SUPREME COURT OF QUEENSLAND

CITATION:	*R v Jufri; R v Nasir* [2012] QCA 248
PARTIES:	**R** **v** **JUFRI** (appellant) **R** **v** **NASIR** (appellant)
FILE NO/S:	CA No 337 of 2011 CA No 348 of 2011 SC No 903 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	21 June 2012
JUDGES:	Chief Justice, Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Appeals dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellants found guilty by jury of facilitating the bringing to Australia of a group of non-citizens and sentenced to mandatory minimum penalty of five years imprisonment with three year non-parole period – where appellants argued insufficient evidence to prove beyond reasonable doubt that they were reckless as to whether the passengers had a lawful right to come to Australia – whether it was open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt that each appellant was guilty of the offence *Criminal Code Act* 1995 (Cth), s 5.2(1), s 5.6(1) *Migration Act* 1958 (Cth), s 42, s 232A(1)

Fonseka v The Queen (2003) 140 A Crim R 395; [2003] WASCA 111, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
R v Ahmad (2012) 31 NTLR 38; [2012] NTCCA 1, cited

COUNSEL: S M Ryan for the appellant Jufri
B H P Mumford for the appellant Nasir
G R Rice SC for the respondents

SOLICITORS: Legal Aid Queensland for the appellants
Director of Public Prosecutions (Commonwealth) for the respondents

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Fraser JA. I agree that each appeal should be dismissed, for those reasons.

[2] **FRASER JA:** The appellants were found guilty by a jury of an offence against s 232A(1) of the *Migration Act* 1958 (Cth) of facilitating the bringing to Australia of a group of non-citizens. Each was sentenced to the mandatory minimum penalty of five years imprisonment with a three year non-parole period. Each appellant has appealed against his conviction on the ground that the verdict is unreasonable and cannot be supported having regard to the evidence. Under that ground, the Court must review the record of the trial and determine whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence.[1]

[3] Section 232A(1) provides:

> "(1) A person who:
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> (a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
>
> (b) does so reckless as to whether the people had, or have, a lawful right to come to Australia;
>
> is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both."

[4] Section 42 provides, so far as relevant:

> "(1) Subject to subsections (2), (2A) and (3), a non-citizen must not travel to Australia without a visa that is in effect.
>
> (2) Subsection (1) does not apply to an allowed inhabitant of the Protected Zone travelling to a protected area in connection with traditional activities.
>
> (2A) Subsection (1) does not apply to a non-citizen in relation to travel to Australia:

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1 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 615.

(a) if the travel is by a New Zealand citizen who holds and produces a New Zealand passport that is in force; or

(b) if the travel is by a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or

(c) if:

(i) the non-citizen is brought to the migration zone under subsection 245F(9) of this Act or 185(3A) of the *Customs Act 1901*; and

(ii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(ca) the non-citizen is brought to Australia under section 198B; or

(d) if:

(i) the non-citizen has been removed under section 198 to another country but has been refused entry by that country; and

(ii) the non-citizen travels to Australia as a direct result of that refusal; and

(iii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(e) if:

(i) the non-citizen has been removed under section 198; and

(ii) before the removal the High Court, the Federal Court or the Federal Magistrates Court had made an order in relation to the non-citizen, or the Minister had given an undertaking to the High Court, the Federal Court or the Federal Magistrates Court in relation to the non-citizen; and

(iii) the non-citizen's travel to Australia is required in order to give effect to the order or undertaking; and

(iv) the Minister has made a declaration that this paragraph is to apply in relation to the non-citizen's travel; and

(v) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen; or

(f) if:

(i) the travel is from Norfolk Island to Australia; and

(ii) the Minister has made a declaration that this paragraph is to apply in relation to the non-citizen's travel; and

(iii) the non-citizen is a person who would, if in the migration zone, be an unlawful non-citizen.

> (3) The regulations may permit a specified non-citizen or a non-citizen in a specified class to travel to Australia without a visa that is in effect.
>
> (4) Nothing in subsection (2A) or (3) is to be taken to affect the non-citizen's status in the migration zone as an unlawful non-citizen."

[5] The effect of s 5.6(1) of the *Criminal Code* (Cth) is that, because the Act does not specify a "fault element" for the conduct described in s 232A(1)(a) of the Act, the fault element is intention. Subsection 5.2(1) of the *Code* provides that "[a] person has intention with respect to conduct if he or she means to engage in that conduct".

[6] Accordingly, the elements of the offence in s 232A(1) have been described as follows: [2]

> "1. … [T]he accused facilitated the bringing to Australia of a group of five or more people… .
> 2. The accused meant to facilitate the bringing of the passengers…to Australia.
> 3. At least five of the passengers…were people to whom s 42(1) of the *Migration Act* applies. That is, the passengers were not Australian citizens; and at the relevant time they did not have valid visas permitting them to enter Australia.
> 4. The accused was reckless as to whether the passengers…had a lawful right to come to Australia."

[7] At the trial both appellants formally admitted the following facts. Between about 28 February and 10 March 2010 the appellants were onboard the vessel "*KM. Permata Intan*". The vessel was detected by Australian authorities at approximately 6.00 am on 10 March 2010 travelling in a southerly direction at approximately 9.9 nautical miles from East Island, Australia. (I interpolate that East Island is part of Ashmore Reef, as indicated on a chart found on the vessel.) The vessel was boarded by a boarding party from the Royal Australian Navy patrol boat HMAS Armidale at about 6.40 am on the same day, when it was approximately 9.75 nautical miles inside Australia's territorial sea. There were 49 people on board, three of whom, the appellants and Haryadi, were Indonesian nationals. The remaining 46 people on the vessel were Afghan. The witnesses in the Crown case were Lieutenant Commander List, who was the commanding officer of HMAS Armidale when that patrol boat intercepted the Indonesian vessel, and five of the Afghan passengers on the Indonesian vessel. There was no significant challenge to their evidence. Neither appellant gave or called evidence.

[8] Elements 1 and 3 were not in issue in the trial of either appellant. As to element 1, the appellants did not challenge evidence given by some of the passenger witnesses that the vessel was crewed for the whole of its journey from Indonesia to Australia by the appellants and Haryadi. Haryadi was the captain, the appellant Jufri steered the vessel and he also assisted the captain and acted as a mechanic (he fixed the engine when it broke down), and the appellant Nasir was the cook and also steered the vehicle at night on one occasion. As to element 3, the appellants admitted that none of those on board the vessel were Australian citizens, none held Australian

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2 See *R v Ahmad* (2012) 31 NTLR 38; [2012] NTCCA 1 at [47].

visas that were in effect, and none of the exceptions in ss 42(2) and 42(2A) of the *Migration Act* 1958 (Cth) applied to any of them.

[9] Elements 2 and 4 were in issue at the trial. In these appeals the appellants put in issue only element 4. Each appellant's case on appeal was that the evidence did not justify a finding, which was submitted to be necessary for proof of element 4, that the appellant was actually or consciously aware that there was a real risk or a substantial possibility that the passengers were coming to Australia without having a lawful right to do so.

[10] The appellants formally admitted that certain photographs of the vessel and items in the vessel were taken by a member of the Royal Australian Navy during the boarding and subsequent inspection and that various items were found when a search was conducted upon boarding the vessel. There were substantial quantities of food and water, a compass, a GPS unit, and two charts, numbered 366 and 87. The charts, which were tendered by consent, were depicted in photographs taken in the vessel's wheelhouse, where the engine controls, compass and GPS unit were also found. Chart 366 is a 1:1000000 scale chart of the Bali Sea and Flores Sea to the Sawu Sea and Indian Ocean. It includes a clearly marked maritime boundary between "Indonesia" and "Australia". Ashmore Reef is shown within Australia, just inside the boundary. There are three connected straight lines running at different angles drawn on the chart between a point adjacent to a headland on the north-eastern part of the Indonesian island of Sumbawa to a point adjacent to the north eastern part of Ashmore Reef. The chart shows Ashmore Reef as being the nearest landfall within Australia for a vessel coming from the northwest, including for a vessel following the route drawn on the chart. The marked route appears to be the most direct maritime route between the apparent departure point on Sumbawa and Ashmore Reef.

[11] The passenger witnesses gave evidence of making arrangements with people smugglers to travel from Pakistan or Afghanistan to Australia. Each of them paid money to one or more persons to acquire a passport for use in the journey by air to Indonesia or a nearby place, and each of them returned the passport to someone apparently connected with the person who had initially supplied it. None retained any travel documents for the final leg of the journey from Indonesia to Australia. Each passenger witness travelled from either Bogor or Jakarta, ultimately arriving on a bus at an unidentified place in Indonesia. After leaving the bus, the passengers walked for a short time through some trees to the beach, where they waited before two small boats arrived. Those boats transferred the passengers to the vessel which took them to Australia. Four of the passenger witnesses gave evidence that they were not asked to show any travel documents to the crew.

[12] The vessel left at night. Consistently with the admissions and the photographs, there was unchallenged evidence that there was no fishing equipment on the vessel. It was a wooden hulled boat of about 20 metres in length and it contained a cabin (a wheelhouse) on the deck. There were four or five rooms below the deck, one of which contained food supplies and the other four of which were occupied by the passengers. One of the passenger witnesses, Ahmadi, described the rooms as being "four to four and a half metres", without bedding or other comforts. He said that the three crew members slept in the room on the top level, "…where they used to do the steering and drive the boat". Sultani gave evidence that the kitchen was at the stern, behind the cabin. The effect of evidence given by Ahmadi, AB, and Sultani was

that, during the voyage the passengers were scared to be seen and for that reason they stayed below decks during the day and sat on the top of the vessel at night time. Ahmadi gave evidence that if they saw the lights of a ship at night time they would go down below the decks. He said that a member of the crew would signal by hand gestures for the passengers all to go and stay down below. Ahmadi and Sultani identified the captain as the person who gave the hand signals. According to AB, Haidari, and Sultani, the voyage took about nine days. AB gave evidence that he saw the crew members talking to one another during the voyage. Sultani, gave evidence that he went into the "captain's room" (the wheelhouse), perhaps on a number of different occasions, and saw the captain, Haryadi, steering the vessel. Sultani saw the navigational equipment and two charts and, with reference to the charts, Haryadi said that "…we will be going through this direction from this route". That was presumably a reference to the route from Sumbawa to Ashmore Island drawn on chart 366.

[13] Each appellant argued that there was insufficient evidence to prove beyond reasonable doubt that the appellant was reckless whether the passengers had a lawful right to come to Australia and for that reason a conviction was unsupportable and unreasonable. It was submitted that there was in this respect a gap in the evidence in the Crown case. To adopt the words used by Mason CJ, Deane, Dawson and Toohey JJ in *M v The Queen*,[3] the effect of the appellants' argument was that "… the evidence, upon the record itself … displays inadequacies … or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted …".

[14] The content of the disputed mental element is supplied by s 5.4(1) of the *Criminal Cod*e (Cth). It provides that "[a] person is reckless with respect to a circumstance if … he … is aware of a substantial risk that the circumstance exists or will exist … and … having regard to the circumstances known to him … it is unjustifiable to take the risk". The appellants focused their arguments upon the first aspect of that provision. The appellants argued that the prosecution was obliged to prove beyond reasonable doubt that the appellant was actually or consciously aware of a real or substantial possibility that the passengers on the vessel had no lawful right to come to Australia. The respondent did not challenge that proposition, but the respondent did take issue with the further arguments in the appellants' outlines of submissions that proof of the offence required evidence that the accused person was aware that persons travelling to Australia were required to have a valid visa or other formal permission to enter Australia, or at least that there was some system which required persons entering Australia to obtain approval prior to entry. Counsel for the appellant Jufri retreated to some extent from the argument in submissions in reply, conceding that it was sufficient for the prosecution to prove that the accused was aware that Australian law required entrants to acquire a lawful right to enter, but no similar concession was made on behalf of the appellant Nasir.

[15] The relevant expression in s 232A(1)(b) is "a lawful right to come to Australia". No reason appears to depart from a literal interpretation of that expression, particularly since its high level of generality may be contrasted with the specific provisions of the Act concerning visas. It may readily be accepted that the reference to a lawful right to come to Australia assumes the existence of an Australian law which, at least

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3 (1994) 181 CLR 487 at 494.

in some circumstances, makes it unlawful for a person to enter Australia, but it does not follow that it is necessary for the prosecution to prove that persons accused of this offence know anything about the Australian visa system or had any knowledge of the content of Australian law. The text of s 232A(1)(b) unambiguously identifies the relevant circumstance for the purpose of s 5.4(1) of the *Code* as one which concerns the absence of "a lawful right to come to Australia". As was submitted for the respondent, the disputed mental element is established if the prosecution proves beyond reasonable doubt that the accused person was aware of a substantial risk that the passengers were coming to Australia without having a lawful right to come into Australia, whatever form such a right might take. It is not necessary to seek support for this conclusion in the respondent's analysis of the legislative history, but that history is consistent with the literal meaning of the current provision.[4]

[16] The respondent argued that the combination of the following circumstances rendered it open for the jury to conclude beyond reasonable doubt that each appellant was aware of a substantial risk that the passengers had no lawful right to come to Australia:

i. The vessel was a fishing boat, obviously not designed or equipped for passenger carriage.

ii. The place of boarding was apparently a remote one, not at any jetty or facility for boarding.[5] The boarding was undertaken at night.

iii. The number of passengers was substantial having regard to the size of the boat.

iv. Conditions for the passengers were rudimentary. There was no bedding for a journey of nine days. There was no evident facility for washing. There was one toilet for all.

v. The passengers followed a pattern of remaining below deck during the day in cramped conditions in equatorial heat and humidity, with not so much as a seat, whereas the main deck offered more space, shade and open air.[6] The passengers emerged onto the main deck at night under cover of darkness. Irrespective of who instigated such a procedure, no one on board could have failed to be aware of it over the nine days of travel.

vi. The persons on board were generally of Middle Eastern appearance.

vii. None of the passengers was asked about passports or Australian visas.

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4 A previous form of the section resulted from the *Border Protection Legislation Amendment Act* 1999 amending s 232A, as it had been enacted by Item 5 of Schedule 1 of the *Migration Legislation Amendment Act* (No 1) 1999, by substituting the element of recklessness for the former element of knowledge that people carried to Australia would become "unlawful non-citizens". Paragraph 282 of the Revised Explanatory Memorandum for that amending Act explained that the amendment would "ensure that a person cannot avoid liability under section 232A on the basis that they did not have technical knowledge that the people being trafficked would become, in Australia, 'unlawful non-citizens'."

5 AB 53 1.20; AB 88 1.52; AB 104 1.20-30.

6 AB 353 photo 12 & AB 358 photo 17.

viii. The jury knew that the captain had the relevant awareness about the lawful right aspect and that all the crew were cooperating and mingling. They were entitled to reason that it would be unlikely that the appellants were the only ones on board who lacked knowledge (or at least awareness of the risk) that the passengers had no right to come to Australia.

ix. The route of the vessel from Indonesia to Ashmore Reef just within Australian waters was marked upon one of the charts kept in the wheelhouse, where it was available to be seen and used in steering the vessel by both appellants.

[17] The appellant Jufri argued that there was no evidence in the prosecution case about his background from which an inference could be drawn that he was aware of a system of approving entry into Australia prior to arrival, or of any requirement for any formal permission to enter Australia. The only evidence in the prosecution case about his personal circumstances were those contained in his formal admission; he was 41 years of age, born in Bone, South Sulawesi, Indonesia, educated to year seven, employed as a fisherman, married, and lived in Probolinggo, East Java, Indonesia. The same argument was advanced by the appellant Nasir, whose admitted particulars were that he was 43 years of age, born in Riau, Sumatra, Indonesia, educated to primary school, employed as a fisherman, married, and lived in Probolinggo, East Java, Indonesia. Both appellants also argued that it was relevant that, on the evidence, neither of them spoke English or could communicate with the Afghan passengers. Each argued that there was no evidence that he would be aware that there might be adverse consequences to him by reason of the passengers on the vessel entering Australia without visas, having regard in particular to the absence of any evidence about the appellants' education, travel, or life experiences. The appellants emphasised the necessity to consider this disputed element of the Crown case from the perspective of the appellants, whose perspective was likely to differ very markedly from that of the average Australian.

[18] The appellants also argued that the circumstances relied upon by the respondent were incapable of supporting an inference beyond reasonable doubt that either appellant was actually aware of a substantial possibility that the passengers on the vessel had no lawful right to come to Australia. As to (i) they argued that the evidence did not justify a conclusion that, from the perspective of the appellants, the vessel was not designed or equipped to carry its passengers; in that respect the standards to be expected in Indonesia might differ from those prevailing in Australia. They advanced similar arguments in relation to (ii), (iii) and (iv). As to the circumstance that the boarding was undertaken at night and (v) that the passengers remained below deck during the day to avoid detection, the appellants argued that, at its highest for the Crown, the evidence supported an inference that those who were aware of the passengers' behaviour might have thought that the passengers were hiding from Indonesian authorities, perhaps because they did not have a lawful right to be in, travel through, or leave Indonesia. It was submitted that, in the absence of evidence that either appellant was aware of this conduct or that the passengers were deliberately hiding, this evidence could establish no more than that the appellants might have believed that the passengers had their own reasons for going below deck during day time hours.

[19] The appellants argued that the circumstance in (vi) did not advance the prosecution case, and the circumstance (vii) that none of the passengers was asked about

passports or Australian visas was not significant in the absence of evidence that either appellant knew what a visa or a passport was, that either appellant knew that the destination of the boat was Australia, or that there was a system in Australia which required entrants to obtain a visa or other formal permission before entering the country. The appellants also argued that it could not be assumed that it was the responsibility of members of the crew performing functions of a kind performed by the appellants to scrutinise travel documents and that there was no evidence that the passengers had not been asked to show their passports before they left the beach of the Indonesian island. As to (viii), the respondent's proposition that the jury knew that the captain was aware that the passengers did not have a lawful right to enter Australia was based upon the admission made by each appellant at trial, that on 27 June 2011 the captain of the vessel, Haryadi, pleaded guilty to the offence of facilitating the bringing of a group of non-citizens to Australia. Neither appellant contradicted that mode of reasoning or the respondent's contention that the formal admissions made by each appellant that the captain had pleaded guilty to the offence were informed by forensic decisions by the appellants' counsel which were designed to highlight the difference between the role of the captain and the less significant roles of each appellant in the vessel. The appellants' argument was instead that there was no evidence and no reason to infer that the knowledge of Haryadi was communicated to either appellant.

[20] As I have mentioned, neither appellant argued that the evidence was insufficient to justify a finding beyond reasonable doubt that the appellants meant to facilitate the bringing of the passengers to Australia. Such a finding was justified by the evidence that one of the charts kept in the vessel's wheelhouse had a maritime route between Indonesia and Australia clearly marked upon it, Haryadi indicated to one of the passengers that the vessel would be following that route, each appellant spent time in the wheelhouse, each appellant also steered the vessel at one time or another, each of the passenger witnesses understood that they were on a voyage to Australia (a circumstance to be assessed in light of that natural human curiosity which, the jury could find, would have led the appellant to enquire about the vessel's destination if that information was not earlier volunteered to him[7]), and the vessel was in fact navigated from Indonesia to Australia.

[21] The possibility that Indonesian authorities might have detained the vessel if they discovered that it was carrying its passengers through Indonesian waters[8] could explain the conduct of the passengers in remaining below deck during the day and otherwise retreating below deck to avoid detection, but it nonetheless remained one of the relevant circumstances to be assessed in combination with the other circumstances proved in evidence. Of particular importance are the circumstances that the appellants were two of only three men acting as the crew of a small wooden boat which was manifestly not designed as a passenger vessel but which carried 46 passengers comprising only Afghan men from a deserted beach in Indonesia to a remote and uninhabited coral cay which was just within Australia's maritime boundary but a great distance from any populated area on the Australian mainland.

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7 cf *Fonseka v The Queen* [2003] WASCA 111 at [15] in which Wheeler J considered that evidence of the state of mind of persons on a vessel which travelled from Sri Lanka to Australia that their destination was Australia was capable of being circumstantial evidence against a fellow occupant of the vessel who was accused of an offence against s 232A. (The evidence was found to be inadmissible on the different ground, which is not applicable here, that it was hearsay.)

8 There was no evidence about this, but it would seem unsurprising.

[22] It was submitted for the appellant Jufri that the evidence did not justify a conclusion that he knew that Ashmore Reef was an uninhabited coral cay, but that is clearly indicated by chart 366. The chart includes a printed glossary which gives English translations of the Indonesian words and abbreviations which are marked on the chart. The remoteness of Ashmore Reef from the Australian mainland and the fact that it is the closest landfall within Australia for a vessel arriving from the north western part of the Indonesian archipelago are readily apparent. The chart depicts Ashmore Reef as a coral reef which, with some gaps, encircles an area coloured green (the intertidal zone[9]) and, within that area, some very small yellow dots (indicating land[10]) which are labelled as East Island, Middle Island, and West Island. The strong impression that the very small area of Ashmore Reef is likely to be uninhabited is confirmed when one compares its appearance with that of the many Indonesian islands also depicted on the chart. Numerous towns or villages, and other features including navigational aids, are marked on many Indonesian islands, but no such feature is shown on Ashmore Reef.

[23] Given the length of the voyage, the small size of the vessel, the large number of passengers, and that the crew consisted of only three men, it is difficult to accept that either appellant was not aware of each of the relevant circumstances, including the passengers' conduct in retreating to the obviously unattractive conditions below deck to avoid detection. Whether the inference should be drawn from these circumstances that each appellant was aware that there was a substantial risk that the passengers had no lawful right to come to Australia was for the jury to decide, but it was open to the jury to draw that inference to the exclusion of any competing hypothesis from the circumstances identified by the respondent. The appellants did not argue that it was not open to the jury to conclude that the prosecution had proved beyond reasonable doubt that it was unjustifiable for each appellant to take the risk that the passengers did not have a lawful right to enter Australia.

[24] I would hold that it was open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt that each appellant was guilty of the offence. I would reach that conclusion without reference to the inference which the respondent submitted should be drawn from Haryadi's plea of guilty, but I would add that the jury could in any event have inferred that it was very likely that the vessel's captain knew that a sea voyage of this kind, rather than more conventional transport, was necessary only because the passengers did not have a lawful right to enter Australia. The jury could then have taken that circumstance into account as a further factor in favour of the conclusion that the appellants possessed the same knowledge.

Proposed order

[25] I would dismiss each appeal.

[26] **GOTTERSON JA**: I agree with the order proposed by Fraser JA in each appeal and with his Honour's reasons for making it.

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9 Green is uniformly used on the chart to designate the intertidal zone of the numerous islands of the part of the Indonesian Archipelago shown on the chart, as well as the few reefs and islands shown on the chart as being within Australia.

10 Yellow is uniformly used on the chart to designate land on the numerous Indonesian islands shown on the chart, including Sumbawa.