the Court Recording Services the Court transcript does not contain transcription of the audio tape. In the event, the Court will refer to the transcript apparently prepared by Court Recording Services presumably for the purposes of and at the instance of the Prosecution. This Court has been provided with an electronic copy of that document by CDPP and an extract (starting at p3 of

that document), including amendments as recorded in Court, is set out below:

THE FOLLOWING IS A TRANSCRIPT OF AN AUDIO RECORDED INTERVIEW BETWEEN ANDREW WELLINGS, GARY LINDNER AND DARREN ROBERT MURRAY ON '*JOLLY ROGER*' ON SATURDAY 17 MAY 2003.

...

WELLINGS: Okay. At approximately 3 - ah - 3.20 this morning we came across - ah - a vessel in the park and it's where I - met you this morning, where you had a net in a dinghy between you and your colleague. What's the name of your colleague in the boat at that time?

MURRAY: (inaudible)

WELLINGS: (inaudible) full name?

MURRAY: Pring.

WELLINGS: Pring. What can you tell me about your activities when I came across you?

MURRAY: I was looking for a lost net.

WELLINGS: And where did you set the net?

MURRAY: Outside the park.

WELLINGS: And can you - um - would you be able to - ah - identify where you set it on - on a chart or a map?

MURRAY: Yes, I would.

WELLINGS: I'm just going to produce a document here which is a photocopy of a survey boundary of - ah - the - the mouth of the East Alligator River, it clearly defines Point Farewell and - ah - and the - the closure line for Kakadu National Park on the East Alligator River. Would you be familiar with that map - that drawing?

MURRAY: Yes.

WELLINGS: Okay. Would it be possible that - ah - you could - ah - with this blue biro put in there a - a cross and number 1 and put your initials next to it where you believe you set the net?

MURRAY: Ah, no.

WELLINGS: Not clear enough, okay. Fair enough. So you set a net out - you're telling me you set a net outside the park and it drifted, is that correct?

MURRAY: That's correct.

WELLINGS: Okay, and when you came across - when I came across you this morning that is what you were doing, is it?

MURRAY: I was looking for the net, yes.

WELLINGS: So did you find the net?

MURRAY: No.

WELLINGS: You did not find the net. In your - ah - do you agree that - that - ah - when we came on your vessel there was a - a net within your vessel? A gill net?

MURRAY: No comment.

WELLINGS: Do you agree that we took a net off you?

MURRAY: No comment.

WELLINGS: When you left us what did you do then?

MURRAY: I requested of Gary Lindner if I could pick up the other nets outside the park before the tide come in and they went under

WELLINGS: Okay.

MURRAY: Otherwise they would get lost too.

WELLINGS: Okay. Can you give me any physical description where you set those nets, like location-wise?

MURRAY: Off the rocks off the tip of Point Farewell.

WELLINGS: Okay. And they were strung out in a easterly, westerly or northerly direction?

MURRAY: They were all over the place because - would you agree that these tides are very big?

WELLINGS: I'd agree the tides are very big.

MURRAY: Would you also agree that when you came across me there was no fish in the dinghy?

WELLINGS: I'd agree with that. But I'll ask you a question now?

MURRAY: Yep.

WELLINGS: Do you agree that when I came across you at that net the water was - was virtually dead low tide?

MURRAY: No, I wouldn't agree.

WELLINGS: You wouldn't agree to that?

MURRAY: No comment.

WELLINGS: So how many nets did you retrieve at that location outside the park - that you say is outside the park?

MURRAY: Four.

WELLINGS: Four nets. And do you have any other nets - - -

MURRAY: I still have one missing, the one I was looking for.

WELLINGS: ~~Missing~~ one net missing. And is that - is that net marked?

MURRAY: I am unsure.

WELLINGS: You're unsure if that net's marked? Under the Fisheries Act are you aware that all your nets should be marked?

MURRAY: Yes, I am.

WELLINGS: So why would you be unsure about this net?

MURRAY: Because some are marked in texta and sometimes it comes off and you have to keep checking it.

WELLINGS: And what type of fixtures do you have on your nets?

MURRAY: No comment.

WELLINGS: No comment. Okay. So is there any other way you can describe - because we haven't - not too sure if it's marked at all. Is there any other way that you can describe your net in case I find it?

MURRAY: No comment.

WELLINGS: And how long have you been in this area fishing, like moored at this location?

MURRAY: About 12 hours.

WELLINGS: Oh, yeah. Where'd you come from?

MURRAY: South Alligator.

WELLINGS: I'm just going to try and - ah - refresh your memory. Do you recall meeting me before?

MURRAY: I think so.

WELLINGS: You think so. On board this vessel?

MURRAY: Actually too - no, I can't really.

WELLINGS: You can't. Well, I can, I can recall meeting you, in fact I've made some entries in my official notebook and - ah - I'm just trying to find them here. The date was the 7th of August 2002. You couldn't recall that date at all and meeting me?

Do you recall a conversation with a Warden or Ranger in the area in relation to the park boundaries, the Commonwealth Reserve boundaries?

MURRAY: Yes.

WELLINGS: So would you feel comfortable that - that you are aware of the Commonwealth Reserve boundaries?

MURRAY: Yes.

WELLINGS: And you're quite adamant that all of your nets that have been set in this area were set outside the Commonwealth Reserve?

MURRAY: Yes.

WELLINGS: Are you aware that the Commonwealth Reserve has certain rules and regulations which could differ from other parts in the Northern Territory?

MURRAY: Not a hundred percent, no.

WELLINGS: Are you aware that commercial fishing within Kakadu National Park is prohibited?

MURRAY: Yes.

WELLINGS: Have you ever set nets within a Commonwealth Reserve?

MURRAY: Um - - - No.

WELLINGS: Conducted any commercial activity at all?

MURRAY: No.

MURRAY: Would you agree that when I came across you this morning you requested that I stop and I stopped?

WELLINGS: Yes.

MURRAY: And you requested - when you asked for me to hand over a net that was - that I agreed to that request?

WELLINGS: Yep, yeah, I agree to that.

MURRAY: Would you say so far that I've agreed to every request you've made?

WELLINGS: Beg your pardon, that what?

MURRAY: I said, I've agreed to every request that you've asked?

WELLINGS: You've been most cooperative and we - we - -

MURRAY: And would you agree - how's your eye did you get jelly fish in it?

LINDNER: Yeah, a bit of an itch.

MURRAY: So do you agree there was a lot of jelly fish?

WELLINGS: Well, I didn't see any but - I can't agree to that.

MURRAY: Mr Lindner got jelly fish in his eye?

WELLINGS: Ah, well, I don't know. Well, I saw one in the net

WELLINGS: All we're doing at the moment - - -

MURRAY: Yep.

WELLINGS: - - - is gathering evidence of what we've come across this morning - - -

MURRAY: Mm mm.

WELLINGS: That's why I ask these questions - quite - to try and clear the matter.

MURRAY: Yep.

WELLINGS: Now I will say at this point that Mr Lindner and I have located a - another net in the area - - -

MURRAY: Mm mm.

WELLINGS: Do you - and you can't really give me any definite - um -

MURRAY: No

WELLINGS: ownership details or a way I can - - -

MURRAY: No comment.

WELLINGS: No. Okay. Well, I'm just letting you know that we have located a - a net within the park?

MURRAY: Mm mm.

WELLINGS: So we'll - we'll be taking that - - -

MURRAY: Mm mm.

WELLINGS: Either use that as evidence against possible netting in the park or attempt to find the owner, whatever our investigation concludes. So that's what we're doing. We appreciate your cooperation to this point and - um - we will be seizing as evidence the net that we took off your vessel earlier this morning. Okay. Now that net will be held while the investigation's carried out. This is just an initial phase of the investigation. At the conclusion of that investigation if no - no - ah - further action is taken then that will be returned to you and they'll be kept in good care up until that point. I'll give you a receipt for that so you can acknowledge your ownership and - and that we have it. Um - if the matter does go to - to another means, like a court or anything like that then obviously the net will be held as evidence until the matter's resolved in the court of law. Do you understand that?

MURRAY: Yes.

WELLINGS: Okay. Is there anything further that you'd like to add while we've got the tape running?

MURRAY: No, that's all.

WELLINGS: Warden Lindner have you got any questions that you'd like to?

LINDNER: No, just I - I have one request for Darren. Do you agree that at one point when you were anchored at the South Alligator River I gave you a copy of this information about the park boundary, stating that it was a Commonwealth Reserve?

MURRAY: Yes.

WELLINGS: Would you like to then sign the - - -

MURRAY: No.

WELLINGS: - - - front page. Would you like to make any mark at all on the

MURRAY: No.

WELLINGS: - - - - to say that - - -

MURRAY: No.

WELLINGS: Well, I will and we'll witness that I - I'll sign this just to state time being 0507 that - that you acknowledge receipt of this - ah - information before and I've signed it, Gary Lindner's signed it, 0507 hours, 17th of May 2003 and I'll just get you to lock that up. Nothing further then, sir?

MURRAY: No.

WELLINGS: Okay. This time I will - ah - provide you with a receipt for that net. And - will I acknowledge the other one on there or - no, so just the one net. Yep.

LINDNER: There's another net in there, you don't know anything about that, do you, any comment?

MURRAY: No.

WELLINGS: How would you describe that net, so I've got that down, have you got the length and?

MURRAY: Which one?

WELLINGS: The one that you gave us out of your vessel - the dinghy when we saw you earlier this morning?

MURRAY: No, I wouldn't be sure to tell you the truth, it was six - six and half inch, seven inch or anything, 'cause you get all mixed up when you set them.

WELLINGS: Yep. Okay. Well I'll just say one gill net, happy with that description? Condition of that net? Good?

MURRAY: (inaudible)

...

59. Wellings resumed giving evidence on 14 November 2003. When cross-examined he rebutted the suggestion that the estimate of the position of the defendant's dinghy when it stopped after travelling into the reserve, was based on where the nets were found by the Wardens. He said [transcript p97] that the said location

"was an approximate area, because the tree line was just so clear and when I saw the vessel and the area that we stopped was in relation to where we intercepted the dinghy later, it was consistent that way. Like - -"

MURRAY: No.

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"was an approximate area, because the tree line was just so clear and when I saw the vessel and the area that we stopped was in relation to where we intercepted the dinghy later, it was consistent that way. Like - - "

60. In cross-examination also, Wellings said that when he saw the light he could see it clearly but *"no, it didn't look like a real - a big light"*. Further that at the time the light became visible it was after it had travelled further upstream from the place where he had first made his observation of the dinghy in the binoculars and further in relation to the light [transcript p100]

"So, you're saying you saw a flash of light?---Well, that last one, the last one was a light on, off, on, just like on, off, that was the last time I saw the light. The first time I saw the light was longer."

So how many flashes do you say there were?---Well, I said there was about three. There was one, there wasn't really a flash, it was on for a period of a bit of time, then it was off, then that light came on again and then it was off and then I saw it, the other time when we were motoring, which I just described."

61. Wellings was also adamant that until such time as the Wardens' boat had left the defendant to go off to Point Farewell and they returned to the place where the boat had stopped, he did not know the actual location of the net until it was picked up in the flash of the spotlight operated by him.
62. After the video had again been played however, Wellings agreed that he and Lindner had both said something like *"Now we are going to the second net location"* and conceded that such an utterance or utterances was or were in accordance with the state of knowing where the net was. He denied as a matter of fact that was ever the case.
63. Wellings agreed that although after the record of interview had been completed there was discussion about collecting the net that had drifted in. At no stage during the record of interview did he suggest to the defendant that if the net had drifted in the defendant should go and get his net.
64. In relation to the questions concerning investigations made by him as to whether or not the net may have drifted, Wellings said [transcript p109]

"Well, I look - I try to pick up the anchor or just lifted up some of the net, there was nothing in it, the - where it was situated as I

mentioned earlier, wasn't in the current line the tide had gone out, when we located the net it was low tide, which means that it had drifted in by eight hours earlier or more like ten hours - you know - I'm not the expert on that, but I'm saying that it would have drifted in - it was physically impossible in my opinion to drift into that position within the last six, eight hours because that tide was going out."

65. Wellings denied the type and weight of the anchors on the net found within the Park facilitated the concept that it could have drifted in. He rejected the hypothesis advanced by Mr Currie [transcript 110] that the net could settle on an incoming tide and upon the tide becoming outgoing the downstream anchor could

"come around and go the other direction and if the tide changes back it may come back, but the fact is, is that at that point it's stuck, because there's been an opportunity for an anchor to sink into the mud, does that sound feasible to you?---No, not with the anchors there's nothing in the net."

66. Wellings rejected the notion that a net "*fully of jellyfish*" would not be held by the anchors on P9. He said, when faced with an indication as to what Mr Connolly's evidence would be, that the way in which the net in the Park was "set" [transcript p115]

"didn't look like a good way of catching fish to me, no, as it was when I saw it"

Wellings conceded also that the unmarked nets (the one in the dinghy, P7, and the one located in the Park, P9) not having identification marks on them had not engendered a thought that the defendant was using unmarked nets in an attempt to evade detection when fishing inside the reserve. Had he so thought, checking those nets which the defendant said he was keen to retrieve, but outside the Park would have been an interesting exercise, in terms of whether or not there was identification on those. He conceded that it would have been interesting to see whether the defendant's other nets set outside the Park were in fact marked with identification.

68. In relation to the flashing small light, Wellings said [transcript 118 and 119]

"If you look around you'd have a spotlight or something.

I suggest to you that he did have a spotlight?---Well, he didn't have it on."

69. Wellings insisted that he would have been able to identify a spotlight and that the defendant was not using one, but conceded, however, that he was not conscious of the need to search for a small light.

"What I'd say, I saw a boat coming in on along side the western bank with no light, at a consistent pace in a consistent direction looking for a lost net with no light and that is what - you know - I find difficult if there is a searching for a net."

70. Wellings refuted the suggestion there was any scanning going on and that the light he saw was in the same position

"it was on, off, on - you know - off, it was just the same sort of light in the same location."

71. Wellings also denied that the defendant's dinghy was under power or underway at any stage when he saw the light.
72. It may be just to say that Wellings should have searched for the "small" light; compared the nets retrieved by the defendant from outside of the Park boundary with P7 and or P9; and even searched for a GPS in the possession of the defendant. As all those associated with witnesses recounting their evidence in Court are aware, it is not a perfect world. Despite the identified shortcoming, Wellings was an impressive and credible witness.

Mathew Charles Rawlingson

73. The next prosecution witness was Mathew Charles Rawlingson, a Ranger. He essentially corroborates Wellings and Lindner in relation to that aspect of the matter upon which he was called to give evidence and nothing significant at all is derived from his involvement.

Peter John Russell

74. Peter John Russell described himself as a fisheries officer and acting sergeant serving in the Marine Fisheries Enforcement Unit of the Northern Territory Police Force. He described his extensive involvement in the duties that had been incumbent upon him in the past. He described a very distinctive knot utilised in the construction of both P7 and P9, namely an Albright knot. He said that the nets were not marked as required by the *Northern Territory Fisheries - Barramundi Fishery Management Plans* Clause 13, which required that at the end of the float it was required there be indelibly put in the net or burnt into it, the licensee's number which for the defendant was 095. It was not there on P7 or P9.

There was a lot of other evidence in relation to the distinctive nature of certain features of P7 and P9 but in the end the defendant does not dispute that either P7 and P9 were indeed his nets. Indeed it is his defence that although P9 was his net, it had drifted into the Park. Consequently this Court does not see any merit in detailing that aspect of Russell's evidence, save to say insofar as there needs to be a finding as to ownership on Russell's evidence this Court finds P7 and P9 were nets so similarly constructed as to give rise to a finding beyond reasonable doubt that each was the property of the defendant, he having conceded unequivocally he was the owner of P7.

16. Russell gave certain specific evidence which was explicitly and properly put to the defendant and Mr Bob Connolly, called by the defendant as an expert barramundi fisherman. The Court will set them out in full [transcript 139 to 152] with headings inserted for this Court's convenience.

[Russell 1] *"From your experience with reference to the tide are you able to say when's the best time to set gill-nets if you want to catch barramundi?---All depends on where you are and how you are fishing. If you're in fishing flat nets they generally lay the flat nets out usually an hour before, sometimes two hours before high tide and they leave the nets there and they come and clear them in the next high tide or there about, usually an hour each side of high tide. With a river net a different animal again, the nets are laid out from the -*

into the channel of the river, if you like and the net is either tied to the mangroves or to a tree and anchored one end or anchored at both ends, they use the same anchors.

*And is there any requirement for a fisherman to check his nets?---
Yes, there is, under section 13 of the Fisheries Act, the fishermen has got to be in control of his operation and there is an agreement between the Seafood Council and the barramundi thing that they will do it every 12 hours, which is every high tide or low tide as depending how they're fishing.*

[Russell 2] *Are gill-nets designed to sit in one spot as the tide comes in and out?---Yes, all - well - yes, 90% of all barramundi fishing in the nets are staked with anchors and they're left and they come back and normally they leave them there for a 24-hour period, then it all depends how the fishing is going, if they're fishing the flats they move the nets along the flats either way.*

And are you able to say what effect what a high tide would have on a gill-net in relation to movement?---All depends on how deep the net was set, if this net was set - fishermen can set nets to come up at low tide, they can set them to come up at high tide, but normally when a fishermen's fishing out on the flats where he's lawfully allowed to fish, they just set the nets to basically kept fish so when they get high tide they can come and clear them. Otherwise the net will be sitting high and dry in the mud and it's no good to anybody that way. The object of the fisherman is to catch -maximise his catch lawfully, so he's not going to leave fish to rot on the things, so that's why they set them, they clear them on high tide when the water's there.

[Russell 3] *Are you able to say with reference to just the two nets that are beside you, in what circumstances a gill-net with anchors as you've described, what circumstances it would drift?---Well, they only - in my experience the only time a gill-net will drift, particularly a flat net if it picks up a big log and that overcomes the whole power of the anchors by the weight of the log usually in it and away it goes. But the net bunches up and it gets tangled around the log.*

[Russell 4] *And in your opinion again by reference to the anchors that you see beside you, would they be sufficient to hold a net against the tide?---Yes.*

[Russell 5] *If - what about if they were empty?---Wouldn't make any difference if it is full.*

If it was full no difference?---No.

So I take from that then that empty nets aren't prone to being swept along in strong tides?---If that was so, if nets were prone to be swept along the tides and end up in places where they shouldn't, there would be fishermen in front - being in front of court every week.

Are you able to say with reference to tides, when the current is at it strongest?---It all depends on the tide, but normally with a neap tide or spring tide for that matter, the current is usually - if it's coming in, is usually strongest in the middle, the middle third of the tide, because it slows down, you actually have periods of slack water at the bottom of the tide and top of the tide the water actually stop for a period of time and turns around and goes the other way and when the tide's going out, it usually runs hardest the first third.

[Russell 6] *Do you know of any obstacle to - if a fishermen wants to collect a gill-net at high tide?---Obstacle?*

Yes, if a gill-net had drifted would there be anything preventing him collecting it at high tide?---Absolutely not, that's the time they normally clear flat nets at high tide.

Is there any need to wait to low tide?---No, the only tide a fisherman would want to clear his net at high - at low tide if he has - it's the river that they can clear them at low tide, quite often what they do these day the fishermen, when they're fishing where they shouldn't they use low tide shots, they come in and put the net an hour before low tide, set on it and pull it out an hour after high tide and go. Barramundi don't swim at all phases of the tide, they only move at certain times of the tide and generally barramundi, particularly in rivers, generally only move the last hour either side of low tide and the other reason why the fisherman prefer to fish like that is that they don't get the bite catch, basically fishing for what you're aiming at is barramundi or other - thread fin salmon and other fish that are saleable and you would fish according to that.

[Russell 7] *If a net was to drift, how would you expect it to look?---Bundled up and a classic example I can give you for that, is that we have a fishery which is the mud-crab fishery which is allowed to use 100 metres of 2.5 inch gill-net, but they're not allowed to stake it at both ends, only one end and they're suppose to sit on it at all times and quite often they don't and what happens with the net is it just bundles up together. The anchor stays at one end the net bundles up.*

And have you had experienced with in the field with fishermen who claimed to have lost a net during the night?---Yeah, absolutely.

[Russell 8] *Sir, what type of lighting do you normally observe fishermen at night to be using?---If a fisherman is fishing on the flat or in the river where he's lawfully allowed to fish, they always use a spotlight.*

And why is that?---So they can see what they're doing and they use the night - they generally - when they leave the boat, they generally run along the coast, but then they turn the light on to find the net, you can see by the reflection on the buoys that any light picking that net up from about 7 or 800 metres to light up like Smith Street, that's why they put the reflector tape on them and it's been my experience that when fishermen are doing things they shouldn't do, they don't use much lighting.

Right, with - so they ever say how difficult it is to find a gill-net without a spotlight, if you're not sure where it is?---If you know where it is it's not a problem at all, if you don't know where it is, you'd be waving the light around everywhere. I mean these lights there powerful 200 watt spotlights, you can see them on a normal still night, on a normal night you can see 10 or 12 kilometres away on the flat.

[Russell 9] *You've got a river bank, here's the river and you've got a net that's parallel following the current line, am I clear in?---I understand what you're trying to say.*

All right, if a net was set that way, would that be consistent with a way to catch fish? ---No, but if you are talking about Point Farewell in the East Alligator River, which I don't consider to be the mouth of a river because it's about 8 kilometres wide, it's just part of the coast, then the big flat which goes just past this side of Point Farewell down to the creek about 20 or 3 kilometres long and wide, is just part of the coast then putting in a net along the coast there parallel with the coast makes sense, because if you put it out into the ocean 8 kilometres wide, it's nothing its just a non thing.

So I take it that you're not really considering the East Alligator River as a river as such?---Not there, no, I don't consider, that's estuary, it's part of the sea and that there is, you would run on that parallel to the mud bank there, because the mud bank goes up, the fish go up on the mud - out on the flats up on the - feeding and as the tide comes back they come off. If you run the net the other way, you may catch the odd fish travelling, but the fish coming off the flats is

what you are after. Obviously if you wanted to fish in the deep water you would have used a river net, not a flat net and that's a flat net.

[Russell 10] *And can you explain what circumstances you'd expect to find mud on a anchor rope or anchor float, I should say?---Set them at the bottom, low tide, mud is soft as hell there, if you stepped off your boat you would disappear up to your eyes. So if that net had been sitting there at low tide or near low tide there's a good chance the float would be sitting on the mud. I'd expect to see mud on a float.*

[Russell 11] *Assuming that both anchors are for whatever reason not operating, how would you expect a gill-net such as that to drift, what would it look like?---It should be bundled up, it wouldn't be laid out straight, you've got all the currents - I mean there's a couple of variables with what you are saying, first thing is the net - the anchor is in deep enough water, that the anchors aren't touching the bottom, so that the current and everything connect. Otherwise if it's not in deep enough water, you've got 30 -32 kilos of anchor plus probably 50, 60 kilos of lead weights dragging on the bottom, that's all prone to the tides and the eddies pulling it and twisting it and doing what it wants with it, but the net in a lot of cases when the current slow down would stop and as soon as the current turn, the current got increasing if the anchors hadn't ripped, which I find very doubtful, then the net would go back on the tide, but the net would bunch up. That's what happens to them, they bunch up together, they're not laid out flat and neat.*

[Russell 12] *Dealing with the net that's just beside you, if one anchor was not operating for whatever reason, would the second anchor that's on the net would it be able to hold the net?--- Absolutely..*

[Russell 13] *Now, if a net drifted inside why would they be apprehended?---Because nets don't drift, they would have placed it there.*

[Russell 14] *Are you saying that, a net with anchors doesn't drift without a log in it?---That's correct, yes.*

So you have never come across a situation where there's been a net drifting without a log in it?---No, I've never seen a net drift without some object in it that's big and make it lift.

On that basis you're quite happy and quite content with the view that, with anchors, 27 pound anchors like these, the net simply would not drift?---That's correct.

Have you ever come across nets, gill-nets with a lot of jellyfish in it?---Jelly blubbers, yeah, I've seen nets with jelly blubbers in them. And have you seen them move?---No.

In fact I would like to put to you that, a net full of jelly blubbers provides such resistance to water, that the net will pretty much always move?---Not so.

I'd like to suggest to you that across rivers the anchors are so insufficient that often the nets are tied to a tree?---

They are. That's because the anchors are insufficient to hold the net?---No, that's to enable the net that bears most of the weight is the one out in the middle of the river, they tie them off to the tree usually because they're pulling them up against the bank and you can't put a net there. The net is tied up, the mesh net goes up against the bank and the net's tied to the bank.

Okay, I'm going to suggest to you, that it's actually done to try and hold the net in place?---That could be so.

And it's done because the anchor is not sufficient?---No, that's not so, because 100 metres down the river there's probably a net in the water with two anchors on it."

77. That was the end of the prosecution case.

Darren Robert Murray

78. The defendant gave evidence. He said that on 16 May he had decided on an afternoon shot a couple of hours before low tide. He said that a net had drifted (the Court infers into the Park), but when it got close to high tide it was too dark to search for it ("his lost net"). He had a look and couldn't find it and went back to the boat to find that another net had drifted but, as the Court understands the evidence, not very far from its set position.
79. The defendant said he was worried about the lost net and he had cruised using a spotlight. Reflectors on the buoys were capable of picking up the

light. He said that he went up the East Alligator River. He said that he knew in doing so he was entering into the Park. He said that he did not want to go too far up the river because it was not the done thing to do. He said that with the net, which he had in his dinghy, he knew going over the closure line as he called it, constituted an infringement of the law.

80. In searching for the lost net, the defendant said, he was in a quandary as to how far to go and ultimately he decided at a particular point to abandon the search. At that time or shortly thereafter Lindner and his colleagues arrived on the scene with a big spotlight. The defendant did not know until that moment that they were on the East Alligator River.

81. The defendant said he had been a commercial barramundi fisherman for 10 years and had done every other type of fishing as well. He said that on a spring tide, as opposed to a neap tide, there was a lot of water moving about and nets could either drift a little way or could take off a couple of miles up the river on a spring tide.

82. The defendant said that when he had gone back with Lindner's permission to locate nets that he had set outside the Park, near Cape Farewell, two or three of those had drifted about 100 metres as well. He said that you usually set barramundi nets in a straight line with the current. He said that without jellyfish or logs, for instance, the behaviour of a net such as those before the Court was like a flag in the wind once it had started to drift.

83. The defendant said that the nets (P7 and P9) were "*most probably mine*" and, as the Court has remarked before, there does not seem to be much of an issue, but if indeed there is, then the Court repeats that it finds that the prosecution has certainly proved beyond reasonable doubt that P7 and P9 were the property of the defendant, such finding being based upon the common features of P7 and P9 as testified to by Russell.

84. The defendant said that he had thought he had marked his nets and could not explain why neither P7 nor P9 were marked.

85. Counsel took the defendant to the evidence of Russell and the reference in the recitation of the defendant's evidence hereunder is to the passages in Russell's evidence previously identified in this decision. The defendant's evidence was in relation to those passages as follows:

[Russell 1] *Neither he nor others he knew fished this way. He said in his view to fish that way would result in the fish being rotten when one returned to clear the nets. He said he usually fished the low tide anyway and he picked up normally within 4 hours. In his view, depending on the season, the fish would cook in 2 hours and one would shoot a couple of hours before low tide and have the nets out in 2 hours. If you were fishing in a river and didn't take them out, they'd go under.*

[Russell 2] *The defendant agreed that what he called "marching them along" was an acceptable way to fish but disagreed that one would ever leave them for 24 hours in using such a technique.*

[Russell 3] *It is correct that if it had a log in it, it would bunch up. But a gill net would drift if the anchors were not in the sandy bottom or if jellyfish or fish were caught in the net. With a good tide going the net will go and it will usually drift with the current. If the top anchor doesn't hold then it will walk. The length of rope and the depth of water all would have an effect.*

[Russell 4] *The determinative thing is the condition of the bottom. Extra weight of the anchor does not itself make any difference.*

[Russell 5] *This is simply wrong. If it was empty it will not take off. For instance if it is full of jellyfish you are dealing with a solid mass. It will take off or go under because of the weight if it is fully of jellyfish.*

[Russell 6] *If the ropes are not long enough at high tide the nets will be under. You cannot see them. As for the tide issue, if there is a low tide shot you don't clear after high tide. On the flats on low tide fishing such as is alleged is correct. He did not agree that low tide is usually employed when there is illegal fishing. You catch fish at low tide and generally that's the way people fish. Twenty years ago people used to fish the high tide. Now they fish the low tide. You can fish when half the tide is out, depends how much sleep you want. You can't do this all the time, you can change at low and high, but you can't keep it up and you generally fish at low tide because there is more fish. At high tide you can't fish all the areas. Anyway if you did this as suggested by Sergeant Russell, as previously advised, either the fish would be going off or sharks would have them, because they go off in a couple of hours, the quality of the product is determined by not leaving them in the nets a long time, more than an hour either side of low tide.*

[Russell 7] *I don't know anything about this. As far as I am concerned when a net drifts, it drifts in a straight line unless there is something in it. There are 4 or 5 panels and one end is staked it will drift out and come back in a straight line.*

[Russell 8] *I keep the spotlight off to keep night vision. If it's on all the time you can't see anything. It's not unusual to flick it on and off, others do that, I was taught to do that.*

[Russell 9] *North of the East Alligator River I consider is part of the coast, in the eyes of some, I say it is part of the river mouth. Where the nets were found inside the Park, at low tide there would be no current. It's not close enough to the bank to fish the flats. They would need to be a lot closer. It does however depend on the tide and day, in my view, it should be cutting the current. I recall also the part of the video which showed the Rangers pulling up the first anchor. The rope was around the flange. With*

the rope in that position I say the anchor would not hold. The flukes would not work and it would not open up in full.

[Russell 10] *In the video one can see the mud on the float. I dispute that configuration of mud could have occurred as a consequence of sitting on the mud. If it was sitting on the mud, when it dried you may get a little patch where the buoy was sitting. To me the mud proves the drifting I say occurred. The buoy goes under the mud when the anchor is dragged. The anchor drags it through the mud. The float follows the line and the anchor through the mud until it pulls out. The anchor can go down 2, 3, 4 feet and if it is not working it will drag the float behind it.*

[Russell 11] *I disagree with what Sergeant Russell says. I say the net in the position as described is consistent with it having drifted.*

[Russell 12] *I disagree with that assertion by Sergeant Russell as well. On the day before in fact at the South Alligator River there had been a big tide which had caused my nets to drift and they drifted half a mile past the line in the middle of the day.*

[Russell 13] *I disagree with that absolutely.*

As for seeing a light well it depends on the night. One can sometimes see a light miles away. On a night of a full moon, it can be like daylight and the lights are not visible for longer instances, on a dull night however you can see for miles. I say on this night I used the spotlight. There may have been a torch in the boat I don't know, I never looked for one.

As for the net that was in the dinghy when I was accosted by the rangers that is a net that I retrieved outside the park and with which I entered the park on the search for the net which had drifted.

[Note:- where the 'first person' is used above it is in fact not intended to be verbatim]

86. In cross-examination the defendant said that he had been very careful to place the nets with which he was fishing outside the Kakadu boundary. Importantly, he affirmed that he knew the location of the boundary line. He was adamant that the nets P7 and P9 were set by him outside the Park and the anchors were set.
87. As for the net in the dinghy (P7), he said it had new floats and "*this was mine*". Strangely he was somewhat reticent in admitting ownership of the net which was found within the Park.
88. The defendant said it was 2 pm on 16 May when he set the net outside the Park and it was then just prior to low tide. He said that at about 100 metres from the boundary or something like that, that was the position in which P7 and P9 were set. Both nets were "flat nets". This is a term of art which means that they were specifically designed to fish on the flat, that is they were designed to operate in shallow water. He did not agree with the proposition that barramundi swam only one hour either side of low tide. He conceded that fishing mud flat as opposed to fishing in a river involved the application of different fishing techniques. He said that in fishing on the flat generally one set the net parallel to the mud flat so water, as the Court understood it, on a full tide would reach the tree line and the nets when the tide receded would catch fish coming back with the flow of the tide. He disagreed with the proposition that a flat net was most effectively set 1 to 2 hours before high tide. He conceded that it was not impossible to involve that technique, but doing so would entail 6 hours before being able to get any catch back, by then the fish would be 'off'. He specifically denied that the net inside the park (P9) had been set by him to maximise his chances of catching barramundi. He reiterated his denial that the net (P7) found in the dinghy had been retrieved from the river and within the park boundary; that it had not been employed in a configuration to box fish in with the other net (P9) which was found in the Park. He said this fishing method was a practice of Asian people. He denied that time and circumstances dictated he

could only retrieve that one net and was unable to retrieve the other being the net found inside the Park before the rangers arrived on the scene.

89. There was some discussion about river nets which in the circumstances seems to this Court to be irrelevant.
90. The defendant pointed out that he was not there when the Rangers had retrieved the net which was found in the Park. He had thought, so far as it matters, that it had been found in the channel, or the edge of the channel. He disagreed that it could not have drifted to the position 100 metres from the main current line. He said that the net which had drifted did not need to look like "*a slithering snake*". He asserted if the current took the net it could be in a straight line.
91. The defendant conceded that the method of retrieving the downstream anchor employed by the Rangers and the use of their motors to do so could have resulted in the float dragging in the mud. He said anything in the net (P7) was shaken out before it was pulled onboard the boat. He reasserted that other gill nets had drifted, that is those that had been placed in similar positions on 16 May 2003, although they had not drifted into the park.
92. The defendant denied he had tailored his evidence to explain the existence of the net found in the park and conceded that the nets should have been marked, but scoffed at the contention that they had been left unmarked for the purposes of "poaching" [this Court's word, which all parties shied away from].
93. The defendant asserted that he did not know the location of the net found in the Park by the rangers although he knew it was inside the Park he didn't want to go too far in. He again asserted that he had used the spotlight and repeated his evidence in chief otherwise. He conceded that the usual method of searching for nets entailed travelling 100 or 200 metres, throttling back the motor, flashing or scanning, and then resuming the course of

travelling and repeating this methodology. He denied that under cover of darkness he had been going directly to where the nets were found.

94. The Court observes that there is no evidence that he was in possession of a GPS.
95. The defendant denied travelling 800 metres from the *Jolly Roger*, anchored 300 metres outside the Kakadu boundary line in a straight line without deviation. He said that he did not know where to go to look for his net. He said that he had not used a light at the point of entry into the Kakadu reserve although he did after that stop the dinghy and did use a spotlight. The Court does not accept this evidence.
96. After some objection, the defendant was referred to the comment on the bottom of page 119 of the transcript of Wellings viz

The opinion that you're offering is that it wasn't a spotlight?---What I'd say, I saw a boat coming in on along side the western bank with no light, at a consistent pace in a consistent direction looking for a lost net with no light and that is what - you know - I find difficult if there is a searching for a net.

But asserted again that he did in fact use the spotlight.

97. The defendant said that he couldn't recall whether he had used a depth sounder although there were rocks on the right hand side (whatever the cardinal point may be) of the East Alligator River. He said however that he roughly knew the terrain and he knew where he was going, but not to what point. He denied that he had ceased attempting to retrieve the net P9 when he heard the Rangers' vessel.
98. The defendant conceded he could have left P7 on the *Jolly Roger*. He denied poaching and denied fleeing from the Rangers.

99. When re-examined in relation in the passage at transcript 119, he agreed that he had travelled into the park at a consistent pace and in a consistent direction.

Bob Connolly

100. The defence then called Bob Connolly. Connolly said he had been a barramundi fisherman since 1974 and that he has known the defendant for 8 or 9 years.

101. He was then taken to the same passages of Sergeant Russell's evidence, which have been highlighted in this decision. Dealing with them seriatim:

[Russell 1] *I disagree with the assertion. The statement would be correct if it was being set at low tide. At low tide the fish congregate into a smaller area.*

[Russell 2] *I disagree with the contention about the 24 hour period. The normal practice is to change it every time. 6 hours is the normal time to leave a net in the water.*

[Russell 3] *I simply don't agree with the proposition. They could drift because the anchors were in sand, they would just go through the sand and take off. Jellyfish being caught in the net would be enough to cause a drift in a big tide. When a net drifts, generally one lets go, bunches into a big U, and then seesaws end to end until an anchor digs in. They float reasonably straight. A 27 pound anchor would not necessarily hold a net on a big tide. Given an anchor twice as big would not hold in certain areas. So much depends on the composition of the bed and whether or not for instance jellyfish were caught in the net.*

[Russell 4 and 5] *No matter what kind of anchor is attached to a net configuration, if full of jellyfish it would be like a brick wall and it would be a hell of a job to expect an anchor to hold all that weight.*

[Russell 6] *The ideal time to retrieve nets is at flat water. I disagree with the proposition that you only want to clear nets at high tide. Slack water whether occurring around high or low tide is the best time to retrieve nets. If you've got a low tide shot a couple of hours later you retrieve them otherwise you attract vermin such as sharks. Not many rivers are open to commercial barramundi fisherman, but where they are, low tide shots on the flats are the best time to fish. 'Poaching' is not best practiced at low tide. If you put your net in at low tide there is no sense in leaving it until after high tide, when the tide runs you catch no fish, the nets float up and the fish go under the net.*

[Russell 7] *If there is no anchor and they were loose in the water the nets would naturally bundle up but if one anchor catches the current would drag the net out and keep it taut.*

[Russell 8] *When using a spotlight at night you use it for short periods of time. You've got your bearings, you have another go for a short period of time, and work along a bank that way. You do not leave a spotlight on. All you can see is water and if you did leave a spotlight you would be going round in circles unless you picked up specific landmarks. He said he was familiar with the East Alligator River and it wasn't an area where you could expect a lot of fish. There was at the East Alligator River more flat than in a normal river, there was also a lot more tidal movement. In his view nets should be set at low tide or close to low tide and parallel with the bank. In river fishing you would normally set across the current not with the current.*

(No comment on [Russell 9])

[Russell 10] *If a rope was caught in the anchor it would affect its performance and if it was caught behind the fluke, it would resist the movement, as a consequence of which the anchor would not bury itself in. If there was a rock between the fluke and the bar, it would have the same effect. On the video it is obvious the rope is around the blade. That would*

impede the anchor doing its job. It could be the cause of the anchor letting go.

Also on the video I see the configuration of mud. I say that is consistent with the anchor dragging and pulling the float through the mud. It pulls it under the mud sometimes, it is as hard to get up as the anchor. I dispute that such marking is consistent with sitting on a mud flat.

[Russell 11] *I disagree with the proposition and in my experience they very rarely bundle up and ultimately the configuration will depend on where the anchor finishes when the tide stops.*

[Russell 12] *If one anchor let go, it is possible that the other anchor would hold, although I don't believe that's what happened here. The float was dragged right through the mud in my view. Further I say nets commonly drift, tidal flow exhibits great strength. If there are lots of jellyfish which can weigh up to 200 or 300 kilograms caught in the net it would take a lot to hold it.*

How far a net would drift would depend on the composition of the river bed. If it let go at high tide and the current came boiling in it could go 1 or 2 kilometres.

(No focus on **[Russell 13 and 14]**)

[Note:- where the 'first person' is used above it is in fact not intended to be verbatim]

102. In cross-examination Connolly said that if a float was operating as it should there was not much chance of it becoming entangled in the anchor and conceded that the trip rope rarely got caught because it generally sat free.
103. If the net had an anchor operate outside the main current flow, Connolly said it would hold the net better than it would in the main current flow because there wouldn't be an equivalent amount of draft on the net.

104. Connolly conceded that use of 2 nets improved the chances of boxing fish in. He said that viewing the video he was unable to locate the position of the net found in the Park in relation to the main current flow, which in any event obviously was different in speed at different stages of the tide.
105. Connolly made the obvious concession that if a poacher was operating he would not use a spotlight because of the visibility factor. Further that the poacher would use the dimmest light possible to avoid detection. He also conceded that to travel 800 metres without stopping and searching for a net was not the normal practice, although it would depend if the person looking for the net thought that he knew where it was. He conceded that if you were travelling at speed at low light close to the riverbank in shallow water and you did not know where you were going and did not know where you were going to it was dangerous and foolish. Further, that in shallow water the net was less likely to drag or overflow with jellyfish, much depended on the location of the current, and that the East Alligator River was renowned for jellyfish. He observed that they would wash out when the tide turns and conceded that under legislation it was incumbent on a commercial fisherman to mark his nets. He conceded that the use of unmarked nets could suggest poaching and that a prudent commercial fisherman would use texta which was waterproof.

The legislation

106. The relevant sections of the *Environment Protection and Biodiversity Conservation Regulations 2000* are set out hereunder.

12.18 Use etc of firearms, nets and other devices

- (1) A person must not use or possess, in a Commonwealth reserve:
- (a) a firearm; or
 - (b) a flail or spear; or
 - (c) a snare or trap; or
 - (d) a hunting-bow, spear gun or any other device designed to discharge a projectile; or
 - (e) a device for detecting minerals or metal; or
 - (f) explosives or fireworks; or
 - (g) a chainsaw; or

(h) any device that can be used, or is designed, for taking an animal, other than a hook and line for catching fish or a hand-held net designed to land a fish caught on a hook and line.

Penalty: 30 penalty units.

2. However, subregulation (1) does not apply to:

(a) use or possession of the item by a person to carry out commercial fishing operations that are authorised by a law of the Commonwealth, a State or self-governing Territory or by a permit issued by the Director; or

(b) possession of the item by a person on a vessel in passage through a marine area.

12.34 Commercial fishing

(1) A person may carry out commercial fishing in a Commonwealth reserve only if the person is authorised by:

(a) a law of the Commonwealth, a State or self-governing Territory; or

(b) a permit issued by the Director.

Penalty: 50 penalty units.

(2) A person who is authorised by a law of the Commonwealth, a State or self-governing Territory or a permit issued by the Director to carry out commercial fishing in a Commonwealth reserve, or in a part of a reserve, must comply with any determination for the reserve, or the part, made by the Director under subregulation (3).

Penalty: 50 penalty units.

(3) For subregulation (2), the Director may determine, for a Commonwealth reserve or a part of a reserve, that:

(a) specified kinds of fishing gear cannot be carried or used;

and

(b) specified kinds of fishing gear are required to be carried or used by a person who is fishing or intending to fish; and

(c) specified practices in commercial fishing are prohibited;

and

(d) specified practices in commercial fishing are to be followed.

(4) The Director may determine that a prohibition or requirement mentioned in subregulation (3) is to apply at all times, at specified times or during a specified period.

(5) Notice of a determination under subregulation (4) must be published.

12.36 Commercial activities

(1) A person must not carry out a commercial activity in a Commonwealth reserve.

Penalty: 30 penalty units.

(2) For subregulation (1), an activity is taken to be carried out in a Commonwealth reserve if:

(a) the activity is carried out in airspace between the reserve and 3 000 metres above mean sea level; or

(b) it results in a commercial activity being carried out in the reserve, whether or not the activity took place in the reserve.

(3) However, subregulation (1) does not apply to a person who is:

(a) carrying out licensed commercial fishing operations in accordance with

WELLINGS: Not clear enough, okay. Fair enough. So you set a net out - you're telling me you set a net outside the mark and it drifted. is that correct? regulation 12.34; or

(b) travelling:

(i) on a merchant vessel in passage through a marine area; or

(ii) on an aircraft using an approved flight path for an approach to landing at, or for departure from, an airport.

107. Also referred to later in this decision are sections of the *Criminal Code Act (1995) Cwth*, which for convenience are also set out:

4.1 Physical elements

(1) A physical element of an offence may be:

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Code:

conduct means an act, an omission to perform an act or a state of affairs.

engage in conduct means:

(a) do an act; or

(b) omit to perform an act.

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

108. And from the Fisheries Regulations (NT):

32. Marking of gear

(1) A person using a fish trap, pot, freshwater pot and, when it is unattached to a vessel, a drop line or a demersal longline, shall, when it is in use under a licence, attach to it a float marked in accordance with subregulation (3).

(2) A person shall use a net, other than a cast net, only if a float marked in accordance with subregulation (3) is attached to the middle of and at each end of the headrope.

(3) A float attached to gear in accordance with subregulation (1) or (2) shall be marked legibly and indelibly –

(a) where the gear is used under a licence, with the licence number in arabic numerals and no other number; or

(b) where the gear is amateur fishing gear, with the name of the person using the gear.

The Law

109. Self-evidently the complaint in each instance has its genesis in Commonwealth legislation and as such is governed by the provisions of the *Criminal Code Act (1995) Cwth*. Defence counsel did not seek to qualify or contest the assertions of the prosecutor in relation to the undermentioned issues and they are:

Count 1. Prosecution alleges the use of the device by the defendant constitutes a physical element of the offence. The prosecutor submits that as a consequence the requisite fault element is to be found in the provisions of section 5.6(1) which obligates the prosecution to prove the conduct was intentional. It is further incumbent upon the prosecution to prove that the conduct took place in a Commonwealth Reserve namely Kakadu National Park. In terms of section 4.1 of the Code, it constitutes a circumstance. Correspondingly in terms of section 5.6(2) of the Code, recklessness is the fault element.

Count 2: the physical element is the prohibition against “possession”. The circumstances is the use in the Commonwealth Reserve, namely Kakadu National Park. The fault elements are sequentially the same as for Count 1.

Count 3: Commercial fishing is the physical element. The circumstances is as for Count 1 and the fault elements are respectively the same.

Count 4: The physical element is the commercial activity constituting conduct. The circumstance is as for Count 1. The fault elements are sequentially as for Count 1.

110. The prosecution in the event of the defendant being found guilty on Count 3, will not seek a finding a guilty in respect of Count 4. A finding of guilty on Count 4 will however be pursued in the event that this Court concludes that the defendant is not guilty in respect of Count 3.

111. Defence counsel relied heavily on his interpretation of the law in relation to a circumstantial case being as set out in *Chamberlain v The Queen* (No 2) [1984] HCA 7; (1984) 153 CLR 521 (22 February 1984) (“*Chamberlain*”).
112. As the Court understood him he propounded that *Chamberlain* was authority for the proposition that each primary fact or piece of evidence had to be established by the prosecution beyond reasonable doubt before any inference could be drawn from that fact. The Court has considered this submission but in particular has concerned itself with the decision in *Shepherd v The Queen* (1990) 170 CLR at 573 (“*Shepherd*”). *Shepherd* was a qualification and explanation of *Chamberlain*. Simplistically Dawson and McHugh JJ in whose decisions Mason concurred, reject the proposition, as this Court understands the formulation by defence counsel. Somewhat quaintly in this Court’s view there is reference in the submissions of both counsel before the Court, as indeed in the judgment of Dawson J, to the metaphor referred to by *Wigmore on Evidence*, (vol 9, Chadbourn rev 1981 para2497 pp412-414):

“But where the evidence consists of strands in a cable rather than links in a chain, it will not be appropriate to give such a warning.”

113. *Chamberlain* was concerned in fact with the issue as to whether or not a direction to the jury comprising a warning should have been given to that jury.
114. As pointed out to counsel, undisputedly obviously, this Court comprises for practical purposes the jury and the judge in one persona. Suffice it to say that this Court accepts, as stated by Dawson J in *Shepherd*:

“... that the guilt of the accused must be established beyond reasonable doubt and, ... [the Court] must entertain such a doubt where any other inference consistent with innocence is reasonably open on the evidence.” [This Court’s underlining]

115. This Court interpolates to emphasise what has been underlined. It is not “any other inference consistent with innocence” which will introduce a

doubt sufficient to warrant the defendant being discharged. It must be one “reasonably open on the evidence” before it qualifies for the purposes of adducing an appropriate and sufficient element of doubt and when specifying the burden on the prosecution Dawson said further:

“That means that the essential ingredients of each element must be so proved. It does not mean that every fact - every piece of evidence - relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, [which obviously is necessary to prove as can be seen from the elements of the offence outlined above in this decision] for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury [this Court] may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately.” [This Court’s underlining]

116. Further, quoting from *Chamberlain*, (Gibbs CJ and Mason J):

“... in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence” [This Court’s underlining]

117. The test of course simply being a statement in different form from the statement above referred to and pronounced by Dawson J. Dawson J continued:

“... the jury can draw an inference of guilt from a combination of facts, none of which viewed alone would support the inference.”

It is pertinent to record formally that Toohey and Gaudron JJ agreed with the judgment of Dawson J. From the judgment of McHugh J this Court finds it is appropriate to quote His Honour as set out hereunder:

“Except in simple cases, the evidence in a circumstantial case will rarely establish facts from which the jury [this Court] can directly draw an inference of guilt.”

And further in *Shepherd*:

"There are many cases where the probability of the correctness of an inference of guilt drawn from the circumstances of the case is greater than the probability of the truth of any of the individual circumstances. As Lord Simon of Glaisdale pointed out in Reg. v. Kilbourne [citation given]: 'Circumstantial evidence ... works by cumulatively, in geometrical progression, eliminating other possibilities'...

If an inference of guilt is open on the evidence, the question for the jury is whether the inference has been proved beyond reasonable doubt - not whether any particular fact has been proved beyond reasonable doubt. Suppose on a charge of murder, the jury thought that the Crown had proved beyond reasonable doubt that the murder weapon belonged to the accused and that he had a motive for killing the deceased, but the jury did not think that these two facts proved his guilt beyond reasonable doubt. Suppose further, however, that the jury also thought that it had been proved on the balance of probabilities that the accused had been seen near the scene of the crime shortly prior to the murder and that he had been inexplicably absent from his employment for a period sufficient to enable him to kill the deceased. The inference that the accused, actuated by his motive, had used his weapon to kill the deceased would be greatly strengthened - probably beyond reasonable doubt - by the further probabilities that he had the opportunity to commit the murder, that he had been inexplicably absent from his employment and that he was in the vicinity of the murder scene at the time of death. Ordinarily, in a circumstantial evidence case, guilt is inferred from a number of circumstances - often numerous - which taken as a whole eliminate the hypothesis of innocence. The cogency of the inference of guilt is derived from the cumulative weight of circumstances, not the quality of proof of each circumstance."

118. Insofar as it necessary to highlight what His Honour is saying, some circumstances even though only established on a balance of probabilities may greatly strengthen other evidence and enable it to pass the test of proof beyond reasonable doubt. It would in such circumstances then be sufficient to convert an inference, which would not otherwise have been capable of being drawn beyond reasonable doubt, to attain that standard.
119. In any event, and insofar as it is necessary, since to disagree is not open to this Court, this Court accepts what McHugh J said [at page 594] using

Chamberlain as authority for the proposition the relevant dicta posed the need to consider

“whether a verdict, based on circumstantial evidence, is unsafe or unsatisfactory.”

Facts

- For the purposes of comprehending the Court’s decision, Court refers to the agreed facts set out in paragraph 2 of this decision.

120. The following facts are found by the Court to have been established beyond reasonable doubt:

- The boundary of the Kakadu National Park is as marked on and apparent from Exhibits P4 and Exhibit P3 and the defendant was conversant with its location;
- On 17 May 2003 the defendant in company of Pring entered the reserve and took up a more or less stationary position at a point 500 to 600 metres south of the boundary (“the critical point”).
- From a point north of the boundary line, the defendant travelled to the critical point at a constant speed in a constant direction (“the entry”).
- The defendant in effecting the entry did not personally use, nor did Pring use, or illuminate the spotlight that the defendant admits was at all material times in his possession.
- At some stage at approximately the critical point, either the defendant or Pring caused to be illuminated a light of low incandescence which was not the spotlight admitted to be in his possession.
- The net (P9) located by Wellings and Lindner was at all material times the property of the defendant.

- The net (P7) located by Wellings and Lindner in the dinghy under the defendant's control was at material times the property of the defendant.
- The defendant was apprehended and stopped his dinghy pursuant to requests from either Wellings or Lindner or both at a point approximately 200 metres south of the boundary of the Kakadu Reserve.
- Neither the nets P7 or P9 were marked in accordance with the requisite legislation or indeed with any identification at all.
- P7 was wet at the time of the defendant's apprehension as were certain items of clothing worn by Pring and further that there was on such clothing, traces of wet mud.
- The defendant and or Pring, at the defendant's direction or with his consent, attempted flight from the critical point prior to being apprehended.
- The defendant declined to inspect P9 when invited to do so.
- It was possible for a net similar in composition and configuration to either P7 and P9 to drift from the position in each was allegedly set (there is no finding as to the position where such net was allegedly set) especially if full of fish, jelly fish or a log. In this regard to some extent the evidence of the defendant and Connolly is preferred to the evidence of Russell.
- The Court does not find that P9 had drifted into the reserve to the critical point.
- At some time prior to the defendant's apprehension, P9 was set at or about the critical point either by the defendant, by Pring at his direction, or by Pring with the defendant's consent or sanction.

- The fact that the trip rope as apparent from the video (Exhibit P11) was between the fluke and the shaft of the downstream anchor when it was retrieved at the critical point by Wellings and Lindner is not determinative of whether or not the anchor at some moment prior to its retrieval fulfilled the purpose for which it was designed or whether it was so configured prior to retrieval.
- The mud on the buoy as evidenced by the relevant image in the video (Exhibit P11) does not in any conclusive way indicate the manner in which its deposit on the buoy occurred, but is not consistent simply with sitting on the mud.
- No other commercial fishing by anyone other than the defendant occurred in the relevant area or at all on 16 or 17 May 2003.
- The current line in the East Alligator River at or about the location of P9 was 50 to 100 metres west of the said location of P9.

DECISION

121. As already recounted, the Court has found as a fact that the net P7 located in the dinghy and the net P9 located within the Kakadu Park are both nets which at all material times were owned by the defendant in the proceeding.
122. It is not necessary to recount the basis upon which, but for the defendant's admission, it would have been established beyond reasonable doubt that he had knowledge that at relevant times he had entered into and remained in the Kakadu National Park. That much is apparent from his own admission.

Charge 2

123. Charge no 2 relates exclusively to P7. Charges 1 and 3 relate to the net P9 found in the Park.

124. In relation to P7, and in the light of the admission of fact, it is difficult to conceive of any basis upon which the defendant could be found not guilty.
125. On the defendant's story, he had retrieved the net from outside the park boundary where it had been first set in the afternoon of 16 May 2003 at about 2 pm. Knowing that he was entering the boundary of the Park, not having thought overly much about adopting another course (such as leaving the net on the *Jolly Roger*), he had entered the Park with P7 in the dinghy in searching for P9. On that basis, despite an early unsuccessful application for a no case ruling, the elements necessary to establish the defendant's guilt are established beyond reasonable doubt in that
- (a) on 17 May in the location the defendant was in possession of the required prohibited article;
 - (b) on his own evidence that he knew that he was in possession of the net inside the Kakadu National Park;
 - (c) further it was in his possession from the time he entered the boundary, travelled 500 or 600 metres south and was in possession when first stopped by the Rangers about 200 metres south of the boundary on the way out.
126. Self-evidently in relation to charge 2 to be made out, there must be room to apply the provisions of Regulation 12.8 of the *Environment Protection and Biodiversity Conservation Regulations* of 2000. There cannot be dispute that P7 is a gill net. So much is admitted or common ground. So also that at all material times "possession" of the net P7 by the defendant was not contested.
127. On the face of it, the defendant's gill net is a "device than can be used, or is designed, for taking an animal". "Animal" is not defined in the dictionary forming part of the Regulations. The definition of "fish" includes "aquatic invertebrate animals". There was never any focus on this issue but the Court formally finds that a fish is an animal.

128. However, sub-regulation (2) of regulation 12.8 excepts from its operation possession by a person licensed to carry out commercial fishing operations that are authorised by a relevant law. The Court accepts the submission by defence counsel that as long the defendant was carrying out commercial fishing operations that were authorised by the relevant law, Regulation 1(h), does not “catch” the defendant. The prosecution apparently accepting the interpretation contended for by defence, however, submitted that to constitute “a lawful fishing operation” possession of the gill net required that each of the floats were required to be marked with the licence number of the defendant in accordance with Regulation 32 of the *NT Fisheries Regulations*. By not being so marked, it was submitted, the fishing operations were authorised by law and the exception does not find application. The Court accepts that submission and finds that by failing to mark P7 as required by the NT Fisheries Regulations the defendant was not carrying out any commercial fishing operation as authorised by any law of the Commonwealth or the Northern Territory. Consequently as the defendant conceded he was aware that he was going over the boundary into the reserve; could have left the net P7 on the *Jolly Roger* and knew he was taking the net P7 into the Reserve, the exclusion set out in regulation 12.18(2)(a) has no application to him.

9. The next matter to be considered is the provision of sub-regulation 12.18(2)(b) which would exclude application of sub-regulation (1)(h). “Passage” is defined in the Macquarie Dictionary (3rd edition) relevantly, the relevant meanings being

“3. The act of passing. 4. Liberty, leave, or right to pass; *to refuse passage through a territory*. 5. That by which a person or thing passes; a means of passing; a way, route, avenue, channel, etc. 6. A corridor, or the like. 7. Movement, transit, or transition, as from one place or state to another.”

130. “Through” in the same dictionary has 22 meanings, but for the purpose of this decision, only the primary meaning is set out:

“1. In at one end, side, or surface, and out at the other, of: *to pass through a tunnel.*”

131. Departing from the pedantic and adopting a purposive interpretation of the legislation, this Court accepts that the exclusion must be interpreted to mean and have application to a situation where a party is legitimately engaged in a passage which necessarily passes through a prohibited area and emerges from that prohibited area into an unprohibited area. In those circumstances this Court does not find that exclusion has application.

132. On that basis the Court proceeds to find the defendant guilty on charge 2.

Counts 1 and 3

133. Broadly speaking in relation to charges 1 and 3, if the defendant is found intentionally to have used P9 in a Commonwealth Reserve (the latter not being in contention) and thereby did carry out commercial fishing in the reserve, he must be found guilty in relation to charges 1 and 3.

134. Applying the principles outlined in *Shepherd*, this Court recites, bearing in mind what has already been found or agreed, the following summary of the basis upon which it will proceed to find the defendant guilty of charges 1 and 3:

- At some stage on 16 May 2003 and the defendant alleges 100 metres north of the boundary the location of which he acknowledged as being known to him, he set P7 and P9. The Court does not accept this evidence. The other nets were set at a different location off Cape Farewell.
- At what precise location P7 and P9 were set the Court does not know nor does the Court know whether the nets were or were not set in the main current line or anything else relevant to their being sited in a specific spot. The Court finds that probably they were set in a “boxed

configuration” which Connolly (earlier in this decision) conceded improved the chances of “boxing the fish in”.

- The defendant contends that P7 drifted some distance from the set point, although the distance is not identified and whether into the Reserve or not is not the subject of any evidence.
- P9 drifted on the defendant’s evidence into the Park, but in precisely what direction or into what location the defendant cannot say. The Court does not accept this evidence.
- With P7 in the defendant’s possession he entered the Reserve although he was somewhat uncomfortable about doing so. The Court finds that at least probably, it was set, as already recorded, in a boxed configuration.
- P9 was set by or at the direction of the defendant at the critical point in conjunction with P7.
- The defendant does not demur from the evidence of Wellings and Lindner that his passage into the Reserve was consistent and did not entail any stopping or alteration in course. He alleges use of the spotlight. The evidence of Wellings and Lindner is however preferred to his evidence and the Court finds that on the night in question he did not use a spotlight as he says he did.
- The defendant does not say when or whether he was aware of the motor of the Rangers’ boat being started or becoming audible prior to interception.
- The defendant would have it that, for no cogent or indeed any given reason, he decided spontaneously to leave the Park and left “with the boat on the plane”. That, this Court finds, is not intrinsically significant because it is consistent with how one would expect the handling of a boat to occur, but it is equally consistent with the defendant fleeing. Even if

he was fleeing, and the Court finds he probably was, *R v El Adl* CA 295/2991 2 Qd R at p195, is authority for the proposition that in a criminal case, that is not conclusive evidence of guilt. It is however part of the matrix upon which the Court is entitled to and does rely.

- There was pursuit and the defendant was brought to a stop. When he was brought to a stop observations were made that P7, his clothing and Pring's clothing were wet and on the same was deposited traces of fresh mud. The Court does not know what the river bed was composed of at the critical point, but again it is another matter which like pieces of a jigsaw puzzle ultimately can be put together to "make a picture". It is certainly not inconsistent with the net having been retrieved at the critical point.
- The defendant acknowledges that he did not take the opportunity to inspect either the location of P9 or to identify same. The Court has to say that it finds such behaviour is inconsistent with a reasonable hypothesis of innocence.
- Neither P7 nor P9 were marked as required by Regulation. That is another matter the Court takes into account as one more "piece of the jigsaw puzzle" establishing the defendant's guilt. The Court does not accept that the defendant would have marked P7 and P9 with some non water resistant 'texta'. The Court finds that he did not mark either net.

135. There are shortcomings which may be the subject of criticism in the evidence of Wellings, Lindner or both. No step was taken by either to ascertain whether there was a torch in the boat and it is not clear from the defendant's evidence whether he possessed one on the night in question or not. As already recorded, the Court finds that the flashing light observed by Wellings and Lindner was not consonant with the sort of illumination which one would expect from a spotlight given their evidence as to the distance from which such a light, when illuminated, would be clearly

visible. It is probable in this Court's perception that indeed there was a low incandescent light utilized and the fact of using a light of such low incandescence is more consistent with guilt than innocence.

136. Factored into the matrix of circumstantial evidence then must be added the other evidence of the prosecution. Without picking out some of the inconsistencies which exist between the evidence of Wellings and Lindner, the evidence is consistent in the sense of

- A conjoint agreed position in relation to the fact that once the defendant's boat had entered into the western side of the river, it travelled at a consistent speed in a constant direction. The Court interpolates to say that Coopers Creek and issues of fishing seem to it to be utterly irrelevant, the defendant does not contend he was fishing and there is no need to focus on whether he entered on the western or eastern side because the issue is that he maintained a high speed path of travel in a more or less constant direction and came to a stop. At no stage during the course of travel was any light illuminated.
- The defendant was observed to be stopped for 3.5 to 4 minutes at a place which was identified ultimately as being more or less the place some 500-600 metres into the Reserve where P9 was located. Defence counsel says if the defendant was stopped there why did he not flee. In 3.5 or 4 minutes, says defence counsel, at the speed his dinghy was capable of, he could easily have removed himself from the reserve. That may be so, it is equally possible, particularly in the light of the fact that one of the anchors on P9 was firmly stuck in the riverbed, he thought he would be able to get both nets out and exit the park and tried to do so. The Court does not have to speculate, it seems the evidence is unequivocal or at least so little possessed of doubt that doubt should not taint the process
- Suffice it to say that it is peculiar that the defendant did not commence travel seemingly until the Rangers first switched their spotlight on, upon

which event he certainly did proceed in a direction which would have led him out of the Park. He travelled some 300 or so metres according to the Rangers before being finally stopped 200 metres approximately south of the Park boundary.

- During that process although being on the plane might be consistent also with normal operating procedure, it is difficult to avoid the conclusion that the defendant was attempting to get away from the people who were obviously coming after him.
- It is also difficult to conceive that he could have thought anyone other than persons in authority would be the people pursuing him. That again forms a part of the matrix which the Court points to.
- The defendant's boat was then brought to a halt and there is no issue about the specific locations which were part of the prosecution evidence. They then represent evidence of the facts of the various location.
- It is also common ground that once the gill net P9 and the defendant was offered the opportunity to identify the net he did not do so. The Court finds this inexplicable and certainly not consistent with innocence.
- The evidence in relation to efforts needed to free each of the 2 anchors of P9 is not in issue. Nor is there an issue that the mud could only have been so deposited by being dragged through the mud that necessitating the anchor itself dragged the buoy through the mud. That could have occurred, on the evidence, in the process of retrieving the anchor and the buoy but it is equally consistent with having been firmly anchored by deliberate intent.
- It may validly be argued that the Rangers and therefore the prosecution led no evidence in relation to whether or not a GPS was in the possession of the defendant. In this Court's perception nothing really turns on that issue.

- This Court finds that the net P9 was placed in position more consistent with being intentionally anchored in that position than having drifted to that position. That finding is based upon the fact that the evidence is uncontroverted that it was in configuration straight and well set, which this Court finds is highly improbable to have resulted from drifting into that position, particularly since it was 50 to 100 metres outside the main current line.
- It is possible that the rope thorough the shaft of the relevant anchor may have caused the anchor not to operate properly because of the location of the rope. However, there is no evidence to suggest that the rope did not end up in that position during the course of its retrieval. It could have done so and nothing conclusive is to be found in this Court's perception to indicate that the location of the rope had occurred prior to its being retrieved.
- The other evidence is to the effect that the net was well set and it therefore cannot be excluded from consideration that the position of the rope is something which occurred during the raising of that anchor.
- There is certainly no evidence to indicate that the anchor on P9 was not doing its job immediately prior its retrieval. The defendant after all did not even inspect the net or its location.
- As the Court indicated during the ventilation of this matter it accepts the evidence of Connolly and the defendant that as a matter of possibility a net can drift in circumstances other than those deposed to by Russell. However, for a net to be so well set 100 metres away from the main current line, and 500 metres further south of the alleged set position, is not consistent with commonsense or logic. It is highly unlikely a net in that position could have become so well set when the current line itself was 50 to 100 metres away. The Court consequently finds that the net did not drift into the position in which it was located.

137. Finally on the issue of credibility, this Court was impressed with the manner of giving evidence and was persuaded and or convinced as to the veracity of the evidence of Lindner and Wellings. Where that evidence conflicts with any evidence of the defendant, this Court prefers the evidence of Wellings and Lindner because in respect of such points of conflict the Court simply does not believe the defendant.

138. From the entirety of or the whole of the evidence, applying where applicable the appropriate reasoning required by *Shepherd*, this Court finds the defendant guilty on Counts 1 and 3.

Conclusion in Brief

139. The Court finds the defendant guilty on Counts 1, 2, and 3.

140. The Court will hear from the parties:-

- (a) in relation to charge 4;
- (b) in relation to issues of costs and forfeiture.

Dated: 9 March 2004



DAVID LOADMAN
STIPENDIARY MAGISTRATE