HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, CALLINAN AND HEYDON JJ

GEORGE PETER OSTROWSKI APPELLANT

AND

JEFFREY RYDER PALMER RESPONDENT

[2004] HCA 30
16 June 2004
P35/2003

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1, 2 and 3 made by the Full Court of the Supreme Court of Western Australia on 7 March 2002 and, in lieu thereof, order that the appeal to that Court be dismissed.*

3. *Appellant to pay the respondent's costs of the application for special leave to appeal and of the appeal to this Court.*

On appeal from Supreme Court of Western Australia

Representation:

G T W Tannin SC with K E McDonald for the appellant (instructed by Crown Solicitor for the State of Western Australia)

K J M de Kerloy with K J Levy for the respondent (instructed by Freehills)

CATCHWORDS

Ostrowski v Palmer

Criminal law – Defences – Respondent charged with fishing for rock lobsters in a prohibited area while holding a commercial fishing licence, contrary to a regulation made under statute – Respondent made inquiries at an office of a State Government department and was provided with incomplete information relating to prohibited areas – Respondent believed he had been provided with complete set of relevant regulations and was therefore unaware that fishing in relevant area was prohibited by law – Whether respondent could rely on defence of "mistake of fact" under s 24, *Criminal Code* (WA) – Whether respondent's honest and reasonable, but mistaken, belief was one of fact or law – Effect of officially induced error of law – Relevance of rules concerning pleading and proof of regulations.

Words and phrases – "mistake of fact", "mistake of law", "state of things".

Criminal Code (WA), ss 22, 24.
Fish Resources Management Act 1994 (WA), s 222.
Fish Resources Management Regulations 1995 (WA), reg 34.

1 GLEESON CJ AND KIRBY J. Professor Glanville Williams said that almost the only knowledge of law that many people possess is the knowledge that ignorance of the law is no excuse when a person is charged with an offence[1]. This does not mean that people are presumed to know the law. Such a presumption would be absurd. Rather, it means that, if a person is alleged to have committed an offence, it is both necessary and sufficient for the prosecution to prove the elements of the offence, and it is irrelevant to the question of guilt that the accused person was not aware that those elements constituted an offence.

The reason for the rule that ignorance of the law is no excuse

2 For present purposes, we use the expression "elements of the offence" to embrace matters of exculpation, and without regard to any special consideration as to onus of proof that might exist in relation to particular offences. Ignorance of the legal consequences that flow from the existence of the facts that constitute an offence is ordinarily not a matter of exculpation, although it may be a matter of mitigation, and in some circumstances it may enliven a discretion not to prosecute. In *Blackpool Corporation v Locker*[2], Scott LJ called the rule that ignorance of the law is no excuse "the working hypothesis on which the rule of law rests in British democracy". His Lordship went on to make the point that the corollary of the rule is that information as to the content of the law should be readily accessible to the public. In a society in which many personal, social and commercial activities are closely regulated, and the schemes of regulation are frequently changed, the detail of regulation may be difficult for citizens and their lawyers to keep up with. Courts themselves normally require evidence of regulations as distinct from statutes.

3 One of the reasons that has been given for the common law rule that courts do not take judicial notice of regulations, as they do of statutes, and that a party relying on regulations must prove them in evidence, is that, in the past, in England, there was no official publication that would give ready access to the content of regulations of the kind that existed in relation to statutes[3]. For purposes of pleading and evidence, unless the statute pursuant to which regulations were made provided that they were to be taken to be part of the statute, and subject to considerations that might arise out of the way particular litigation was conducted, in civil litigation the making and content of regulations

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1 Williams, *Textbook of Criminal Law*, 2nd ed (1983) at 451.

2 [1948] 1 KB 349 at 361.

3 *Todd v Anderson* (1912) SC (J) 105 at 108 per Lord Salvesen, cited in *Ex parte Madsen; Re Hawes* [1960] SR (NSW) 550 at 552.

were treated by the common law as facts to be alleged and proved. Proof of the making and the terms of regulations established that they formed part of the law to be applied to the resolution of the case[4]. The same applied in criminal proceedings. Regulations duly made form part of the law but, subject to any statutory provision to the contrary, in legal proceedings their existence and content must be alleged and proved by the party relying on them. This principle has been held to apply in Western Australia[5].

4 The rule that ignorance of the law does not afford an excuse for an act which would otherwise constitute an offence applies in Western Australia by virtue of s 22 of the State's *Criminal Code*. The respondent contends, however, that the present case is governed, not by s 22, but by s 24, which provides that a person who does an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as he believed to exist. The outcome of the appeal turns upon the operation of ss 22 and 24 in the circumstances of the case.

The elements of the subject offence

5 The facts, the relevant legislation and regulations, and the history of the proceedings, are set out in the reasons of Callinan and Heydon JJ.

6 The respondent was charged with a contravention of reg 34 of regulations made under the *Fish Resources Management Act* 1994 (WA). That regulation prohibited the holder of a commercial fishing licence from fishing for rock lobsters in an area defined in a Table to the regulation and described in the heading to the regulation as the waters surrounding Quobba Point. It is sufficient for present purposes to adopt the description in the heading. The prohibition was expressed in unqualified terms. There were three elements of the offence created by the regulation: being the holder of a commercial fishing licence; fishing for rock lobsters; and doing so in the waters surrounding Quobba Point, as defined. The respondent's conduct satisfied all of those elements. Furthermore, the respondent made no mistake, and had no erroneous belief, about any of those elements, or about any matter relevant to them. He knew he held a commercial fishing licence; he knew he was fishing for rock lobsters; and he knew where he was fishing. What he did not know was that there was a regulation prohibiting

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4 *Ex parte Madsen; Re Hawes* [1960] SR (NSW) 550.

5 *Norton v The Queen* (2001) 24 WAR 488 at 520-521. See, however, *Evidence Act* 1995 (Cth) ss 5, 143.

his conduct. He was fishing where he intended to fish; he did not know there was a law against it.

7 The respondent's explanation of his lack of knowledge of the regulation was not challenged by evidence to the contrary, and was accepted by the magistrate. He contended that this explanation gave him a defence under s 24 of the *Criminal Code*. The magistrate rejected that contention. In the Full Court of the Supreme Court of Western Australia, an attempt was made to broaden the basis of the respondent's defence by relying upon what was said to be a principle of common law concerning inducement of error by the conduct of public officials. The Full Court refused to allow that issue to be raised because, if it had been raised before the magistrate, the prosecution may have wanted to call evidence from Departmental officers. The prosecution at first instance had been content to argue the s 24 defence on the basis of the respondent's version of what occurred. If the new argument had been raised before the magistrate, the evidence might have taken a different course. It is only the s 24 defence with which this Court is now concerned.

8 There was some debate between counsel as to exactly what was said, and not said, by the officers with whom the respondent dealt, but the points of difference are immaterial. It is the substance of what passed between the respondent and those officers, not the precise language used, that matters. On his evidence, the respondent was seeking to obtain from the Department knowledge as to where it was lawful, and where it was unlawful, for him to fish for rock lobsters. His requests for information must have been so understood, and the information he was given was a response to these requests. The respondent submits, the magistrate found, and the Full Court agreed, that, in substance, the respondent was led to believe that the documentary material he was given contained a complete reference to the places in which commercial rock lobster fishing was prohibited, that it was reasonable of him to have that belief, and that the belief was mistaken. That, it is said, was an honest and reasonable, but mistaken, belief in the existence of a state of things and was covered by s 24.

The history and meaning of ss 22 and 24 of the Code

9 Sections 22 and 24 are based on the Queensland *Criminal Code*, drafted by Sir Samuel Griffith. The corresponding provisions of the Queensland Code were intended to state the common law[6]. In *Thomas v The King*[7], Dixon J said that ss 22 and 24 "state ... the common law with complete accuracy".

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6 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 572-573.

7 (1937) 59 CLR 279 at 305-306.

10 The common law applicable to a case such as the present was stated by Jordan CJ in *R v Turnbull*[8], in a passage quoted by Brennan J in *He Kaw Teh v The Queen*[9], as follows:

> "... it is also necessary at common law for the prosecution to prove that [the accused] knew that he was doing the criminal act which is charged against him, that is, that he knew that *all the facts constituting the ingredients necessary to make the act criminal* were involved in what he was doing. If this be established, it is no defence that he did not know that the act which he was consciously doing was forbidden by law. Ignorance of the law is no excuse. But it is a good defence if he displaces the evidence relied upon as establishing his *knowledge of the presence of some essential factual ingredient of the crime charged*." (emphasis added)

What Jordan CJ referred to as "the ingredients necessary to make the act criminal" are what we have earlier called the elements of the offence. Sections 22 and 24 must be read together. The reference in s 24 to a belief in the existence of a state of things must be, and can be, understood in the light of s 22, and of the common law principle reflected in ss 22 and 24. In a case such as the present, the key to such understanding is in Jordan CJ's reference to "the facts constituting the ingredients necessary to make the act criminal". Section 24 is not concerned with mistakes at large. In particular, it is not concerned with mistakes about whether there is a law against conduct of a certain kind. Section 24 requires that attention be directed to the elements of the offence charged, and to the facts relevant to those elements, understood in the wider sense explained at the commencement of these reasons. It requires identification of the act or acts alleged to constitute the offence, and consideration of the extent to which the accused would have been criminally responsible for such act or acts "if the real state of things had been such as he believed to exist". Section 24 applies to mistakes about the elements of the offence, not mistakes about the existence of the law creating the offence.

The nature of the mistake

11 The respondent, seeking to characterise his mistake as one of fact rather than law, says that his mistaken belief as to a state of things was a belief that he had been given, by the officers of the Department, complete information as to the regulatory prohibitions on commercial rock lobster fishing so far as they affected

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8 (1943) 44 SR (NSW) 108 at 109.

9 (1985) 157 CLR 523 at 572.

his proposed activities. Let it be accepted that this was so. The information provided to the respondent was not an element of the offence created by reg 34, any more than the respondent's state of mind concerning the existence of the prohibition is an element of the offence. The three elements of the offence are stated above. The respondent had no mistaken belief about any of them. The reference in s 24 to "the real state of things" is a reference to the state of things relating to the elements of the offence in question, not to the state of things as to whether the offence exists, or whether the conduct constituted by those elements is an offence. An example of the application of s 24 may have arisen if, as a result of navigational error, the respondent had been under an honest and reasonable, but mistaken, belief as to his location. In that event, it may have been that, if the real state of things had been as he believed, his conduct would not have contravened reg 34, and thus he would have had a defence under s 24.

12 The only mistake that the respondent made was a mistake that resulted from his ignorance of the law. The acts of the respondent would have constituted a breach of reg 34 even if he had been given complete and accurate information by the Department. What the respondent's argument amounts to is that, in that event, he would not have done the acts. That is not the issue raised by s 24. It is beside the point. The magistrate, and the dissenting member of the Full Court, were right to hold that the case fell within s 22 of the *Criminal Code*, and not s 24.

13 This is not a case that gives rise to the difficulties that are sometimes involved in distinguishing between mistakes of law and mistakes of fact, or in applying the common law, or ss 22 and 24, to what are sometimes described as mixed questions of fact and law[10]. Here the mistake that was made, however it is characterised, was not relevant to any element of the offence charged. Rather, it was a mistake that resulted in ignorance of the existence of the prohibition contained in reg 34, that is to say, ignorance of the law.

Conclusion

14 The appeal should be allowed. We agree with the consequential orders proposed by Callinan and Heydon JJ.

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10 *Strathfield Municipal Council v Elvy* (1992) 25 NSWLR 745 at 751; *Von Lieven v Stewart* (1990) 21 NSWLR 52 at 66-67.

15 McHUGH J. The issue in this appeal is whether the respondent, Mr Jeffrey Ryder Palmer, was entitled to rely on a defence of mistake of fact under s 24 of the *Criminal Code* (WA) to a charge of fishing for rock lobster in a prohibited area. Mr Palmer believed that the area was not so prohibited. His belief was induced by the conduct of an employee of Fisheries Western Australia ("Fisheries WA"), a State Government department. When he requested a copy of the relevant regulations which identified the areas where fishing for rock lobster was prohibited, the Fisheries WA employee gave Mr Palmer documents that did not identify the area proposed to be fished as one where fishing for rock lobster was prohibited. Section 24 declares that a person who does an act under an honest and reasonable, but mistaken, belief in the existence of any "state of things" is not criminally responsible for the act to any greater extent than if the real "state of things" had existed.

16 In my opinion, Mr Palmer could not rely on the defence of mistake of fact under s 24. His mistake was one of law: he erroneously believed that no law prohibited him from fishing for rock lobster in that area. It is irrelevant that his belief was induced by the conduct of a Fisheries WA employee.

Statement of the case

17 On 1 March 2000, in the Court of Petty Sessions of Western Australia at Carnarvon, George Peter Ostrowski, an officer of Fisheries WA, charged Jeffrey Ryder Palmer with an offence under reg 34 of the Fish Resources Management Regulations 1995 (WA) ("the Regulations") and s 222 of the *Fish Resources Management Act* 1994 (WA) ("the Act"). The material parts of the charge alleged that Mr Palmer:

> "being the holder of a commercial fishing licence, fished for rock lobster within that portion of the Indian Ocean bounded by a line starting from a point on the high water mark situated at the southwestern-most extremity of Quobba Point and extending south ... and thence generally northwesterly along the high water mark aforesaid to the starting point; contrary to Regulation 34 of the Fish Resources Management Regulations 1995 and Section 222 of the Fish Resources Management Act 1994."

The area referred to in the charge was the area described in the Table to reg 34 of the Regulations, being the area where fishing for rock lobster was prohibited. The offence was a strict liability offence.

18 On 2 March 2000, Packington SM rejected a defence of mistake of fact based on s 24 of the *Criminal Code* and convicted Mr Palmer of the offence. He imposed a general penalty of $500 and a mandatory additional penalty of $27,600, calculated under s 222 of the Act. He also ordered Mr Palmer to pay costs of $2,000.

19 Subsequently, Miller J in the Supreme Court of Western Australia granted Mr Palmer leave to appeal to the Full Court of the Supreme Court of Western Australia against the decision of Packington SM, and an extension of time in which to do so. In the appeal, Mr Palmer claimed that he was entitled to rely on the defence of mistake of fact in s 24 of the *Criminal Code*. He contended that he had made reasonable and specific inquiries concerning the regulations applicable in the area where he proposed to fish and, on the basis of the representations he had received, honestly and reasonably believed that the area was not restricted. He contended that this honest and reasonable, but mistaken, belief was a "belief in the existence of any state of things" within the meaning of s 24 of the *Code*. A majority of the Full Court (Malcolm CJ and Olsson AUJ, Steytler J dissenting) upheld his appeal[11]. The Court set aside the conviction recorded against him and the penalties imposed upon him, and dismissed the complaint.

20 Subsequently, this Court granted Mr Ostrowski leave to appeal against the orders of the Full Court.

The material facts

21 At all material times Mr Palmer was the holder of a commercial fishing licence under the Act. He leased a boat, the subject of a fishing boat licence and a managed fishery licence. These licences, in particular the managed fishery licence, authorised Mr Palmer to fish for western rock lobster by means of a temporary pot entitlement of 87 pots in Zone B of the western rock lobster fishery, an area located off the central coast of Western Australia near Carnarvon.

22 On or about 11 November 1998, Mr Palmer went to the Fremantle office of Fisheries WA and asked for a copy of the current regulations to cover the 1998/1999 fishing season for rock lobster in Zone B. He was told that a copy of the regulations was not available, but that, if he returned on 13 November, a copy would be available. He returned on that day. According to Mr Palmer's evidence, an "office lady" working at the public counter told him that the office still did not have copies of the regulations available for collection by members of the public. She offered to photocopy the copy of the regulations held by the Fremantle office, an offer that Mr Palmer accepted. After photocopying the regulations, the woman gave Mr Palmer a copy of the West Coast Rock Lobster Limited Entry Fishery Notice 1993 and a bundle of notices made variously under the *Fisheries Act* 1905 (WA) and the Act. None of these documents mentioned reg 34 of the Regulations, which provides:

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11 *Palmer v Ostrowski* (2002) 26 WAR 289.

"**Fishing for rock lobster in the waters surrounding Quobba Point**

A person who is the holder of a commercial fishing licence must not fish for rock lobsters at any time in the area described in the Table to this regulation.

Penalty: $5000 and the penalty provided in section 222 of the Act.

Table

All that portion of the Indian Ocean bounded by a line starting from a point on the high water mark situate at the southwestern-most extremity of Quobba Point and extending south to south latitude 24˚34'; thence east to a point on the high water mark; and thence generally northwesterly along the high water mark aforesaid to the starting point."

23 The woman also told Mr Palmer that, if he wanted more information, to take one of the pamphlets in the public reception area. He took a pamphlet entitled "Fishing for Rock Lobsters" for the 1998/1999 season issued by Fisheries WA, which in fact related largely to recreational rather than commercial fishing. Mr Palmer did not inform any Fisheries WA officer or employee that he held a commercial fishing licence. In his evidence, he said that he assumed that any Fisheries WA officer or employee would deduce this from the fact that he ordered a commercial research log book at the same time as he collected the material from the Fremantle office.

24 Between approximately 7 and 9 February 1999, Mr Palmer placed a number of rock lobster pots near Quobba Point and within the waters described in the Table to reg 34 of the Regulations. He knew the true geographical position of the pots and intended to fish for rock lobster in that area. On about 8 February 1999, he was made aware that officers from Fisheries WA were inspecting his lobster pots. However, Mr Palmer contended that he did not know that fishing for rock lobster was prohibited in this area until, on 10 February, he spoke with officers from Fisheries WA, who had entered the harbour at Carnarvon on a boat carrying his lobster pots.

The *Criminal Code*

25 The critical provision of the *Criminal Code* is s 24, which provides:

"**Mistake of fact**

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

26 Section 24 must be read together with s 22, the relevant part of which states:

"**Ignorance of law, bona fide claim of right**

Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by an offender is expressly declared to be an element of the offence."

27 Section 36 provides that the provisions of Ch V (which contains ss 22 and 24) "apply to all persons charged with any offence against the statute law of Western Australia." It is not disputed that these provisions apply to the offence in respect of which Mr Palmer was convicted[12].

28 Sections 22 and 24 should be construed with reference to the applicable common law principles relating to mistake of fact and mistake of law. In *Thomas v The King*[13], Dixon J noted that ss 22 and 24 (and the equivalent provisions in the other Code States) state "with complete accuracy" the common law principle that a mistaken belief as to a matter of fact is a defence to a criminal or statutory offence, but a mistaken belief as to a matter of law is not a defence to such a charge.

29 Sections 22 and 24 of the *Criminal Code* are based on provisions of the *Criminal Code* (Q), which were intended by its drafter, Sir Samuel Griffith, to reflect the common law distinction between a mistake of fact and a mistake of law[14]. This legislative history, together with the presence in the *Criminal Code* of s 22 and the heading "Mistake of fact" above s 24, require the phrase "any state of things" to be read as a reference to a matter of fact rather than a matter of law. As Brennan J said in *Boughey v The Queen*[15]:

"It is erroneous to approach the Code with the presumption that it was intended to do no more than restate the existing law but when the Code

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12 *Geraldton Fishermen's Co-Operative Ltd v Munro* [1963] WAR 129 at 133; *Pearce v Stanton* [1984] WAR 359 at 362 per Rowland J.

13 (1937) 59 CLR 279 at 305-306.

14 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 572-573 per Brennan J.

15 (1986) 161 CLR 10 at 30-31. See also *Marwey v The Queen* (1977) 138 CLR 630 at 637 per Barwick CJ.

> employs words and phrases that are conventionally used to express a general common law principle, it is permissible to interpret the statutory language in the light of decisions expounding the common law ... The meaning of the words and phrases to be found in a Code is controlled by the context in which they are found but when the context does not exclude the common law principles which particular words and phrases impliedly import, reference to those common law principles is both permissible and required." (footnote omitted)

30 Queensland courts have interpreted the phrase "state of things" in s 24 of the *Criminal Code* (Q) – which for all intents and purposes is identical to s 24 of the Western Australian *Criminal Code* – as referring to matters of fact only[16]. Western Australian courts appear to have assumed a similar interpretation[17].

31 Mr Palmer contends, however, that s 24 is significantly different from the common law in that the phrase "belief in the existence of any state of things" has a broader operation with respect to mistake than the equivalent common law principle, which applies in relation to a belief "in the existence of a state of facts"[18]. He submits that the phrase "belief in the existence of any state of things" extends to cover the object of his mistake, which involved an erroneous conclusion about the state of the law, based on two mistakes of fact.

32 In support of his contention that his mistake was covered by the phrase "state of things" in s 24, Mr Palmer relies on a statement by Isaacs and Powers JJ in *Duncan v Theodore*[19] that "'state of things' includes the existence of a law or a valid regulation under a law." That dictum is of no assistance in this case. In *Duncan*, one of the issues before this Court was whether s 7 of the *Sugar Acquisition Act* 1915 (Q) – which declared that no action should lie against certain persons for damage sustained by reason of the making of a Proclamation under that Act or by anything done or purporting to be done thereunder – applied

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16 *Horne v Coyle; Ex parte Coyle* [1965] Qd R 528 at 532 per Lucas J, Sheehy ACJ and Douglas J agreeing; *Loveday v Ayre and Ayre; Ex parte Ayre and Ayre* [1955] St R Qd 264 at 276 per Hanger J; *Pusey v Wagner; Ex parte Wagner* [1922] St R Qd 181 at 184-185.

17 *Roddan* (2002) 128 A Crim R 397 at 401 per Murray J, Wallwork and Einfeld JJ agreeing; *Illich v Young* (2000) 32 MVR 354 at 358 per Roberts-Smith J; *Giorgi v Playboy Holdings Pty Ltd* (Unreported, Supreme Court of Western Australia, 16 August 1993, White J) at 8-9; *Ex parte D* (1995) 17 ACSR 52 at 73-74 per Murray J.

18 *Proudman v Dayman* (1941) 67 CLR 536 at 541 per Dixon J.

19 (1917) 23 CLR 510 at 536.

to acts done under an invalid Proclamation. The Court had to determine whether the term "anything done or purporting to be done thereunder" protected the seizing of cattle by a police officer under an invalid Proclamation. The owners of the cattle had brought an action for damages against the police officer.

33 Isaacs and Powers JJ, who dissented on this and other issues, held that the section applied to acts done under an invalid Proclamation. Their Honours adopted a statement in *Maxwell on the Interpretation of Statutes* that, in enactments such as s 7, terms such as "under", "by virtue of" and "in pursuance of" require a belief by the relevant officer "in the existence of such (1) *facts*, or (2) *state of things* as would, if really existing, have justified his conduct."[20] It was in this context that their Honours said that "'state of things' includes the existence of a law or a valid regulation under a law."[21] Isaacs and Powers JJ held that the defendant officer's belief that the Proclamation was valid brought the case within s 7 and that, accordingly, no action lay against him. The majority Justices held to the contrary.

34 The dictum of Isaacs and Powers JJ about the operation of a provision which conferred an immunity on government officials from actions for damages carries no persuasion in the different context of the *Criminal Code*, even if one ignores the fact that the dictum was expressed in a dissenting judgment. In the *Criminal Code*, the very different issue is whether the term "state of things" applies to an incorrect belief as to the state of the law (including the existence of a regulation) or its application. Unlike *Duncan*, the issue is not whether an expression in a protective provision should be given a beneficial interpretation to apply to an otherwise invalid regulation.

35 No doubt s 24 may protect mistaken belief concerning an event or matter which involves a mixed question of fact and law. This is consistent with the suggestion by Dixon J in *Thomas* that such a mistake should be characterised as one of fact. His Honour said[22]:

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20 *Duncan* (1917) 23 CLR 510 at 536, citing *Maxwell on the Interpretation of Statutes*, 5th ed (1912) at 378 (original emphasis).

21 *Duncan* (1917) 23 CLR 510 at 536.

22 *Thomas* (1937) 59 CLR 279 at 306. However, in *Strathfield Municipal Council v Elvy*, Gleeson CJ stated in relation to Dixon J's proposition that mistakes on mixed questions of fact and law will not ordinarily constitute mistakes of fact: (1992) 25 NSWLR 745 at 751, Clarke JA and Lee AJ concurring.

> "[I]n the distinction between mistakes of fact and of law, a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law."

Similarly, McPherson JA in *Comptroller-General of Customs v Woodlands Enterprises Pty Ltd*, after referring to Dixon J's observation in *Thomas*, said[23]:

> "Because it refers to a mistaken belief in the existence of any 'state of things' ... s 24 of the *Criminal Code* (Qld) is capable of comprehending a mistake about a matter of mixed fact and law".

36 As I later explain, however, no question of a mistake about a matter of mixed fact and law arises in this case.

A mistake of fact or of law?

37 The distinction between a mistake of fact and a mistake of law is by no means a simple one[24]. In *Iannella v French*, Windeyer J said[25]:

> "The distinction which our law makes for its purposes between law and fact, between questions of law and questions of fact, between mistakes of law and mistakes of fact, is thus by no means as easy as might at first be expected. That it is not absolute is illustrated by the many cases said to turn on a mixed question of law and fact. Then there is the choice between two propositions – on the one hand that of Dixon J in this Court in *Thomas v The King* that 'a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law' – on the other hand the rule that, when the facts are ascertained it is a question of law whether a thing or place answers a particular description in the statute". (footnote omitted)

38 Mr Ostrowski contends that the operative mistake made by Mr Palmer was that Mr Palmer believed that he was lawfully entitled to fish in a particular area. Mr Ostrowski submits that such a mistake is one of law. On this view, the events which occurred prior to Mr Palmer's placing his lobster pots in the

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23 (1995) 83 A Crim R 579 at 585. See also *Walden v Hensler* (1987) 163 CLR 561 at 592 per Dawson J.

24 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 374 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; *Griffin v Marsh* (1994) 34 NSWLR 104 at 122 per Smart J; *Fitzpatrick v Inland Revenue Commissioners* [1994] 1 WLR 306 at 320 per Lord Browne-Wilkinson.

25 (1968) 119 CLR 84 at 114-115.

restricted area – in particular, Mr Palmer's visits to the Fremantle office of Fisheries WA – are irrelevant. Mr Ostrowski contends that a mistake concerning the "state of things" would have occurred if Mr Palmer had been mistaken as to an *element of the offence* in reg 34. Such a mistake would have occurred, for example, if Mr Palmer believed that he was not fishing for rock lobster or that he was not in the geographical area where he was. No mistake concerning the "state of things" exists, argues Mr Ostrowski, if all that has occurred is that a person believes that he or she is acting lawfully.

39 In response, Mr Palmer contends that the earlier dealings with Fisheries WA are relevant – indeed fundamental – to characterising his mistake. He submits that at all material times he possessed an honest and reasonable, but mistaken, belief that:

(a) he had been provided with all relevant regulations concerning the area where he proposed to fish;

(b) there was no regulation bearing on the closure by Fisheries WA of the waters in which he proposed to fish or, in short, that reg 34 of the Regulations did not exist; and

(c) he was lawfully entitled to fish where he did.

40 Mr Palmer submits that the first two mistakes were of a factual nature and that, although the third matter was a mistaken conclusion of law, it cannot logically be dissociated from the factual events which gave rise to it. On this basis, so Mr Palmer contends, the mistake amounts to a mistake as to the existence of any state of things within the meaning of s 24 of the *Criminal Code*, and that s 22 does not apply to a mistake of this kind.

41 At common law, and in my opinion under the *Criminal Code*, once the prosecution proves in relation to a strict liability offence that the defendant knew the facts that constitute the actus reus of the offence, that is, all the facts constituting the ingredients necessary to make the act criminal, the defendant cannot escape criminal responsibility by contending that he or she did not understand the legal consequences of those facts. In *R v Turnbull*, Jordan CJ, when discussing the common law concept of mens rea, said[26]:

> "[I]t is also necessary at common law for the prosecution to prove that he knew that he was doing the criminal act which is charged against him, that is, that he knew that *all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing*. If this be

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26 (1943) 44 SR (NSW) 108 at 109, Davidson and Street JJ concurring.

> established, it is no defence that he did not know that the act which he was consciously doing was forbidden by law. Ignorance of the law is no excuse. But it is a good defence if he displaces the evidence relied upon as establishing his knowledge of the presence of *some essential factual ingredient of the crime charged*." (emphasis added)

This passage was cited with approval by Brennan J in *He Kaw Teh v The Queen*[27].

42 Similarly, in *Thomas*, Latham CJ said that "[m]istaken belief as to any relevant element of the offence is sufficient to bring the case within the rule in *Tolson's Case*".[28] His Honour summarised the rule in *R v Tolson* as follows: "[T]he accused is not guilty if he had an honest and reasonable belief in the existence of facts which, if they had really existed, would have made his act both legally and morally innocent."[29]

43 In *Tolson*[30], a majority of nine of the 14 Justices of the Queen's Bench Division held that it was a defence to a charge of bigamy that, when the accused married, she had an honest and reasonable belief that her "former husband" was dead. Despite the split nature of the decision in *Tolson*, the case seems a straightforward application of basic principle. Mrs Tolson believed that she was a single woman because her husband was dead. That was a mistake of fact[31]. Accordingly, she had an honest and reasonable, but mistaken, belief in the existence of facts which, if they had existed, would have rendered her actions legally innocent. If she had in fact been single, she could not have been guilty of bigamy.

44 The decision of this Court in *Thomas*[32], another bigamy case, also produced a narrow majority in favour of the accused. The majority (Latham CJ, Rich and Dixon JJ, Starke and Evatt JJ dissenting) held that it was a defence to a charge of bigamy that the accused had believed "bona fide and on reasonable

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27 (1985) 157 CLR 523 at 572.

28 (1937) 59 CLR 279 at 292, citing *R v Tolson* (1889) 23 QBD 168.

29 (1937) 59 CLR 279 at 287.

30 (1889) 23 QBD 168.

31 Of course, as Dixon J acknowledged in *Thomas*, questions of the legal status of a person involve a question of law, but a statement that a person is single is treated as a statement of fact: (1937) 59 CLR 279 at 307.

32 (1937) 59 CLR 279.

grounds"[33] that he was not married and therefore a single man entitled to marry. The basis of the belief of the accused was that his marriage to his "former wife" was not valid because her decree of divorce "had not been made absolute, so that she was still a married woman when he married her."[34] In upholding the defence of honest and reasonable mistake, Latham CJ said[35]:

> "The belief was that a decree absolute had not been made by the Supreme Court of Victoria. Whether or not such a decree had been made was a question of fact. If no decree absolute had been made, the marriage of the accused's former wife would not have been dissolved and therefore, she would still have been a married woman when she married the accused. Thus, her marriage to the accused would have been invalid, and he would not have been a married person when he went through the ceremony of marriage with Miss Deed. Thus, if his belief as to the matter of fact mentioned had been true, he would not have been guilty of the offence charged."

45 In the bigamy cases[36], the mistake concerned a belief as to a fact that, if true, meant that the accused was a single person when he or she went through a ceremony of marriage. Such facts included the fact of a husband's death or the absence of a decree absolute. They were not cases where the accused had a simple but erroneous belief that he or she was entitled to marry. In *Thomas*, Latham CJ said[37]:

> "The case would, I agree, have been entirely different if his belief had only been a belief that, for some reason or other which he did not understand, the prior marriage of his wife had not effectually been dissolved. That belief might well be regarded as being a belief with respect to a matter of law, and a mistaken belief upon a question of law could not be a defence to a criminal charge."

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33 *Thomas* (1937) 59 CLR 279 at 285 per Latham CJ.

34 *Thomas* (1937) 59 CLR 279 at 284 per Latham CJ.

35 *Thomas* (1937) 59 CLR 279 at 286.

36 *Tolson* (1889) 23 QBD 168; *Thomas* (1937) 59 CLR 279. See also *R v Wheat* [1921] 2 KB 119; *R v Adams* (1892) 18 VLR 566; and *R v Kennedy* [1923] SASR 183, where the defence of mistake of fact was rejected. In the light of *Thomas*, however, *Wheat* cannot be considered good law in Australia.

37 (1937) 59 CLR 279 at 286.

46 Thus, it is no defence to a criminal charge that the defendant believed that his or her actions were not regulated by law or that his or her actions satisfied the provisions of a law. Such beliefs are mistakes of law, not mistakes of fact. In *Von Lieven v Stewart*[38], the Court of Appeal of New South Wales held that the belief by a promoter of a scheme operated by a company that the scheme "neither involved an offer to the public nor a prescribed interest"[39] and accordingly did not contravene the *Companies (New South Wales) Code* or the *Securities Industry (New South Wales) Code* was a mistake of law, not fact. It provided no defence to charges of breaching provisions of those Codes. Clarke JA said that, once the defendant knows all the facts which constitute the elements of the offence, a mistake as to their legal effect is not a defence to a criminal charge[40]. Handley JA (with whom Mahoney JA agreed) said[41]:

> "[A] belief or assumption that the acts in question are lawful either because they are unregulated, or because the requirements of the law have been satisfied, cannot excuse in cases such as this. ... The only excuse is the existence of an actual or positive belief, based on reasonable grounds, in the existence of some fact or facts which, if true, would make the act in question innocent".

47 In *Horne v Coyle; Ex parte Coyle*[42], a truck driver had been convicted of using a vehicle for the carriage of goods without a permit. The driver relied on s 24 of the *Criminal Code* (Q). He believed that it was lawful for him to obtain verbal permission from an officer of the Transport Department before the goods were carried and to acquire a permit only after the goods had been carried. Lucas J concluded that this was a mistake of law[43]:

> "It is, I should think, impossible for s 24 to apply in circumstances in which an accused person merely says 'I admit that I did so-and-so, but I believed that it was lawful and not an offence against the Act in question'."

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38 (1990) 21 NSWLR 52.

39 *Von Lieven* (1990) 21 NSWLR 52 at 55 per Clarke JA.

40 *Von Lieven* (1990) 21 NSWLR 52 at 55.

41 *Von Lieven* (1990) 21 NSWLR 52 at 66-67.

42 [1965] Qd R 528.

43 *Horne* [1965] Qd R 528 at 532-533, Sheehy ACJ and Douglas J agreeing.

The nature of Mr Palmer's mistake

Mistake of law

48 Mr Palmer believed that he was legally entitled to fish for rock lobster in the area in which he was fishing. He was operating under this mistaken belief when he committed the offence. His belief was clearly connected to one of the elements constituting the offence, namely, that "[a] person who is the holder of a commercial fishing licence must not fish for rock lobsters at any time *in the area described in the Table to this regulation*." (emphasis added) Mr Palmer's mistake, however, was one of law, not fact.

49 The statement of Handley JA in *Von Lieven*, set out above, exactly covers this case. Mr Palmer was the holder of a commercial fishing licence. He fished for rock lobsters in the area described in the Table to reg 34 of the Regulations. He intended to fish for rock lobsters in that area and he knew that he was in that part of the Indian Ocean described in the Table to that regulation. Mr Palmer made no mistake as to any of the factual elements of the charge. His mistake was that he believed that the law of Western Australia did not prohibit or regulate fishing for rock lobsters in that area. His mistaken belief was not a mistake as to a fact or "state of things", but a mistake as to the operation of the law. His case fell within s 22, not s 24, of the *Criminal Code*. It was ignorance of the law that caused him to make the mistake that he did. Under s 22 of the *Criminal Code*, ignorance of the law is not an excuse for an act or omission that "would otherwise constitute an offence, unless knowledge of the law by [the] offender is expressly declared to be an element of the offence."

50 The mistake made by Mr Palmer may be contrasted with that made by another Western Australian rock lobster fisherman, Mr Stanton, who successfully relied on s 24 of the *Criminal Code* as a defence to a charge under the Act of selling undersized rock lobsters[44]. In *Pearce v Stanton*[45], the s 24 defence succeeded because Mr Stanton was found to have held an honest and reasonable belief that the lobsters were the correct size. Such a belief – as to the actual size of the lobsters – was a belief in the existence of a fact which constituted one of the elements of the strict liability offence. If, by contrast, Mr Stanton had held a mistaken belief as to the minimum size of rock lobster permitted by law, this would have been a mistake of law. The belief in those circumstances would have been based on a misunderstanding of the regulations governing the minimum lobster size.

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44 *Pearce* [1984] WAR 359.

45 [1984] WAR 359.

Mixed fact and law

51 Nor was the mistake made by Mr Palmer a mistake of mixed fact and law of the type described by Dixon J in *Thomas*, which for the purpose of s 24 may be regarded as a mistake of fact. The earlier mistakes made by Mr Palmer – as to whether he had a complete set of regulations and whether a regulation existed which prohibited fishing in the area – explain how he came to form his mistaken view as to where he could fish. These earlier mistakes are nevertheless preliminary to the commission of the offence. They do not concern the elements of the offence; they cannot change what is a mistake of law, namely, a belief that Mr Palmer was entitled to fish for rock lobster in the area, into one of fact.

Earlier mistakes of fact

52 Mr Palmer relies on the suggestion by Smart J in *Griffin v Marsh*[46] that a mistake of law based on an earlier mistaken belief as to a relevant and important fact should be treated as a mistake of fact. Such a general proposition cannot be accepted. It is true, as Smart J noted, that such a principle is more consistent with the principle that the law only punishes those with a guilty mind. However, this is not the determinative principle in this area. The very existence of the strict liability offence in the present case indicates that, to adopt the words of Dixon J in *Proudman v Dayman*[47], the Legislature was also concerned to "cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced." In other words, an intention to commit the offence is not one of the elements which constitutes that offence; rather, the offence is made out if the prosecution establishes that the defendant knew all the elements constituting the offence. Indeed, the suggestion of Smart J effectively introduces a new rule of law: a mistake of law is a defence to a criminal charge if it was the consequence of a relevant mistake of fact. Such a rule cannot stand with the terms of s 22 of the *Criminal Code*, particularly in the context of strict liability offences.

Erroneous advice

53 It is irrelevant that Mr Palmer's mistake was induced by the conduct of an employee of Fisheries WA. That conduct cannot convert a mistake as to the applicable law into a mistake of fact. If a defendant knows all the relevant facts that constitute the offence and acts on erroneous advice as to the legal effect of those facts, the defendant, like the adviser, has been mistaken as to the law, not the facts.

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46 (1994) 34 NSWLR 104 at 118.

47 (1941) 67 CLR 536 at 540.

54 Four cases which address this issue are *Olsen v The Grain Sorghum Marketing Board; Ex parte Olsen*[48], *Loch v Hunter; Ex parte Loch*[49], *Cambridgeshire and Isle of Ely County Council v Rust*[50] and *Power v Huffa*[51]. In the first two cases each defendant claimed that he or she was acting on the erroneous advice of a third party – either a legal adviser or a government official – that the acts in question were legal and that this mistake amounted to a mistake of fact. In the last two cases each defendant claimed that he or she had been given lawful authority to act as charged and that this mistake likewise amounted to a mistake of fact. In each case the defendant's argument failed, the court finding that each defendant was acting under a mistake of law. Accordingly, the bare fact that the adviser or official may have been mistaken as to the state of the law does not convert the defendant's mistake into one of fact. Both the adviser or the official and the defendant operate under a mistake of law.

55 In *Olsen*[52], the defendants relied on s 24 of the *Criminal Code* (Q) to defend a charge under a Queensland statute of buying grain from a person other than the Grain Sorghum Marketing Board. The defendants, who were grain merchants, had carried grain from Queensland into New South Wales and then back to Queensland in the belief that they were protected by s 92 of the Constitution[53]. In doing so, the defendants had acted under advice from counsel, an advice which was based on a decision of the Full Court of the Supreme Court of Queensland, which was subsequently reversed by this Court. The Full Court of the Supreme Court of Queensland rejected the defendants' claim that as the result of counsel's advice they were engaged in interstate trade, which involved a question of mixed fact and law. Stable J said that the mistake was clearly one of law[54].

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48 [1962] Qd R 580.

49 Unreported, Full Court of the Supreme Court of Queensland, 1 May 1957, Stanley, Mack and O'Hagan JJ.

50 [1972] 2 QB 426.

51 (1976) 14 SASR 337.

52 [1962] Qd R 580.

53 Section 92 provides, inter alia: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

54 *Olsen* [1962] Qd R 580 at 592.

56 A defence under s 24 of the *Criminal Code* (Q) also failed in *Loch*[55] where the licensee of a hotel was prosecuted under the *Liquor Act* 1912 (Q) for keeping the hotel open for the sale of liquor outside legal trading hours – at 11am on a Sunday. The licensee contended that she was entitled to rely on s 24 because she believed, following advice given to her by a licensing inspector, that the legal trading hours were 10am to 12 noon on a Sunday. Stanley J (with whom Mack and O'Hagan JJ agreed) held that s 24 could not apply because[56]:

> "at most [the licensing inspector] could only have been purporting to tell the licensee the contents of the Liquor Act and giving her a statement of law, and that what she had was an honest and reasonable but mistaken belief in a state of law, not a similar belief in a state of fact."

57 In principle, the present case is no different from those cases where the defence of mistake of fact failed even though the defendant believed that he or she had been given lawful authority to act as charged. In *Rust*[57], the English Court of Appeal concluded that a highway trader was acting under a mistake of law rather than of fact when, contrary to law, he operated a stall on the highway for several years. Before setting up the stall he had consulted various officials, none of whom told him that he could not set up the stall. His belief that he had lawful authority to operate his stall did not constitute a defence, because none of the officials who he approached had the legal right to license him to operate the stall. Thus, even if the facts were as the trader believed them to be, he would not have been acting lawfully because, as a matter of law, the officials could not permit him to do so[58].

58 Similarly, in *Power*[59], the Full Court of the Supreme Court of South Australia rejected the defence of mistake of fact where a woman, who had been convicted of the offence of loitering, claimed that she had acted under the authority of the Commonwealth Minister for Aboriginal Affairs. The woman claimed that the conviction should be quashed because she had believed that, on the authority of the Minister, she was entitled to remain where she was. However, the Minister had no authority to permit the defendant to loiter.

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55 Unreported, Full Court of the Supreme Court of Queensland, 1 May 1957, Stanley, Mack and O'Hagan JJ.

56 *Loch* (Unreported, Full Court of the Supreme Court of Queensland, 1 May 1957, Stanley, Mack and O'Hagan JJ) at 2.

57 [1972] 2 QB 426.

58 *Rust* [1972] 2 QB 426 at 434 per Lord Widgery CJ (Shaw and Wien JJ agreeing).

59 (1976) 14 SASR 337.

Bray CJ said that the woman's belief had two parts: (1) that she was acting under the authority of the Minister; and (2) that that authority was lawful. This second belief was a mistake of law, not of fact. Because a vital part of her mistaken belief was a mistake of law, the defence of mistake of fact was not open to her[60].

59 The four cases show that, without more, a mistaken belief that an activity is lawful or authorised will be a mistaken belief as to a matter of law rather than to a matter of fact. Accordingly, the fact that Mr Palmer's mistake was induced by the conduct of an employee of Fisheries WA cannot convert what is a mistake of law into a mistake of fact. Moreover, as Mr Palmer acknowledged, for the purposes of s 24 of the *Criminal Code*, it is irrelevant whether the mistake of law is induced by incorrect information obtained from an official government body or from any other third party or is induced by any other form of mistaken factual understanding. Thus, in any situation where a person's mistaken belief as to the legality of an activity is based on mistaken advice, that person would not have a defence under s 24. To find otherwise would expand the scope of the defence in s 24 to an unacceptable extent. It would also undermine the principle that ignorance of the law is no excuse, a principle expressly provided for in s 22 of the *Criminal Code*.

Order

60 The appeal must be allowed and the conviction reinstated. In accordance with the undertaking given on behalf of Mr Ostrowski, he should pay Mr Palmer's costs for the special leave hearing and for the appeal in this Court.

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60 *Power* (1976) 14 SASR 337 at 345 per Bray CJ.

61 CALLINAN AND HEYDON JJ. The respondent is a professional fisherman. He was induced to fish in forbidden waters by the provision to him of inaccurate or incomplete materials by an official of the State Government department responsible for administering fisheries. The question in the appeal is whether his mistaken belief was as to a state of things or as to a matter of law. As well as raising that question the appeal provides an example of the way in which provisions for mandatory penalties[61] can operate harshly and unfairly, and, as has occurred here, generate time consuming and expensive appellate litigation.

Facts and relevant provisions

62 Regulation 34 of the Fish Resources Management Regulations (WA) ("the Regulations") made under the *Fish Resources Management Act* 1994 (WA) ("the Act") is as follows:

> "**34. Fishing for rock lobster in the waters surrounding Quobba Point**
>
> A person who is the holder of a commercial fishing licence must not fish for rock lobsters at any time in the area described in the Table to this regulation.
>
> Penalty: $5000 and the penalty provided in section 222 of the Act.
>
> **Table**
>
> All that portion of the Indian Ocean bounded by a line starting from a point on the high water mark situate at the southwestern-most extremity of Quobba Point and extending south to south latitude 24° 34'; thence east to a point on the high water mark; and thence generally northwesterly along the high water mark aforesaid to the starting point."

63 The Regulation was made under ss 256, 257(1)(a) and 257(1)(b) of the Act which provide as follows:

> "**256. Regulations – general power**
>
> (1) The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary

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61 Sections 39 and 45 of the *Sentencing Act* 1995 (WA) make provision for the imposition of no sentence and the making of a "spent conviction" order, but no suggestion was made that any provisions other than the *Fish Resources Management Act* 1994 (WA) and Regulations made under it applied here.

or convenient to be prescribed for giving effect to the purposes of this Act.

(2) The regulations may create offences and may provide for a penalty not exceeding $10 000 and a daily penalty not exceeding $100.

257. Regulations – other licences

(1) The regulations may provide for the licensing of –

(a) persons engaged in commercial fishing;

(b) persons engaged in specified activities by way of recreational fishing.

..."

64 Section 222 of the Act provides as follows:

"**222. Additional penalty based on value of fish**

(1) This section applies to an offence against section 43, 46, 47, 50, 51, 74, 77, 82, 86, 88 or 173 or any prescribed provision of the regulations.

(2) If a court convicts a person of an offence to which this section applies the court must, in addition to any general penalty imposed in respect of the offence, impose on the person an additional penalty equal to 10 times the prescribed value of any fish the subject of the offence.

(3) A court may determine the prescribed value of any fish the subject of the offence by reference to either the weight of the fish or the number of fish.

(4) A court is to determine the prescribed value of any fish the subject of the offence –

(a) if the court is determining the value of the fish by reference to the weight of the fish, by multiplying the weight by the value per unit of weight prescribed in respect of fish of that class; and

(b) if the court is determining the value of the fish by reference to the number of fish, by multiplying the number by the value per fish prescribed in respect of fish of that class.

(5) The additional penalty referred to in subsection (2) is irreducible in mitigation despite the provisions of any other Act.

(6) A provision of the regulations may be prescribed for the purposes of subsection (1) by reference to the circumstances in which the offence is committed."

65 At all material times the respondent was the lessee of a commercial fishing licence pursuant to which he fished for rock lobsters. The licence permitted him to fish in particular for western rock lobsters in a "managed fishery" with 87 pots in zone B of the western rock lobster fishery ("Zone B").

66 On or about 11 November 1998 the respondent visited the Fremantle office of the relevant State Government department, Fisheries Western Australia ("Fisheries WA"), to obtain the relevant regulations for Zone B. He was told by an unidentified official that "a copy of the current regulations to cover the 98/99 fishing season for lobsters" was not available, but that if he were to return on 13 November 1998, "they would have them available".

67 Two days later, the respondent returned to the office of Fisheries WA, Fremantle, where an "office lady" at the public counter told him that the office "still did not have the regulations on hand". She volunteered however to photocopy "the copy that they had themselves". The appellant accepted that the inference that the regulations to which the woman was referring were complete was available. We interpolate that on the uncontradicted account of the respondent, the inference was irresistible.

68 In consequence, the respondent was given a photocopy of the "West Coast Rock Lobster Limited Entry Fishery Notice 1993" made under s 32 of the *Fisheries Act* 1905 (WA) ("the Management Plan") and a bundle of notices given pursuant to the *Fisheries Act* or the Act. Neither the Management Plan nor the bundle of notices made any reference to the Regulation. At the same time the respondent was told that "if [he] required any further information [he should] take one of the pamphlets" which were on a rack in the public reception area of the Fremantle office of Fisheries WA. Accordingly, the respondent took a copy of a pamphlet entitled "Fishing for Rock Lobsters" for the 1998/99 rock lobster season issued by Fisheries WA. The pamphlet in question related to recreational fishing. It stated that the waters mentioned in the Management Plan "[were] not specifically set out in these pamphlets". It is common ground that the respondent did not inform the staff that he was the holder of a commercial fishing licence. Subsequently, it was clear that the person to whom the respondent spoke should, or would have been aware that he was a commercial fisherman because he ordered a commercial research log book at the same time.

69 Between 5 and 10 February 1999, the respondent fished with 54 rock lobster pots within the waters described in the table to the Regulations. There is no doubt that the respondent knew the location of each of the 54 rock lobster pots. He also truly believed, it is not suggested to the contrary, that his licence permitted him to fish in the waters in which he was fishing. The respondent was observed checking and resetting the rock lobster pots by fisheries officers. They made no attempt to rebuke or stop him from continuing to fish. There is no suggestion that the respondent sought to conceal his activities in any way or that he was doing otherwise than attempting to earn a living in a responsible and lawful manner.

70 The respondent was charged with a breach of r 34 of the Regulations. The respondent was tried by a magistrate at Carnarvon. In the course of the proceedings the appellant proved the relevant regulation and the table. This was done in accordance with the Western Australian practice, the necessity for which at common law was explained by Roberts-Smith J (Wallwork J and Pidgeon AUJ agreeing) in *Norton v The Queen*[62]. Extraordinarily, and after the uncontested facts to which we have referred emerged, the appellant pressed the prosecution. To do so in those, and the further circumstances that a conviction would result not only in the distress and opprobrium that any conviction carries, but also in the imposition of harsh mandatory penalties, has the appearance of an act of mindless oppression. The magistrate found that the respondent:

> "did not direct his mind to that Regulation because he did not know anything about it ... that means there is no evidence before the court about a reasonable belief as to the operation of Regulation 34. If follows ... that section 24 does not arise, the honesty and reasonableness of the [respondent's] belief are not such as required to be negatived by the prosecution.
>
> Section 22 operates ignorance of the law is no excuse."

71 In convicting the respondent, the magistrate also observed that:

> "the [respondent] has acted entirely honestly and in my view, reasonably throughout".

72 In consequence of the conviction the magistrate was obliged to impose a mandatory penalty of $27,600 pursuant to s 222 of the Act and in addition ordered that the respondent pay a fine of $500 and costs of $2000.

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62 (2001) 24 WAR 488 at 520-521 [162]-[163].

The appeal to the Full Court

73 The respondent sought, and was given leave to appeal to the Full Court of the Supreme Court of Western Australia from the whole of the decision of the magistrate.

74 On the hearing of the appeal, the respondent applied for leave to raise an additional ground, that, if his mistake was one of law, he should still have been acquitted on the basis that the mistake was induced by an official agency of the State of Western Australia (Fisheries WA) responsible for the administration of the regulation said to have been contravened by the respondent. In presenting this argument the respondent relied upon a proposition which he contended had emerged from a series of recent Canadian cases[63]. Olsson AUJ in the Full Court was of the opinion that it could not be concluded that any principle to that effect had been unequivocally accepted in Canada[64]: in any event, his Honour said the case was not an appropriate one for the consideration of it[65].

75 The respondent's appeal to the Full Court (Malcolm CJ and Olsson AUJ, Steytler J dissenting) succeeded. The leading judgment (with which in substance Malcolm CJ agreed) was given by Olsson AUJ. His Honour stated his reasons in this way[66]:

> "With all due respect, it seems to me that, in the instant case, the learned magistrate has overlooked what was a fundamentally important facet of the pertinent circumstances.
>
> ...
>
> On the evidence which the learned magistrate plainly accepted, the appellant expressly went to a major office of Fisheries WA (as the proper regulatory authority) to procure from it a copy of the applicable Regulations, so that he could, inter alia, inform himself of what were, and were not, permissible fishing areas within zone B. That was, undoubtedly his express purpose, which he communicated to the relevant officer at the time.

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63 See *R v Jorgensen* [1995] 4 SCR 55 at 68-77.

64 *Palmer v Ostrowski* (2002) 26 WAR 289 at 303 [93].

65 *Palmer v Ostrowski* (2002) 26 WAR 289 at 304 [98].

66 *Palmer v Ostrowski* (2002) 26 WAR 289 at 301-302 [67]-[78].

In response to that request officers of Fisheries WA ultimately gave him what they represented was a complete set of the relevant Fishery Notices, amended up to date. That representation was false, no doubt unwittingly. The appellant quite reasonably and accurately interpreted the material given to him as indicating that there was no gazetted restriction on fishing in the area in which he in fact worked at the time of the alleged offence.

The belief arrived at by the appellant was the direct product of a mistake of fact engendered by the incorrect representations made to him, namely that the documentation supplied was complete and accurate. It was not. Hence his mistaken belief.

In those circumstances the matter before the learned magistrate was, in my opinion, a classic illustration of a proper s 24 defence. The appellant had put forward evidence of an honest and reasonable, but mistaken, belief in the existence of a state of things by reason of which he acted as he did. Unlike the situation in *Pennings*[67], he did apply his mind to the critical issue and his belief was the product of a mistake of fact induced by the actions of Fisheries WA. The statements made to him concerning the documentation supplied were positively misleading as to a vital factual state of affairs – whether they contained all applicable materials upon which he could determine his licence rights. Patently (and I may say inexcusably) they did not.

Counsel for the respondent strongly contended, inter alia, that such a conclusion was the product of an erroneous characterisation of what had actually occurred. He submitted that, however such a situation came about, the conclusion of the appellant as to his right to fish in what proved to be closed waters was 'a belief as to the operation of the Regulations on his entitlement as a commercial fisherman to fish in particular waters'; and was thus a mistake of law. Accordingly, s 24 had no operation.

In my view this contention cannot be upheld.

On the evidence as accepted by the learned magistrate this was neither a case of mere ignorance of reg 34 nor of a mere faulty interpretation of such a regulation actually known to the appellant. Here the precipitating event which ultimately led to the commission of the proscribed act was the provision to him of the incorrect documentary information which induced the error made. The effect of the provision to

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67 *Penning v Williams* unreported, Supreme Court of Western Australia, 13 September 1996.

the appellant of the documentation omitting reg 34 (or even any reference to it) amounted to a factual representation that there was no relevant regulation bearing on the closure of the waters proposed to be fished by him. This, in turn, gave rise to a positive belief on the part of the appellant that he was entitled to drop his pots in the relevant area.

In the broadest sense, a mistake of fact to which s 24 attaches will almost inevitably also involve a mistake of law. In the instant case a conclusion that the appellant was entitled to fish where he did was no doubt a belief as to a question of law. However, that conclusion cannot logically be disassociated from the factual events which gave rise to it and, in any event, a clear distinction needs to be made between the interpretation of a document on the one hand and the fact of its existence on the other: cf *Iannella v French*[68], *London Street Tramways Co Ltd v London County Council*[69].

I consider that the correct principle to be applied in a case such as this is best summarised by the dictum of Smart J in *Griffin v Marsh*[70] in these terms:

> 'If any ultimate conclusion reached by an accused, including a conclusion of law, is vitiated or flawed by an earlier mistaken but honest and reasonable belief as to a relevant and important fact, usually the mistake should be regarded as one of fact.'"

The appeal to this Court

76 Before dealing with the submissions of the parties it is appropriate to point out that the appellant appears now to have accepted that this was really a case for the exercise of a prosecutorial discretion not to prosecute because he has given this undertaking to the Court:

> "Instructions have been sought and obtained from the Attorney General of Western Australia that in the event the Magistrate's decision is reinstated and the conviction entered, the Executive Council will advise the Governor to remit the general penalty, the mandatory penalty and the order for costs. This undertaking, together with the agreement reached between the Appellant and the Respondent that the Respondent's costs of

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68 (1968) 119 CLR 84 at 96-97.

69 [1898] AC 375 at 380-381.

70 (1994) 34 NSWLR 104 at 118.

the appeal and special leave application be paid, cure any perceived injustice to the Respondent."

77 The undertaking, unfortunately, does not completely "cure … injustice" to the respondent. The allowing of the present appeal would lead to the reinstatement of the conviction. Under s 224(2) of the Act, if three or more convictions are recorded in respect of a licence in any ten year period, the licence must be cancelled. Hence the present conviction will remain operative for s 224(2) purposes, and nothing in the undertaking overcomes the result.

78 The appellant submitted in this Court that Olsson AUJ overstated the magistrate's findings in favour of the respondent with respect to the respondent's belief as to the completeness of the material made available to him, and the role of departmental officers in making it available. It is unnecessary to express an opinion about that because the appellant accepts that a fair description of the respondent's state of mind was that he left the Fisheries WA office believing that he had a complete set of the Regulations. As reg 34 was not reproduced in the Management Plan or the pamphlet that he was given, the respondent was unaware that fishing in the relevant area was prohibited by law.

79 The appellant's submission adopted the reasons of Steytler J in dissent in the Full Court. The essential difference between his Honour and the majority was in the characterization of the relevant mistake, which the former considered to be a mistake of law. Before we discuss that difference we should set out the relevant provisions of the *Criminal Code* of Western Australia:

"**Ignorance of law: *Bona fide* claim of right**

22. Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by an offender is expressly declared to be an element of the offence.

But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.

...

Mistake of fact[71]

24. A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

80 Section 36 of the Code makes the provisions with respect to criminal responsibility applicable to all offences:

"**Application of Chapter V**

36. The provisions of this chapter apply to all persons charged with any offence against the statute law of Western Australia."

81 Steytler J characterized the respondent's mistake as one of law in this way[72]:

"The appellant, in my respectful opinion, made no mistake of fact in respect of any element of the offence with which he was charged. He knew that he was fishing for lobster. He knew where he was fishing for lobster. This is not a case in which he believed that he was somewhere other than the place where he in fact was or in which he believed that he was fishing for something other than what in fact he was fishing for and hence that his conduct in fishing at that place was lawful. Rather, the only mistake that he made was to believe that it was lawful for him to fish for lobster in the place in which he was in fact fishing. That, in my opinion, was a mistake of law."

82 Section 24 of the Code upon which the respondent relies refers to a mistaken belief in the existence of any state of "*things*". The use of the word "things" is significant. It implies a concept somewhat wider and different from a mere mistaken belief of a fact or a fact exclusively. Otherwise, it may be asked, why was the word "facts" rather than "things" not used? An orthodox approach to statutory interpretation by a reader unaware of the history of the Code and Ch V might well be inclined to regard "things" as embracing every imaginable

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71 Section 32(2) of the *Interpretation Act* 1984 (WA) provides that section headings are not to be taken to be part of the Act.

72 *Palmer v Ostrowski* (2002) 26 WAR 289 at 295 [22].

state of affairs, as to law or fact, and both of them, whether intermixed or quite distinct. A view not inconsistent with such a construction has some support from the dissenting judgment of Isaacs and Powers JJ in this Court in *Duncan v Theodore*[73] and in the opinion of the Privy Council on appeal[74] from it to which we will make reference again later. The provision has of course to be read and given meaning in context and subject to reduction or refinement to the extent that the Code otherwise states. The Code does however so state, in what might be thought to be explicit terms, by excluding, by s 22, ignorance of "the law".

83 The history of the two sections was considered and summarized by Steytler J in the Full Court[75]:

> "As Brennan J (as he then was) has pointed out in *He Kaw Teh v The Queen*[76], provisions of this kind, when first drafted in this form (and the first draft of its kind was done by Sir Samuel Griffith), were intended to reflect the common law (see also the comments of Dixon J in *Thomas v The King*[77]). As Brennan J also pointed out, in earlier times criminal responsibility was imposed upon or imputed to an accused upon proof of the external elements of an offence alone[78] and hence an honest and reasonable but mistaken belief in a state of facts which would make the supposed offender's act innocent was treated as an excuse or a true exception to criminal responsibility. Brennan J points out (*He Kaw Teh*[79]) that the origin of that state of mind as an exception is reflected in the exculpatory form in which it appears in the *Criminal Codes* (including that in this State) which have adopted Sir Samuel Griffith's draft, although the prosecution bears the ultimate onus of negativing the defence: see *Woolmington v Director of Public Prosecutions*[80]; *He Kaw Teh*."

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73 (1917) 23 CLR 510.

74 *Theodore and Beal v Duncan* (1919) 26 CLR 276; [1919] AC 696.

75 *Palmer v Ostrowski* (2002) 26 WAR 289 at 293 [13].

76 (1985) 157 CLR 523 at 572-573.

77 (1937) 59 CLR 279 at 306.

78 Turner, *Russell on Crime*, 12th ed (1964), vol 1 at 33-34.

79 (1987) 157 CLR 523 at 573.

80 [1935] AC 462.

84 It is impossible not to sympathize with the respondent. On any fair and objective view he was not culpable in any way. To the contrary he was most diligent. He went to the office of the administering authority twice in order to ascertain what his obligations were. Entirely openly and strictly in accordance with his licence he sought to comply with his understanding of what he could do based on official information personally provided by officials.

85 Be that as it may, it is the task of this Court to apply the law by answering the question whether the respondent should be regarded merely as having been ignorant of the law, an excuse which s 22 of the Code would deny him, or whether he had an honest and reasonable, but mistaken, belief in the existence of a state of things which if they had in fact existed would have meant that he was not criminally responsible. The question is an important one. A mockery would be made of the criminal law if accused persons could rely on, for example, erroneous legal advice, or their own often self-serving understanding of the law as an excuse for breaking it, however relevant such matters might be to penalty when a discretion, unlike here, in relation to it may be exercised.

86 The evidence and the findings as to the respondent's honesty and reasonableness are one way and need no further reference. What then were the mistaken "things" which he honestly and reasonably believed to exist? Olsson AUJ described them as the completeness of the "applicable materials upon which [the respondent] could determine his licence rights"[81]. We do not disagree with that description so far as it goes but do not think that it is a complete one. It is also another matter whether the things to which his Honour referred formed part of or constituted the relevant operative mistake.

87 The respondent submits that the matter or matters of which he was unaware were of mixed fact and law. Dixon J in *Thomas v The King*[82] acknowledged the possibility in an appropriate case of a compound of law and fact. He said:

> "But, in any case, in the distinction between mistakes of fact and of law, a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not a mistake of law. This is brought out by an apposite passage in the judgment of Jessel MR in *Eaglesfield v Marquis of Londonderry*[83]:– 'A misrepresentation of law is this: when

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81 (2002) 26 WAR 289 at 301 [73].

82 (1937) 59 CLR 279 at 306.

83 (1876) 4 Ch D 693 at 702.

> you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, there is still a statement of fact and not a statement of law.'"

88 Isaacs and Powers JJ were in dissent in *Duncan v Theodore* in which understandings or beliefs as to relevant matters were discussed. They said there of a provision[84] in the *Sugar Acquisition Act* 1915 (Q)[85]:

> "*Maxwell on Statutes* refers to this class of enactment as one where the words 'under' and 'by virtue of' and 'in pursuance of' do not mean what the words in their plain and unequivocal sense convey, and that they must be modified to carry out the object of the enactment. Belief of the defendant is required, the learned author says, 'in the existence of such (1) *facts*, or (2) *state of things* as would, if really existing, have justified his conduct.' (We have numbered and italicized the two expressions 'facts' and 'state of things.') It will be seen that 'state of things' includes the existence of a law or a valid regulation under a law." (footnote omitted)

89 *Duncan v Theodore* subsequently went on appeal to the Privy Council[86] where it was held that the relevant proclamation had been validly made with the result that it was not necessary for their Lordships to consider the effect of the protective provision. In the course of their opinion, their Lordships said however that they were "in agreement with the view of the Act taken as the conclusion of the powerful reasoning of *Isaacs* and *Powers* JJ."[87] The case is distinguishable. It was a civil case and was concerned with one provision in an enactment and not the relationship between two provisions in a criminal code based on the common law at the time of its composition.

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84 Section 7 of the *Sugar Acquisition Act* 1915 (Q) relevantly provided:

> "No action ... shall lie ... against His Majesty or the Treasurer, or any officer or person acting in the execution of the Proclamation hereby ratified ... or any other Proclamation made under this Act, or of this Act, for or in respect of any damage ... alleged to be sustained by reason of the making of the said or any such Proclamation or the passing of this Act, or of the operation thereof, or of anything done or purporting to be done thereunder, save only for or in respect of the value ... of any raw sugar (or other commodity) acquired by His Majesty."

85 (1917) 23 CLR 510 at 536.

86 *Theodore and Beal v Duncan* (1919) 26 CLR 276; [1919] AC 696.

87 *Theodore and Beal v Duncan* (1919) 26 CLR 276 at 283; [1919] AC 696 at 707.

90 The difficulty for the respondent is that there were here a series of mistakes, the one to which Olsson AUJ referred, the actual decision to rely on the information with which he had been provided, and the actual reliance, by fishing in the embargoed waters. The last is a different mistake from, for example, a mistake as to the location of his vessel or his lobster pots. The last, it can be seen, is discrete in time, place and physical activity from the other two, although but for them it is unlikely that it would have been made. The offence of which the respondent was convicted was not of failing to obtain, or hold and rely on complete and accurate materials, but of fishing where professional fishing was impermissible. The elements of the offence consisted of fishing in the embargoed waters, an activity which the respondent knew to be proscribed. Unfortunately, in the circumstances he could be no less guilty than a motorist who has done everything reasonably possible to ascertain the speed limits on a stretch of roadway along which he is to travel but having failed to do so, in one or more instances, exceeds those limits because he was unaware of them.

91 During the course of the appeal the appellant objected to any reliance by the respondent on the ground of defence which the Full Court did not need to determine, that is, a defence of official inducement to act, because evidence relevant to it might have been adduced at trial had it been raised there. The objection was upheld and accordingly needs no further reference.

92 We regret to say that for the reasons which we have given the appeal must be upheld. The judgment of the Full Court of the Supreme Court of Western Australia should be set aside and the conviction reinstated. The order for costs in favour of the respondent in the Full Court should stand. The appellant should pay the respondent's costs of the application for special leave and the costs of the appeal as agreed by the appellant.