ITQs and Property Rights
A review of Australian case law

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Abstract. This paper discusses the legal concepts of property and property rights and examines how the Australian courts perceive fishing entitlements (licences, ITQs and Individual Effort Units). On the basis of case law concerning the nature of other fishing entitlements, such as fishing licences, the courts are likely to find that ITQs are proprietary in nature. However the Australian courts have found that fishing entitlements, although similar in terms of the privileges conferred, are not the common law property right of *profit á prendre*. They are a statutory entitlement. Compensation for modification and extinguishment of these rights depends on whether there is compensation payable under applicable legislation or on whether the plaintiffs can rely on constitutional guarantees of acquisition of property on just terms. The courts have clearly indicated that fishing entitlements are rights created by government as means of regulating the fishing industry and are thus governed by the legislation that created them. By annulling that legislation, the entitlement no longer exists. By modifying the legislation, the entitlement is redefined. However, until there is a relevant Australian case on ITQs, it remains to be seen whether the courts will view them any differently to other fishing entitlements

Keywords: Individual Transferable Quotas, property rights, Australian ITQ fisheries

1. INTRODUCTION

Given the abundance of economic rhetoric on the subject of property rights and fisheries, it is not surprising that fishers often consider Individual Transferable Quotas (ITQs) to be similar to private property. During pre-ITQ consultation with industry, fisheries managers have been known to "sell" perceived benefits of ITQs arguing that they constitute 'stronger property rights'. In contrast, governments are often concerned that ITQs will be considered property by the courts, raising the possibility of compensation claims if Total Allowable Catches (TACs) are reduced or ITQ arrangements subsequently modified or extinguished.

This paper discusses the legal concepts of property and property rights, examines how the Australian courts perceive fishing entitlements (licences, ITQs and Individual Effort Units) and on the basis of this analysis, addresses the question as to what this means, in practice, for a fisher who holds ITQs[1].

2. AUSTRALIAN ITQ FISHERIES

In Australia, there are currently twenty ITQ fisheries, which accounted in 1997/8 for approximately 26% of total landings by weight and 22% of total landed value. Of these twenty fisheries, twelve are single species fisheries, five are dual species fisheries, two are three species fisheries and one fishery, the south east trawl fishery, has sixteen species under quota. Fisheries are either managed by the Commonwealth (Federal) government whose jurisdiction generally extends from three nautical miles to two hundred nautical miles or by state governments who generally have jurisdiction from the low water mark to three nautical miles. In Commonwealth-managed fisheries, ITQs have been introduced into the tuna, shark, scallop and finfish fisheries. In state-managed fisheries, ITQs have largely been limited to higher value single species fisheries such as pearl, abalone and rock lobster.

3. LEGAL CONTEXT

There are two basic sources of law in Australia - statute law and common law. Statute law is a formal written enactment of legislation by a legislative body (federal, state or council), whilst common law is developed by the courts. Statutes are used to introduce new laws, repeal existing statutes or combine previous legislation and common law principles into one comprehensive statement of law. Where a statute and the common law deal with the same subject matter then, to the extent that there is an inconsistency between them, the statute prevails. The regulation, management and control of fisheries in Australia are governed by statute law, enacted at both the state and federal level. These fisheries statutes set up the broad regulatory framework to manage federal and state fisheries.

[1] A more comprehensive discussion of the legal concepts of property rights with respect to ITQs can be found in Kaufmann, B., G. Geen and S. Sen, *Fish Futures: Individual Transferable Quotas in Fisheries*. FERM, 1999.

3.1. Property Rights in Law

In legal terms, property is not an object itself, but rather the rights that a person has in relation to that object. This includes the right to exclusive physical control of the property; the right to possess the property; the right to use and enjoy the property; and the right to alienate the property (Hepburn, 1998). Therefore, the definitive right in private property relationships is the right of the owner to the use, possession and enjoyment of the object to the exclusion of the rest of the world. A perfect property right would be totally exclusive, completely secure, fully transferable and of infinite duration.

In practice, property rights are rarely absolute, as often the law places restrictions on the way rights can be exercised. Good examples of this are planning and environmental law that place restrictions on land use in certain areas.

3.2. Property rights and Australian ITQs

Australian ITQ regimes differ significantly with regard to these ideal characteristics of a property right. Quota rights have been granted for a duration of ten years (renewable) in the Tasmanian abalone fishery, for the duration of a management plan (e.g. southern bluefin tuna fishery), and as a condition on an annual permit which has to be renewed annually (e.g. South Australian rock lobster fishery). Transferability also varies between ITQ fisheries. Depending on the fishery, seasonal or permanent transfers are allowed and in some fisheries, quota transfers cannot be split from the fishing licence or permit. For many fisheries there are limitations placed on minimum and/or maximum quota holdings. All transfers require the consent of the fisheries management authority. In some cases, ownership and third party interests are recorded on a register that may or may not be open to the public.

4. FISHING ENTITLEMENTS AS PROPERTY RIGHTS

Almost all Australian legislation which establishes ITQ regimes does not state that quotas, or any other form of fishing entitlement, are property. The known exception is the Tasmanian Deed of Agreement for abalone where quota unit entitlements are converted into shares, valid for ten years, with an automatic option to renew at the end of this period. Furthermore, the issue as to whether ITQs are property in law has not been challenged in the Australian courts. However, cases concerning the legal status of fishing entitlements such as fishing licences provide a good indication of the way in which Australian courts would view ITQs.

Australian courts have found that fishing licences are proprietary in nature and can be the subject matter of a trust (*Pennington* v *McGovern*[2]) or property of a partnership (*Kelly* v *Kelly*[3]). The courts have also found that a fishing licence constitutes property for the purpose of paying stamp duty when a licence is transferred (*Austell Pty Ltd.* v *Commissioner of State Taxation*[4]). One case (*Pyke* v *Duncan*[5]) found that a licence was personal rather than proprietary in nature, but doubt has been cast on this decision by a subsequent case (*Alessios and Others* v *Stockdale and Others*[6]) because it was considered inconsistent with the weight of authority.

4.1. Fishing rights and the common law

It is sometimes argued that fishing entitlements are antecedent to any statutory right and are a common law property right known as a *profit á prendre.* A *profit á prendre* is a right to take part of the soil, minerals, natural produce including fish and wild animals. The person does not own the thing gathered whilst it is on the land, but has a right to gather it. Usually a licence is granted to the holder of a *profit á prendre* to allow the person to enter the land (Gray, 1991). An English case, decided in the nineteenth century, established that the public had the right of fishing, at least in tidal waters. (*Goodman v Mayor of Saltash*[7])

There are two Australian cases where fishing entitlements were argued to be a *profit á prendre*. In *Harper* v *Minister for Sea Fisheries and Others*[8] the question was whether licence fees collected in the Tasmanian abalone fishery under state government legislation represented an excise tax. If they were found to be an excise tax, such a tax would be invalid because they could only be imposed by the federal parliament. Although the main focus of the case concerned commercial taxation and licence fees, one of the alternative arguments put forward by the Minster was that the fee represented a payment for a *profit à prendre* as opposed to a tax. The court found no need to address this argument having found that the licence fee was a royalty. However the judgments contained some interesting observations about fishing rights and *profit à prendre*, demonstrating their wariness towards the application of old common law rights to modern resource regulation (McCamish, 1994). The judgement noted that:

> The right of commercial exploitation of a public resource for personal profit has

[2] (1987) 45 SASR 27

[3] (1989) 50 SASR 477

[4] (1991) 4 WAR 235

[5] [1989] VR 149

[6] Australian Journal of Administrative Law,Vol.6 February 1999 p. 105

[7] (1882) 7 App Cas 633

[8] (1989) 168 CLR 314

> become a privilege confined to those who hold commercial licences. This privilege 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 in a society which is coming to recognize that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all content. (Mason CJ, Deane and Gaudron JJ)

The claim that a fishing licence was a *profit à prendre* was also made in *Bienke* v *The Minister for Primary Industries and Energy*[9]. In this case, it was argued by a licence holder that boat licences in the Commonwealth-managed northern prawn fishery were a *profit à prendre* and could not be taken away without compensation being paid under common law principles. The Federal Court found that statutory rights to fish may be comparable to a *profit à prendre* but these rights were a new type of right dependent on the legislation which created it:

> Legislation which prohibits the public from exercising a common law right, so as to prevent uncontrolled exploitation of a resource and confers statutory rights on licensees to exploit that resource to a limited extent, might be regarded in one sense as creating a right analogous to a *profit à prendre*: Harper, at 335. However, the right is not a common law right, but rather a new species of statutory entitlement, the nature of which depends entirely on the terms of the legislation...Thus the fact that the holder of a boat licence, on one view, might have a privilege comparable to a profit à prendre, does not mean that he or she has an entitlement based on antecedent proprietary rights recognised by the general law. (Mason CJ, Davies and Sackville JJ)

The case law discussed in this section suggests that courts are willing to find fishing entitlements (other than ITQs) to be proprietary in nature under specific circumstances, but that these entitlements are created by statute and are not a common law property right. It is likely that ITQs, in similar circumstances, would also be considered proprietary in nature, but not equivalent to a common law property right.

[9] (1995) 63 FCR 567

5. MODIFICATION AND EXTINGUISHMENT OF FISHING ENTITLEMENTS

As it is not uncommon for fishers to pay considerable amounts of money for ITQs, it is important for them to know whether they are buying a proprietary right that entitles them to compensation if the government modifies or extinguishes their ITQ. This could occur if, for example, a marine park is closed to fishing, or a reduction in commercial TACs is required to allow for an increase in recreational catches.

In law, there is a long established principle that a statute will not be construed to take away property without compensation unless the statute says so unequivocally (see *Attorney General* v *de Keyser's Hotel* [1920] AC 490; *Minister of State for the Army* v *Dalziel* (1944) 68 CLR 261 and *Commonwealth* v *Huon Transport Pty Ltd* (1945) 70 CLR 293*).* Some Australian legislation does make specific provision for compensation to be paid in the event licences are cancelled. Such provisions can be found in the fisheries legislation of Victoria[10] and in specific legislation[11] of Western Australia where fishers are prohibited from fishing in areas declared as marine parks or reserves. Other state fisheries legislation and Commonwealth fisheries legislation make no provision for compensation to be paid if fishing entitlements are taken away. However, under Commonwealth legislation[12] where a fisheries management plan is revoked, holders of entitlements known as Statutory Fishing Rights are entitled to a Statutory Fishing Right option which entitles holders to rights under any new plan.

Another way to claim compensation is to claim that property was acquired other than on just terms. In Commonwealth-managed fisheries fishers claiming compensation for any modification or extinguishment of their rights not covered by statute could claim that that compensation is payable under Section 51(xxxi) of the Australian constitution which states that the Commonwealth Parliament has powers to make law with respect to:

> 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.

To be successful, claimants would need to establish that their fishing entitlement was property and secondly, that

[10] Fisheries Act 1995 s.63

[11] Fishing and Related Industries Compensation (Marine Reserves) Act 1997

[12] Fisheries Management Act 1991 s. 31 A

there had been an acquisition of property other than on just terms.

The overwhelming majority of court decisions involving section 51(xxxi) have concerned the acquisition of land or property rights at common law. However there have been a few important cases in fisheries which provide guidance as to the way courts are interpreting the law. The first important Australian Commonwealth fisheries case on acquisition was *Minister for Primary Industry and Energy v Davey* [13] where the Full Bench of the Federal Court of Australia considered the question of property acquisition under just terms in the Northern Prawn Fishery.

The relevant facts of the case were as follows. In 1985, new management arrangements introduced into the fishery resulted in operators being allocated units of fishing capacity, known as 'Class A' units. They were based on a vessel's underdeck volume and main engine horsepower. A certain number of Class A units were required to use a vessel in the fishery. To operate a vessel in the fishery an operator also had to have a boat licence which was referred to as a 'Class B' unit. Both types of units were tradeable. Continued concerns over tiger prawn stocks and industry profitability prompted the Commonwealth Government to implement a compulsory 30.76% reduction in the number of Class A units held by each fisher on 1 April 1993. After the compulsory reduction, fishers would hold insufficient A units to use their vessel in the fishery. They would therefore need to purchase additional A units or, assign A units from one vessel to another if they held more than one vessel or; reduce the vessels engine power and/or; sell their remaining A units and cease fishing.

The compulsory reduction was successfully challenged in court[14] where it was found that such a reduction constituted an acquisition of property other than on just terms, and was therefore contrary to the limitation on the Commonwealth's power contained in section 51 (xxxi) of the Constitution. The Commonwealth appealed the decision in *Minister for Primary Industry and Energy v Davey* [15] claiming (amongst other things) that there was no acquisition of property because no person obtained any units or any other form of property, and alternatively, that the rights in the units were always subject to the Northern Prawn Fishery (NPF) Management Plan, as amended from time to time.

In deciding this appeal case the court assumed that the rights in question were proprietary in nature and focused on whether there had been an acquisition of property. The court found that the mere extinction or diminution of a property right did not necessarily result in acquisition unless the Commonwealth or third parties had acquired an interest in the property. The court observed that:

> All the fishermen are in the same position. It may be the case, (and it should be emphasised that what was urged here by the respondents was but a forecast as to economic consequences), that after the compulsory restructuring, and subsequent market rationalisation of units, some operators, in particular the larger corporate operators, will end up with a larger share of the fishery's capacity. Nevertheless, this advantage would arise principally from the survivors' greater ability to purchase extra units, effectively buying-out their competitors, and would stem from their own initiative, and market forces, rather than any acquisition by means of the Commonwealth law.

Concerning the alternative argument that rights were always subject to amendments to the management plan, the court agreed. The court found that the amendments to the management plan altered rights that were created by the Plan and noted that:

> units may be transferred, leased and otherwise dealt with as articles of commerce. Nevertheless, they confer only a defeasible[16] interest, subject to valid amendments to the N.P.F. Plan under which they are issued. The making of such amendments is not dealing with the property; it is the exercise of powers inherent at the time of its creation and integral to the property itself. Paragraph 20B of the N.P.F. Plan [on compulsory reduction] confers no proprietary benefit upon the Commonwealth or a third party. And instead of taking away something the fishermen possessed, it merely alters the statutory creatures in accordance with the statutory scheme creating and sustaining them. (Black CJ and Gummow J)

On the same day, the court also heard *Bienke v the Minister for Primary Industries and Energy*[17]. Similar to the claims in *Davey*, Bienke claimed that the compulsory

[13] (1994) 47 FCR 151

[14] *Davey* v *The Minister of Primary Industries and Energy* (1993) 40 FCR 567

[15] *op cit.* note 11

[16] A defeasible interest is an interest which can be defeated, revoked or annulled.

[17] op cit. note 8

restructuring program embodied in the NPF Management Plan was a device for compulsorily acquiring property, not on just terms. In this case, it was the compulsory reduction of the Class B unit (the boat licence) rather than the Class A units that were the subject of acquisition. The court reaffirmed the *Davey* decision, finding that neither the Commonwealth nor a third party had acquired any proprietary interest, and noted that licences were 'inherently susceptible' to modification or extinguishment because changes would be made to the management plan.

The issue of compensation has also been addressed by the Tasmanian Supreme Court in *Gasparinatos v The State of Tasmania*[18]. The court was asked to consider whether there had been an acquisition of property in the Tasmanian abalone fishery. The Tasmanian abalone fishery is managed by individual quotas issued through Deeds of Agreement authorised under the *Fisheries Act 1959*. Under his Deed of Agreement, the plaintiff (Gasparinatos), could take 34 abalone quota units a year for commercial purposes. Each unit was worth 1/3500th of the TAC.

The facts of the case are as follows. Subsequent to the establishment of the Deeds of Agreement, the Minister established a new, temporary fishery for 'undersized' abalone in specific areas of State waters (where abalone experienced much slower growth rates). New licences were issued for the temporary fishery. One of the claims Gasparinatos made was that there had been an acquisition of his property without compensation. He argued that the Deed of Agreement granted him the right to take a fixed proportion of the TAC for all abalone taken lawfully in State fishing waters and that the Minister had, in effect, increased the total allowable catch by allowing a temporary fishery for "stunted" abalone. Failure to grant him a portion of this increased TAC amounted to an acquisition of his property and therefore compensation should be paid. The court held that there was no acquisition as the Deed of Agreement gave Gasparinatos a proprietary interest in a fixed proportion of the abalone TAC as stated in Regulation 39D (2,100 tonnes) but not a proprietary interest in *all* abalone lawfully taken in state waters. Thus it was possible that abalone could be taken in addition to the TAC.

In *Consolidated Abalone Divers Group Inc v The Department of Fisheries of NSW*[19], the Australian Supreme Court of New South Wales (Administrative Law Division) examined whether the introduction of new management arrangements in the New South Wales abalone fishery, and the consequent allocation of quota shares involved an acquisition of property without compensation. The facts of the case are as follows. In 1985, a two-for-one scheme was introduced which required any new entrant into the fishery to obtain two 'original' permits. Both original permits had to be surrendered and the new entrant issued with a consolidated permit. A new entrant could also enter the fishery by purchasing a consolidated permit. The consolidated permits were twice the value of the original permits. Management arrangements were changed with the introduction of the *1994 Fisheries Management Act*. Specifically, the abalone fishery was termed a Commercial Share Management Fishery and permit holders would, after a four stage process, become shareholders each allocated 100 provisional shares. The two-for-one scheme was scrapped.

In response to the management changes, the Divers Group claimed that allocation of shares should have taken into account existing entitlements (which included the ability of consolidated permit holders to sell their permits for twice as much as original permit holders) and their expectation that as the number of permit holders decreased through the two-for-one scheme their quota shares would increase. The court found that the limited number of endorsements created a semi-monopoly such that an endorsement could be considered a proprietary right. However, the decision to abolish the two-for-one scheme was not considered to be a destruction of proprietary rights without compensation because:

> The consolidated licensees do not lose their endorsements or their right to fish for a quota of the TAC. Their capital asset (right to sell their endorsement) is likewise not lost; it can still be sold as previously. The plaintiffs' argument amounts to no more than that its value is reduced, but there are a number of other factors that may lead to its value being reduced. (Dunford J)

In summary, most of the above Australian Commonwealth and State cases suggest that while fishing entitlements may be considered proprietary in nature, the very nature of the legislation creating these entitlements explicitly recognises that such entitlements are subject to modification and extinguishment. What remains unclear is whether the compensation would be payable if modification or extinguishment took place and it was possible to show that there had been a third party acquisition. If or example, in moving a fishery from effort controls to ITQs the allocation formula results in a significant redistribution of wealth amongst fishers and it is apparent that some fishers have gained at the direct expense of other fishers, a case may be made that a third party acquisition of property has occurred.

[18] (1995) 5 TAS R 301

[19] BC9801814, 15 May 1998

6. CONCLUSIONS

Although ITQs are often claimed to have stronger property rights than other fishing entitlements such as permits, the case law suggests that courts are unlikely to view ITQs any differently unless expressly defined by statute. The courts have also clearly indicated that fishing entitlements are rights created by government as means of regulating the fishing industry and are thus governed by the legislation that created them. By annulling that legislation, the entitlement no longer exists. By modifying the legislation, the entitlement is redefined.

From a legal perspective, it may be rather misleading to claim that ITQs are a stronger property right than other fishing entitlements. However, the law is not static, and it remains to be seen whether Australian courts will view ITQs differently to other forms of fishing entitlements.

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