FISHERIES MANAGEMENT ACT 1991: ARE ITQS PROPERTY?

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INTRODUCTION

In 1989 the Commonwealth Government released a policy statement entitled "New Directions in Commonwealth Fisheries Management". Its aim was to establish a regulatory framework which would encourage the biologically sustainable exploitation of Australia's fisheries while increasing economic efficiency in the industry and facilitating the introduction of a resource rent. Heeding economists' arguments that the introduction of greater property rights for individual fishermen would meet these ends,[1] the policy statement identified as central to its proposed reforms the introduction of Individual Transferable Quotas (ITQs). Most Australian fisheries achieve restrictions on catch by limiting the size and fishing capacity — that is, the efficiency — of boats in a fishery. Alternatively, they limit fishing hours, thus encouraging over-development of fishing capacity by fishermen seeking maximum catches in the available time.[2] ITQs, by comparison, grant to their owners the right to take a specified quantity of fish, at any time and with the most suitable equipment, thus avoiding wasteful use of costly fishing gear. Being a direct measure of productivity, they also lend themselves to the collection of a resource rent. ITQs also allow the manager of a fishery to control fish numbers by adjusting the size of each ITQ in order to reflect a biologically desirable

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1 J A Crutchfield and A Zellner, *Economic Aspects of the Pacific Halibut Fishery*, US Department of the Interior (1963); T F Meany, "The Nature and Adequacy of Property Rights in Australian Fisheries" in N H Sturgess and T F Meany (eds), *Policy and Practice in Fisheries Management* (1982); A Scott, "Catch Quotas and Shares in the Fishstock as Property Rights" in E Miles, R Peally and R Stokes (eds), *Natural Resources Economics and Policy Applications* (1986); A Scott, "The Evolution of Individual Transferable Quotas as a Distinct Class of Private Property Right" in H Campbell, K Menz and G Waugh (eds), *Economics of Fishery Management* (1989); J Crutchfield, "Fisheries Management: A Time for Change", in T J A Hundloe (ed), *Fisheries Management: Theory and Practice in Queensland* (1986); D G Moloney and P H Pearse, "Quantitative Rights as an Instrument for Regulating Commercial Fisheries" (1979) 36 *J of the Fisheries Research Board of Canada* 859.

2 An ITQ regime came into operation in the South-East Trawl fishery on 1 January 1992 and in the Southern Bluefish Tuna (SBT) fishery in 1984, and there have been recommendations that other major fisheries such as the Northern Prawn fishery follow suit: M France, "ITQs may be good in theory but can they work in practice?" *Australian Fisheries* (August 1991) 14. Otherwise Australian fisheries are regulated by restrictions on fishing capacity and fishing time.

Total Annual Catch.[3] It is for these reasons that ITQs offer significant advantages for the management of most mobile species.[4] They have operated since 1984 in the Southern Bluefin Tuna fishery and are used in a number of fisheries overseas.[5]

To realise their potential for increased productivity, economists argue that ITQs require a range of characteristics which they describe as property rights. They need to be transferable, exclusive and receptive to market forces; and fishermen must be able to deal with them flexibly, by leasing them and borrowing against them. Fishermen must be confident that their right to a catch is a permanent and bankable right. The Government was happy to recommend the implementation of such rights, but not to use the economists' language. Its policy statement completely avoided the term "property".[6] It has subsequently enacted the Fisheries Management Act 1991 (Cth), to replace the Fisheries Act 1952 (Cth) with a more flexible statutory framework. There is no mention of "property" here either. What under the 1952 Act were called licences and what the policy statement called "ITQs" are both now entitled "statutory fishing rights".

For the Government, "property" is the danger word. If rights to fish in Commonwealth fisheries are "property", then revocation, or even variation, might require compensation on just terms under s 51(31) of the Constitution. A more efficient fishery is one with fewer fishermen, so the stakes are high. If fishermen's numbers are reduced and their rights are not regarded as "property", their heavy capital investment, combined with a stagnant market in used boats and gear, would expose them to the risk of bankruptcy and exclusion from a way of life. For Government, if licences are compensable, the cost of large-scale fishery re-structuring could be prohibitive. When the issue flared temporarily in relation to the Northern Prawn Fishery in 1987, the Senate debate was heated. The Government, proposing uncompensated cancellation of old-style licences, was accused of compulsory acquisition of property.[7] The proposed legislation was amended and the issue avoided.

My focus will not be on the Northern Prawn Fishery, but on ITQs (described as "statutory fishing rights" in the Fisheries Management Act 1991). Most of the issues and arguments discussed in this article will be directly applicable to other fishing rights held under different legislation and different regulations around Australia. That there

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3 ITQs, although an improvement on previous management regimes, are not a perfect system for protecting fish numbers. The major problems are unrecorded catch, under-reporting of catch and the dumping of ancillary species caught in a net and of low grade fish: Department of Primary Industries and Energy, *Longterm Management in the South East Trawl Fishery: Information Paper No 4* (1991); L Wilson, "ITQs are not TACs" *Australian Fisheries* (September 1991) 2; P Copes, "A Critical Review of the Individual Quota as a Device in Fisheries Management" (1986) 62 *Land Economics* 278.

4 ITQs may not be best for sessile fish species, for which other farming methods might be used, or for high fecundity species, which might afford to be fished more thoroughly.

5 North American fisheries have been at the forefront of ITQ innovation. For claims as to its success in those fisheries, see L Wilson, "ITQs around the World" *Australian Fisheries* (October 1991) 15.

6 "Property" is mentioned only in Chapter 11, in a discussion of the weaknesses of a different, pure property-rights system unregulated by government.

7 Senate debates about Northern Prawn Fishery Plan of Management No 12: Sen Deb 1987, Vol 127 at 2261.

exists an array of such rights is an indictment of the federal system.[8] However, Constitutional issues in fisheries have been discussed elsewhere[9] and litigated at the highest level.[10] In contrast, property issues have largely been ignored by legal writers in Australia.[11] That is despite the fact that these issues are at the forefront of fisheries economics, politics and administration.

HISTORIC DEVELOPMENT OF FISHING RIGHTS

The development of ITQs, and the law's attitude to fishing interests, should be seen in the context of the development of fishing rights. Historically courts have played a negligible role in salt-water fishing. From King John's agreement in Magna Carta not to allow weirs to obstruct inshore tidal fisheries, there developed the "public right of fishing" in tidal waters. In the absence of private rights, there were no disputes over infringement, and hence no refinement of rights at common law.

Neither, until recently, had legislation led to a development of ocean fishery rights. The absence of a persuasive fishing lobby may also be traced to Magna Carta's common right of fishing, for the effect of such a right is to encourage competition for a finite stock. When there is competition for the same stock, the form of regulation is critical; a control directed at a particular type of gear might have little effect on one fisherman, but render another's equipment entirely useless. Industry agreement on appropriate forms of regulation can thus be elusive. Fishermen also tend to operate from different ports, in different grounds, for different fish and at different times. The comparison with farmers is illuminating; their lobby has represented common regional interests and has sought to avoid destructive competition. Fishermen, by contrast, have had little perception of a common interest and, historically, have not been a unified political group. This is not an English or Australian phenomenon but a world-wide trend to which Alaska and Iceland are exceptions.[12] As a result, legislators had been willing — and able — to keep their distance from fisheries.

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8 Fishermen may be required to hold two different licences for the same fishery. Under the new legislation, moreover, they may hold one new Commonwealth transferable, revocable licence in perpetuity and an annual, old-style, boat-specific licence from the State. Even in the same scheme, it may be necessary to differentiate between a licence, an endorsement, a quota or a unit. Indeed it is a fundamental weakness that a fisherman may require two very different licences in the same fishery for catching the same fish. There are also jurisdictional problems with migratory and mobile species. See generally, J Waugh, *Australian Fisheries Law* (1988).

9 Ibid; E Campbell, "Regulation of Australian Coastal Fisheries" (1960) 1 *Tas L Rev* 405.

10 *New South Wales v The Commonwealth* (the *Seas and Submerged Lands Act* case) (1975) 135 CLR 337; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340; *Bonser v La Macchia* (1969) 122 CLR 177; *Attorney-General (British Columbia) v Attorney-General (Canada)* [1914] AC 53; *Attorney-General (Canada) v Attorney-General (Quebec)* [1921] 1 A.C. 413.

11 T F Meany, above n 1.

12 A Scott (1986), above n 1 at 63-65. ITQs are themselves evidence of this politically divisive effect. They disadvantage small fishermen, who are unable to increase quotas in the marketplace, and are locked into diminished returns if the Total Annual Catch, of which each ITQ represents a percentage portion, decreases. Although the "industry" has

The effects of regarding fisheries as common property have not been confined to law and politics: they have been just as disastrous in terms of fish biology and economics. Resource deterioration has been chronicled in all common property situations. The day-to-day race for stock means that no time is reserved for husbandry or stock improvement. Profit re-investment is limited to better harvest equipment, which in turn is over-capitalised and does not attract an economic return. The common property nature of the tidal fishery, even when licensed restrictively to abrogate the public right, has doomed it to biological deterioration and economic waste. The effect was, eventually, to provoke the legislature to take an active role in fisheries management by passing legislation which would support a more mature management system than one of simple, destructive, input licensing. In broad terms, the aim of ITQs is to minimise the common property nature of the fishery, by attempting to create a private property right, albeit one which fixes upon a specific fish only upon its capture. In this sense, ITQs are the first scheme since Magna Carta fundamentally to reappraise the concept of rights to fish offshore.

Magna Carta, however, only regulated fishing in tidal waters. The common law did have the chance to develop fishing rights in private waters. But even here, it did not develop efficient fishery-specific property rights. Fishing interests were analysed in terms of interests in land. Rights to the swimming fish passed with land and were "an incident of the ownership of the soil."[13] It was possible for the owner of the underlying soil to create a fishery as a hereditament separate from the soil,[14] either as a several fishery (an exclusive right to fish) or as a common of piscary (a right in common with others, but to the exclusion of the public). Even such a right was but a form of a *profit à prendre*,[15] which is an interest in land. In *Wickham v Hawker*, for example, the grantee was given the right to "hawk, hunt, fish and fowl"[16] on the property, and the grant was analysed as one.

In a land-centred social and economic environment it is not surprising that law-makers, largely land-owners themselves, saw nothing unusual in analysing a right to fish as an interest in land. But legal rights developed in such a different environment have not provided an adequate basis on which to build a modern regulatory system for large-scale offshore fishing.

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supported the programme in the Southern Bluefin Tuna fishery, ITQs have provoked widespread antagonism among New South Wales SBT fishermen: B Stanard, "Our Fish are going off" *Bulletin* June 25 1991 at 100.

13 *Halsbury's Laws of England* (4th ed) Vol 18, para [616].

14 *Seymour v Courtenay* (1771) 5 Burr 2814; 98 ER 478; *Lord Fitzwalter's* case (1674) Mod 105; 86 ER 767.

15 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 335.

16 (1840) 7 M & W 63; 151 ER 679; for similar terms in a grant see *Ewart v Graham* (1859) 7 HLC 331; 11 ER 132.

PROPERTY

Introduction

"Property" is a chameleon term. It has even been described as having no definite or stable connotation.[17] On one hand is the view of economists who apply notions of property to fisheries and advocate the potential for dramatically increased and sustained productivity. On the other is the approach of lawyers who are capable of producing a distinction between a negative covenant, which the law might call proprietary,[18] and a positive covenant, which it will not.[19]

Use of the concept of property is not limited to economists,[20] but has extended to social[21] and political[22] theorists, and to historians. Industrial England required a system of property rights which facilitated the mobilisation of assets for the production of substantial goods and the accumulation of capital. "Property" emphasised exclusivity, transferability and absolute ownership; it came to refer to things rather than rights over things. But in this century the New Property theorists have advocated that government benefits ranging from welfare to occupational licences[23] should be proprietary. They have emphasised property rights as relationships between people rather than things.[24] MacPherson, for example, sees the right to participate in the economic life of the community as a property right.[25] These arguments directly affect any attempt to categorise fishing rights, which, through regulating the relationship between fishermen, seek to apportion a finite resource in the most economically efficient way.

One practical effect of these changing perceptions of property has been a gradual erosion by the legislature of private property rights in natural resources. A growing community expectation that resources should be exploited in the best interests of the community has been reflected in the increasingly tight restrictions placed on both urban and rural land ownership[26] and in the legislative reservation to the Crown of

17 J M Cormack, "Legal Cases in Concepts of Eminent Domain" (1931–2) 41 *Yale LJ* 221 at 221–223.

18 *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143.

19 Except in very constricted circumstances: *Halsall v Brizell* [1957] Ch 169.

20 J H Dales, *Pollution, Property and Prices* (1968); H S Gordon, "The Economic Theory of a Common Property Resource: The Fishery" (1954) 62 *J Political Economy* 124; R H Posner, *Economic Analysis of Law* (2nd ed 1977).

21 C Reich, "The New Property" (1964) 73 *Yale LJ* 733.

22 For the relevance of property concepts to Marxist interpretations, see, eg, O Kahn-Freund, "Introduction" to K Renner, *The Institutions of Private Law and their Social Functions* (1949); W Friedmann, *Legal Theory* (5th ed 1967) at 367–371 and 405–407.

23 C Reich, above n 21.

24 F Cohen, "Dialogue on Private Property" (1954) 9 *Rutgers L Rev* 357.

25 C B MacPherson, "Capitalism and the Changing Concept of Property" in E Kamenka and R S Neale (eds), *Feudalism, Capitalism and Beyond* (1975).

26 Rural Australia has been particularly slow to give in; see generally J R Bradsen, *Soil Conservation Legislation in Australia* (1988) (National Soil Conservation Programme Report). But as evidence of greater regulatory involvement, see the South Australian vegetation clearance controls: R J Fowler, "Vegetation Clearance Controls in South Australia – A Change of Course" (1986) 3 *Environment and Planning LJ* 48 and recent regulatory amendments to the Planning and Environment Act 1987 (Vic). Bradsen has argued that the

underground mineral[27] and petroleum resources. In the area of fisheries, it has been reflected in the introduction of a resource rent and in the new-found concern for long-term sustainability.

The response of Australian courts to changing concepts of property has been more cautious than that of the legislature. They have, on the whole, been slow to recognise new categories of proprietary interest. In *Victoria Park Racing and Recreation Grounds Ltd v Taylor*,[28] the High Court, unlike American courts,[29] declined to recognise "a quasi-property in the spectacle"[30] of a horse-race or in the business of horse-racing. Nor has Australian law recognised a proprietary right in order to protect business from unfair competition — unlike the House of Lords, which has been prepared to "interfer[e] to protect rights of property"[31] through its passing off action.[32] Also, unlike the House of Lords,[33] the High Court has recoiled from attributing to the contractual licence the proprietary attributes of irrevocability[34] and of enforceability against third parties.[35] It is not surprising that the law has been slow to declare particular interests to be proprietary; complex benefits and obligations attach to property interests, with significant ramifications in bankruptcy, tax and other contexts. The term "property" is used to define rights and duties under Acts as varied as the Constitution itself, the Judiciary Act 1903 (Cth), the Stamp Act 1958 (Vic) and the Stamp Duties Act 1920 (NSW).

At the same time, however, courts have developed significant flexibility below the level of the established categories of common law proprietary interests. When the word "property" has arisen in the context of a particular statute or rule of law, courts have tended to interpret it widely:

> "Property" is not a term of art, but takes its meaning from its context and from its collocation in the document or Act of parliament in which it is found.[36]

Courts have thus admitted into the operation of particular statutes or rules interests not otherwise regarded as strictly proprietary. It becomes possible for a judge to say that "'property' embraces every possible interest recognised by law which a person can have in anything and includes practically all valuable rights."[37] Again, fishing is an example.

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solution to increasing land degradation may lie in increased community involvement in private use of farming land.

27 For example Mining Act 1971 (SA); Coal Acquisition Act 1981 (NSW).

28 (1937) 58 CLR 479.

29 *International News Service v Associated Press* 248 US 215 (1918).

30 (1937) 58 CLR 479 at 496 per Latham CJ.

31 *J Bollinger v Costa Brava Wines Co Ltd* [1960] Ch 262 at 275 per Danckwerts J.

32 *Bollinger* was specifically approved by the House of Lords in *Erven Warmink BV v J Townerd & Sons (Hull) Ltd* [1979] AC 731.

33 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233.

34 *Cowell v The Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, although see *Heidke v Sydney City Council* (1952) 52 SR(NSW) 143.

35 *Errington v Errington* [1952] 1 KB 290; *Binion v Evans* [1972] Ch 359.

36 *Kirby v Thorn EMI Pty Ltd* [1988] 1 WLR 452 per Nicholls LJ.

37 *Dorman v Rogers* (1982) 148 CLR 365 at 372-373 per Murphy J.

Two courts have recently held that fishing licences are "property" in the context of particular Acts.[38]

There is a third line of cases that walk a middle path, treating property as "a bundle of rights".[39] On this approach, discussed below, courts have returned to the fundamental characteristics of property and compared them to the bundle of rights in question. Courts in these cases have not considered the recognition of a new proprietary interest equivalent to a lease or a *profit à prendre*. But nor have their analyses really been limited to the particular Act or rule of law under which the question has arisen. Take, for example, the High Court's decision in *R v Toohey; ex parte Meneling Station Pty Ltd*[40] on the interpretation of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). If the High Court had held that the grazing licence in question had possessed the fundamental characteristics of a property right, it is hard to see how it could hold that the same licence, possessing the same fundamental characteristics, was not also property for the purposes of a Stamp Act, the Judiciary Act or the Constitution. Interestingly, on occasions where courts have taken a fundamental characteristics approach, such as in *Toohey* and in *Millirpum v Nabalco Pty Ltd and the Commonwealth*,[41] they have denied the existence of a property interest — perhaps because of the far-reaching ramifications that such a decision might have.

In order, then, to bring an ITQ within the legal concept of property, fishermen could take one of two broad approaches. They could argue by analogy that in substance they possess a common law proprietary interest in land, a *profit à prendre*. Alternatively, they could argue that although their interest confers no interest in land, as such, it does by its own characteristics fulfil the requirements of property. They might argue this in one of two ways. They could encourage a court to hold that a licence is property because it possesses sufficient of the fundamental characteristics of a property right. Such a judgment might form a precedent in areas of law wider than the particular statute. Or, finally, fishermen might merely argue that, under the interpretation of property that has prevailed in the particular area in which the issue arises, the licence is indeed property. I will later discuss whether an ITQ is "property" within the meaning of s 51(31) of the Constitution.

FISHERIES MANAGEMENT ACT 1991

Before assessing whether ITQs fulfil the requirements of any of the above approaches, we must first clarify the exact terms on which an ITQ will be held by fishermen and then examine the State Supreme Court cases in which fishing interests, held on different terms, have been considered.

38 *Pennington v McGovern* (1987) 45 SASR 27; *Austell Pty Ltd v Commissioner of State Taxation* 89 ATC 4905.

39 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285 per Rich J.

40 (1982) 158 CLR 327.

41 (1971) 17 FLR 141 at 272.

The Act

An initial problem is that no finalised management plans have as yet been implemented under the Fisheries Management Act 1991 (the Act).[42] The only major fishery in Australia to be regulated by ITQs over a medium-long term is the Southern Bluefin Tuna (SBT) fishery. The ITQ system was implemented in the SBT by using the old inflexible system of licences and endorsements which existed under the Fisheries Act 1952 (Cth). In the SBT, a fisherman must still apply for an endorsement for his boat licence, without which the licence conveys no right to take any quantity of fish. The endorsement specifies a quota of fish which the holder of the licence can take. Quotas — that is, the endorsements — are transferable, the effect of a transfer of an entire quota being a diminution in the number of endorsed boat licences.

It is primarily this kind of complexity that created the need for a more flexible Act. The new statutory fishing right[43] might take the form of a licence, a quota, or any other of the many fishing interests currently in operation around Australia.[44] For the purposes of this article, I will outline the relevant features of the rights that a fisherman might hold in a fishery managed through ITQs under the Act. Although the precise terms of a statutory fishing right will be found in plans of management and subordinate instruments, the Act in fact contains many of the relevant conditions.

Section 17(6)(b) of the Act provides that the Australian Fisheries Management Authority (AFMA)[45] may determine a plan of management under s 17 of the Act and may provide for management "by means of a system of statutory fishing rights, and other fishing concessions"[46] under that plan. A statutory fishing right is defined in s 21(1) as:

> (a) a right to a specified quantity of fish in, or a specified proportion of the fish in, a managed fishery; or
>
> (b) a right to use a boat in a managed fishery for purposes specified in a plan of management; or

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42 Existing management plans are currently being reviewed with an eye to the provisions of the new Act. At the time of writing, the SBT fishery, the first fishery to have a management plan implemented under the new Act, was in the process of adapting to its new arrangements. The quota allocation arrangements were the subject of an appeal to the Federal Court by Austral Fisheries on the basis that they produced a result so absurd that no reasonable person could defend it on justifiable grounds. It was also expected, at the time of writing, that the SBT would continue to operate under existing arrangements until such time as relevant constitutional arrangements could be made between the States.

43 See the discussion of the new statutory fishing right in the following paragraphs.

44 An example of different fishing interests currently in operation in Australia is the unit of input capacity used in the Northern Prawn fishery, which was the subject of public controversy in 1987 (see Introduction). A unit of input capacity is a measure of the type or amount of equipment that a fisherman may use. As the legislative scheme operated in the Northern Prawn fishery at the time of writing, a unit was a measure of "hull units" (which bears a relation to the size of the boat) and "engine power units" (which bears a relation to the size of the boat's engine).

45 The AFMA is established under the Fisheries Administration Act 1991 (Cth). That Act is one of a group of six Acts which includes the Fisheries Management Act 1991.

46 A "fishing concession" is defined in s 3 as "(a) a statutory fishing right; or (b) a fishing permit...".

(c) a right entitling a person to use:
  (i) specified fishing equipment; or
  (ii) a specified quantity of fishing equipment; or
  (iii) a specified type of boat; or
  (iv) a boat of a specified size;

in a managed fishery; or

(d) any other right in respect of fishing in a managed fishery.

Section 32(1) of the Act also allows for the creation of a "fishing permit" to authorise the use of a specified boat by a specified person. Permits may authorise the use of a boat for processing or carrying fish, but also for commercial fishing generally. They are subject to conditions very similar to statutory fishing rights, examined below, and may also be subject to specific conditions which might include the type or quantity of fish that can be taken.[47] Section 32(6)(c) provides that, unless otherwise stated, a permit remains in force for five years.

It would be possible to establish an ITQ system, in a manner similar to the current SBT fishery, by using permits granted subject to a right to take only a specified quota of fish. However this is unlikely; fishing permits were intended to operate in fisheries where there was no plan of management.[48] It is more likely, given the new flexibility of statutory fishing rights and the effort to which the legislature has gone to create them, that transferable quotas will be, in themselves, "statutory fishing rights" under s 21(1)(a). In some fisheries the owner of the ITQ might also require a fishing permit, in order to fish using his own boat, although it is clear that the exact relationship between permits and rights, and indeed the exact content of the statutory fishing right itself, will vary from fishery to fishery.[49]

A sample ITQ

For the purposes of the remainder of this paper, an ITQ held under the Act will be taken to possess the following characteristics.

(i) Duration: Under s 22(4)(c), a fishing right remains in force until cancelled or ceasing to have effect (see below), unless issued on the specific condition that it end at an earlier date. It is, therefore, perpetual.

(ii) Revocation: It is possible for *all* rights in a fishery to cease to have effect almost immediately,[50] and for one individual right to be cancelled under s 39 if its holder contravenes the Act or fails to pay a prescribed fee. But can a right be revoked merely at the discretion of the AFMA? It appears so. Under s 39(b), the AFMA may cancel any fishing concession if "to do so would be in accordance with a condition of the

47 See s 32(7).

48 Sen Deb 1991, Weekly Hansard No 11, 4567 (6 June 1991).

49 In some fisheries (eg, where ITQs are not used), the "statutory fishing right" could be "the right to use a boat, or a boat of a particular size ... In other fisheries it could be a boat unit ... or it could be a unit of fishing gear": F Meany, "Managing fisheries in the best interests of all" *Australian Fisheries* (January 1992) 6 at 8.

50 For instance, if the relevant plan of management for the fishery is revoked or if the fishery becomes managed by a Joint Authority pursuant to a Commonwealth-State agreement: s 22(3)(b)–(c).

concession relating to cancellation". Under s 22(4)(a), a fishing right is "subject to such other conditions as are specified in the certificate, including conditions relating to the suspension or cancellation of the fishing right and the transferability or otherwise of the fishing right." For my purposes I will presume the worst case for fishermen: a right subject to revocation at any time at the discretion of the AFMA.

(iii) Variation: Under s 22(5) the AFMA may "whether or not at the request of the holder, vary or revoke a condition of the fishing right".

(iv) Transfer: Section 49 provides that transfer is subject to the approval of the AFMA. However the AFMA has a restricted discretion, in that it may refuse approval only if the transfer would be contrary to the relevant plan of management or to a condition of the fishing right. Because it is of the essence of ITQs that they be transferable, I will presume a right to which there are no conditions on transfer.

(v) Other uses and dealings: The Act evidently contemplates that fishermen should be able to create interests in a statutory fishing right. According to s 48(1), subject to any specific conditions, a holder may "deal with the fishing right as its absolute owner". Equities in relation to the right may be enforced against its holder (s 48(3)) except to the prejudice of a *bona fide* purchaser for value without notice. The Act in fact sets up a register for dealing with interests in a fishing right.[51]

APPROACHES TO STATE FISHING RIGHTS

Cases considering the status of statutory fishing rights are a recent phenomenon. Two of four relevant State decisions hold that licences are property, two that they are interests personal to their holder. All the cases interpret different sets of regulations. Yet, while each judge considers different factors and accords varying weight to those factors, there is a consistency of approach in at least one way: no judge attempts to define exactly what "property" is, or what characteristics it might possess, in order to decide whether the licence in question possesses those qualities or characteristics. Rather, the primary determinant in each case is the previous interpretation, by other courts, of the term "property" as used in the particular Act applicable to the relevant licence. That is, they adopt the third of what I have suggested are three different approaches to the concept of "property".

In *Pennington v McGovern*[52] the South Australian Supreme Court decided that a licence under the Fisheries Act 1982 (SA) was a proprietary interest capable of being the subject-matter of a trust. Only King CJ specifically asked whether the licence could convey to its holder rights of property. He concluded that it could:

> The provisions ... as to the contemplated value and transferability of the licence and as to the right to hold it notwithstanding that its exercise is subject to the direction and instructions of another, are all, to my mind, indicia of rights of property.[53]

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51 Any dealing purporting to create or assign an interest in a fishing right has no effect until registered (s 46(2)), although registration confers no legal effect upon an instrument which it would not otherwise have had (s 51).

52 (1987) 45 SASR 27.

53 Ibid at 31.

The emphasis on transferability is common in these cases. But, as we shall see, no reference to value was made in either *Millirpum* or *R v Toohey*. Indeed there may be no market value in a piece of scrap paper; nevertheless it can be property. On the other hand, the reference to a "right to hold" the licence in a kind of statutory trust arrangement perhaps relates to the holder's right to use the property.

Justice Legoe likewise considered transferability. The requirement that the licensing director consent to any transfer did not, he felt, render the licence inalienable. His description of the licence is couched in terms very specific to the case: "[It] is proprietary in the sense that it is capable of being transferred ... under the terms of this deed and in the events which have happened".[54]

Pennington is far from authority that fishing licences are property. But neither is Lunn AJ's decision in *Kelly v Kelly*[55] authority that they are not. The issue was whether a statutory abalone fishing licence was property that was susceptible to partition and sale in an order for the winding up of a partnership. In deciding that it was personal to the holder, Lunn AJ emphasised that the Fisheries Act 1982 (SA) contained no specific statement that licences were transferable. He was particularly influenced by regulations requiring the holder to be "of good character and repute", to have committed no offence against the Act and to produce a medical certificate for diving. His Honour made no reference to any of the other characteristics of the licence, or of property generally.

In *Pyke v Duncan*,[56] Nathan J considered whether Victorian fishing licences were property capable of being seized by the Sheriff and sold:[57]

> The answer is "No". *Although the licences may give proprietorial rights or amount to property for other purposes,* they do not possess ... those characteristics which enable them to be seized as "property" by the Sherriff.[58]

What were "those characteristics"? His Honour examined cases dealing with licences in the context of the Licensing Act 1883 (Vic),[59] the Insolvency Act 1890 (Vic)[60] and the Judiciary Act 1903 (Cth),[61] and concluded that the critical factor was transferability.[62] Under the Fisheries Act 1968 (Vic), transfer was not automatic, because it depended on the licensing director's consideration of the welfare of the entire industry. The Sheriff "cannot transfer the licence of his own volition".[63] And so the licences, "are not 'property' within the restricted meaning of that word ... in so far as the Sherriff is incapable of selling [them]."[64]

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54 Ibid at 45.
55 (1988) 48 SASR 115.
56 [1989] VR 149.
57 Under a writ of *fieri facias*.
58 [1989] VR 149 at 150 (emphasis added).
59 *Anthoness v Anderson* (1888) 14 VLR 127 (liquor licence).
60 *Jack v Smail* (1905) 2 CLR 684 (grocer licence).
61 *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222 (taxi licence).
62 "If the licence holder lacked the capacity to freely dispose ... then the licence itself did not amount to property for the purposes of [those] Acts": [1989] VR 149 at 153.
63 Ibid at 159.
64 Ibid.

Justice Nathan found nothing in *Pennington* that "deals with the nature of a fishing licence in so far as it may be seized",[65] and made no reference to King CJ's recognition of transferability and value as indicia of property. In effect he avoided the question of what is "property" in his emphasis on transferability in the context of seizure by the Sheriff. General statements that "[l]icences held under the Fisheries Acts are personal in nature"[66] were unnecessary to his decision, and in that sense misleading.

In *Austell Pty Ltd v Commissioner of State Taxation*[67] the appellant contended that a crayfishing licence held pursuant to the Fishing Act 1905 (WA) was not "property" under the Stamp Act 1921 (WA). Under the Fishing Act, the Minister for Agriculture had a wide discretion to renew, suspend, transfer or cancel licences. Licences were, nevertheless, transferable. Unlike Nathan J in *Pennington*, Brinsden J in *Austell* recognised that the Minister's discretion was fettered by the purposes of the Act and the policy behind it, and that a licence could not conceivably be revoked or transferred "on the mere whim of the Minister".[68] Justice Brinsden brushed aside the possibility that a fishing licence could confer a proprietary right in the fishing grounds. But he felt that "property" is a word of "very general meaning and comprehensiveness",[69] and that the crayfishing licence satisfied its lay meaning. He felt, moreover, that there was no reason to give the term a narrow meaning in the particular context of the Stamp Act. Justice Brinsden then turned to other cases concerning various licences. Considering *Pennington*, he could find no significant differences between the applicable Acts and regulations: "Clearly the licence is of value and is capable of being transferred."[70] His Honour also reasoned that the High Court in *Banks v Transport Regulation Board (Vic)*[71] and the Queens Bench in *The Smelting Company of Australia v IR Commissioners*,[72] had respectively held a taxi-cab licence and a licence to exercise a patent to be property interests. His Honour declared that the crayfishing licence was "property" under the Stamp Act (WA).

These cases suggest that the meaning of "property" varies in different contexts. Justice Nathan captured this in his statement that a licence "may ... amount to property for other purposes" but not for seizure by the Sheriff as "property" under a writ of *fieri facias*. Transferability is the only common thread, but even then the cases differ on the effect of the requirement of administrative approval of proposed transfers. The other indicia of property rights received only passing attention, if any. Justice Brinsden's judgment, the most comprehensive, focused not on the proprietary characteristics of the licence, but on its similarity to licences considered in other cases. In none of the cases has an in-depth study of the property nature of fishing licences been undertaken, and the possibility that fishing rights might amount to a *profit à prendre* has not been discussed at all.

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65 Ibid at 155.
66 Ibid at 160.
67 (1989) 89 ATC 4905.
68 Ibid at 4909.
69 Ibid at 4913, quoting Pollock B in *Smelting Company of Australia v IR Commissioners* [1896] 2 QB 179.
70 (1989) 89 ATC 4905 at 4914.
71 (1968) 119 CLR 222.
72 [1896] 2 QB 179.

ARE ITQS PROPERTY?

What would be the likely response of a court to an argument that an ITQ with the characteristics listed would (i) be a *profit à prendre* (ii) possess the fundamental characteristics of a property right or (iii) be protected by s 51(31) of the Constitution?

Profit à prendre

The High Court in *Australian Softwood Forests Pty Ltd v Attorney-General*[73] described a *profit à prendre* as "a right to take something off another person's land",[74] and Halsbury's adds that "it may be exercisable in common with one or more persons."[75] The thing taken must be capable of ownership.[76] A *profit à prendre* is an interest in land.[77] A right to take fish off another's land may be classified as a *profit à prendre.*[78] At common law the right of more than one fisherman to take fish from water not owned by the fishermen themselves, to the exclusion of the general public, was called a "common of piscary" in private waters, and was recognised as a *profit à prendre.*[79] Rights under a fishing licence have very similar characteristics.

The most recent Australian discussion of *profits à prendre* in fishing was by the High Court in *Harper v Minister for Sea Fisheries,*[80] where it was argued successfully that a Tasmanian fishing licence fee was not an excise because it was not a tax. One argument was that it was a fee paid for a *profit à prendre.* Another was that it was "the price exacted by the public, through its laws, for the appropriation of a limited public natural resource."[81] On either view, the fee was not a tax.[82] The Court accepted the latter argument. Hence it was unnecessary to ask whether the licence was a *profit à prendre.*[83]

However, in deciding on the "public exaction" argument, Brennan J described the licence as:

> [A] right of fishing in another's waters to the exclusion of the public. Such a common law right is a *profit à prendre* ... but at common law it is not available in tidal waters.[84]

Justice Brennan did not deny the availability of a *profit à prendre;* his Honour merely said that a fishing right "to the exclusion of the public"[85] did not exist at common law. But the legislature's intervention means that such a right does now exist in the form of a licence or, under the new Act, in the form of a statutory fishing right. At common law

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73 (1981) 148 CLR 121.
74 Ibid at 130 per Mason J.
75 *Halsbury's Laws of England* (4th ed) Vol 14, para [244].
76 *Alfred F Beckett v Lyons* [1967] 1 Ch 449 at 482 per Winn J.
77 *Halsbury's Laws of England* (4th ed) Vol 14, para [242].
78 *Marshall v Ulleswater Steam Navigation* (1863) B&S 732; 122 ER 274; *Wickham v Hawker* (1840) 7 M&W 63; 151 ER 679.
79 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 335 per Brennan J.
80 (1989) 168 CLR 314.
81 Ibid at 325 per Mason CJ, Deane and Gaudron JJ.
82 According to the definition of a tax in *Air Caledonie International and Others v The Commonwealth* (1988) 165 CLR 462.
83 (1989) 168 CLR 314 at 334 per Brennan J.
84 Ibid at 335.
85 Ibid.

there were no analogous rights of fishing in the sea,[86] and it had never been argued before a court that a *statutory* right was a *profit à prendre*. So, although there is no express authority that *profits à prendre* could exist in tidal waters, there is none that they could not, and the question remains: can a *profit à prendre* be created in a tidal fishery?

Rights created by or pursuant to statute may be proprietary in character.[87] Courts will look to the substance rather than the form of the right.[88] However, one factor will be the language of the Act in question.[89] I will later discuss whether the wording of the Fisheries Management Act 1991 is sufficiently strong to restrict rights granted under it to a collection of statutory, rather than proprietary, rights. For the moment, however, it should be noted that no judgment in *Harper* suggested that a licence could not be property simply because it was created by the legislature.

Can we deduce from the fact that the common law recognises *profits à prendre* in private fisheries that it could also recognise a *profit à prendre* in tidal waters? Two particular problems arise in relation to tidal waters that do not arise in relation to private fisheries. The first concerns the fish themselves. It might be objected that fish in the sea are wild animals continually crossing jurisdictional and management boundaries; wild animals of any kind are not capable of ownership,[90] and the thing taken as a profit must be capable of ownership.[91] But that point can be dismissed quickly. The nature of a *profit à prendre* is that the right to take wild animals while they are upon the soil belongs to the owner of the soil, who may grant that right to others as a *profit à prendre*.[92] This is despite the rule in the *Case of Swans*[93] that there is no property in wild animals. The right to take wild animals upon the soil was called a qualified property *rationii privilegii*.[94] There is no reason to distinguish a fish in a running private stream from a fish in the sea. Indeed, the common law recognised — and, in England, continues to recognise — the existence in tidal waters of exclusive private fishing rights granted by the Crown prior to Magna Carta.[95]

The second problem looms larger, and relates to ownership of the seabed underlying the regulated fishery. There are three "zones" in which different issues arise in establishing ownership: the seabed within three nautical miles of the low-water mark; the seabed between three and 12 nautical miles; and the seabed beyond 12 nautical miles. My conclusion however, is that nothing in any of these "zones"

86 With the rare exceptions of private fisheries granted by the King prior to Magna Carta. See below, text and n 95.

87 *Toohey* (1982) 158 CLR 327 at 342–344.

88 In the context of statutory mining rights, see M Crommelin, "The Legal Character of Petroleum Production Licences in Australia" in T C Daintith (ed), *The Legal Character of Petroleum Licences: A Comparative Study* (1981) 60.

89 Ibid at 66.

90 *Case of Swans* (1592) 7 Co Rep 15b, 17b; 77 ER 435.

91 *Alfred F Beckett v Lyons* [1967] 1 Ch 449.

92 *Lord Firzhardinge v Purcell* [1908] 2 Ch 139; *Halsbury's Laws of England* (4th ed) Vol 14 para [242].

93 (1592) 7 Co Rep 15b, 17b; 77 ER 435

94 *Ewart v Graham* (1859) 7 HL Cas 331; 11 ER 132; *Halsbury's Laws of England* (4th ed) Vol 2 para [208].

95 These were known as "several" fisheries: *Malcomson v O'Dea* (1863) 10 HL Cas 593 at 618-619; 11 ER 1155 at 1166.

precludes the creation by the Commonwealth of a *profit à prendre* in the waters above the seabed.

The first "zone" is the seabed within three nautical miles of the low-water mark. Until early in 1991, three nautical miles was the extent of Australia's territorial sea. Common law authorities tend to recognise Crown property rights in the territorial sea.[96] Certainly the United States Supreme Court has declared that the United States possesses such rights in its territorial sea,[97] and likewise the Canadian Supreme Court.[98] But whether the property, and the right to legislate, belongs in this first zone to the Commonwealth or to the Australian State to which the waters are adjacent, presents a complex question. The respective rights of the Commonwealth and the States are determined by the Coastal Waters (State Powers) Act 1980 (Cth) and the Coastal Waters (State Title) Act 1980 (Cth),[99] which were passed largely as a result of the decision in the *New South Wales v The Commonwealth (Seas and Submerged Lands Act* case)[100] that State territory ended at the low-water mark. The Powers Act extends State legislative power to about three nautical miles offshore.[101] It also makes special provision for fisheries: fisheries (such as the SBT) may be regulated according either to Commonwealth or State law in disregard of the three-mile limit, if the particular fishery is subject to a Commonwealth-State agreement. The Title Act, on the other hand, grants to States "the same right and title to the property in the seabed beneath the coastal waters ... [and] in respect of the space (including space occupied by water) above that seabed" as if the sea-bed were within the limits of the State: s 4(1). There is an argument, made but not decided in *Harper*, that the Title Act is invalid.[102] Ostensibly, however, property in the seabed within the three mile zone rests with the States.

Is it realistic to assert that the Commonwealth can create proprietary interests in that seabed? One view is that it *is* realistic, on the basis that the States have consented to the creation of such rights. In *Harper*, Brennan J, having avoided the issue of property in the seabed, added the proviso that a right to fish may be invalid if "created in diminution of proprietary rights of the owner of the seabed *and without the owner's consent*." (Emphasis added.) But on the facts of that case, his Honour continued:

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96 *New South Wales v The Commonwealth (Seas and Submerged Lands Act* case*)* (1975) 135 CLR 337 per Gibbs J and Stephen J.

97 *United States v California* 332 US 19 (1974).

98 *Reference re Ownership of Offshore Mineral Rights* (1967) 65 DLR (2d) 353.

99 These were passed at the request of State parliaments under s 51(38).

100 (1975) 135 CLR 337.

101 The exact geographical scope of the Acts is described in Schedule 2 to the Petroleum (Submerged Lands) Act 1967 (Cth). See *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 369.

102 The argument is that the Act is not supportable by s 51(38), as it is not a law for the "peace, order and good government" of the Commonwealth because it divests the Commonwealth of large tracts of property which it is unable to re-claim without paying just compensation under s 51(31) of the Constitution. The major obstacle to that argument is the extremely narrow interpretation given by the High Court to the substantive effect of the phrase "peace, order and good government": see *Union Steamship of Australia Pty Ltd v King* (1988) 166 CLR 1, and the discussion in P Hanks, *Constitutional Law in Australia* (1981) at 88.

> [M]anagement of the fishery ... is arranged between the Commonwealth and Tasmania. The arrangement ... testifies to the consent of the Crown ... to the creation of those rights.[103]

In no Commonwealth regulated fishery — and hence in no fishery in which an ITQ under the 1991 Act will apply — will a State have property in the underlying soil without having entered into an agreement of a similar kind with the Commonwealth,[104] thereby consenting to the creation of proprietary rights. It is, therefore, at least arguable that the Commonwealth has the power to create proprietary rights such as *profits à prendre* within the three nautical mile zone.

The second "zone" is the area of the seabed between three and 12 nautical miles from the low-water mark. Australia is now entitled to, and did in 1991, claim a 12 nautical mile territorial sea. Both the Title and Powers Acts remain applicable only to three nautical miles.[105] The Commonwealth's claim to property in the sea-bed, in the zone between three and 12 nautical miles, is hence not contestable by the States.

Finally, in the "zone" outside Australia's territorial waters, s 51(10) of the Constitution grants to the Commonwealth *legislative* power over fisheries,[106] a power confirmed in *Bonser v La Macchia*.[107] But whether the Commonwealth has *property* in the seabed is a difficult question. The 200 nautical mile Exclusive Economic Zone (EEZ), as outlined in the United Nations Convention on the Law of the Sea 1982, has been accepted by the International Court of Justice as "part of customary international law".[108] Under Article 56, Australia has in its EEZ "sovereign rights for the purpose of ... exploiting, conserving and managing the natural resources ... of the waters superjacent to the seabed". An obligation to ensure proper conservation and management methods and to prevent over-exploitation is stated emphatically,[109] and comprehensive ancillary powers are granted to that end.[110] The difference between sovereignty and "sovereign rights", if any, is unclear. Members of the High Court, however, seem to have assumed that both incorporate property rights.[111]

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103 (1989) 168 CLR 314 at 335.

104 If the fishery is not regulated pursuant to the Coastal Waters (State Powers) Act 1980 (Cth) (as is the SBT), then either (i) the Commonwealth will have legislative powers because the fishery crosses State coastal waters and the States involved have consented to Commonwealth regulation, or (ii) because no Commonwealth-State agreement of any kind has been reached, Commonwealth ITQs will only regulate waters outside three nautical miles and State regulations will apply within that distance.

105 Coastal Waters (State Powers) Act 1980 (Cth), s 4(2).

106 Section 51 empowers the Commonwealth to make laws "for the peace, order and good government of the Commonwealth with respect to:- ... (10) Fisheries in Australian waters beyond territorial limits."

107 (1969) 122 CLR 177. That case upheld the operation of Commonwealth legislation six nautical miles from the coast of New South Wales. At that time, Australia's territorial waters extended only to three nautical miles.

108 *Continental Shelf (Tunisia v Libya)* case (1982) ICJ Reports 18 at 74.

109 Article 61.

110 Powers, for example, to construct islands and other apparatus for the purpose of exploiting the seabed (Article 60).

111 *Robinson v Western Australian Museum* (1977) 138 CLR 283; M Crommelin, above n 88.

But whatever the exact status of the seabed at international law, the question of proprietary rights to catch fish is one of municipal law. It is submitted that the entry into the picture of concepts of international law does not necessarily preclude the existence of property rights in relation to fish past the 12 mile zone. A *profit à prendre* does not grant rights of ownership. In this respect, sovereign rights over fishery resources in waters outside a nation's territorial waters are themselves closely analogous to a common law *profit à prendre*,[112] in that they grant the right, not to own the underlying land (or seabed), but to exploit resources in the waters above. At common law "a man may have a several fishery, though the property in the soil is not in him".[113] The holder of a *profit à prendre* in such a fishery would take not from the owner of the soil but from the owner of the fishery.[114] That is, this so-called interest in land would be created by someone other than the owner of the soil. It seems at least arguable that uncertainty as to the exact nature of the Commonwealth's rights in relation to the seabed past 12 nautical miles is no bar to the creation of proprietary rights in that zone.

Will the courts find a *profit à prendre*?

I have argued that after *Harper* it is still possible to recognise a *profit à prendre* in a sea fishery. But I do not think that the High Court would do so if unavoidably confronted with the issue. Justice Brennan in *Harper* said that:

> [A fishing licence confers] a privilege analogous to a *profit à prendre* in or over the property of another. A limited natural resource which is otherwise available for exploitation by the public can be said truly to be public property whether or not the Crown has the radical or freehold title to the resource. A fee paid to obtain such a privilege is analogous to the price of a *profit à prendre*; it is the charge for the acquisition of a right akin to property.[115]

It is possible that concepts like "analogy" and "akin to" were used solely to avoid the significant problems which, as we have seen, arise in considering whether a *profit à prendre* can exist in tidal waters and sea fisheries, especially when there was an easier solution to the issue at hand. But the general tenor of Brennan J's judgment, and more particularly that of Mason CJ, Deane and Gaudron JJ's joint judgment, suggests that the Court will be wary of applying, to modern resource regulation, concepts of an outdated common law. The words of the joint judgment are wide-ranging and possess an obvious possible relevance for many natural resources:

> The right of commercial exploitation of a public resource ... can be compared to a *profit à prendre*. In truth, however, it is *an entitlement of a new kind created as part of a system for preserving a limited public natural resource*.[116]

Such words are welcome to those who see as destructively anachronistic any argument by analogy to concepts of nineteenth century English jurisprudence. Warnings from an American writer discussing petroleum legislation in the 1960s are directly on point:

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112 M Crommelin, above n 88.

113 Co Litt 122b per Lord Coke, cited in argument in *Malcomson v O'Dea* (1863) 10 HL Cas 593 at 603; 11 ER 1155 at 1160.

114 *Halsbury's Laws of England* (4th ed) Vol 18 para [622].

115 (1989) 168 CLR 314 at 335.

116 Ibid at 325 (emphasis added).

> The ancient sea weed cases, the basis for much of the lore concerning the *profit à prendre*, have little if any relevance to the interests created by instruments dealing with ... important natural resources today. If any of this ancient lore is to be applied ... it should be applied selectively.[117]

In sentiments like these we find the background to the decision in *Harper*. It might be argued that, unlike petroleum, interests in fisheries have long been treated as *profits à prendre*, and have developed as such at common law. However that historical link is only cosmetic. I have already argued that fishing interests in private waters were categorised in terms of interests in land because that was simple, convenient and suited landowners. *Profits à prendre* were never an appropriate management tool for fisheries.

If the sentiments expressed in *Harper* indicate the High Court's general attitude to analogies between licensing schemes and traditional common law concepts, then there appears to have been a significant change since *ICI Alkali (Australia) Pty Ltd (in vol liq) v Federal Commissioner of Taxation*,[118] where Barwick CJ described a mining lease as so clearly a lease that "no elaboration or, indeed, any discussion of that matter is required".[119] A lease, like a *profit à prendre*, is a common law proprietary interest, and Barwick CJ had no hesitation in analysing the statutory right as such. It might be argued that an analogy to a lease is not as anachronistic as a reference to the more antiquated concept of *profit à prendre*. But that distinction is at best tenuous. Rather, a change of approach seems to have occurred in later cases such as *Harper* and *Toohey*. In the latter, Mason CJ was prophetic of the sentiments subsequently expressed in *Harper*: "notwithstanding the similarity" to a *profit à prendre*, the grazing licence was a "creature of statute forming part of a special statutory regime governing Crown land." He then continued:

> It has to be characterized in the light of the relevant statutory provisions without attaching too much significance to similarities which it may have with the creation of particular interests by the common law owner of land.[120]

Similar sentiments may underlie Connolly J's unelaborated dicta in *Australian Energy Ltd v Lennard Oil NL*[121] that an authority to prospect for oil conferred no interest in land,[122] and Murray J's decision in *BHP Petroleum Pty Ltd v Oil Basins Ltd*[123] that the nature of an offshore petroleum production licence should not be construed by reference to "outdated relics of medieval law".[124]

Finally, Mason CJ's statement in *Toohey* suggests that the language and context of "the relevant statutory provisions" will be a factor in ascertaining the legal nature of rights granted pursuant to a statutory licencing scheme. In relation to statutory mining rights, courts have tended to emphasise the substance, rather than the form, of the rights;[125] appellation is a relevant, but not a decisive, factor. The language and context

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117 H R Williams, "Comments on Oil and Gas Jurisprudence in Canada and the United States" (1965) 4 *Alberta L Rev* 189 at 192-193.
118 (1979) 22 ALR 465.
119 Ibid at 470.
120 (1983) 158 CLR 327 at 344.
121 [1986] 2 Qd R 216.
122 Ibid at 219.
123 [1985] VR 725.
124 Ibid at 738.
125 M Crommelin, above n 88.

of the Fisheries Management Act 1991 Act suggest very strongly that the right was not intended to be proprietary. The term "statutory fishing right" directly echoes the phrase "statutory rights", which was the term used by the High Court in *Harper* to describe the Tasmanian abalone fishing licence (which was held to be, not proprietary, but a mere creation of statute). Moreover, s 22(3)(e) states baldly that "no compensation is payable because the fishing right is cancelled". In conjunction with the provisions relating to revocation of fishing interests, it is implicit in s 22(3)(e) that the legislature did not intend to create common law proprietary interests. It seems unlikely that a court will declare an ITQ to be a *profit à prendre.*

The "fundamental characteristics" approach

If a court rejected the argument that an ITQ constituted a *profit à prendre,* the fishermen might argue in the alternative that an ITQ contains what Blackburn J in *Millirpum* described as "the substance of proprietary interests rather than their outward indicia".[126] While he felt that all need not co-exist, and that each may be subject to qualifications, Blackburn J held that "property ... in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate."[127] In *National Provincial Bank v Ainsworth,* Lord Wilberforce said that to be property an interest "must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."[128]

That passage in *Ainsworth* was adopted by Mason J in *Toohey.*[129] For Mason and Wilson JJ[130] the grazing licence failed on the last two requirements; it was unassignable, and it lacked permanence because it was revocable at the Minister's discretion on three months' notice. Wilson J, however, extended his analysis. The right to remove produce, along with the statute's use of the term "forfeiture" in relation to breach of conditions (language he considered appropriate to an interest in land), favoured a proprietary interest. More troublesome were the actual terms of the Crown Lands Act 1931 (NT), which drew a sharp distinction between interests, leases and easements on the one hand and, on the other, licences. Wilson J inferred from this distinction that, while the former were clearly proprietary interests, licences were not.

All four judgments followed a "fundamental characteristics" approach. Yet Blackburn J and Lord Wilberforce between them list six different characteristics,[131] to which Wilson J adds consideration of the rights under the grant, and of the language of the creating instrument. And if we heed Blackburn J's warning of qualifications on each interest, then it becomes apparent that the characteristics approach breeds uncertainty. That it can also be circular was most evident in *Millirpum,* where aboriginal clans sought a declaration of proprietary rights in relation to the earth, which declaration would in turn vest in them such powers as the right to exclude others. Yet Blackburn J

126 (1971) 17 FLR 141 at 272.
127 Ibid.
128 [1965] AC 1175 at 1248.
129 (1982) 158 CLR 327 at 342.
130 Gibbs CJ and Murphy J agreeing.
131 To be usable and exclusive (Blackburn J), to be definable, indentifiable and stable (Lord Wilberforce), and to be transferable (both).

asked as one criterion for deciding if the clans had property rights, whether the clan had a right to exclude.

Is an Australian court likely to hold that an ITQ possesses the "fundamental characteristics" of property? *Harper* provides little guidance. We have seen that no judge in that case directly considered whether the Tasmanian fishing licence was "property". Brennan J, for example, avoided the issue by concluding that the Commonwealth (the "owner" of the seabed) had given its "consent" to the creation of the licence, whether it was property or not. However, a close reading of his judgment suggests that Brennan J might have thought the licence was in fact property of some kind:

> [If the licences] were created *in diminution of proprietary rights of the owner of the seabed* and without the owner's consent, some question as to the validity of the law might have arisen, for the legislature of a State may not be competent to *create proprietary rights* out of property beyond the boundaries of the State ...[132]

Such a proviso was only necessary if Tasmania, in creating the licence, may have created proprietary rights. The dictum is hardly conclusive, however, and the issue remains open.

None of the "fundamental characteristic cases" decided that the right in question was property. It seems that fishermen would again face a difficult argument in establishing the proprietary nature of their licences. This is particularly so since the decision in *Toohey* was also concerned with a statutory right to exploit a resource. *Toohey*, however, is not conclusive against the property argument. ITQs under the Fisheries Management Act 1991 (Cth) will exhibit proprietary features that the grazing licence in that case did not. Both Wilson and Brennan JJ emphasised that the licences were not transferable; ITQs will be. ITQs are also exclusive, in that no other fishermen is entitled to another's quota and there are penalty provisions for those who infringe. The interest is readily definable and it is inherent in ITQs that there are few restrictions on the use and enjoyment of the property.[133] Lastly, while the language of the instrument is a factor, and in the new legislation it points to personal rights, it is only that — a factor.

One feature common to ITQs and the grazing licence, however, is that both are revocable. Mason and Wilson JJ in *Toohey* emphasised revocability in denying the quality of property to the grazing licence. But the fishermen could argue that revocability should not be accorded the great weight that it was granted in that case. They could argue that there is a confusion in the case between the *quality* and the *duration* of the rights under the grazing licence. Decisions relating to mining leases have emphasised the quality, rather than the duration, of the interest:[134]

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132 (1989) 168 CLR 314 at 335 (emphasis added). That problem did not arise in *Harper*, however, for the management of the fishery in accordance with Tasmanian law is arranged between the Commonwealth and Tasmania (see above at 390).

133 There are, for example, no restrictions on how or when the quota is obtained, or on who is employed actually to take the fish. Neither are there restrictions on whether its owner sells, leases or pledges it as security.

134 See generally, M Crommelin, above n 88.

> I do not think that an interest, which would amount to a *profit à prendre* if it were granted in perpetuity or for a term of years, loses its essential character because it is determinable on one month's notice, any more than a tenancy does so.[135]

The Government's response would be that revocability goes to the security of tenure which, in itself, is a basic quality of a property interest. Even while the interest is valid, it is undermined by the uncertainty of its tenure.

The relevance of the revocability of a licence appears arguable. We might return to Lord Wilberforce's requirement in *Ainsworth* of "some degree of permanence or stability", adopted by Mason J in *Toohey*.[136] How can an interest possess "some degree" of permanence other than through being subject to possible revocation? If Lord Wilberforce was not alluding to cases similar to this, what did he have in mind as "some degree"? Certainly the common law recognised that an interest could be determinable at an uncertain time in the future and yet constitute a fee simple interest in land. This explains the law's recognition of the determinable and the conditional fee simple.[137] In the case of *Attorney-General v Cochrane*,[138] for example, a fee simple interest in land was vested in a council, from which in turn Cochrane held a lease for 14 years. Both the fee simple and the lease were subject to the condition that the Minister could revoke at any time. Justice Mason, as he then was, did not question that the council's interest was proprietary. He merely directed his discussion to whether it was a "fee simple upon a condition" or a "determinable or conditional estate in fee simple".[139]

It appears that revocability does not automatically prevent the characterisation of ITQs as property, and that there are strong arguments that ITQs possess other fundamental characteristics of a property right. Indeed, we have seen that their very existence is a result of the legislature's desire to introduce a fishing right which had a proprietary nature. Nevertheless, in light of other cases, it seems unlikely that a court will declare that an ITQ exhibits the fundamental features of a property right.

The "particular provision" approach: Commonwealth Constitution s 51(31)

A fisherman wishing to protest against the revocation of a fishing right might, lastly, concentrate specifically on the interpretation of "property" in the context of s 51(31) of the Commonwealth Constitution. Section 51(31) empowers the Parliament of the Commonwealth to:

> make laws for the peace, order and good government of the Commonwealth with respect to: ... (31) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

This requirement to pay "just terms" may not be frustrated by reliance on an implied power.[140] Hence the Commonwealth may not invoke any incidental power implied in

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135 *Unimin Pty Lty v The Commonwealth* (1974) 22 FLR 299 at 308 per Connor J.

136 (1982) 158 CLR 327.

137 See generally *Zapletal v Wright* [1957] Tas SR 211.

138 (1970) 91 WN(NSW) 861.

139 *Attorney-General v Cochrane* (1970) 91 WN(NSW) 861 at 871.

140 *Johnston Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth* (1943) 67 CLR 314 at 318 and 325, regarding s 51(6) (the power of the Commonwealth to legislate in relation to defence). There is a limited exception in relation to those powers which necessarily involve the acquisition of property: Deane J, in *The Commonwealth v Tasmania*

s 51(10), the fisheries power, to acquire property. The acquisition power of the Commonwealth derives from s 51(31) alone.[141]

We have already seen that the meaning of "property" can vary in different legal contexts. In the context of appropriation of property, concern for the protection of individuals against government has overridden concern for strict interpretations of "property". Section 51(31) raises similar considerations to those raised by the assessment of Capital Gains Tax, for example.[142] But whereas a wider definition of "property" favours the individual in the context of appropriation, it disadvantages the individual when tax is assessed. As part of a constitutional guarantee, "property" in the context of s 51(31) has received an appropriately liberal construction;[143] "property is the most comprehensive term that can be used"[144] and extends to include "innominate and anomalous interests".[145] In *Minister of State for the Army v Dalziel*,[146] the High Court recognised that the proprietary right taken was statutory, rather than a recognised common law or equitable interest, yet held nevertheless that it was property under s 51(31). In *Bank of New South Wales v The Commonwealth* (the *Banking* case),[147] Dixon J said that s 51(31) was "not to be confined pedantically ... to some specific estate or interest in land ... and to some specific form of property in a chattel or chose in action". The Commonwealth had tried "to acquire the substance of a proprietary interest".[148] In the *Commonwealth v Tasmania* (the *Franklin Dam* case), Deane J said that "there is no reason why ... [a] benefit under a legislative scheme cannot, in an appropriate case, be regarded as property."[149]

(the *Franklin Dam* case) (1983) 158 CLR 1 at 282, cites taxation, the forfeiture of prohibited imports and the sequestration of the property of a bankrupt. See also *Mutual Pools and Staff Pty Ltd v The Commonwealth* (1994) 68 ALJR 216 at 230-231 per Deane and Gaudron JJ.

141 The relationship between s 51(31) and other heads of Commonwealth power was discussed in a series of cases decided as this article was going to press: *Mutual Pools and Staff Pty Ltd v The Commonwealth* [1994] 68 ALJR 216; *Health Insurance Commission v Peverill* [1994] 68 ALJR 251; *Georgiadis v Australian & Overseas Telecommunications Corporation* [1994] ALJR 272 and *Re Director of Public Prosecutions; ex parte Lawler* [1994] ALJR 289. These cases do not affect the conclusions I reach. None of them concerns a statutory scheme of resource allocation. *Peverill* comes closest, in that it concerns a right to payment under a statutory scheme. There was held in that case to be no unlawful acquisition of property when a doctor's statutory right to reimbursement from the Commonwealth Government under its medical benefits scheme was replaced by a statutory right to be reimbursed at a lower level. To the extent that this exhibits a preference on the Court to treat rights created pursuant to statute as falling outside the protection of s 51(31), it serves to reinforce the conclusion I reach at the end of this article.

142 Tax is levied on "any form of property": Income Tax Assessment Act 1936 (Cth), s 160A.

143 *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-202.

144 *The Commonwealth v The State of New South Wales* (1923) 33 CLR 1 at 20-21 per Knox CJ and Starke J.

145 *Bank of New South Wales v The Commonwealth* (the *Banking* case) (1948) 76 CLR 1 at 349, approved in *Mutual Pools and Staff Pty Ltd v The Commonwealth* (1994) 68 ALJR 216 at 222 per Mason CJ and at 229 per Deane and Gaudron JJ.

146 (1944) 68 CLR 261.

147 (1948) 76 CLR 1.

148 Ibid at 349.

149 (1983)158 CLR 1 at 287.

It seems very likely that ITQs will be regarded as property for the purposes of s 51(31). Nevertheless, compensation may not be payable for their cancellation, let alone for their variation or suspension. That is because it is in relation to "acquisition", rather than to "property", that the basic conflict between the need for flexible government regulation and protection of individual rights becomes apparent. That conflict is a difficult one. Is it logical that a right, which the Commonwealth creates as part of an administrative scheme, can transcend that scheme to the extent that it attracts constitutional protection? On the other hand, s 22(3)(e) asserts that "no compensation is payable because the fishing right is cancelled". In so providing, is the legislature derogating from its grant if it has in other respects created an interest which corresponds to property? At what stage does regulation of rights become deprivation of rights?

It has been said of the term "acquisition" that "not every compulsory divesting of property is an acquisition within s 51(31)".[150] In Mason J's words, it is not enough that legislation "terminates a pre-existing right ... there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight".[151] Section 51(31) had no operation in the *Franklin Dam* case because the regulation did not give to "the Commonwealth nor anyone else ... a proprietary interest of any kind in the property".[152] Neither, on its face, would cancellation of a fishing licence. It is arguable that an ITQ is different from the land in the *Franklin Dam* case in that the Wilderness Regulations merely restricted the use of land. When an ITQ is cancelled, the entire property is extinguished. In such a case it is surely not true to say that "[i]n terms of its potential for use, the property is sterilized".[153] However the problem remains that, strictly, no-one would "acquire" any property interest in the cancelled ITQ.

The fishermen's best argument might follow Deane J's reasoning in the *Franklin Dam* case, that "difficult questions arise ... where one can identify some benefit flowing to the Commonwealth or elsewhere as a result of the prohibition or regulation".[154] It was on these grounds that Deane J found that regulation 5 of the World Heritage (Western Tasmania Wilderness) Regulations (Cth), which prohibited development or "any other works" on particular Tasmanian soil, fell within s 51(31). He felt that "the practical effect of the benefit obtained by the Commonwealth is that ... the land remains in the condition which the Commonwealth, for its own purposes, desires to have conserved."[155] The fishermen could show that many benefits flow to the Commonwealth and others from the cancellation of licences: long-term fee or rent[156] increases from a more profitable fishery, more valuable licences for those remaining in

150 *Trade Practices Commission v Tooth & Co Pty Ltd* (1979) 142 CLR 397 at 408 per Gibbs J. See also *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) ALJR 272 at 275-276 per Mason CJ, Deane and Gaudron JJ.

151 *Franklin Dam* case (1983) 158 CLR 1 at 145.

152 Ibid at 146.

153 Ibid at 145 per Mason J.

154 Ibid at 283.

155 Ibid at 287.

156 Be it a resource rent under the new system, in which such a rent will be an integral part of fisheries management (see the Policy Statement, and see the Fisheries Management Act 1991) or a licence fee of the kind by which the Commonwealth has traditionally collected income.

the industry, and decreased surveillance costs in a smaller fishery. Indeed, the Commonwealth can grant the entire quota again.

Nevertheless, the argument faces difficulties.[157] The views of Deane J aside, the Court in the *Franklin Dam* case was satisfied that "the extinction or limitation of property rights does not amount to acquisition".[158] Moreover, the benefit flowing to the Commonwealth in the *Franklin Dam* case was a more direct one, allowing the Commonwealth to fulfil an international obligation. Lastly, it was perhaps because he foresaw this kind of argument in relation to land planning that Deane J himself said:

> In a field which needs to be regulated in the common interest, such as zoning under a local government statute, it will be apparent that no question of acquisition of property for the purposes of the Commonwealth is involved.[159]

Exactly why that would be apparent in all cases of regulation "in the common interest" is not explained by his Honour. Let us apply this language to statutory mining leases, for example, which both academics[160] and judges[161] have described as *profits à prendre*. It is hard to believe that Deane J would simply apply the cited passage to revocation of a mining lease. His analysis only begs the question of degree: is a valuable, divisible, identifiable and transferable licence granted in perpetuity, to take fish, more like a mining lease or more like the right to build a factory in a residential zone?

Perhaps all we can say is that Deane J considers the particular example of land zoning to be regulation, which falls outside the scope of s 51(31), rather than confiscation, which falls within it. Justice Stephen in *Trade Practices Commission v Tooth & Co Pty Ltd* referred to the American experience, which has shown that "there is no set formula to say where regulation ends and taking begins".[162] Justice Stephen, in talking about "restraints, short of actual acquisition, imposed on the free enjoyment of proprietary rights", felt that "far reaching restrictions upon the use of property may in appropriate circumstances be seen to involve [an 'acquisition']".[163]

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157 The decision in *Minister v Davey* (1993) 119 ALR 108 was reported after this article was written. That case concerned input licences of the type described in n 44 above, which were held in the Northern Prawn Fishery under the Fishing Act 1952 (Cth). The Full Court of the Federal Court held that the cancellation of 30.76% of each fisherman's units was not contrary to s 51(31). Burchett J found that the benefits which could be said to flow to the Commonwealth from cancellation of the units did not constitute an "acquisition" for the purposes of s 51(31): see at 128-129. But cf at first instance: *Fitti v Minister for Primary Industries & Energy* (1993) 17 ALR 287 at 294-296 per O'Loughlin J. The decision of the Full Court is in line with the conclusion I reach at the end of this article in relation to ITQs held under the Fisheries Management Act 1991.

158 (1983) 158 CLR 1 at 181 per Murphy J. See also Mason J at 145 and Brennan J at 247-248. Gibbs CJ, Wilson and Dawson JJ decided on different grounds and did not need to consider s 51(31). And see *Mutual Pools and Staff Pty Ltd v The Commonwealth* (1994) 68 ALJR 216 at 222 per Mason CJ: "the distinction between extinguishment and acquisition of rights is clearly recognized in property law."

159 (1983) 158 CLR 1 at 283.

160 See, for example, M Crommelin, above n 88.

161 *ICI Alkali (Australia) Pty Ltd (in vol liq) v Federal Commissioner of Taxation* (1979) 22 ALR 465.

162 (1979) 142 CLR 397 at 414-415, citing 29A *Corpus Juris Secundum* Eminent Domain, para 6.

163 (1979) 142 CLR 397 at 414-415.

Justice Brennan in the *Franklin Dam* case cited the United States Supreme Court's construction of the similar provision as one "designed to bar Government from forcing some people alone to bear public burdens which ... should be borne by the public as a whole."[164] It is interesting that one of the Government's justifications for imposing a resource rent on fisheries is that the fishery is a public resource for the use of which licence-holders should pay.[165] If it is the community's resource, why should the burden of its improvement be met by individuals — especially if, in good times, they are paying a resource rent?

We are left, then, with a clash of policy considerations of the highest order. The language, especially of the joint judgment in *Harper*, suggests that the need to regulate valuable economic resources might outweigh what was referred to in *Tooth* as the "constitutional safeguard which is the manifest policy of par (31)".[166] That would be a significant decision, given "the liberal construction appropriate to such a constitutional provision".[167] But perhaps it could be no other way, when the public is coming to expect government regulation of resource extraction. Once the floodgates were opened upon regulatory schemes of this kind, "it would be necessary to identify a touchstone for applying the limitation to some regulatory laws and not others".[168] The task of establishing a touchstone has defeated the United States Supreme Court which "quite simply, has been unable to develop any 'set formula' for determining when ... economic injuries caused by public action [will] be compensated by the government."[169] In the light of extensive government regulation in many areas, Murphy J in the *Tooth* case might have been right in saying that "if alterations to a set of government regulations were to be regarded as acquisitions of property within s 51(31) there would be some remarkable results."[170]

Finally, I note that one major benefit of ITQs is that they do in fact provide inexpensive compensation for fishermen who choose to leave the industry, selling their quotas at market price. They are to that extent a preferable solution to the simple cancellation of fishing units which was proposed in 1987 in the Northern Prawn Fishery. But marketability does nothing to protect fishermen when an ITQ is cancelled altogether. A government seeking to cancel an ITQ might argue that it is merely reducing the Total Annual Catch, of which the ITQ represents a percentage proportion, to zero, thereby reducing the value of the interest, but not cancelling the interest itself. But such a conceptualisation clearly infringes the concept of "just terms", and were the

164 *Armstrong v United States* 364 US 40 (1960) at 49.

165 "The government believes that where individuals or firms are provided with preferential rights to exploit a community resource, they should pay an appropriate charge to the community as owner of the resource" (Policy Statement: "New Directions in Commonwealth Fisheries Management" (1989)).

166 (1979) 142 CLR 397 at 452 per Aickin J.

167 *Smith Kline & French Laboratories (Australia) Limited and Others v Secretary, Department of Community Services and Health* (1990) 95 ALR 87 at 127 per Gummow J.

168 (1979) 142 CLR 397 at 247-8.

169 *Penn Central Transport Co v New York City* 438 US 104 (1978) at 124.

170 (1979) 142 CLR 397 at 434.

High Court to decide that the rights attract protection, such an argument would not prevail.[171]

CONCLUSION

If the current tenor of High Court and State decisions prevails, it seems unlikely that ITQs will be declared to be *profits à prendre* or proprietary rights of any kind. On one view this is undesirable; judicial recognition of a fisherman's rights as property can only benefit the controversial[172] new ITQs, given that their *raison d'être* is the similarities they exhibit to property rights. The eminent Canadian economist, Anthony Scott, has argued that scepticism evoked amongst fishermen by administrative equivocation has been fatal to new fishery management regimes in Canada and Alaska.[173] In Australia, legal decisions will filter back through managers; any decision, legal or administrative, that undermines the new property interest will reinforce the view that administrators are half-hearted. And scepticism can be particularly detrimental to a regime depending on certainty and long-term stability. New interests will have limited impact if, in substance, they are perceived to be the same as the old interests. While the judgments in *Harper* are refreshing in their adoption of a twentieth century approach to resource management, the "rejection of excessive conceptualism does not require repudiation of the basal principles of the common law".[174]

My view, however, is that the role for lawyers is merely to ensure that the law is flexible enough to accommodate changes in this rapidly developing field. The most recent economic literature has moved beyond ITQs. The future, in fact, may not lie in complex regulatory schemes at all. Scott argues that by giving rights in the actual fishstock (rather than the harvest) to fishermen, administrative costs would be minimised and individual fishermen would be encouraged to invest in research and breeding.[175] Unlike ITQs, which allow for significant control by fisheries administrators, such a system would minimise the role of administators and allow market forces to dominate. Positive administrative innovation such as this system would require must not be sabotaged by the lumbering intricacies of the common law. Transferability, exclusiveness and identifiability may be recognised proprietary characteristics at common law. But the replacement, alteration or revocation of licences is integral to flexible administration. If licences are declared to be proprietary by courts in Australia, the power to replace, alter or revoke them will be greatly impaired, as will the flexibility and long-term competitiveness of Australia's fishing industry.

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171 For a discussion in the context of s 51(31) of a 30.76% diminution in the value of licences due to amendment of a Commonwealth Government scheme, see *Minister for Primary Industry and Energy v Davey* (1993) 119 ALR 108 at 130-131 per Burchett J; and see, generally, *Mutual Pools and Staff Pty Ltd v The Commonwealth* (1994) 68 ALJR 216 at 235-236 per Dawson and Toohey JJ.

172 B Stanard, above n 12; L Wilson, above n 5.

173 A Scott (1986), above n 1.

174 M Crommelin, "Mining and Petroleum Titles" (1988) 62 *ALJ* 863 at 871.

175 A Scott (1986), above n 1.

The prevailing trend in the courts balances legalistic notions of property against the need to promote the long-term exploitation of our natural fish resource. Fishing regulations should be treated as what they are, statutory regimes, and interpreted accordingly. In legal terms, a case by case approach to licences as property has the advantage of being adaptable to the circumstances of the case at hand; indeed, for the resolution of cases in State courts, that approach has so far been sufficient.