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Legislating for property rights in fisheries

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PART III
LEGISLATING FOR FISHERIES PROPERTY RIGHTS

FOREWORD

In recent decades, the traditional right in the public to fish in tidal waters has been supplanted by limitations on access to the stocks, particularly for commercial fishers. This has been achieved by statutory schemes establishing rights of varying natures. Where these rights are fully established, they show many of the legal characteristics of property.

In 1999, the FishRights99 Conference on Use of Property Rights in Fisheries Management was held in Fremantle, Western Australia, in collaboration with FAO. The Conference brought together fisheries managers, economists, lawyers and politicians from all a round the world to discuss, describe and explain the operation of property-based fisheries rights systems in the many countries which have implemented, are implementing or are considering the implementation of such systems in their national fisheries. The report of the Conference and technical papers were published as FAO Fisheries Technical Paper 404, Volumes 1 and 2, in 2000. Those proposing to introduce or improve a property-based fisheries rights system would do well to refer to this publication.

This study is a contribution of the FAO Development Law Service to the discussion on rights-based systems in fisheries management from a legal perspective. It outlines the history of the development of rights-based fisheries management, the concepts of property rights in fisheries and the terms used in property rights regimes, the governing legislation in jurisdictions which have introduced property rights in fisheries, the interpretation placed by the courts of the jurisdiction on that legislation, and the possible options for implementing property-based fisheries rights systems in national legislation.

The papers from the Fishrights 99 Conference provided much of the basis for this study. The many papers of that Conference have proved too numerous to cite fully, and lack of specific mention of any particular paper does not mean that it is not worthy of examination and reference. A preliminary report was prepared by the author, in 2000, on the national legislation and case law of Australia, both Commonwealth and States; of New Zealand; and of United States of America federal law. This further study is based in large part on that preliminary report. Legislative and case law materials were collected initially by the FAO Development Law Service, and then by the author. Particular use was made of the Web site AUSTLII for the Australian and some New Zealand materials, and of FAO legal

database FAOLEX for other countries. Other materials were obtained from libraries in Canberra, Australia, and from the Internet.

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ABBREVIATIONS

ACE	annual catch entitlement (New Zealand, Iceland)
AFMA	Australian Fisheries Management Authority (Commonwealth of Australia)
Cwth.	Commonwealth (Australia)
EEZ	Exclusive Economic Zone
FAC	fleet allowable catch (Morocco)
IFQ	individual fishing quota (USA)
IQ	individual quota
IQE	individual quota entitlement (Manitoba, Canada)
IQQ	individual quota by quantity (Morocco)
IQU	individual quota unit (Victoria, Australia)
ITQ	individual transferable quota
IVQ	individual vessel quota (British Columbia, Canada)
iwi	Maori tribe (New Zealand)
LOSC	United Nations Convention on the Law of the Sea
NSW	New South Wales (Australia)
NT	Northern Territory (Australia)
SFR	statutory fishing right (Australia)
SQ	individual quota by percentage (Morocco)
TAC	total allowable catch
TACC	total allowable commercial catch (New Zealand)

EXECUTIVE SUMMARY

The last two decades have seen the emergence, in many parts of the world, of limited access rights in fisheries under national jurisdiction. Access was initially limited by input controls such as restrictions on gear type, duration, vessel size, etc. But the recent shift has been to output controls, in the form of catch quotas, usually held in respect of an individual, and increasingly made transferable. In this form, they are often known as Individual Transferable Quotas, or ITQs, although they go by many other names and take many different forms.

These rights are increasingly being regarded by economists, managers, lawyers and judges as "property" rights, and even "property". At law, a designation of "property", albeit incorporeal, can have certain consequences. It may be that some of these consequences are not what the framers of the governing legislation intended. It is important, therefore, when preparing fisheries management policy and particularly when contemplating the introduction of property rights systems, that planners are aware of the nature and consequences of their creation, and are able to make informed rather than accidental choices.

Part I of this Study examines the historical background to fishing rights, and the theoretical concepts and constructs employed in the analysis of property rights in fisheries. Historically, the great legal systems of the West recognised a public right to fish in tidal waters. However, in response to a growing awareness last century of the potential and sometimes actual exhaustibility of fisheries resources, this traditional open access regime was replaced by increasing regulation which restricted the right to fish by licensing, and then by placing limits and conditions on those licences. Such restriction techniques, however, were unable to resolve the problem of the "race for fish" which continued to deplete fish stocks.

It is now accepted by many that the creation of a form of exclusive property right in marine fisheries by the establishment of quotas promotes greater industry involvement and hence better fisheries management. Over the last two decades, such systems have been established, in varying forms, in many maritime nations."

The concepts of "property" and "ownership" are elusive of definition. Roman and English law took somewhat differing views. It is generally agreed that "property" is not a thing in itself but a bundle of rights held or exercised in relation to a thing. Rights themselves are viewed differently by economists

and lawyers: economic rights are the end sought, whereas legal rights are the means of achieving the end.

A legal view of ownership, or the holding of rights in relation to property, sees it as a spectrum of rights which have three features:

- a juridical relationship between a person and a thing
- privileges and powers are open-ended
- the holder is entitled to self-seekingness.

Absent any of these features, the relationship falls short of true ownership. Where powers are not open-ended, they create a non-ownership proprietary interest, best exemplified by the concept of *profit à prendre*.

Economists view property rights as having, in varying degrees, qualities of:

- exclusivity
- permanence
- security of tenure
- transferability.

Property rights in natural resources may be classified into operational level rights — the rights of Access and Withdrawal; and collective choice level rights — the rights of Management, Exclusion and Alienation.

Fisheries access regimes have ranged through:

- open access (which is actually the absence of a regime)
- state property or limited access regimes
- private property regimes
- communal property regimes.

To this list may be added nation-state regimes and global regimes.

The exclusionary nature of the individual quota may in some cases work against the interests of disadvantaged and indigenous groups, by concentrating fisheries rights in the hands of the wealthy (and sometimes expatriate) few. Quotas may even be held by the "armchair fishers" who are able to afford them. It is possible that the way forward must take account of the interests of fishing communities by establishing community or group

quota schemes where possible, thereby serving the interests of the social obligations of states set out in the FAO *Code of Conduct for Responsible Fisheries*. Further, an ecosystem-based approach to fisheries management has yet to be devised, and a greater rather than lesser degree of government involvement may be required.

Part II contains a detailed study of the legislation of various countries in respect of fisheries rights and the extent of their property nature. Legislation is analysed in each case for treatment of:

- description of the rights
- establishment and allocation
- security
- transferability
- permanence
- other matters pertaining to the rights created.

Two countries are studied in detail: New Zealand, which has undertaken a comprehensive implementation of ITQs by detailed legislation; and the federated nation Australia, both the Commonwealth and the states, which between them demonstrate a wide range of fisheries rights regimes. These systems demonstrate the many and varied approaches taken to legislating for fisheries rights, but on the other hand show a marked similarity in judicial approaches to determining the extent of the property nature of fisheries rights. Both countries have also had to deal with the problem of recognition of the traditional fishing rights of indigenous peoples.

One of the significant factors giving rise to differences in legislative and judicial approaches to fisheries rights in these two common law jurisdictions is the presence or otherwise of a written constitution which requires just compensation for deprivation of property. Where there is no such provision, as in New Zealand, a strong property rights system has been created, and has been subject to minimal court challenge. On the other hand, though, the New Zealand system has perhaps been a little over-ambitious in concept, and no little confusion has been caused by the gradual implementation of a highly comprehensive set of statutory provisions.

Various other countries which have implemented fisheries rights in their fisheries law are also discussed, and it is noted that:

- Iceland shares with New Zealand the distinction of having introduced the most comprehensive ITQ property rights systems in the world
- in Nicaragua, a country assisted in legal aspects of its fisheries reform, a comprehensive ITQ system was also prepared.
- the United States of America has seen only limited introduction under fisheries management plans of quota management systems. IFQs under the amending legislation of 1996 are expressly described as revocable "permits to harvest".
- in Canada, ITQs have evolved in both federal and provincial legal systems after the event as a response to the demands of managers and industry, rather than as a legislated initiative designed to guide the nature and course of fisheries for the future.
- both South Africa and Namibia, anxious to throw off the influence of former apartheid regimes, have been reluctant to introduce property rights of a secure and permanent nature.
- Morocco is one of the more recent nations to undergo an FAO-assisted transformation to an ITQ system, which is implemented under Management Plans for each fishery to be managed.

The following conclusions may be drawn from a study of judicial decisions (appearing as Annex 1):

- courts everywhere have agreed that ITQs, being creations of statute, are in general subject to the terms of the statute that creates them
- a form of property is thereby capable of creation which is in some measure less than fully "owned" in the full sense of private property law
- the "bundle of rights" that constitutes property is capable of apportionment between private persons and the state
- the characteristics of transferability, exclusivity, security and durability are not present to their fullest degree

- the categorisation of the "non-ownership property interest", which lacks open-endedness, appears more appropriate to describe quotas
- quotas are at least a form of *profit à prendre*; in some cases they are somewhat more.

Part III discusses the issues involved in preparing legislation for the implementation of fisheries rights, and offers some models from the laws of various countries that have already done so. It is impossible, however, to propose a single "model fisheries rights law". The theoretical constructs of the various resources regimes proposed in Part I are capable of a wide range of variation, and do not necessarily follow the same development process. These variations are often driven by geographical, political, social and economic considerations.

Essential considerations in legislating for a fisheries property rights scheme are:

1. Process Matters
2. Fishing Management
3. Holding and Allocation of Rights
4. Nature and Characteristics of the Right
5. Management Structures
6. Fees and Charges.

1. Process matters include considerations of:
   - the extent and content of existing fisheries law — this will dictate the extent and direction of the new legislation required.
   - territorial jurisdiction, particularly in the case of federal or colonial/territorial situations; and in management of migratory and straddling stocks.
   - plural legal systems and traditional rights of indigenous peoples.
2. Fishing management includes the setting out of conservation principles, the process of promulgating management plans and most crucially, the establishment of total allowable catch.
3. The legal nature of the quota-holder, usually an individual, shows a major break with the traditional practice of issuing licences in respect of

vessels. Group holdings are also possible, particularly where the preservation of traditional or community rights management is desired.

The initial allocation process has provided much of the impetus for the many court challenges that have assisted in determining the nature and even the legitimacy of fisheries rights. There are various methods of allocating initial quota, often depending on the pre-existing number of participants in the fishery, and whether fleet or participant size is to be reduced and if so by how much. It is also essential to provide an adequate appellate process, using existing or new mechanisms, which is not too cumbersome or drawn-out.

4. There are various possible approaches to determining the extent of the property nature of the right to be created —

- recognise the right as permanent property, and provide some other measure of allowable catch which is capable of variation
- declare in the governing statute that the right is or is not property
- create a "special" property-right while declaring in the statute that fisheries resources in the natural environment belong to the state
- issue permits and class them as revocable privileges
- declare that no compensation is payable in the case of extinguishment
- rely on the courts to find that any property nature of a fisheries right is an incident of crown sovereignty rather than a proprietary right, or that the right is not fully indefeasible and does not confer any benefit on any one party
- provide for compensation in the case of cancellation for management purposes.

Most commonly, the extent of property in the fisheries right is determined by the strength of the various property characteristics of transferability, durability, security and exclusivity.

Transferability is the key defining feature of most fisheries rights, and is the characteristic which more than any other gives the rights their value. The extent of the transferability varies. Control over transfers is usually left to the state, the exception being communities which are issued an overall quota which is then allocated and managed internally.

Durability is the other main determinant of the property nature of fisheries rights. Unlike transferability, durability can actually be perfect, i.e. the right can be permanent. This, it is argued, encourages investors to take a long-term view of the sound management of the fishery.

Security is achieved by the establishment of a register. Where a variety of property interests such as mortgages, liens and other interests are capable of registration, this increases the security and value of the property interest.

Exclusivity, the right to hold and manage property without external interference, is guaranteed by the state as against other private individuals by a system of trespassory rules in the form of monitoring and enforcement provisions. Although these are usually already present to a considerable extent in fisheries legislation, new "quota" offences will also need to be added.

Freedom from interference by the state, in the form of reduction, suspension and cancellation of rights, is not so strongly guaranteed. Rights in fisheries are creatures of statute and the state can intervene only subject to legal or constitutional guarantees of just compensation. Suspension and cancellation of quota holdings must be considered: so also must the situation where the governing management plan for a fishery is altered or abolished.

5. ITQs bring with them an increased level of need for a wide range of administrative and functions, requiring an expanded or even new form of management structure. Attention must be paid to such matters as:

    - the possibility of or need for formalising the consultative process with industry
    - legal recognition of management structures for community-based rights
    - the relationship with fisheries research bodies
    - specialist fisheries enforcement agencies.

6. A fisheries rights system brings increased costs of administration, data collection and collation, research, monitoring and enforcement. A fisheries rights system may be required to pay for these services in various ways, including resource-rent collection such as licence fees and produce taxes, charges for initial allocation and transfer taxes.

In conclusion, it must be remembered that the legislation for a fisheries rights system must be capable of permitting a measure of amendment as the scheme itself develops and changes subsequently to initial implementation.

PART I
BACKGROUND AND CONCEPTS

HISTORICAL BACKGROUND

Open Access

Western legal systems have long recognised private rights to take, and even to own, fish in inland waters. The fundamental right of public access to fisheries in tidal waters is equally well established. It existed in English law prior to Magna Carta, where it went hand in hand with the doctrine of "capture", which held that there was no ownership in the swimming fish until they were captured. After Magna Carta, this public right under the common law system could be modified by legislative intervention. The public right to fish developed more slowly in continental maritime nations where legal systems were based on Roman law, but they gradually moved away from the Roman concept of absolute ownership, as nations extended their sway over the oceans. Open access and the freedom of the seas were developed as a legal principle in the 16th and 17th centuries starting with the writings of Grotius, a principle which was applied to the open ocean as well as to tidal waters within national territory. The only exception was the exclusion of foreign fishermen as between countries, but this was more designed to exclude foreigners from convenient ports and markets, than to deny them rights to the fish.[1]

Much of the rationale behind the open access principle was the belief in the inexhaustible abundance of marine resources. But the twentieth century has proved that this is no longer so. The problems of overfishing in an open-access regime were already becoming apparent nearly 100 years ago[2], and in 1911 Jens Warming stressed the dangers of overfishing.[3] This was borne out by observation of the changes in the quantity of certain ocean fishstocks between the two World Wars. Fisheries science and technology underwent many revolutionary developments, and fishing regulation commenced with the introduction of gear and season restrictions.

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1 Scott (2000b) p. 106.

2 Gislason (2000b) notes this in the Pacific halibut fishery, p. 383.

3 Property Rights in a Social and Ecological Context: Case Studies and Design Applications.

In the mid twentieth century, almost coinciding with the first assertion of national claims over oceanic fishery resources,[4] Scott Gordon, taking up Warming's argument, proposed that the only solution to the problem of marine resource depletion is "private property or public (government) property, in either case subject to a unified directing power".[5] In 1968, the biologist Garret Hardin in his famous formulation of "the Tragedy of the Commons" again focused attention on the relationship between environmental degradation and the absence of rules governing the use of natural resources. This much-cited article has suffered tremendous criticism over the last few decades, due to Hardin's apparent failure to distinguish a "common property" regime, subject to its own form of rules, from an open access situation in which no collectively accepted rules are in place or observed. It was the latter situation that Hardin classified as the "commons," in the process obscuring the historical fact that where collective ownership and access are accompanied by effective rules and institutions, "tragedy" is far from inevitable. As a consequence, Hardin's article was interpreted for years as a confirmation of the dangerous consequences of collectively owned property, reinforcing the argument that individually owned private property was the only solution to resource overexploitation.[6]

Limited Licensing

In the last few decades, improved technology, increased demand for seafood, opening up of new fisheries and rising prices have seen the degradation and even collapse of many fisheries worldwide. Regulation has been stepped up, with solutions such as limitations on licensing and buy-back schemes designed to reduce fleet size, but such measures have had only a small impact on fishing effort. When fishermen only have rights to the fish they have caught, the increased pressure on them to catch as much as they can in a competitive situation has led to the "race for fish". Governmental attempts to regulate fishing by such means as limiting licences and permits, imposing stringent and complicated licence conditions and restricting fishing periods or areas have merely seen the emergence of more intensive fishing,

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4 Particularly the 1952 Declaration of Santiago, whereby Chile, Ecuador and Peru proclaimed their exclusive sovereignty and jurisdiction over a maritime zone of flat 200 nautical miles including the fish, the subjacent soil and subsoil.

5 Gordon (1954). As did later Hardin, Gordon also used the term common property instead of open access.

6 This and several other paragraphs in this Part have been adapted from Lería & Van Houtte (2000).

overcapitalization in gear and vessels, widescale poaching and breach of licensing and reporting conditions. Licence-holders are locked in and non-holders are locked out. Size and season limits fail to regulate the overall catch. Harvest reduction is economically inefficient as it fails to reduce costs. Management by regulation is not working, and fishstocks continue to dwindle.

The Rationale for Fisheries Rights

It is now clearly accepted that open access fishing and the absence of effective governing rules constitute an issue which cannot be ignored. The FAO Report *The State of Food and Agriculture 1992* acknowledged that:

> "Economic waste has reached major proportions; there has been a general increase in resource depletion, as fishing efforts have moved down the food chain; the marine environment has become increasingly degraded; conflicts have become more widespread; and the plight of the small-scale fishermen has intensified. "

The Report states the solution as two-fold: fisheries should no longer be treated as free goods, but as a resource with a specific value; thus it will be valued by the resource-exploiters. This will come about as alternative systems of property rights in fisheries, including exclusive use rights, are developed.

Economists are the chief proponents of this view. They note that extensive, well-defined and well-enforced fisheries property rights promote higher production levels worldwide through the promotion of trade and capital accumulation, and they construct models to prove this. However, free fishing results in excessive fishing capitalization and effort, while the resource dwindles. It is therefore the aim, particularly in the fisheries sphere where property rights are non-existent or poorly defined, to attempt development and implementation of such rights (Arnason (2000) 14 ff.).

Following this view, the rationale for introduction of ITQs is set out in practical terms by Ackroyd & Beattie (n.d.) in relation to the Californian sea urchin fishery as follows:

- the tradability of quota avoids locking in quota-holders and locking out non-holders, thereby creating a value in the quota itself
- the value thereby developed in the quota obliges industry to fish in the most cost-effective way

- with security over the harvest, fishers will no longer be obliged to compete with their counterparts resulting in overfishing
- because they must bear the cost of bad management decisions in reduced catch entitlement, fishers can assume a large part of the responsibility for good fishery management
- quotas abolish the basis for overfishing. If the resource is overfished, the quantity available for fishing is reduced and so is the value of the quota. Quota holders change from being exploiters of the resource to being its custodians
- fishers are more inclined to enhance the value of their harvest by only landing the best quality catch, instead of simply harvesting greater quantities.[7]

An opposite view[8] argues that it is not the ownership stake of fishers that promotes care of the resource, but better technology and science, and increasing environmental regulation. It is the stick, not the carrot, that obliges industry to comply with the increasing demands of government management strategies.

Another argument takes the middle ground, and suggests that the evolution of property rights in fisheries is no more than "the development of the old system of licences, with more of the valuable characteristics added".[9] Fisheries rights were not consciously developed to create a property right; they were introduced merely to improve existing licence systems in the face of dwindling fish stocks by adding certain desirable characteristics, which thereby turned the regulatory regime into a form of property right.[10]

PROPERTY RIGHTS — THEORY AND CONCEPTS

Property in English Law and Roman Law

Cacaud, in writing of the establishment of a quota system in the octopus fisheries of Morocco, has noted that property rights systems appear to be

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7 This may be so for sedentary species which are hand-harvested, but it ignores the problems of bycatch discards in other types of fisheries.

8 Jensen (2000) p. 47.

9 Scott (2000a) p. 1.

10 This argument however overlooks the fundamental shift created by the establishment of quota rights from input controls to output controls.

more readily adopted in common law countries than in those following a civil law system.[11] This may be in part at least due to the differing origins and nature of the concepts of property and ownership in each of these two major legal systems. Roman law, upon which civil law systems are based, developed the concept of virtually absolute *dominium*, the ultimate ownership title, which can be legally protected as such and which contrasts with mere possession. Roman law does not distinguish degrees of ownership. In contrast, English law contains no such abstract. Ownership is no more than a "bundle of rights" qualified in their extent by law and the limitations of the actions which can be brought to enforce the rights. The three elements of ownership - the right of indefinite user; the right of unrestricted disposition; and the unlimited duration of the right of enjoyment - are each subject to qualification, direct or indirect. All property, whether real or personal, is held subject to the overriding rights of the sovereign (whether as reversionary landlord or ultimate legislating power). The classic definition of ownership in English law, states Pollock, can be no more than "the entirety of the powers of use and disposal allowed by law". English courts developed a hierarchy of actions over property, shading from the fully proprietary to the purely possessory. At common law, the dispute concerns who has the better seisin: at Roman law, the question is a stark yes or no to ownership.[12]

Many modern civil law systems have abandoned the absolute notion of Roman ownership. In the ninetinth century era of the creativity of civil law legal science, the autonomy of the individual was highly developed, and private property was a fundamental institution.[13] In the twentieth century, the dichotomy between state and individual became blurred by the introduction of a legally recognized intermediate level of various organizations and bodies. The *nemo dat quod non habet* rule applied in both English and Roman law, but many modern civil law systems have abandoned it, and a possessor can give good title to a bona fide purchaser for value.[14] The supreme rights of the individual over property and contract have been eroded - but it can be contended that the rights of the state over property *vis-à-vis* the rights of the individual are not as strongly assumed as in common law systems.

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11 Cacaud (2000) footnote 10.
12 Buckland & McNair (1952) pp. 60 ff.
13 Merryman (1969) 69, pp. 100–105.
14 Buckland & McNair (1952) p. 77.

Theories of Property

A considerable amount of theoretical discussion has ensued as to the meaning and nature of fisheries property rights systems. They are variously argued to be property, and something less than property. One cause of confusion is that the two terms property and rights are often used interchangeably. They may be distinguished as follows:

- the term **property** is often confused with a tangible thing that is owned. Property, however, is not an object but a concentration of power over things and resources. This power is as secure as the duty of all others to respect the conditions that protect this concentration of power. Using a legal definition: *"property is the right to dispose of a thing in every legal way, to possess it, to use it and to exclude every one else from interfering with it."*

- **right** is the capacity of the claimants to call upon others without such claims, to acknowledge their duty to honour the claim, with any violation of such a duty sanctioned by the state or by an authority. It is *"a capacity ... of controlling, with the assent and assistance of the state, the actions of the others."* [15]

A further cause of confusion has resulted from the fact that different disciplines, notably those of economics and law, are talking different languages from the outset. Rights may be distinguished in economics and law in that:

- economic rights are the end sought;
- legal rights are the means to achieve that end.

Connor[16] submits the legal view of "property" as follows:

- property is not a thing, but a right established by socially constructed convention

- property is a bundle of rights or interests in an asset. The bundle may be apportioned between different holders

- rights can be established and supported within a given community and are only declared as such when tested in the courts

- rights can be established, qualified and extinguished by statute.

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15 Black's Law Dictionary.
16 Connor (2000).

A far more detailed socio-legal analysis of the nature of property and its ownership is given by Harris in his recent work[17]. Property he defines as "the thing the object of an ownership interest". The creation of ownership of property rights is only necessary when there is a scarcity of resources, i.e. there are insufficient resources available for instant use by all those seeking to use or extract them. Where a scarcity occurs, allocation mechanisms are required. But these mechanisms may not necessarily be linked to property institutions, as for example in the allocation of priorities for hospital care.

There are two essentials of any property institution. The first is the set of trespassory rules, whether merely social conventions or embodied in law and supported by civil or criminal sanctions, which oblige members of society not to make use of the property without the consent of the individual or group who possesses some kind of open-ended relationship with the property.[18]

The second essential is the "ownership spectrum", which is the open-ended relationship supported and protected by the trespassory rules. There is no universal description of "ownership". The concept covers a spectrum from "mere property" to "full-blooded ownership", which is almost, though still not quite, totally unrestricted in nature. All ownership interests comprise some use-privileges and some control-powers. At the upper end of the spectrum, they include powers of transmission, but this is rarely a necessary feature of an ownership interest.

But all forms of property ownership have three features in common:

- they involve a juridical relationship between a person/group and a resource
- the privileges and powers they comprise are open-ended i.e. they cannot be concretely and finitely listed
- they authorise "self-seekingness" on the part of the individual/ group to whom they belong i.e. the individual/group itself derives profit or other benefit from the property.

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17 Harris (1996).

18 These property-specific rules must be distinguished from property-independent prohibitions, which may relate to property but are universally applied throughout the social unit and do not specifically protect the interests of any particular group or individual.

Absent all three of these qualities listed above, an interest falls short of true ownership. **Quasi-ownership interests**, of public officials in public agencies for example, lack the third element of self-seekingness: it is the public represented by the public agency which derives the benefit from the public official's legal ownership, not the public official himself. And **non-ownership proprietary interests** lack the second element of open-endedness: their content is limited.[19] They are usually created out of an ownership interest by a specific contract or grant which confers a specific use-privilege over a thing. These limited rights are, however, protected by special trespassory rules[20] which ban any use of the resource which would frustrate the limited rights entailed by the interest. Where the contract or grant is protected by trespassory rules against the world in general, including the contractor or grantor and his successors, a non-ownership proprietary interest is created.

Such interests are commonly of three types:

- rights to enjoy some specifically granted category of the use privileges which are included in the original ownership
- rights to deny the owner of some of his use privileges
- rights to subtract some monetary value out of the wealth potential of the resource.

Common examples of these from English law are, firstly, easements and *profits à prendre*; secondly, natural rights such as the right to light and the right to support; and thirdly, mortgages and charges of various kinds.

According to these proposals then, it appears that fishing property rights, lacking open-endedness because their content is limited by the statute which creates them, are less true "property" in the legal sense, than a form of non-ownership property interest, of the first type given above - something in the nature of a *profit à prendre*.

A quantified view of property comes from economists.[21] According to them, property rights have four essential characteristics:

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19 As, for example, the interest in an easement falls short of a true estate in land.

20 The range of protection specifically includes successive owners.

21 For detailed discussion and modelling see Scott (2000b) pp. 109 ff. and Arnason (2000).

- **exclusivity** – the ability to hold and manage the right without outside interference
- **duration**, to perpetuity
- **security** of tenure – the ability to withstand challenges of others to the title
- **transferability**, with varying degrees of restriction on transferees.

Security

Security, or quality of title, is the ability of the right-holder to withstand challenges of other to the right. A fisheries right may be challenged by other individuals, by displacement or court verdict. It may be challenged by the state, which can withdraw or terminate the right in accordance with law.

Exclusivity

This is the ability to hold and manage the right without outside interference. Enforceability, the ability to enforce the right, is an important aspect of exclusivity. Other fishers may interfere with a right-holder's ability to harvest fish in the manner he wishes. More significantly, the state by regulation, licence conditions, gear, area and seasonal restrictions etc. usually interferes to a considerable extent with a fisheries right-holder's exclusivity.

Duration

This is the time-span of the property right, the period during which the holder may exercise powers of ownership. A fisheries right may last anywhere from a very limited period of a year or less (the time-span of an ordinary fishing licence) to perpetuity.

Transferability

This is the ability to transfer the property right to another. Fishing licences are not usually transferable. But as fishing rights acquire a measure of exclusivity, thereby becoming a scarce resource, they acquire value in themselves and the demand emerges for the power to transfer. A subset of transferability is divisibility, the ability to divide the right into smaller portions which can be transferred individually. Divisibility means rights-holders and potential transferees can tailor their holdings to their particular needs and abilities, and thereby attain optimum allocation of the resource between exclusive users.

Another subset of transferability is flexibility - the ability with which conditions on the right can be altered or relaxed to meet sudden changes in circumstances.

These characteristics are not absolute, but are present in different types of rights to varying degrees. The comparative strength of each one of them provides a measure of the quality of the rights. A strong balance of all four provides a "perfect" property right, which in reality can probably never be achieved. Property rights are limited for both technical reasons: The problems of defining and policing the rights; and social reasons: the opposition of the dispossessed, and the uncertainty and upheaval in social equilibrium that the creation of new property causes. But the more strongly each of the characteristics is manifest in a right, the stronger its property nature and the more it acquires inherent value.

It is this economic view which provides the more appropriate paradigm for the analysis of fisheries rights legislation. Other matters can also be noted in addition to the basic four, and, together, these features provide a context within which the rights can be discussed.

PROPERTY RIGHTS IN FISHERIES

Rights in Natural Resources

Ostrom and Schlager[22] classify the rights involved in the management of natural resources and their evaluation in terms of operational-level property rights and collective-choice level property rights. Operational-level rights consist of:

- the right of Access, which authorizes the possessor to enter in an area and enjoy non-subtractive benefits (the holder of this right is termed the "Authorized Entrant")
- the right of Withdrawal, which besides the right of access gives the possessor the right to obtain the "products" of a specified resource (the holder is termed "Authorized User").

The rights of Management, Exclusion and Alienation are classified as collective choice level property rights.

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22 Ostrom and Schlager (1992).

The difference between the two levels of property rights is important because the Authorized Entrant or User can only exercise the specific rights allocated to him, without the additional right of participating in the design of future operational-level rights or of playing an active role in the management of the resources. To be involved in operational-level Withdrawal or Access rights, the Authorized User must hold at least one of the collective-choice level property rights. In this sense:

- the right of Management gives the holder the authority to determine how and where harvesting of a resource may occur, and whether and how the structure of a resource may be changed
- the holder of a right of Exclusion can regulate the access to the resources and how this access can be transferred
- the right of Alienation gives the possibility of transferring part or all of the collective choice rights to others.

Fisheries Access Regimes

For fisheries, as for other natural resources, it is useful to refer to the various "regimes" which govern property rights in a particular setting. Lería and Van Houtte distinguish four access regimes. The first regime is more aptly described as the absence of any property rights regime, namely, *open access*. The other three are *state property regimes*, *private property regimes*, and *common property regimes*.

Open access

In an open access situation, the resources are considered as equivalent to *res nullius*. Open access cannot be considered a "property regime" as it lacks two essential characteristics: firstly, it lacks an authority system for establishing and enforcing norms of behaviour among participants; and secondly, no person or group holds exclusive rights over the resource. The harvesting of open access resources does not involve property rights but rather privileges[23] of access and possession.

In fisheries today, open access theoretically applies only on the high seas, beyond the limits of any state's jurisdiction. There are many important high

[23] "A particular and peculiar benefit or advantage enjoyed by a person, company or class, beyond the common advantages of other citizens": Black's Law Dictionary.

seas fishstocks, such as tuna, which have been overexploited due to their high economical value. In order to prevent their depletion, many international and regional instruments[24] oblige states to co-operate and regulate the fishing operations of their nationals in the waters beyond their EEZs. This intrusion of state control into the high seas can be viewed as transforming the *unregulated* open access situation into a regulated one where the resources are no longer *res nullius* but *res communis omnium.*[25]

State property regimes

State sovereignty is a construct of international law. Sovereignty is the right of a state to control matters and resources within its territory, and is distinguished from ownership. State sovereignty is exercised by legislating, within constitutional parameters, with regard to all matters and things within that control.

This power of control has been extended beyond the strict boundaries of state sovereign territory in respect of maritime jurisdiction. During the 1960s, as a consequence of the failure of the Geneva Conventions on the territorial sea, a number of Latin American and Caribbean countries unilaterally declared the expansion of their sovereign rights beyond the territorial sea into what they called the "patrimonial sea." The United Nations Convention on the Law of the Sea (LOSC), which entered into force in 1994, established the concept of the Exclusive Economic Zone, which derives directly from this "patrimonial sea" concept. By Articles 56 and 57 of the Convention, coastal states have "the sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living" in the EEZ, a portion of sea not exceeding 200 nautical miles from the "baseline from which the breadth of the territorial sea is measured. " These articles, fundamental parts of the Convention, entitle states to manage almost 35 percent of the world's

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24 See in general the UN Fish Stocks Agreement, the FAO Compliance Agreement, and numerous regional fisheries agreements. In addition, a number of non binding instruments encourage states to cooperate on these matters. See, for example, the Code of Conduct for Responsible Fisheries, the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing, and the Plan of Implementation adopted at WSSD, Johannesburg.

25 High seas fishery resources can now be considered as international property, belonging to all.

oceans; as a result, therefore, more than 90 percent of the potential resources of marine fisheries are now within state EEZs.

A state may, of course, exercise this sovereign right in different ways. It can choose to leave the resources available for free use, creating a situation of open access; or it can choose to exploit the resources directly through its own agencies. In addition to these two possibilities there is a more widely used and practical system, whereby the state grants licences - or *profits à prendre* - to individuals or groups, thus controlling access to the resources. Under this system the licensee (or Authorized User) has only the right - at operational level - of withdrawal.[26] Whether issued in respect of a person or a vessel, this right is "personal" (usually the holder of the right cannot sell or lease it) and it needs to be renewed regularly, usually each year. Due to the large numbers of competing Users in each fishery the right does not give the fisher any security over his future harvest, and for this reason he tends to harvest as much as he can and as fast as he can: the "race for fish". The natural consequence of this system is the overexploitation of resources and the overcapitalization of the sector, a consequence with which states have tried to cope with different input and effort controls, such as restrictions on the granting of licences, gear restrictions and limitations, technical, area and seasonal restrictions, or limits on the total harvest, often in the form of a total allowable catch (TAC).[27] These efforts, while they may have limited overexploitation, have at the same time increased the "race for fish" and consequent overcapitalization. Hence the search for alternatives.

Private property regimes (or individual property rights)

Private property regimes in fisheries are best exemplified by the Individual Transferable Quota (ITQ) system, a system proposed as early as 1973 by Francis Christy.[28] Under this system, a proportion of the TAC is assigned to an individual or a group. This gives the Authorized User an exclusive right to harvest a part of the annual yield of fish. The individual does not have a property in the resource, but has an exclusive right to harvest. Hence when the quota is rented, sold or mortgaged, the subject of these transactions is

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26 By fishing or harvesting.

27 Logically, a TAC is applied to an entire fishstock, whether or not it is contained within the boundaries of a single state's waters. Where the stock is straddling or migratory, states draw up national TACs, with varying degrees of cooperation and communication with other states involved.

28 See Grafton (1996).

not a tangible object but a right of *usufruct*.[29] In its purest form this system gives the Authorized User permanent exclusivity to the harvest of the quota, with the right to manage this authorization, and to divide, sell, lease or mortgage i.e. it gives collective choice property rights (to refer again to Ostrom and Schlager's terminology).

It must be emphasized that in none of the countries that have adopted quota systems does a "pure" property right system exist. Instead, national legislation has usually limited the right to sell, lease, divide or mortgage the quota, as well as limiting the duration of the exclusive usufruct. Theoretically, the exclusive and stable possession of the quota can resolve the problem of overcapitalization because the Authorized User can decide when and where to assert his rights to harvest without the problem that someone else will catch his quota, so he has far less reason to "race for fish." The fishing property right evolved from the licensing system and as in that system, the state continues to play a dominant role in the establishment of the national TAC, in the management of the resources and in control of users through the imposition of penalties for transgressors. Furthermore, in most fishing property right systems adopted to date, allocation has been free of charge and based upon historical participation in the industry, or other characteristics such as vessel capacity, gear characteristics (or a combination of these) and so on. Usually, the quota allocated is a percentage of the national TAC but it can also be denominated on the basis of weight, as in the original design of New Zealand's ITQ system.

Common property regimes

The final form of property regime found in fisheries is the common property regime. This type of regime is important in a number of parts of the world, particularly in Pacific Island states, in Japan, Indonesia and also in some cases in Europe and North America. In a common property regime, a local community rather than an individual holds the exclusive right to harvest in a particular geographical area. These exclusive rights can take different forms such as rights to harvest a particular stock, to fish in a particular area, or to use a certain kind of gear or vessel. The management of the resource is carried out by the community, which assumes some measure of control, including monitoring and surveillance functions, and devises the

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[29] In civil law, "the right of enjoying a thing, the property of which is vested in another, and to draw from it all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing": Black's Law Dictionary, Fifth Edition.

individual rights to withdrawal and access. This means the community as a whole has collective-choice property rights to varying degrees.

The relationship between the community and the state is an important one. Usually, the state retains the overall power to devise regulations such as the establishment of the national TAC, whereas the local community devises the local rules that must be respected by the individual members of the community in the use and maintenance of the common resources. Cooperation between the national level and local level is a key to achieving sustainable development of the fishing industry, and a lack of enforcement on one or both of the levels could cause a reversion to an open access situation.

A wider analysis

Drawing on previous literature, Taylor-Moore[30] expands these four regimes into six, namely:

- open access regime: no user group has exclusion rights
- limited access regime: specific user groups have limited exclusion rights
- private property regime: exclusive rights held by the private sector
- communal regime: exclusive rights held by specific communities
- nation state regime - exclusion rights held by the state on behalf of its citizens
- global regime - exclusion by agreement of nation states.

Within these regimes, both fishers and other interested parties exercise various generic rights:

- harvest rights - rights to take, sell and otherwise dispose of fish, to hold licences and quotas
- use rights - rights to modify habitat, and to use it for purposes other than resource extraction

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30 Taylor-Moore (2000) p. 72.

- conservation rights - to maintain habitats, provide fish-ways, to manage and protect resources, particularly threatened and endangered species
- management rights - rights of all sectoral stakeholders to be involved in management planning decision-making, rights to compensation, and rights to formal conflict-resolution processes.

STILL MISSING: THE SOCIAL DIMENSION

Most writers, managers, economists and policy-makers agree that the granting of property rights in fisheries to the private sector will bring with it increased involvement in maintaining the resource. But the social scientists[31] dispute this, seeing the argument for increased property rights in fisheries as an economic rationalization that works against the interests of disadvantaged groups. By placing a value on fisheries rights, and allowing transferability which increases that value when they are freely traded, fishing rights become increasingly concentrated in the hands of the few, not necessarily fishers themselves, but rather the "armchair fishers" who are able to afford them. his works against the interests of workers in and prospective new entrants into the fishery: the actual fishers when they are not owner-operators, the crew-members who are attempting to progress up through the hierarchy, and the small-scale artisanal and traditional fishers — all of whom are already disadvantaged by the effects of modernization and the free-market economy. But it appears that the introduction of property rights in fisheries accelerates the process.

The social responsibilities of states are set out in Article 6 of the FAO *Code of Conduct for Responsible Fisheries*, and in particular:

> 6.1 States and users of living aquatic resources should conserve aquatic ecosystems. The right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of the living aquatic resources.
>
> 6.2 Fisheries management should promote the maintenance of the quality, diversity and availability of fisheries resources in sufficient quantities for present and future generations in the context of food security, poverty alleviation and sustainable development...

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[31] This discussion of the way forward indicated by the FAO *Code of Conduct for Responsible Fisheries* is derived from Symes (2000a).

> 6.18 Recognizing the important contributions of artisanal and small-scale fisheries to employment, income and food security, States should appropriately protect the rights of fishers and fishworkers, particularly those engaged in subsistence, small-scale and artisanal fisheries, to a secure and just livelihood, as well as preferential access, where appropriate, to traditional fishing grounds and resources in the waters under their national jurisdiction.

There is probably little doubt that the goals of conservation and sustainability of resources are well served by the fleet reduction, industry involvement and management that a fisheries rights system brings.[32] However, this may come at a cost to the social interests of present and future generations and of those engaged in traditional, artisanal and small-scale fisheries. Symes views the social obligations imposed by Article 6 as requiring attention to:

- rights of indigenous peoples
- the discrimination caused by the distributional effects of privatization, which may be offset by zoning and specific quota allocation to small or community groups
- enabling access by part-time, seasonal and recreational fishers
- creating opportunities for new entrants
- loss of employment and income to crew members, other employees, and share-fishers.

These social obligations can probably be well served by comprehensive community or group quota schemes. Left largely to themselves, traditional or local communities are usually well-able to conduct their internal affairs in a manner which benefits them and their resources, although their methods may not be those of the large-enterprise fishing industry. The introduction of community regimes in some Lake Winnipeg fisheries saw a change from a small number of large boats to a larger number of much smaller boats, thereby creating a situation of greater community equity and social justice.[33] Even where there are no traditional fishing communities involved in fishing,

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32 Although this may not be entirely true in fisheries with a high volume of bycatch and undersize discards.

33 Gisalson (2000) pp. 124 and 125.

rights-holders are tending towards groupings, both formal and informal, which work together with government for their common purpose.

A fisheries rights system may also do little to conserve the wider aquatic environment, being concerned only, or mainly, with the specific fisheries resource for which it was established. Indeed, an ecosystem-based approach to fisheries management has yet to be worked out, and will apparently require much greater investigation and regulation in matters such as extent of fishing effort, gear restrictions, the parameters of precautionary measures, the setting of TACs, etc. If this is so, then the future may see greater, rather than less, government involvement in fisheries regulation, and the trend towards increased security for rights-holders may be reversed.

PART II
FISHERIES RIGHTS IN LEGISLATION

INTRODUCTION

The first transferable quotas were arguably developed in the herring fishery of Iceland in 1979, when vessel catch quotas were made transferable at the initiative of the fishermen.[34] Another early quota system was that of Lake Winnipeg in the Manitoba Province of Canada;[35] but these quotas were not transferable, a defect which was only addressed by legislative intervention in 1985-86.

By the early nineties, several countries had already legislated various forms of property rights in fisheries, notably Australia, New Zealand and Japan. Since then, the last decade has seen an increase worldwide in the adoption of many and varied forms of exclusive use property rights systems. Today, besides an expanding acceptance and appreciation of the close interaction between the sustainable use of natural resources and the security of property rights connected with them, there is also an increased interest in the different types of property rights regimes e.g., state, private or common property. This is due to awareness that no single model can effectively promote the sustainable use of natural resources, but rather, that a well-designed regime must be developed in consonance with the specific ecological and social contexts in which it is to operate.

This Part examines fisheries legislation of various countries that have introduced a form of property right in some or all of their fisheries. Two countries are studied in detail: New Zealand, which has undertaken a comprehensive implementation of ITQs by detailed legislation; and the federated nation Australia, both the Commonwealth and the states, which between them demonstrate a wide range of property rights legislative regimes. These jurisdictions are examined from the viewpoint of the presence and strength of the various characteristics of property rights, and other property rights features appearing in the legislative scheme are also noted. Various other countries that have taken or are taking steps towards implementing fisheries property rights are examined in somewhat lesser detail.

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34 Gissurarson (2000) 2.

35 Described in Gislason (2000a). For further details see below.

NEW ZEALAND

Introduction

New Zealand comprises two principal adjoining islands, with a significant area of fisheries waters of marine habitats ranging from South-West Pacific tropical to sub-Antarctic. Fishing has traditionally played an important part in the culture of the indigenous Maori; this way of life has been taken up by the immigrant colonising population, with the result that fishing and hence fisheries management have high significance to the whole nation.

New Zealand is a unitary state, with a unicameral Westminster-style legislature. It has no entrenched written Constitution or Bill of Rights. New Zealand acquired the common law system of England, and although the New Zealand Court of Appeal is effectively the final appellate court in most circumstances, appeals in certain situations are still taken to the Privy Council, and decisions of the higher courts of the United Kingdom on matters of English law are still highly persuasive. New Zealand was a conquered colony, and a Treaty was drawn up with the indigenous Polynesian Maoris that has guaranteed them a significant measure of recognition of traditional fishing rights.

New Zealand has pursued a strong policy of property rights implementation and development for more than a decade, with the introduction of ITQs. All commercial fishing in New Zealand waters must take place under a permit. Additionally, quota management stock (stock of a declared quota management system) may only be taken under annual catch entitlement that is generated by allocation of individual transferable quota. A comprehensive quota scheme is established directly by legislation. Permits to fish quota management stocks are not issued unless the applicant holds an individual catch entitlement for that stock.

A History of Fishing Rights Legislation[36]

New Zealand first commenced operations of a statutory system of fishing rights by 1986 amendments to the *Fisheries Act* 1983. Under this system, quotas were allocated under a declared total allowable catch for a fishery, by a staged process via provisional allocations, and were capable of permanent transfer or lease for a specified period or specified tonnage of fish. The

[36] For detailed outline of the New Zealand legislation, see Nielander and Sullivan (2000a).

quotas were subject to both minimum and maximum holding levels. No purchaser or lessee could harvest unless he achieved the minimum holding before commencement of fishing; and no one person could hold more than a prescribed maximum of quota, but this could be varied following consultation. The legislation provided for the taking of surplus to a maximum of 10 percent, and a carry-over of a corresponding reduction in the following year; and similarly, a carry-over of up to 10 percent shortfall in catch to the following year. Any reduction in TAC was either accompanied by proportionate reduction in quota, in which case compensation was payable for the fair market value of the quota; or by Crown purchase or lease, and retention, of quota. Annual resource rentals were payable for quota.

The Act was amended several times over successive years, as the quota system established itself in New Zealand and virtually all of New Zealand's commercial fisheries were brought under the system. Significant related legislation was enacted after 1986, notably the *Maori Fisheries Act* 1989, the *Resource Management Act* 1991, and the *Treaty of Waitangi Fisheries Claim Settlement Act* 1992, which allocated quota to Maori commercial fishing interests to comply with the Treaty of Waitangi, and regulated non-commercial interests. There is no cap on customary harvest, and allowance is made in the annual TAC for estimated customary removals. The scheme under the Act also became more detailed, with the introduction of further transitional concepts of quota types, further provision for Crown acquisition of quota, and greater attention paid to the concept of "total allowable commercial catch", which was the balance of total allowable catch after other fishing interests, notably recreational and customary Maori fishing interests, were taken into account. Provisions for compensation for reduction in quota, minimum holding provisions and restrictions on holdings, and procedures on taking fish in excess of quota and carrying forward of unused quota, also became more detailed.

Meanwhile, a 5-year review process, begun in 1991, eventually resulted in a new *Fisheries Act* 1996, to replace all previous Acts, although subordinate legislation under the former Acts is continued unless amended or replaced. However, the 1996 Act has only partially been commenced, so that much of the 1983 Act is still in force, and is still being amended even after 1996.

The 1996 Act itself in Part XVII contains detailed repeal, amendment and savings provisions that effect much of this partial replacement. However, these repealing provisions are themselves only being commenced in stages.

At the time of writing, the quota management system is operating under a complex combination of the provisions of the 1996 Act and the 1983 Act plus amendments, but the situation is continually changing. When the 1983 Act is fully repealed, or at least when the repeal of the *Fisheries Amendment Act* 1986, which established the quota system, is fully effective, the system will be operated entirely under the 1996 Act.

Meanwhile, section 322 provides that in the case of inconsistency between the two Acts, those parts of the 1996 Act that are in force shall prevail.

The 1983 Act

The 1986 amendments to this Act first introduced quotas as a specific statutory creation, in a new Part IIA. The scheme as first introduced contained provisions to enable the declaration of fisheries to be subject to quota fishing; a declaration of total allowable catch; and the issue of provisional rights for quota management areas. The original 1986 allocation process provided that the Minister was to buy back and subsequently cancel quota, so as to equate the final total with TAC. Once equilibrium was reached, the final quotas were issued, as perpetual and transferable rights. The Director-General was to have regard, in any particular case, to any unfairness in the light of "the commitment to, and dependence on, the taking of fish of that species… by the person…" (sec. 28(3)). This scheme was amended and eventually repealed by the commencement of the relevant provision of the 1996 Act.

Much detail was provided in the 1986 amendments as to maximum and minimum quota holdings, and other holding restrictions (such as New Zealand residence), which had the effect of limiting the free transferability of quota. It was these details that were the principal subject of later amendments to the 1983 Act, as the nature of the managed fisheries was tailored to suit changing circumstances in the fishing industry.

The 1983 Act provides that where the TAC for a fishery was reduced for management purposes, quota held by the Crown was to be cancelled (sec. 28U), or quotas are reduced proportionately, and compensation is payable by the Crown for their fair market value, which may go to arbitration for determination if agreement cannot be reached on the value (Sections 28B – 28D, still in force).

Another provision of the 1983 Act still in force is section 107C, relating to forfeitures for fisheries offences. Section 107C(1) reads:

> "Where any property, fish, proceeds, quota, or interest in quota (hereafter in this section all referred to as property) is forfeit or ordered to be forfeit to the Crown under section 107B of this Act, the Minister may, subject to the provisions of this section, dispose of that property as the Minister thinks fit. "

The 1996 Act[37]

The 1996 Act states in its long title that it is intended to reform and restate the law relating to fisheries resources - it also takes features from other legislation into account. A considerable amount of this restatement is evident, but so also is a considerably more detailed scheme for the management of quota. The entire thrust of the Act is stated to be "to provide for the utilisation of fisheries resources while ensuring sustainability" (sec. 8). Environmental principles (sec. 9), and "information principles", effectively a restatement of the precautionary principle, (sec. 10), are also to be taken into account in the exercise of powers, functions and duties under the Act.

Description of rights

Limited access fishing rights are described as "quota", which in the 1996 Act means individual transferable quota and provisional individual transferable quota, and in some cases also refers to annual catch entitlement, or provisional catch history.

Although the management scheme is set out in great detail, emphasis may be found throughout on the need for consultation and consideration for the rights of quota owners (see for example the consultation and agreement process which must be undertaken and the attention to the possible grievances of quota owners in section 25, when quota management areas are to be altered.)

Section 27 sets out the nature of **individual transferable quota**, as follows:

> " (a) It is to be allocated in perpetuity in a manner permitted by this Act:
>
> (b) It perpetually generates a right to receive an annual catch entitlement for that stock in the applicable quota management area:

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37 The version of the *Fisheries Act* 1996 used here was obtained from the FAOLEX legal database. It is however subject to frequent amendment and phased commencement.

> (c) It is to be expressed as quota shares, and each quota share represents an equal proportion of the total allowable commercial catch for the stock:
>
> (d) It may be traded in any manner permitted by this Act:
>
> (e) It may be secured in any manner permitted by this Act:
>
> (f) It may be caveated in any manner permitted by this Act:
>
> (g) Each person's holding is liable to be increased or decreased as a consequence of appeals against provisional catch history or the transfer of quota by the Crown under section 22 or section 23 or section 52 of this Act:
>
> (h) It is liable to be forfeit for contravention of aggregation limits or foreign ownership constraints, or on conviction for any offence referred to in section 255 (4) of this Act:
>
> (i) It may be cancelled and reallocated to give effect to an alteration to quota management areas:
>
> (j) In the case of quota for squid, the quota may be subject to a method restriction. "

Quota is expressed as a number of shares for each fishstock. The total for each stock is 100,000,000 shares, and the value of 1 share is therefore equal to one hundred-millionth of the total allowable commercial catch for the stock (sec. 42).

Provisional ITQ is generally the same creature (sec. 28), except that it is interim only and may only be transferred by operation of law.

A person who was entitled to quota under the 1983 Act acquires a preferential allocation right for the amount of quota not allocated when his provisional maximum ITQ was converted to ITQ. This right is personal, non-transferable and must have been held continuously to have effect under the 1996 Act when allocations are made based on preferential allocation rights.

Provisional catch history is the mechanism by which quota is allocated (sec. 30), and does not of itself confer any entitlement to take fish. It is a person's catch history based on individual catch entitlement over a specified period depending on the fishery in question, and is a contingent right that comes into existence upon allocation by the chief executive or by virtue of a decision of the Catch History Review Committee or any court in accordance with the Act (sec. 29). It may be transferred to any other eligible person and thereby becomes added to that person's catch history.

By section 65, **annual catch entitlement** has the following characteristics:

(a) It is generated from quota and relates only to the stock and quota management area in respect of that quota:

(b) It may, when a total allowable catch is increased during a fishing year ... be created by the Minister ...

(c) It is to be allocated in a manner permitted by the Act:

(d) It is to be expressed in kilograms and expressed as applying to a particular fishing year:

(e) It confers upon the commercial fisher an entitlement to harvest a quantity of fish, aquatic life, or seaweed of the stock taken under the authority of that annual catch entitlement, and in accordance with a fishing permit and any conditions and limitations imposed by or under the Act

(f) It may be used to satisfy or remit deemed value amounts under section 76 …

(g) It may be transferred to the chief executive as a bycatch trade-off in satisfaction of a deemed value amount under section 78 …

(h) It may be traded in any manner permitted by the Act:

(i) It may be caveated in any manner permitted by this Act:

(j) It is liable to be forfeit if owned by an overseas person:

(k) In the case of an annual catch entitlement for squid, it may be subject to a method restriction.

Quota generates annual catch entitlement on the first day of each fishing year (sec. 66), and is allocated by a formula process set out in section 67. In addition to the general offence of taking fish without a permit under section 89, it is also an offence under section 69 to take fish etc. subject to a quota management system without the appropriate annual catch entitlement to take the fish.

Establishment and allocation of rights

The Minister from time to time declares a fish stock (a quota management stock) to be subject to a quota management system (sec. 18). Stocks already subject to quota management under the 1983 Act automatically become quota management stocks under the 1996 Act. This declaration is accompanied by a declaration of the quota management area of the stock, and the declared fishing year for the stock (sec. 19). Quota management areas already declared under the 1983 Act are continued by section 24.

The Minister sets an annual total allowable catch in respect of each quota management stock in a quota management area (sec. 13), so as to maintain or regain maximum sustainable yield for the stock. An annual total allowable commercial catch is then set for each quota management stock in a quota management area, having regard to the total allowable catch and non-commercial fishing interests (sec. 20).

Eligibility for allocation of quota is determined according to principles set down in sections 31 ff. Eligible persons have their provisional catch history assessed, based on and equivalent to individual catch entitlements, and quota is allocated on this basis. Elaborate carry-over and transitional provisions are provided for management stocks, areas and quota allocations previously established under the 1983 Act.

Provisional catch history may be transferred within a limited period by holders who are not eligible to receive quota (sec. 37).

Previous permit holders, holders of licences for controlled fisheries under the 1983 Act, and persons having provisional catch history, whether acquired by allocation or transfer, recorded in their names in the Quota Register, are entitled to quota allocation (sec. 45). Unallocated quota shares are allocated to the Crown (sec. 49). The chief executive may also purchase and transfer quota in the name of the Crown (sec. 50).

Decisions regarding individual catch entitlements, eligibility, allocations of provisional catch history and disputes regarding the transfer of provisional catch history, may be made by an interested person or the chief executive to the Catch History Review Committee (sec. 51). Declarations may also be sought from the High Court regarding determinations as to eligibility on citizenship or residence basis (sec. 58).

Security of rights

The 1986 amendments created a register of ITQs. The 1996 Act extended details pertaining to registration, with what appears as a deliberate effort to create a virtually indefeasible title to ITQ. Detailed registration provisions allow for transferability and the registration of third-party interests, for both quota and annual catch entitlements.

A Quota Register and separate Annual Catch Entitlement Registers for each fishing year shall be kept (sec. 124). The Quota Register shows, for each stock TAC, TACC, ITQ allocations, registered transfers of ITQ and provisional ITQ, provisional catch history allocations and transfers, caveats

and mortgages over quota shares (sec. 127). Annual Catch Entitlement Registers show generation or creation, holdings and transfers of annual catch entitlement, and statutory caveats (sec. 128). No transaction is effective until registered (sec. 155). A person claiming to be entitled by operation of law to be registered as the owner, mortgagee, or caveator of quota shares, or the owner or caveator of annual catch entitlement, may have that interest registered in accordance with the Act (sec. 161).

Annual catch entitlement, provisional catch history and provisional ITQ can be similarly registered, but there is no similar conclusive guarantee as to title in these instances.

Section 168 specifically guarantees "ownership rights", as follows:

> " (1) The production of a certified copy in hard copy form signed by or on behalf of the Registrar or a Deputy Registrar, and sealed with the Registrar's seal, of a record in any register kept under this Part of this Act as to the ownership of any individual transferable quota, shall be held in every court of law or equity and for all purposes to be conclusive proof that the owner shown in the certified copy was, as at the time of the issue of the certified copy, owner of the quota to which the certified copy relates. "

The Quota Register under the 1996 Act therefore operates similarly to a land title register, and a registration document relating to ownership, mortgagee or caveator rights of ITQ is conclusive proof, subject to provisos regarding registration through fraud. However, the interests of registered *bona fide* purchasers or mortgagees for value are protected, even where their interests are registered through fraud, error or void or voidable instruments.

Transferability of rights

ITQ is transferable by way of share transfer (secs. 27 and 132). Annual catch entitlements are similarly transferable (secs. 65 and 133). However, dealings in quota, annual catch entitlement and provisional catch history are only effective if performed in accordance with the Act (sec. 135). Quota shares may be mortgaged in accordance with the Act (sec. 136), but annual catch entitlement may not be (sec. 137). Sections 139 ff. provide some statutory limitations on mortgages and the rights of mortgagees. Caveats may be registered over quota shares or annual catch entitlement (secs. 147 ff).

Transfer of provisional catch history, quota, or annual catch entitlement cannot be made to overseas persons except in very limited circumstances (secs. 56–58). Aggregation of quota shares beyond set limits by any one

person, or even by a person together with persons associated with him, is not permitted except under limited circumstances (secs. 59 and 60), and excess quota is forfeit unless the High Court declares otherwise (sec. 61). Used annual catch entitlement cannot be transferred (sec. 73).

Transferability has always been possible, even under the 1986 amendments, although it has been subjected to various limitations such as maximum and minimum holdings, which have been altered over the years. Under the 1996 Act, the transferability of quota is almost completely unlimited - the only limits imposed are those of registration requirements and anti-monopoly and foreign ownership safeguards. The transfer of annual catch entitlement and provisional catch history is a little more limited but nonetheless possible. This ease of transfer lies at the heart of the entire quota system - it is transferability which renders quota such a valuable commodity, and the value realised on transfer which encourages trade, surrender of fishing rights and ultimately a reduction in competitive overfishing.

Permanence of rights

The permanent nature of the New Zealand ITQ is set out clearly in the 1996 Act, which specifies that ITQ is "allocated in perpetuity", and "perpetually generates a right to receive an annual catch entitlement". The quantum of this entitlement is however dependent on the current TACC.

The TACC set under section 20 may be varied or reduced, including reduction to zero (sec. 20). If the TACC is reduced and the Crown holds any unencumbered quota shares, they may be distributed amongst quota holders according to a set formula (sec. 22). Similarly, if a TACC is increased and an eligible person holds preferential allocation rights for the stock, the Crown may deduct from every person "owning" quota for that stock a set number of quota shares and transfer them to the eligible person, thereby creating a new ITQ holder (sec. 23).

All commercial fishing, including quota management stock fishing, must be carried out under a valid fishing permit (sec. 89). A person may hold only one fishing permit, and it is non-transferable. Where a fishing permit is cancelled, any individual catch entitlement under the permit does not entitle the holder to any allocation of quota (sec. 96).

Shareholdings may be reduced or varied so as to compensate for new entrants following an increase in TACC (sec. 23) or where provisional catch history is adjusted following an appeal (sec. 52). Share registration is adjusted accordingly (sec. 153). Mortgaged or caveated holdings may be similarly

adjusted where necessary (sec. 153), or where there has been an adjustment in quota holding following an alteration in quota management area (sec. 154). Any transfer of quota or annual catch entitlement performed by the chief executive under the Act is not prevented by the existence of a mortgage or caveat, but the Registrar may alter the mortgage or caveat accordingly (sec. 163).

Section 168 is entitled "Guarantee of Ownership Rights", and its effect is to make the registration record of ownership of ITQ (but not provisional ITQ, annual catch entitlement or provisional catch history) conclusive proof of ownership, subject to the usual qualifications of obtaining by fraud, or deriving otherwise than as a *bona fide* purchaser for value.

Quota shares may be forfeited to the Crown for certain offences, in the same way as fish catch, fishing vessels and other property (sec. 255).

Proportionality

Since inception, the New Zealand ITQ has been subject to proportional distribution. The 1986 amendments clearly set out the Minister's power to reduce a TAC for a quota management area, and unless the reduction is taken up by the cancellation of ITQ held by the Crown, the permissible take under related ITQs is reduced "on a proportionate basis". The proportionality principle was further developed in 1990 amendments. The 1996 Act continues the principle, with detailed provisions for adjustments, both for decrease and increase in TACC, based on provisional catch history, preferential allocation rights, and the use of Crown holdings of quota shares to achieve the balance of distribution. Quota shares are expressed in kilograms of catch and the precise formulae of redistribution are set out in the Act itself.

Other matters

The Minister may set and vary a deemed value rate for any quota management stock, at a level designed to ensure that there is an incentive for commercial fishers to acquire annual catch entitlement to balance against catch, rather than risking the penalties of illegal fishing (sec. 75). The deemed value is paid by or to each fisher after actual catch history is balanced against annual catch entitlement (sec. 76).

Under the 1983 Act, individual transferable quota is described as enabling the holder or lessee of the rights, "to take in total within the quota management area concerned in any year fish of the species or class shown in

the quota up to the tonnage shown in the quota" - it is an enabling right. The language of the 1996 Act speaks of an ITQ "generating a right" to take fish.

Noteworthy too is section 255 of the 1996 Act, which provides for forfeiture of fish, proceeds of the sale of fish, and property used in the commission of the offence which gives rise to the forfeiture. Property for these purposes includes quota, and includes even quota held by persons associated with the offender.

Conclusions

From the outset, it is apparent that New Zealand has embraced the concept of securing sustainable fisheries development through the use of ITQs, and the legislation and administrative machinery for this were designed accordingly. From the inception of the system in 1986, the governing legislation has contained detailed provisions for the creation and protection of ITQs. Adjustments and improvements to the legislative scheme have been ongoing, and reveal that the policy intention is and always has been to create a legal entity which is as close as possible to "property", in the sense that property is not a thing but a bundle of rights vested in one or more persons, in relation to the thing. The New Zealand legislation has catered for the most significant rights of this bundle.

New Zealand is able to establish this strong property system because of its exceptional characteristics as an isolated island nation with a unitary jurisdiction[38]. Fisheries management is completely centralised in New Zealand, with the Ministry of Fisheries administering the Acts, drawing up management plans, preparing allocation plans etc. Most of New Zealand's commercial fisheries are now managed under an ITQ system, and further extensions are planned. Its fisheries legislation appears directed towards a creation that is intended to be viewed as property. The original system established by the 1986 amendments to the 1983 Act has certainly been viewed as such by the New Zealand courts[39].

The wording of the 1996 Act now appears to put the matter beyond doubt. It uses full property rights language for ITQs, particularly at section 27

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38 Nielander and Sullivan (2000b) p. 426.

39 See the unreported case *New Zealand Federation of Commercial Fishermen (Inc.) v. Minister of Fisheries,* CP 294/96, at first instance, appeal as CA82/97, CA 83/97, CA 96/97, where both the High Court and the Court of Appeal declared quota to be property, subject only to the overriding powers of the legislature.

which describes the "nature" of quota, and section 168, which establishes an indefeasible title similar to that of the Torrens system of land registration. These rights are permanent, transferable, divisible and subject to the rights of third parties whose interests may be registered.

However, there are still some constraints on what might otherwise be termed full ownership in property. Transferability is subject to some statutory bars. Proportionality reduction in shareholding for management purposes does not give rise to compensation. The rights granted are in the fishing, not in the fish themselves, which remain owned, so far as such animals *ferae naturae* can be owned, by the state. Some aspects of the "bundle of rights" remain with the state, namely the rights of protection and of management, and the most important aspect of all: the right to create, and correspondingly to extinguish, by legislation.

AUSTRALIA

Introduction

Australia, the island continent, has one of the largest EEZs in the world. Partly due to its history as a series of settled colonies of Britain, however, less attention has been paid in the past to fisheries production than to that of pastoral and agricultural settlement and development. The rights of the indigenous inhabitants to their traditional dwelling, hunting and fishing grounds has only recently been acknowledged in law, and the process of delimiting these rights, by court decision and legislation, is still in progress.

The Commonwealth of Australia comprises a federation of six states (New South Wales, Queensland, Victoria, South Australia, Western Australia and Tasmania) and a number of internal and external Territories, the only relevant one of which is the Northern Territory.[40] Each state is a separate jurisdiction, with its own legislative, executive and judicial system, and its own Constitution (the Northern Territory is governed by a Commonwealth Act). The Commonwealth Constitution sets out the special powers reserved to the Commonwealth, with the states exercising the residue of powers. Where there is an inconsistency between State and Commonwealth legislation in respect of a field reserved to the Commonwealth, the Commonwealth legislation prevails.

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40 For the purposes of this paper, a reference to an Australian State includes a reference to the Northern Territory unless otherwise indicated.

The English common law was received into all jurisdictions in Australia.[41] Each one has now developed its own jurisprudence, but all are interconnected, and decisions from each one are highly persuasive throughout the country. Appeals formerly went ultimately to the Privy Council of England, although this process has now been abolished, and the High Court of Australia is now the ultimate appellate court.

Fisheries management in Australia has moved from the first limited entry fisheries of the 1960s through attempts to rationalise the industry by means of unitising vessel inputs and introducing buy-back and rationalisation schemes, to a partial implementation of property rights in many fisheries. However, more than half of Australian fisheries are still managed under restricted licence effort.[42]

Fisheries Jurisdiction[43]

The Commonwealth Constitution in section 51(x) vests power in the Commonwealth to make laws with respect to:

> " (x) Fisheries in Australian waters beyond Territorial Limits. "

The Commonwealth *Seas and Submerged Lands Act 1973* specifically declares that sovereignty over the 12 nautical mile territorial sea (including the airspace over it and the seabed beneath it), the contiguous zone and the continental shelf, is exercisable by the Commonwealth. The High Court in *New South Wales v The Commonwealth* (1976) 135 CLR 337 confirmed that state territory was bounded by the low-water mark, and Commonwealth fisheries jurisdiction extended to fish in the territorial sea and on the continental shelf.

Following the Offshore Constitutional Settlement of 1979, a series of complementary state and Commonwealth Acts and agreements have apportioned jurisdiction over and responsibility for maritime areas and activities between the Commonwealth and the states.

The Commonwealth *Coastal Waters (State Powers) Act 1980* and the *Coastal Waters (Northern Territory Powers) Act* 1980 declare that state coastal waters do

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41 For detailed discussion of the implications of the reception of the English common law in Australia, see McFarlane (2000).

42 For a detailed breakdown of the proportions of fisheries and licences held under ITQ regimes, see McIlgorm & Tsamenyi (2000).

43 This discussion is based on that of McFarlane (2000).

not extend beyond 3 nautical miles from the baselines, and provide as follows:

> 5. The legislative powers exercisable from time to time under the constitution of each State extend to the making of:
>
> (a) all such laws of the State as could be made by virtue of those powers if the coastal waters of the State, as extending from time to time, were within the limits of the State, including laws applying in or in relation to the sea-bed and subsoil beneath, and the airspace above, the coastal waters of the State;…
>
> (c) laws of the State with respect to fisheries in Australian waters beyond the outer limits of the coastal waters of the State, being laws applying to or in relation to those fisheries only to the extent to which those fisheries are, under an arrangement to which the Commonwealth and the State are parties, to be managed in accordance with the laws of the State.[44]

This provision does not derogate from Commonwealth sovereignty over the 3-mile zone of the territorial sea, but simply bestows upon states the ability to legislate within those waters. States may also legislate with respect to fisheries beyond the three-mile zone, but only by agreement with the Commonwealth.

The Commonwealth *Fisheries Management Act 1991* provides at section 5:

> (1) For the purposes of this Act, the coastal waters of a State or internal Territory are:
>
> (a) the part or parts of the territorial sea of Australia that are:
>
> (i) within 3 nautical miles of the baseline by reference to which the territorial limits of Australia are defined for the purposes of international law; and
>
> (ii) adjacent to that State or Territory; and
>
> (b) any marine or tidal waters that are on the landward side of that baseline and are adjacent to that State or Territory but are not within the limits of a State or Territory.

This is paralleled in state fisheries legislation by such means as defining "coastal waters" in the legislation to have the same meaning as in the *Fisheries Management Act* 1991.

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[44] Section 5 of the *Coastal Waters (State Powers) Act* 1980 (Cwth). The *Coastal Waters (Northern Territory Powers) Act* 1980 (Cwth.) contains a similar provision.

Part 5 of the Commonwealth Act provides for the management of fisheries in cooperation with the states. By arrangement, they may be managed by Joint Authorities, by the Commonwealth or by the relevant state.[45] The terms of the Joint Authority agreement specify the law, whether state or Commonwealth, which is to apply in the management of the fishery. A fishery within the three-mile zone may be managed under Commonwealth law; or a fishery beyond the three-mile limit may be managed under appropriate state law. Again, appropriate provisions of state legislation complement the Commonwealth Act.

Australian Fisheries Legislation

The consequence of this system is a multiplicity of fisheries management Acts, Regulations, Management Plans and other subordinate legislation governing fishing in Australian waters. There is no requirement of compatibility between state and Commonwealth laws. All states and the Commonwealth have their own fisheries management Authorities and governing legislative regimes, which, although showing common trends, in some respects show marked differences in their features. Each of these eight regimes will therefore be examined separately.

Commonwealth

The first restricted entry Commonwealth-managed fishery was created in 1963, but serious restrictions were not commenced until the 1980's.[46] At that time, fisheries under Commonwealth jurisdiction were managed in accordance with the Commonwealth *Fisheries Act* 1952.

In 1991, a new legislative regime was introduced, which established the Australian Fisheries Management Authority (AFMA) under the *Fisheries Administration Act* 1991, and the Commonwealth fisheries management regime under the *Fisheries Management Act* 1991. During a two-year transitional period, the 1952 Act remained in force to the extent necessary to continue licences, until 1994 when its repeal was completed.

The *Fisheries Management Act* 1991 set the standard for the structure of fisheries legislation of the states, many of which enacted new fisheries legislation in subsequent years.

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45 Part 5 of the *Fisheries Management Act* 1991, and particularly sections 71 and 72.

46 For more details see Palmer (2000).

Description of rights

Fishing rights under the Act are termed "statutory fishing rights", and are defined as follows:

"21 Nature of a statutory fishing right

(1) For the purposes of this Act, each of the following rights is a separate statutory fishing right:

(a) a right to take a particular quantity of fish, or to take a particular quantity of fish of a particular species or type, from, or from a particular area in, a managed fishery;

(b) a right to a particular proportion of the fishing capacity that is permitted, by or under a plan of management, for, or for a part of, a managed fishery;

(c) a right to engage in fishing in a managed fishery at a particular time or times, on a particular number of days, during a particular number of weeks or months, or in accordance with any combination of the above, during a particular period or periods;

(d) a right to use a boat in a managed fishery for purposes stated in a plan of management;

(e) a right to use particular fishing equipment in a managed fishery;

(f) a right to use, in a managed fishery, fishing equipment that is of a particular kind, of a particular size or of a particular quantity or is a combination of any of the above;

(g) a right to use a particular type of boat in a managed fishery;

(h) a right to use a boat of a particular size or having a particular engine power, or of a particular size and having a particular engine power, in a managed fishery;

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

Establishment and allocation

Plans of management are determined for a fishery by AFMA (sec. 17). Plans may incorporate provisions of any Act, regulation or determination, but the *Fisheries Management Act 1991* prevails to the extent of any inconsistency. Determinations regarding plans of management are treated as subordinate legislation for various purposes specified in section 19.

The fishery is managed by the allocation of fishing rights of the type specified under the plan of management. Allocation may be by tender, auction or ballot, or by any other procedure set out in the plan of management (secs. 24 and 25), to applicants who are registered as eligible in

accordance with the conditions for registration set out in the plan (sec. 26). Auctioned rights go to the highest bidder; tenders or balloted rights to the person ranked highest on the precedence list; other grants are awarded in accordance with the procedures set out in the plan. Charges are levied in accordance with the *Statutory Fishing Rights Charge Act* 1991.

A short-term permit valid for no longer than 5 years may be issued under section 32 in respect of a specified area or a fishery that is not yet a managed fishery.

Section 79 provides that where a fishery is managed by a Joint Authority under the law of the Commonwealth, the Joint Authority has the same powers as AFMA under the Act in relation to the management of the fishery, including the powers relating to statutory fishing rights described above.

Review of allocation of statutory fishing rights, whether made by AFMA or a Joint Authority, is conducted on application by a dissatisfied eligible person by the Statutory Fishing Rights Allocation Review Panel established under Part 8 of the Act. An appeal lies from a decision of the Panel to the Federal Court of Australia on any question of law (sec. 161).

Security of rights

Section 45 obliges AFMA to register statutory fishing rights. The Register is prima facie evidence of any particulars registered in it (sec. 53(1)). Section 46 requires that dealings with the right must be registered, in the following terms:

> **"46 Creation etc. of interests in fishing rights**
>
> (1) This section applies to a dealing that would, but for subsection (2), have the effect of creating, assigning, transferring, transmitting or extinguishing an interest in a fishing right.
>
> (2) The dealing has no effect of a kind mentioned in subsection (1) until it is registered under this section.
>
> **47 Trusts not registrable**
>
> Notice of any kind of trust relating to a fishing right is not receivable by AFMA and must not be registered. "

Transferability of rights

The Act then goes on to provide as follows:

> **"48 Power of holder of fishing right to deal with fishing right**
>
> (1) Except where a condition of a fishing right provides otherwise, a holder of a fishing right may, subject only to any rights appearing in the Register to be vested in another person and to section 49, deal with the fishing right as its absolute owner and give good discharges for any consideration for any such dealing.
>
> (2) Subsection (1) only protects a person who deals with such a holder as a purchaser in good faith for value and without notice of any fraud on the part of the holder.
>
> (3) Equities in relation to a fishing right may be enforced against the holder of the fishing right except to the prejudice of a person protected by subsection (2).
>
> **49 Approval of AFMA etc. to dealing required in certain circumstances**
>
> (1) A person must not transfer the ownership of a fishing right unless AFMA has, in writing, given its approval to the transfer.
>
> (2) AFMA may only refuse to give an approval for the purposes of subsection (1) if the transfer would be contrary to the requirements of the relevant plan of management or a condition of the fishing right.
>
> (3) A purported dealing in contravention of subsection (1) has no effect.
>
> **51 AFMA not concerned with certain matters**
>
> AFMA is not concerned with the effect in law of any instrument lodged under section 46 and the registration of the dealing does not give to the instrument any effect that it would not have if this Part had not been enacted. "

These provisions permit dealings with a fishing right in a manner comparable to dealings with other things normally accepted as property, subject only to the proviso that the right and the interests in it are registered in the required manner. Section 48(1) is interesting in that it declares that the holder of a fishing right may deal with the right "as its absolute owner"; but subsection (2) then goes on to qualify that right, and the persons protected by the statutory declaration of "absolute ownership" of subsection (1). Equities in relation to a fishing right may be enforced against the holder of a fishing right except to the prejudice of a person protected by the provisions of the section concerning holders who are purchasers for value in good faith and without notice of fraud. Section 49 qualifies the free transferability of

rights, and provides for the circumstances in which the approval of the Authority is required in relation to dealings referred to in section 48. Section 51 goes further in cutting down any tendency towards a "stand-alone" proprietary quality of rights.

Permanence of rights

AFMA may vary or revoke a condition of a SFR, or new conditions may be added (sec. 22(5)). Under section 22(3), SFRs cease to have effect if the plan of management under which it is granted is revoked by AFMA under section 20(3); may cease to have effect or apply to a fishery if the joint arrangement with the relevant state is terminated under section 75 or new arrangements are made under section 79; or may be cancelled for breach of condition, non-payment of fees or for infringements of fisheries laws, not only of Australia and its States and Territories, but also of its fisheries waters neighbours New Zealand and Papua New Guinea (secs. 38 and 39). The finite duration of a SFR may also be specified (sec. 22(4)(b)).

The Act sets out in detail at sections 31A ff. the consequences to fishing rights of revocation of a plan of management. Each former right-holder thereupon holds a statutory fishing rights option (unless a new identical plan immediately replaces the former plan, in which case former rights-holders assume new equivalent rights) (sec. 31A(1)).

The option entitles the holder to be granted relevant rights under a new plan which is substantially the same as the revoked plan, or at least has some features in common (sec. 31A(4)). Sections 31B and 31C provide detail of the classes and number of rights to which the option-holder becomes entitled. The option however must be exercised by the option-holder giving appropriate notice, otherwise the option lapses (sec. 31K).

A Register of Statutory Fishing Rights Options creates the same interests in the options as are created in fishing rights under section 46 (see above) (sects. 31E ff).

No compensation is payable if a SFR is cancelled, ceases to have effect or ceases to apply to a fishery (sec. 22(3)(e)). But section 167A(1) provides that:

> If, apart from this section, the operation of this Act would result in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay reasonable compensation to the person.

Section 167A goes on to provide for the Federal Court to determine the reasonable amount of compensation in the event of disagreement.

New South Wales[47]

The *Fisheries Management Act* 1994 largely replaced the former *Fisheries and Oyster Farms Act* 1935, although many provisions of the latter are continued under the new legislation. For these purposes, the latter Act is still in force. Fishing licences are retained but made automatically renewable, with only a limited discretion in the Minister to cancel or suspend, mainly for breaches of the Act. Prior to the establishment of a full share-management regime, a restricted fishery regime is usually established which allows time to determine the parameters of the final full regime.

Description of rights

Rights under the NSW legislation appear as shares in a fishery, and rights holders are referred to as shareholders. There is no definition provided, as none is needed. The "share" nature of the right is evident from the provisions of the Act related to acquisition, registration, etc.

Establishment and allocation

Total Allowable Catch is set by a Total Allowable Catch Setting and Review Committee (the "TAC Committee") established under the *Fisheries Management Act 1991* (sec. 26). The TAC Committee may determine any total allowable catch, and is required to do so if a management plan or the Minister requires it (sec. 28).

Limited access fisheries under this legislation are termed "share management fisheries". The process of creation of a share management fishery is set out at sections 41–62. The abalone and lobster fisheries appear as share management fisheries in Schedule 1[48], and further share-management fisheries may be declared by the Governor, by proclamation on the recommendation of the Minister (sec. 44). An interim Management Advisory Committee is set up, the criteria for allocation of shares are determined, applications from eligible persons for shares are then invited and shares are issued provisionally until the commencement of the management plan for the fishery, when a final issue is made. Access to the fishery is then limited to provisional shareholders, appeals are heard and a management plan is

47 The consolidated version of the New South Wales *Fisheries Management Act* used is current to 6 January 2000.

48 The abalone and lobster fisheries are listed in Schedule 1.

drafted. The Act establishes a Share Management Fisheries Appeal Panel to hear appeals from applicants for shares.

A management plan is made by a regulation, and the management plan commences when the regulation commences. At this stage, the fishing, share-transfer and other rights of shareholders are fully identified, exercisable and subject to review. A management plan prevails over any other regulation or fishery closure unless the regulation or closure states otherwise.

The mere holding of a licence to fish in the fishery does not in itself entitle the holder to fish; he must also have the appropriate shareholding (secs. 54 and 66). His licence must also be endorsed accordingly (sec. 68). The commercial total allowable catch for the fishery is to be distributed wholly amongst the shareholders (sec. 78). A shareholder may purchase a portion of another shareholder's total allowable catch, but not so as to exceed twice his allocation (sec. 79). A total allowable catch allocation or part of it may be carried over to or borrowed from a future allocation (sec. 80). Any excess of allocation caught must be paid for, or shares forfeited and sold by public tender (sec. 81).

Shareholders must pay a management charge and a periodic "community contribution" on their shares in proportion to their shareholding (secs. 76 and 77).

Security of rights

A Share Management Fisheries Register is maintained by the Director, in which all issues, renewals, cancellations and forfeitures of and dealings in shares are entered (sec. 89). The Register is evidence (whether prima facie or conclusive is not stated) of particulars entered in it (sec. 98(1)).

Transferability of rights

Licences are not transferable (sec. 135). A share in a share management fishery may be transferred, assigned, transmitted or mortgaged and any other interest of a kind prescribed by the regulations may be created in the share (sec. 71). However, any such transaction must be recorded in the Share Register, and these provisions are subject to any restriction imposed by the management plan. Sections 91(1) and 92 provide:

> "91. (1) A transaction that purports to have the effect of transferring, assigning, transmitting, mortgaging or otherwise creating an interest in a

> share in any share management fishery does not have that effect until it is registered in the Share Register. "

The Director is not concerned with the effect in law of any document lodged under section 91 (Registration of dealings in shares) and the registration of the transaction concerned does not give to the document any effect that it would not have if the Division had not been enacted (sec. 96).

Section 92 provides that no notice of any kind of trust relating to shares is to be noticed or registered.

The holder of the appropriate shareholding in a share management fishery may nominate a commercial fisher to take fish in the fishery on behalf of that holder. The nomination is to be noted in the Share Register (sec. 69).

Permanence of rights

Shares are issued initially for ten years, but may be renewed under appropriate circumstances (sec. 73).

Shares in a share management fishery may be voluntarily surrendered and sold by public tender, returning 85 percent to the shareholder (sec. 74).

When a declaration is made abolishing a share management fishery, all shares in it are cancelled. If the management plan has already been commenced, the shareholders are entitled to compensation from the State for the market value before the cancellation of the shares they held. The amount of compensation payable is to be determined by agreement between the Minister and the person entitled to compensation or if there is no agreement, it is to be determined by the Valuer-General. A person who is dissatisfied with the amount of compensation offered or with any delay in the payment of compensation may appeal to the Land and Environment Court. A person entitled to compensation may instead agree to accept shares in another share management fishery which is replacing the omitted fishery wholly or partly (sec. 44).

Certain offences are designated as forfeiture offences by the management plan, and shares may be forfeited by court order for those and certain other offences (sec. 75).

Other matters

A note[49] to section 3 of the Act (Objects of Act) states:

> "**Note**. At common law, the public has a right to fish in the sea, the arms of the sea and in the tidal reaches of all rivers and estuaries. The public has no common law right to fish in non-tidal waters. The right to fish in those waters belongs to the owner of the soil under those waters. However, the public may fish in non-tidal waters if the soil under those waters is crown land. In the case of non-tidal waters in rivers and creeks, section 38[50] declares that the public has a right to fish despite the private ownership of the bed of the river or creek. However, the right to fish in tidal or non-tidal waters is subject to any restriction imposed by this Act."

Northern Territory [51]

The Northern Territory *Fisheries Act* is comparatively simple and straightforward as regards the establishment of fishing rights. Most matters are left to the discretion of the Minister in preparing a Management Plan. There is however a clear direction to provide compensation for those whose rights are extinguished.

Description of rights

The Act makes reference in Schedule 2 to the possibility of determination of "quota" or "allowable catch" in a fishery subject to a management plan.

Establishment and allocation

Fishing licences may be issued to a person (sec. 11), and temporarily or permanently transferred to another person (secs. 12A and 12B). Management Plans are prepared for declared management areas or managed fisheries (secs. 22 and 23).

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[49] Section 285 provides that Notes appearing in the Act are explanatory only and do not form part of the Act.

[50] Section 38 reads:

> **"38 Right to fish in certain inland waters**
>
> (1) A person may take fish from waters in a river or creek that are not subject to tidal influence despite the fact that the bed of those waters is not Crown land if, for the purpose of taking those fish, the person is in a boat on those waters or is on the bed of the river or creek. "

[51] The version of the Northern Territory *Fisheries Act* used was obtained from AUSTLII, and is current to 1 July 1996.

Section 27(1) provides that:

> "Every provision of an operative management plan shall have the force and effect of a regulation in force under this Act. "

Where there is no Management Plan, the Minister may make declarations closing areas, restricting species, types etc, gear used, etc (sec. 28).

Schedule 2 sets out in detail matters to be included in a Management Plan. The number of licences may be limited. A management plan may:

> "(bb) specify the number of licences that may be issued in relation to an area or a fishery, as the case requires, and prohibit or regulate the transfer of licences in respect of a fishery;
>
> (c) determine a quota or allowable catch for the fishery or for any designated areas within the fishery for all fish or aquatic life within the fishery or such areas, or for any designated species or type of fish or aquatic life;
>
> (d) authorize the Minister, by notice in the *Gazette*, to allocate a quota or allowable catch to the person or persons the Minister specifies, and to specify the method (if any) by which a quota or allowable catch may be allocated;…
>
> (f) establish a system for limiting access to the fishery to persons who can satisfy the Director of their eligibility having regard to, but not limited to, the following criteria or such criteria as may be specified in the plan:
>
> (i) present participation in the fishery;
>
> (ii) historical fishing patterns and dependence on the fishery; or
>
> (iii) the capability of fishing vessels being used, or intended to be used, in the fishery, to operate in other fisheries; …"

Although section 50 gives a right of review by the Local Court of a decision of the Director regarding the issue, suspension, cancellation etc. of a licence or permit, no such right is written into the Act regarding allocation of fishing rights.

Security of rights

By section 9, registers shall be established for: "the grant, renewal, variation of a provision, transfer (in whole or part), expiry, suspension, or cancellation of rights, licences, registrations, permits, quotas, or other authorities required or granted under this Act. "

Transferability of rights

Licences may be temporarily or permanently transferred (secs. 12A and 12B), to Australian residents or Australian corporations only (sec. 12C), unless the regulations provide otherwise (sec. 47), or in the case of a managed fishery, where the management plan prohibits or regulates the transfer of licences issued in respect of the fishery (Schedule 2 (bb)).

Section 9 refers to the need for registration of "transfer" of "quotas", but there is no other reference to transferability of quota. It may however be implied that quota is transferable, subject to similar qualifications as for licences.

Permanence of rights

Schedule 2 provides that a Management Plan may:

> " (j) provide for the establishment and administration of a scheme for the rationalisation of the fishery and for those purposes may provide for -
>
> (i) a limitation or reduction in an equitable manner of the number of fishing units licensed to operate in a fishery;
>
> (ii) the surrender and purchase of licences relating to that fishery on payment of agreed compensation;
>
> (iii) the establishment of a trust account under the Financial *Administration and Audit Act*;
>
> (iv) the imposition of levies or other payments for the purposes of funding any compensation to be paid; and
>
> (v) the repayment of surplus amounts, after payment of any outstanding amounts due, to persons who, on conclusion of a scheme, are holders of licences in respect of fishing units to which the scheme relates. "

There is no reference in the Act to any payment of compensation.

Queensland[52]

The *Fisheries Act* 1994 replaces the *Fisheries Act* 1976 and the *Fishing Industry Organisation and Marketing Act* 1982.

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52 The version of the Queensland *Fisheries Act* used was obtained from AUSTLII, and is current to 29 May 1998.

Description of rights

The term "authority" is used in the Act, and is defined to mean a licence, permit, quota or other authority in force under the Act (sec. 4). Quota is defined as follows:

> **"Meaning of 'quota'**
>
> 9. "Quota" includes a restriction on activities by way of fishing, including, for example, a restriction specified by reference to all or any of the following:
>
> (a) a quantity of fish;
>
> (b) a percentage of a quantity of fish;
>
> (c) a period of time;
>
> (d) an area;
>
> (e) the length or another reference to the size of a boat;
>
> (f) a quantity or type of fishing apparatus or aquaculture furniture;
>
> (g) an activity affecting a fish habitat, whether or not the activity involves fishing;
>
> (h) anything else prescribed under a regulation."

Establishment and allocation

Management plans may be made by the Chief Executive or by AFMA where the appropriate Commonwealth/State arrangements are in place (sec. 3(1)). Management plans are subordinate legislation (sec. 32(2)). However, section 42 provides that anything which may be declared, or about which provision may be made, by a management plan may also be declared or made by a regulation. Regulations prevail over management plans to the extent of any inconsistency.

Declarations of matters such as closed seasons, closed areas, etc, may be made in a management plan (sec. 37) or directly by a fisheries agency (secs. 47 ff.). Declarations (other than emergency declarations) are subordinate legislation (sec. 45).

Quotas may be prescribed by a management plans (sec. 38) or, where there is no such provision in a management plan, by a declaration by the Chief Executive or a Joint Authority (sec. 44). Otherwise, quotas may be determined in the same way as licences or permits under the Act (sects. 49 ff). This Division is couched in the general terms usually applied to the issue of licences, and implies that quotas are no more permanent or substantial.

The Act establishes a Fisheries Tribunal as an administrative tribunal (sec. 85). A person whose interests are adversely affected by an order, direction, requirement or other decision may appeal on the grounds that the decision was contrary to the Act, manifestly unfair or will cause severe personal hardship to the appellant (sec. 196). However, no appeal lies against a decision about making a declaration or management plan.

Security of rights

A Register of authorities must be kept (sec. 73). The holder of an authority may apply to have a specified person's interest noted in the Register.

Transferability of rights

An "authority" (defined to include quota) may be transferred on application, subject to any limitations in the regulations or the applicable Management Plan (sec. 65).

Permanence of rights

Management plans may be amended or repealed according to their terms. Any authorities issued under the Plan are terminated.

Authorities, including quotas, may be suspended or cancelled for infringements of the law or where necessary or desirable for the best management, use, development or protection of fisheries resources or fish habitats. Any third-party interest may be disregarded for this purpose (sec. 67).

Sections 40 and 47 provide that no compensation is payable *per se* if a management plan or fisheries declaration is made, amended or repealed, or anything previously permitted is prohibited or regulated by the plan or declaration. However, a regulation, management plan or declaration may itself provide for the payment of compensation.

South Australia[53]

In this state, access to fisheries is limited by conditions and limitations on licences only. This is enabled by a detailed regulation-making section of the *Fisheries Act* 1982 (sec. 46). The regulations may prescribe a "scheme of

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53 The most recent amendment in the AUSTLII version of the *Fisheries Act* 1982 was made in 1996, and the most recent notation is of a commencement in 1997.

management" for a fishery, and licence limitations, conditions and related matters are set out in the prescribed scheme of management. Registration of fishing boats is also required (sec. 34).

Section 37 of the Act enable conditions to be placed on a licence which are:

> " (a) directed towards conserving, enhancing or managing the living resources to which the fishery relates; or
>
> (b) related to any other matter prescribed by the scheme of management for the fishery. "

Conditions may prevent taking of certain species of fish, or the use of types of gear.

Licences are only transferable if the scheme of management under the Regulations permits it, the requirements of the scheme have been met and the Director's consent is obtained (sec. 38).

Licences and boat registration endorsed on the licence run together, and the suspension, cancellation or expiry of a licence effect the same result upon the registration (sec. 39).

South Australia also manages two inshore fisheries by separate Acts: the *Fisheries (Gulf St. Vincent Prawn Fishery Rationalization) Act* 1987; and the *Fisheries (Southern Zone Rock Lobster Fishery Rationalization) Act* 1987. A feature of these two Acts is that they make specific provision for payment of compensation for cancelled or surrendered licences under the rationalization programme.

Tasmania

Regulatory framework

The *Living Marine Resources Management Act* 1995 replaces the former *Fisheries Act* 1959, which it repeals.

Establishment and allocation

In essence, the scheme provided under the Act involves the issue of licences and the allocation of quota to licensees, in accordance with a management plan drawn up for the fishery concerned.

Management plans may be drawn up in respect of any fishery (sec. 32). More important, however, are the rule-making powers of the Minister under Part 3 (sects. 33 ff.). Rules may be made in respect of virtually any matter under the

Act. A management plan consists of a set of rules relating to a specified fishery (sec. 32). Rules may also be made for matters relating to fishing licences, fishery capacity, entitlements under licences, prohibited and permitted fishing, opening and closing of seasons and fisheries, vessels and apparatus, fish and fishing, fish processing and handling and other miscellaneous matters.

Rules prevail over inconsistent regulations (sec. 41) but a provision of a management plan which is inconsistent with a rule prevails (sec. 42).

Management Plans, where made, also prevail over provisions of the Act itself to the extent of any inconsistency (sec. 76). What follows must be read in the light of this provision.

The Minister may also issue guidelines on any matter related to licensing (sec. 75). These clearly do not have legislative status, but attention must be paid to such guidelines in matters of issuing, varying etc. licences.

There is no need to specify in Tasmanian legislation that Management Plans are subsidiary legislation, as the set of rules which constitute a Management Plan already have legislative status.

Absent a Management Plan, TAC and quota allocations are set by the following procedure:

1. After consultation with the relevant fishing body, the Minister declares that a species or class of fish in a fishery, or a part of a fishery, is subject to quota management under a management plan (sec. 93).

2. A total allowable catch is set (or varied) under the management plan for the fishery, again after consultation with representatives of persons considered likely to have an interest in the amount set (sec. 95). The management plan specifies such matters as the period during which the TAC may be taken, the process by which the TAC is to be allocated, etc (sec. 94). The allocation may also take into account the need for a portion of TAC to be allocated for recreational fishing (sec. 96).

3. The allocation process is actually performed through the licensing process, under the general rule-making provisions (see above) found at sections 34 and 35. Fishing licence rules may be made for criteria and qualifications for granting licences, the number of licences, procedure for determining issue, conditions, grounds for cancellation, suspension and refusal to renew, etc. Fishery capacity rules may be made regarding the quantity of fish that may be taken, the apparatus that may be used,

the number of vessels and persons in the fishery, and the method by which capacity is to be determined.

The holder of a fishing licence may appeal to the Resource Management Planning and Appeal Tribunal against an allocation decision on the facts of the case; or on the grounds of natural justice (sec. 97).

The rock lobster fishery is governed directly by the Act in Part 6A. A specific formula is set out to determine annual total allowable catch, which is tailored towards the total closure of one fishery and the regulation of another. Quota units are allocated to licence-holders on a catch history basis. The allocation of rock lobster catch history units is not subject to review or appeal (sec. 98F(5)). However, a licence-holder may request the Secretary to review the determination of the value of the rock lobster catch history (sec. 98K), and an appeal lies to the Appeal Tribunal against the result of a review of the Secretary under section 98K on the facts of the case; or the grounds of natural justice.

Transfer of rights

Unless a Management Plan specifies otherwise, transfer is not an inherent right under the Act. The holder of a licence must apply to the Minister to transfer the licence to another person; or to transfer a quota or entitlement under the licence to another licensee (sec. 82(1)). The Minister may refuse transfer if he is not satisfied as to the intended transferee, or other factors affecting the desirability of transfer (sec. 82(2) and (3)). However, the transferability and other such qualities of a fishing licence may be specified in rules under section 34.

A holder of a licence must not allow another person to use the licence by means of leasing, subleasing or lending, or in any other similar way, without the Minister's approval, which may be withheld if the Minister is not satisfied as to the desirability of such an action on specified grounds (sec. 87).

Conditions may be imposed on licences, and the conditions varied. The terms of the variation provision are drawn up so as to imply that variation will favour the licensee.

Permanence of rights

Licences are issued for a fixed term (sec. 80), and are renewable (sec. 81). Licences may be cancelled by a magistrate upon application by the Secretary,

on grounds of non-compliance and commission of fisheries offences (sec. 90). The rules and management plans may make further provision for the suspension and cancellation of licences.

Compensation is only payable for amendments or revocation of management plans, or reductions or other limitations to fishing, if it is provided for in the management plan for the fishery or otherwise under the Act or its regulations (sec. 300). Otherwise, neither the Minister nor the Crown is obliged to make any compensatory payment.

Other matters

The Tasmanian Act contains the following provision:

> **"SECT 9 Ownership of living marine resources**
>
> (1) All living marine resources present in waters referred to in section 5(1)(a), (b) and (c)[54] are owned by the state.
>
> (2) Any fish specifically provided for under a marine farming licence are not owned by the State but are the property of the holder of that licence."

Victoria[55]

The *Fisheries Act* 1995 replaces the former *Fisheries Act* 1968. The 1995 Act came into force gradually and finally repealed its predecessor in 1998. The 1995 Act provides a scheme of access licences, management plans and detailed provisions for the allocation of individual quota units to access licences under management plans.

Description of rights

Individual quota consists of a number of individual quota units, as determined for a species of fish, allocated to a licence.

Establishment and allocation

Management Plans are notified by the Minister in the Gazette (secs. 28 ff.). and 28(8) specifically provides that Guidelines included in a management

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54 This refers to the standard definition of state waters as those adjacent waters in the 3-mile coastal zone.

55 The version of the Victorian Fisheries Act used was obtained from AUSTLII, and is current to 1 April 1998.

plan may include criteria designed to reduce the number of licences or permits that are held in respect of a fishery.

Under section 64, the Governor-in-Council orders the TAC for a fishery by period or zone, and issues a "quota order" to that effect. A formula is determined for calculating the quantity of fish (by number, volume, weight or value) in an individual quota unit within the TAC. The number of "individual quota units" per licence-holder is then determined by period, fishery or zone, and minima and maxima set, and gives the individual quota allocated to a particular access licence. TACs and individual quotas may be applied over a "quota period" specified in a quota order.

The allocation of individual quota units is also determined by order of the Governor-in-Council. Orders may also specify the circumstances, if any, in which the quotas can be exceeded or wholly or partially transferred or carried over, set the minimum and maximum individual quota units that may be acquired or held by each licence holder in a specified period or specified fishery or zone, and determine a method or formula for varying individual quotas or individual quota units over a period of time (sec. 64(1)).

The Secretary must give the holder of an access licence a quota notice setting out details of the individual quota allocated to the licence, as soon as possible after the quota allocation. Fresh quota notices must be issued upon any variation to individual quota made by a quota order; or where a licence is renewed or transferred, or individual quota units are transferred (sec. 65).

A Commercial Fisheries Licensing Panel and a Licensing Appeals Tribunal were originally established under the 1968 Act, and continued under the 1995 Act. The Panel considers applications regarding the issue, transfer or renewal of fishery licences (sec. 134). The Tribunal hears appeals from persons aggrieved by decisions of the Secretary in relation to the issue, transfer, renewal, suspension, cancellation etc. of licences (secs. 136 and 137.

Security of rights

There is no register as such, but a person with a financial interest in a licence may apply to the Secretary to have it registered (sec. 59).

Transferability of rights

Transferable licences, or registered financial interests in licences, may be transferred with the consent of the Secretary and provided statutory conditions are satisfied (sec. 56).

Section 65 permits the transfer of individual quota units between holders of access licences for the same fishery, provided the number transferred does not exceed the number permitted to be transferred or acquired by the relevant quota order. The Secretary's approval must be sought, and may be obtained if the transfer is consistent with "every quota order and management plan that applies to the relevant fishery or zone". The Secretary must refuse if the application for approval is inconsistent with any provision of the Act. New quota notices must be issued for each access licence involved in the transfer and acquisition.

Permanence of rights

The quota order establishing quotas for a fishery also determines the circumstances, if any, in which quotas can be exceeded, or wholly or partially transferred or carried over and varied: Section 64. Quota orders may also reduce a TAC or the number or size of individual quota units before the end of the TAC or quota period.

Access licences may be cancelled under licence reduction arrangements for management purposes: Section 61. Where a licence is cancelled for management purposes under section 61, compensation for consequential loss is payable (secs. 62 and 63). Section 153B provides for payment of the value of scallop-dredging licences cancelled by section 153A. The payment is an amount to be determined by the Minister and Treasurer.

Other matters

The Act contains the following provision:

> **"10. Crown property**
>
> (1) The Crown in right of Victoria owns all wild fish and other fauna and flora found in Victorian waters.
>
> (2) The property in any wild fish and other fauna and flora found in Victorian waters passes—
>
> (a) to the holder of an access licence, a recreational fishery licence, an aquaculture licence or a relevant licence or permit when taken from Victorian waters in accordance with the licence or permit;
>
> (b) to any other person when—
>
> (i) lawfully taken from Victorian waters; and
>
> (ii) where no licence or permit is required under this Act for the purpose. "

Western Australia[56]

The *Fish Resources Management Act* 1994 replaces the *Fisheries Act* 1905, which it repeals. The 1994 Act also repeals the *Oyster Fisheries Act 1881* and the *Whaling Act 1937*.

Description of rights

"Entitlements" are conferred under licences or permits (termed generally "authorizations").

Establishment and allocation

The 1994 Act provides a scheme of management plans, managed fisheries, and various types of "authorizations" (defined generally as a licence or permit: section 4) which may be issued. A two-tiered scheme of limitations is provided: firstly, that the number of authorizations in a fishery may be limited or restricted, and secondly, entitlements conferred by authorizations may be limited.

Provisions for Fisheries Management are found at Part 6 of the Act commencing at section 53. The Minister notifies the making of a management plan (sec. 54), for a managed fishery or an interim managed fishery (sec. 56). Management plans may be amended or revoked (sec. 54(2)). Before making a management plan (except for an interim managed fishery) or amending or revoking a management plan, the Minister is bound to consult with advisory committees and other appropriate persons.

A Management Plan is subsidiary legislation for the purposes of the *Interpretation Act* 1984 (sec. 55). Most of the provisions regulating and restricting fishing in a managed fishery are written into the management plan for the fishery (sec. 62).

When a management plan has been prepared for a managed fishery or interim managed fishery, authorizations do not automatically entitle a person to engage in fishing activity in that fishery (sec. 73). A further allocation process is necessary. The management plan may specify the number and classes of authorizations to be granted for the fishery, the conditions of eligibility for authorizations, and the procedure for determining which

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56 The version of the *Fish Resources Management Act* 1994 used contains amendments that were in force as at 30 April 1998.

applicants will be granted authorizations if the number of eligible applicants exceeds the number of authorizations to be granted (sec. 58).

No person is entitled to grant of an authorization "as of right" (sec. 136). Moreover, the fact that a person engaged in fishing, or used any boat for fishing, in a fishery before a management plan was determined for the fishery does not confer any right to the grant of an authorization if a management plan is determined for that fishery (sec. 70). Neither does grant of an authorization entitle the holder to another grant if a subsequent management plan is determined for the fishery (sec. 72).

The management plan may also specify the way entitlements conferred by authorizations are fixed and allocated, and the extent of entitlements expressed as units (sec. 60). Entitlements may be limited by reference to quantity of fish taken, area, fishing period, gear used, types and number of boats, vehicles and aircraft used or any other factor (sec. 66).

A management plan may provide for the making of objections to the grant of authorizations, and the manner of consideration of the objections (sec. 58(2)(e)).

Security of rights

A Register of authorizations is kept by an appointed Registrar (secs. 124 and 125). A person holding a security interest in an authorization may apply to have it registered (secs. 127 and 128) but registration does not give the interest any further force than it already has (sec. 129).

Transferability of rights

Authorizations may be transferred upon application to the Executive Director, provided he is satisfied as to the suitability of the proposed transferee (sec. 140). Part of an entitlement under an authorization may be similarly transferred, but only for a limited period (sec. 141). The transfer of an authorization, or part of an entitlement under an authorization, may be refused on grounds specified in a management plan (sec. 58(2)(k)). Entitlements may be transferred temporarily in accordance with a management plan (sec. 60(2)).

Persons who contravene offence provisions of a management plan are liable to a court order for reduction of their entitlements. The forfeited entitlements may be sold to persons eligible under the management plan (secs. 76 and 60(2)(i)).

A management plan may limit the number of persons who may operate under an authorization, and specify their functions (sec. 60(o)).

Permanence of rights

Authorizations may be varied, and shall be varied where a management plan specifies criteria for variation and those criteria have been met (sec. 142).

Entitlements under an authorization may be varied, increased, reduced, or suspended during a specified period, according to the relevant management plan (sec. 60(2)).

If a management plan ceases to have effect, or expires in respect of an interim managed fishery, the authorizations in respect of the fishery cease to have effect (sec. 70).

The *Fisheries Adjustment Schemes Act* 1987 provided a system of compensation when authorizations were cancelled or entitlements reduced upon the reduction of a fishery under the 1905 Act. However, the 1994 Act provides its own adjustment process. Fisheries adjustment schemes may be voluntary or compulsory, and a separate fund is established for each one, funded in part at least by the levy of authorization fees. In a voluntary scheme, agreed compensation is paid for the voluntary surrender of an entire authorization or part of an entitlement under the authorization. Where it is not possible or appropriate to establish a voluntary scheme, the Minister may establish a compulsory scheme (sec. 14B). The authorizations or entitlements that are to be reduced may be selected by any means, including ballot or lottery (sec. 14E), and objections may be lodged before the reduction commences (sec. 14D).

Section 14G provides that any loss suffered as a result of such cancellation is entitled to fair compensation assessed as market value of the authorization or entitlement affected. If the person affected and the Minister cannot reach agreement, the matter may be referred to a Fisheries Adjustment Compensation Tribunal established under the Act (secs. 14J ff.). Legal representation is possible before the Tribunal (sec. 14U), which may refer a case stated on a question of law to the Supreme Court (sec. 14V). A decision of the Tribunal is final section 14Z. The Minister may also purchase boats and gear from affected persons (sec. 15A).

Summary of Australian Commonwealth and State Legislation

Property Rights Features

The principal property features of limited access rights in Australia are security, transferability and permanence. The various jurisdictions achieve this in varying ways and to various degrees. Other portions of the "bundle of rights" that go to make up the concept of "property", such as rights of protection and exclusion and the right of management, remain vested in the Crown through the governing statute.

Security

A measure of security is afforded by the establishment of a register, in the Commonwealth and New South Wales, in relation to SFRs and shares respectively, but these registers are *prima facie* evidence only of matters contained in them. An indefeasible title is not created by registration.

Transferability

Transferability is a key feature of the individual transferable quota. Only in NSW are fishing shares readily transferable. The right to transfer the Commonwealth statutory fishing right is qualified. AFMA's permission must be obtained and this will be withheld if the transfer is contrary to a management plan or a condition of the right. Limitations are imposed on the transfer of IQUs in Victoria. They may be transferred independently of licences, but only to other licence-holders in the same fishery. A licence in South Australia may only be transferred if the scheme of management under the Regulations permits it.

Permanence

The less susceptible fishing rights are to variation and extinguishment, the more closely they resemble property. This is even more so when the rights may be extinguished without compensation.

The Commonwealth SFRs may continue as options even when a management plan is revoked. They only cease to have effect when the management regime in respect of which they are issued ceases completely and is not replaced. No form of compensation is available in this situation. SFRs are also susceptible to change if a management plan is altered. Like other forms of fishing authorisation, SFRs may be cancelled without compensation for breach of condition, commission of fisheries offences, etc.

NSW shares have a finite life of 10 years, but are renewable. When a share management fishery is abolished, all shares are cancelled, and if the plan has been commenced, holders receive an agreed market value of the shares in compensation, or replacement shares in a replacement fishery. Shares may be surrendered by a shareholder exiting the industry, and may be sold at the option of the shareholder. A court may order forfeiture of shares for commission of certain offences.

In general in Victoria, where licences are cancelled for management purposes, compensation is payable for consequential financial loss. However, for one specific fishery closure, the Act only provided payment for the value of the licence, in an amount determined by the Minister and Treasurer.

Western Australian legislation provides that fair compensation is payable where authorizations or part of the entitlements under authorizations are voluntarily surrendered or otherwise cancelled for management purposes.

Management plans for Northern Territory, Queensland and Tasmanian fisheries may provide for payment of agreed compensation where fishery access is reduced for management purposes, but this is not mandatory.

Property concepts

Some Australian states have paid specific attention to the concepts of property and fishing rights in their fisheries legislation. The explanatory note to the New South Wales Act acknowledges the common law right of the public to fish in the sea and tidal waters. On the other hand, both the Victorian and Tasmanian Acts provide for ownership of living marine resources (Tasmania) or wild fish, flora and fauna (Victoria) in state waters by the state. It seems that these states felt the need to assert this "ownership", either as a claim to sovereignty, or at least as a claim to the right to legislate in respect of the resource.

Proportionality

Shareholders in NSW share management fisheries are allocated a share of total allowable catch in proportion to their shareholdings in the fishery, although there is discretion to delay allocation and thereby not restrict fishing effort of shareholders. The Individual Quotas of Victoria are composed of individual quota units of a quantity of fish (by number, volume, weight or value) determined under a quota order. The quota order

may reduce a TAC or the number or quantum of individual quota units according to a predetermined formula.

Otherwise, proportionality is discretionary. SFRs under Commonwealth legislation may or may not be proportionate, and are subject to variation in their conditions. In the Northern Territory and Queensland, subordinate legislation may or may not allocate catch proportionally. In Tasmania, TAC may be allocated proportionally under a management plan, with a right of appeal.

Conclusions

The legislative schemes of fisheries rights in Australia, in both the Commonwealth and the states, range between an endorsed licence model and one approaching, but not actually attaining, a full property rights concept. In the main, Australian jurisdictions tend to treat limited-access rights as an incident of a fishing licence. Only some Australian states, and the Commonwealth, have developed the concept of fisheries quotas to the stage of creating a property right.

The most complete of the latter is NSW, which employs the somewhat unusual approach of allocating "shares" in a "share management fishery". The shareholding must be held additionally to a licence, to enable fishing in a share management fishery. The language used in the Act parallels that of corporations legislation. This seems deliberately to be mandating a property view of its fisheries "shares". But, despite the language used and the provision of matters such as a share register, these shares cannot be fully equated to the share in the incorporated company, which is a legally acceptable form of property. The NSW fisheries share is dependent on the issue of a licence. It has a limited life, and even during that lifespan, its continued existence is dependent on the ongoing payment of fees and levies. It is subject to proportionate variation of its worth. Dealings in it are ineffective unless registered.

The Commonwealth establishes "statutory fishing rights", described as any one of a long list of rights in relation to fishing: a right to a quantity of fish or proportion of capacity, or qualified by area, time, gear etc. A statutory fishing right is on a par with permits and licences, all termed "fishing concessions". The scheme established by the *Fisheries Management Act 1991*, and particularly the language of section 21, are notable in that considerable flexibility is possible in determining the exact nature of the SFR under each management plan. By contrast, the fishing permit is clearly not intended to

operate as a long-term property right. Although used to a considerable extent, it is seen as a transitional measure pending the establishment of management plans for all Commonwealth-managed fisheries.[57]

The Commonwealth *Fisheries Management Act* does not use the word "property". Instead, a right-holder may deal with the right "as its absolute owner". But this provision affords protection only to a *bona fide* purchaser for value without notice of fraud. Trusts relating to SFRs are not registrable and consequently not recognised.

Victoria and Queensland have less well-developed systems. Victoria establishes "individual quota units" within the total allowable catch, set by orders of the Governor-in-Council. IQUs are allocated in respect of licences, but they may be dealt with separately from licences. The Queensland Act goes so far as to provide a special definition of "quota", as including a restriction on activities by way of fishing, which may be by reference to any one of various factors. Quotas may be prescribed by management plans, but they are determined in the same way as licences or permits. The language of the Act is couched in the general terms usually applied to the issue of licences, and implies that quotas are no more permanent or substantial.

The other states do not establish limited access rights as a separate entity. They have left such matters as allocation, proportionality, compensation for extinguishment etc. to the discretion of subordinate legislation (usually the management plan). Quota allocations usually have no more of a property nature than the licence they are endorsed on, which is liable to cancellation, of limited duration, and usually not transferable (an exception is the licence of South Australia, which is conditionally transferable). The Northern Territory legislation is comparatively straightforward, and provides for "quota or allowable catch", allocated by the Minister under a management plan, as an incident of licence. Management plans may provide a licence buyback programme when a reduction in fishing effort is planned. In Western Australia, quota is no more than an entitlement, expressed as units, under licences and permits. Both the number of licences or permits in a fishery and the quantity of entitlement under the licence or permit may be limited. In Tasmania, a portion of the total allowable catch may be allocated to a licence-holder. Quota is an incident of licence rather than a separate concept. However, as Management Plans prevail over the terms of the Act, the Plan for an individual fishery may provide otherwise. And the law of South

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57 See the discussion in Palmer, op. cit.

Australia goes no further than to limit the number of licences that may be issued in a fishery.

In all Australian jurisdictions, essential "property" features are retained by the state, whether explicitly or otherwise. Whether or not the claims by Victoria and Tasmania to "ownership" of the resource are valid property claims, or whether they are a restatement of sovereignty which gives rise to the right to legislate regarding the resource, all limited fishing rights in Australian legislation are creatures of that legislation, and owe their existence to the will of the legislature which created them.

OTHER COUNTRIES

Iceland

Iceland is a nation almost entirely dependent on fishing. Like New Zealand, it is a small island state, and like New Zealand, it has a well-developed quota system, arguably one of the first. The *Act regarding the Management of Fisheries of 1990* was developed in consultation with the Icelandic fishing industry, although it is still not without its opponents, and was developed as a response to the realisation that Icelandic fish stocks, the common property of the nation, were being rapidly depleted in the race for fish. The Act replaced the previous mixed system of vessel catch quotas and effort quotas with vessel quotas which were of indefinite duration and fully transferable.[58]

The Act relies on the "two pillars" of TAC and ITQs. It sets out a simple but definite system. Article 4 requires all commercial fishing to be undertaken under an annual general fishing permit. Quotas are issued to individual vessels for all species subject TAC determination under the Act. Quota proportions are unchanged but the overall quantity depends on the total quantity set for the species, and is notified to the boat at the beginning of each fishing season: Article 7. Temporary increases or decreases for a season may be declared where it appears that the fishing revenue is likely to vary "significantly" - more than a 20 percent shift from the average income over the previous five years: Article 9. Permanent transferability of quotas is only slightly restricted, depending on the capacity of the transferee boat to fill the new quota (art. 11). The Ministry must be notified in advance of all

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58 See Gissurarson (2000) pp.1 ff. for details of the development of the Act.

quota transfers (art. 12).[59] Quotas are only rescinded if a boat fails to catch at least 25 percent of its quota for two consecutive fishing years.

A notable provision in article 1 declares that the issue of fishing permits under the Act does not constitute any claim to ownership or irrevocable claims by individuals over fishing rights. This was a result of political lobbying, and was intended to prevent compensation claims for cancellation of quotas, but has since been regretted as it leaves the legal status of quotas unclear. Article 1 also declares that all utilized marine resources found in Icelandic waters are "the common property of the Icelandic nation"; and that the purpose of the legislation is "to ensure the preservation and sensible utilization of these resources, thereby guaranteeing full employment and stable settlement of the country".[60]

Nicaragua[61]

For decades, the legal framework for fisheries in Nicaragua was characterised by poor implementation and the use of ad hoc decrees in place of a coordinated legislative approach. The *Fisheries Law of 1961* was never implemented. Instead, fisheries management was governed by different management Decrees and effected through poorly controlled licensing and permitting schemes.

Assistance to Nicaragua was provided in 1993 through a World Bank project, in which FAO participated with respect to legal aspects.[62] The approach of the legal component of the project was to use the Chilean *General Law on Fisheries and Aquaculture of 1991* as a model. This law, which established an ITQ system through a new administrative regime entitled "the Special Fisheries Regime", appeared to have attributes that, if carefully adapted, could be effectively applied to the Nicaraguan context.

The Chilean law has the following basic features:

- it recognizes and assigns fishing rights *free and in perpetuity* to boat owners who are currently operating in fully exploited fisheries;

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59 On the other hand, annual transfers of Annual Catch Entitlement (given in tonnes) are temporary.

60 The English translation of the original was obtained from the FAOLEX database.

61 This description is taken directly from Lería & Van Houtte (2000)

62 The economic analysis for a Nicaraguan ITQ system in was undertaken by World Bank experts*

- it uses catch history as the basic criterion to allocate the percentage share of the TAC to fishing rights. The owner in perpetuity of this individual fishing quota can divide, sell, lease, remove or inherit it, converting it into a commodity to be commercialised in the national or international markets. No single quota owners may accumulate more than 35 percent of the TAC for a particular fishery.

- for fisheries not previously subject to TAC, as in the case of *jurel*, article 40c, paragraph 2, establishes that a fixed coefficient be used to calculate the proportion of the total fishing rights (the Total Fishing Effort) assigned to each vessel, which is based on a mathematical relationship between the size of the vessel's fish-hold multiplied by a coefficient particular to each geographic region.[63]

The draft Nicaraguan law prepared under the project distinguishes between artisanal and industrial fisheries as follows:

- artisanal: one person, one boat up to 35 feet length, with gear operated manually;

- industrial: persons and companies, using gear mechanically operated.

Both artisanal and industrial fisheries have commercial objectives.

The draft law identifies two different regimes applicable to industrial fisheries: general access and fully exploited fisheries. Fully exploited fisheries applies to all fisheries where fishing is at a level equivalent to the maximum catch that each species is capable of supporting without jeopardising its long term conservation. The general access regime is characterised by free access and applies to all fisheries which do not fall into any other categories defined by the law (exactly the same as the Chilean model). In order to introduce these two regimes, the draft law abandoned the licensing system which had been the traditional system in Nicaragua, in favour of a transferable quota system.

The Preamble of the draft law considers the ITQ system a better regime for three reasons:

- stock conservation: is improved, as only one variable needs to be controlled (the capture);

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63 Cárdenas & Melillanca (1999).

- effective production is enhanced, as each quota holder is able to determine how the product is captured. Fisheries administration is not involved in this respect. The quota holders have more information and the overall investment is marginal;
- the ITQ system establishes a way of allocating rights through public auction (considered to provide incentives to private investment).

The ITQ regime applies to fully exploited fisheries. The draft law considers the shrimp and lobster fisheries fully exploited, and provides the possibility of increasing the number of fully exploited fisheries in the future. The Ministry of Economy and Development has the authority to declare a fishery fully exploited. The ITQs will be assigned by way of public auction.

The right conferred by the ITQ is to be saleable, leasable, inheritable, divisible or otherwise transferable. Quota holders are obliged to declare any possible transfer of or alteration to their right to the Registry. The quota gives the quota holder the annual right to a specific quantity of species measured by weight (the result of multiplying the annual global quota to a fixed figure given to the quota holder). The transitory regime recognises a historic right to the pre-existing licence owners.

The ITQ regime requires a good system for monitoring, control and surveillance. The general access regime is a free regime applicable to all fisheries that are not declared fully exploited where access is free and only subject to registration. The draft law also establishes:

- a preferential regime for Nicaraguan nationals (both companies and persons)
- that the access to the living marine resources is guaranteed to Nicaraguan citizens. Foreign nationals may have access to the living marine resources only where supply exceeds demand.
- a very complicated registration system, including a registry of ITQ holders.

USA

Federal Jurisdiction

Federal fisheries management in the USA is governed by the *Magnuson-Stevens Fishery Conservation and Management Act*, which declares at 16 U.S.C 1801 that:

> "The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities."

The Act was heavily amended in 1996 by the *Sustainable Fisheries Act*, which places greater emphasis on conservation and sustainable management of US fisheries and other living marine resources. Conservation and management measures must not only be directed towards efficient utilisation of the resource; they must also consider the impact of utilisation of fishing communities, and fair distribution of the benefits derived from fishing.

The *Magnuson-Stevens Act* declares at 16 U.S.C 1856 section 306(a) that the jurisdiction and authority of a state extends, for the purposes of the Act, to any pocket of waters adjacent to the state and totally enclosed by lines delimiting the territorial sea of the United States. State authority within the boundaries of a state is not affected. The "boundaries of a state", as referred to in the original version of the Act at 16 U.S.C. section 1811 (since superseded) and in 16 U.S.C section 1856 have been defined in several court cases. *Tingley v. Allen* 397 So. 1166 (Fl. App. 1981), holds that federal law pre-empts any state's attempt to define its own marine boundaries and that the federal boundary legislation, the Submerged Lands Act of 1953, 43 U.S.C. section 1301 et seq., prevails. Under that Act, as interpreted by the Supreme Court of the US in the case of *United States v. Florida*, 425 U.S. 791 (1976), a state's marine boundary is three marine leagues (nautical miles) from the shoreline. The Federal Court case of *Anderson Seafoods, Inc. v. Graham*, 529 F. Supp. 512 (M.D. Fla. 1982), interpreting old 16 U.S.C. 1811, says essentially the same thing, that the state's marine boundary is three marine leagues offshore.

Within a state's territory, however, powers not specifically reserved to the federal government or denied to the states under the Constitution are exercised by the states. State regulation of fishing vessels outside state boundaries is permitted provided state laws are consistent with Federal regulations and the relevant fishery management plans, or the fishery management plan has delegated management of the fishery to the state (16 U.S.C. 1856 section 306(a)(3)). 16 U.S.C. 1854 section 304(d)(1) provides that the Secretary may enter into a cooperative agreement with a state under

which the state administers a permit system, and the agreement may provide that all or part of the fees collected under the system accrue to the state.

Fisheries waters outside state territorial boundaries (the EEZ) are managed by eight Regional Fishery Management Councils established under the Federal Act – five for the Atlantic Coast and three for the Pacific, including the waters of US territories and possessions (American Samoa, Guam, and the Northern Mariana Islands) in the Pacific: 16 U.S.C. 1852. Each Council implements its own regulations and management regimes, with the consequence that no management programmes are the same.

The *Sustainable Fisheries Act* imposed a moratorium on issue of any new IFQs before October 2000, while new proposals for the regulation of limited access fishing are prepared. The National Academy of Sciences was required to submit to Congress a comprehensive report on IFQs by 1 October 1998, analysing effects of limiting or prohibiting transferability of IFQs, or limiting their duration; mechanisms to prevent foreign control of U.S. fisheries; individual processor quotas; mechanisms to avoid adverse impacts on fishing communities and to ensure fairness in allocations; monitoring and enforcement; criteria for candidate fisheries; social and economic costs and benefits; and value created.

The first federal quota system was established in 1982 for the western Atlantic bluefin tuna. This was followed in 1990 for the Mid-Atlantic surf clam and ocean quahog fishery, and later for the North Pacific and Alaska Halibut and Sablefish Fisheries, and the South Atlantic Wreckfish Fishery. When the 1996 moratorium was imposed, these fisheries were the only ones for which IFQ systems had been established. Others are managed by gear, season, size or area restrictions, in an attempt to limit overfishing.[64]

Management plans

The Regional Fishery Management Councils prepare and submit to the Secretary a fishery management plan, or amendments to a plan, for each of its fisheries that requires conservation and management (16 U.S.C. 1855(h)). The management plan contains an assessment of the maximum sustainable yield and optimum yield from the fishery; the capacity and extent of annual harvest of the optimum yield, the gear used, areas and times of fishing, number of hauls, etc. (16 U.S.C. 1853(a)).

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64 For background to US fishery management see Milliken (1994); Nielander & Sullivan (2000a).

The plan may establish a permit system for fishing in the fishery, and a limited access system for the fishery in order to achieve optimum yield, and factors to be taken into account include: present participation and historical fishing practices in the fishery; its economics and socio-cultural framework; dependence on the fishery; and effects on fishing communities (16 U.S.C. 1853(b)). Where the Council fails to prepare an adequate plan or amendment, or the Secretary disapproves, the Secretary may himself prepare a plan or amendment (16 U.S.C. 1854(c)). Once drawn up and agreed, fisheries management plans and amendments are implemented by regulations.

Meaning of quota

Quotas are known under the Act as individual fishing quotas or IFQs, and are defined under section 3 as:

> "a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person."

Allocation

This is carried out under the terms of the relevant fisheries management plan. In the existing IFQ fisheries, IFQs are allocated on the basis of catch history and vessel capacity. However, the *Sustainable Fisheries Act* included a provision for the reservation of up to 25 percent of fees collected for a programme to assist the purchase of quota by small-vessel and entry-level fishers, in an attempt to break monopolies of IFQ. Each managed fishery developed its own appeal process for initial allocation, however only one fishery developed a detailed process.

Transfer, use and exclusivity

16 U.S.C. 1855(h) provides for the establishment of a central registry system for limited access system permits, including IFQs, to provide for the registration of title to and interests in those permits. All security interests (including assignments, liens and other encumbrances) in, and sales and other transfers of, permits must be registered in order to be effective, and the registration is the exclusive means of perfection of title to and security interests in the permits (16 U.S.C. 1855(h)(3)).

Permits may be sold and otherwise transferred (16 U.S.C. 1855(h)(3)).

Permanence factors

A Council may submit and the Secretary may approve the termination or limitation of a management plan which provides for a limited access system, including an IFQ programme, without compensation to holders of any limited access system permits (16 U.S.C. 1853(d)).

Fishing capacity reduction programmes are to be established in overfished commercial fisheries. The programmes may, in accordance with the relevant fishery management programme, provide for payments in respect of vessel or permit buy-outs, provided the plan prevents rebuilding (by permitting new entrants, vessel upgrades etc.) (16 U.S.C. 1861a.(b)).

Consequences

16 U.S.C. 1853(d)(3)(C) specifically states that an IFQ or other limited access system authorization does not confer any right of compensation to the holder if it is revoked or limited.

The fishing capacity reduction programmes under 16 U.S.C. 1861a. are voluntary only. Vessels may be scrapped or permanently withdrawn from the fishery; permits may be surrendered. Programme participation is determined under an implementation plan, which will specify eligibility criteria for vessels and procedures for participation, such as owner-bids submitted under an auction system of fair market-value assessment (16 U.S.C. 1861a.(e)).

Other matters

The Act specifically states that IFQs or other limited access system authorizations do not create any right, interest or title in or to any fish before the fish is harvested (16 U.S.C. 1853(d)(3)(D)).

The Managed Fisheries[65]

Quota-managed fisheries under the *Magnuson-Stevens Act* are governed by Regulations, promulgated according to recommendations from the relevant Regional Fisheries Management Council, which devises them in conjunction with the states and sectoral interests.

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65 For a more detailed summary of the establishment of these fisheries, see Nielander & Sullivan, op. cit.

The Mid-Atlantic Surf Clam and Ocean Quahog Fishery was the first USA fishery to be managed under a limited access scheme. Regulation actually commenced in 1977, and the management plan was amended several times thereafter, with the fishery at one stage being divided into three, each managed under a different management plan. An aggregate annual catch quota was established for each fishery, which, when reached, resulted in the closure of the fishery for the year. In 1990, the three were brought under one plan, with the introduction of proportional quotas and entrance based on vessel catch history and vessel dimensions.[66]

The South Atlantic Wreckfish Fishery followed, with a quota programme commenced in 1992. Allocation was based mainly on catch history, and limits were placed on share sizes from the outset. However, consolidation of quota share commenced immediately. The quantum of quota is calculated annually, and the programme has resulted in a well-managed fishery.

The North Pacific Halibut and Sablefish Fishery was the subject of intense debate as management measures were gradually implemented. Attempts to limit entry into the fishery commenced in 1983. By 1992, following considerable debate, a proposal was developed to issue IFQs of unlimited duration, initially allocated free on the basis of vessel catch history. Allocation was a one-time initial event. Subsequent IFQ permits are issued annually based on calculations stemming from the initial QS allocation, and only permit-holders are entitled to fish. Transferability is limited to prevent over-consolidation of fleets and preserve the owner-catcher nature of the fleet. Fishing commenced under the system in 1995.[67]

Rights in the Legislation

Fisheries law in the USA is based on the concepts of the people's ownership of the resource, the government's sovereign right to conserve and manage it, and an open-access regime. The only exceptions to these principles are treaty rights of Native Americans and to an extent, subsistence fisheries in Alaska. Fisheries management has been decentralised in a *laissez faire* economic climate. This is manifested in a fragmented administrative framework, with regional councils, in collaboration with states, responsible for drawing up

66 Sea Watch International v. Mosbacher 762 F. Supp. 370, 9 April 1991.
67 Smith (2000).

management plans and to a large extent, setting policy[68]. Consequently, the management regimes in different parts of federal waters differ widely, and in general, local fishing interests have long been able to ensure that fisheries management regimes are favourable to themselves.

However, the recent collapse of several significant fisheries in USA waters has encouraged a shift in policy. The *Sustainable Fisheries Act* 1996 reveals a shift in power from regional to federal management, with a greater emphasis on centralised control of overfishing. On the other hand, the moratorium introduced by the Act demonstrates that Congress is still clearly reluctant to accept quotas as a sustainable fishery management tool. Limiting access is seen as a privatisation issue, and debate centres on such questions as private rights to a public resource, and the management benefits vs. drawbacks of privatisation.[69]

This reluctance has manifested itself in the redefinition of IFQs in the 1996 Act. Many of the features of quotas which are spelt out in the fisheries legislation of other jurisdictions are absent from the US legislation. An IFQ is expressly defined as "a permit to harvest". The right may be revoked at any time. There is no right of compensation if the permit is revoked or limited. And no right, title or interest in unharvested fish is created by any limited access system permit (16 U.S.C. 1853(d)). The legislature appears to be intent on avoiding any possibility of definition of rights as property, and consequent compensation claims for property deprivation.[70]

Nevertheless, some aspects of the US IFQs tend to demonstrate property attributes. By their very nature, they are exclusive. And within statutory limits, they are transferable. However, IFQs lack a guarantee of permanence, and may be legally revoked without compensation at any time; transfers are hedged about with restrictions; and even the language of the legislation tends towards an interpretation which does not create property. And, inescapably, the right to manage remains firmly with the state[71].

Based on this, it has been proposed that the thrust of the US fisheries legislation appears far more towards the creation of a right in the nature of a

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68 For a comparison of the ITQ systems of New Zealand and the USA, and a discussion of some of the reasons for the different approaches and results, see Nielander and Sullivan, op. cit.

69 Creed & McCay (1996).

70 Rieser (1997).

71 See also the discussion in Rieser, op. cit.

usufruct – the right of using and taking the fruits of something belonging to another[72]; or the right to use and enjoy the profits and advantages of something belonging to another[73]. Other writers have argued that the right is more in the nature of a revocable privilege, granted by the trustee state for the wise utilisation of a resource which belongs to the general public.[74] The limitations on transfer, principally designed to prevent over-consolidation of quota holding; the fact that some quota shares cannot be consolidated or divided on transfer; and the liability of revocation without compensation, are pointed to as indicators of the non-property nature of the right.

This characterisation of IFQs as a usufruct or revocable privilege is the outcome of a major policy debate. The commercial fishing fleets of the USA do not wish their traditional "freedom of the seas" to be eroded, and their lobbying has been successfully directed towards curtailing the development and implementation of limited access fishing programmes and preserving their traditional open access rights. One aspect which must be curtailed is the entrenchment of any tendency towards a property nature of fishing rights, which could amount to a derogation of the common-law right of open access.[75]

The National Academy of Sciences Report was published in 1999. It found that quotas can effectively address some management issues, and recommended the lifting of the moratorium.[76] But quotas have varying effects in different fisheries, and it was recommended that biological, social and economic objectives should be clearly defined, and participant involvement is essential. Each fishery must be treated on a case-by-case basis. Increases in administration and enforcement costs are inevitable. The initial allocation process is the most controversial aspect of establishing a quota management programme, and criteria other than mere catch history should be considered. Transferability should be limited sufficiently to

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72 Osborne: A Concise Law Dictionary (5th edition 1964).

73 The American Heritage Dictionary 1967 (3rd edition 1996).

74 See Smith, op. cit., also Connor (2000). Refer also to Sharick-Jensen: "The American (In)experience: The Dividing Line Between Privilege and Property in Rights Based Systems" and "US Rights Based Systems: The Distinctions between Privilege and Property", unpublished papers given at the FAO Fishrights99 Conference, Perth, Western Australia, 1999.

75 Nevertheless, US courts in recent years have inclined towards finding a property nature, in one fishery at least: see *Foss v. National Marine Fisheries Service* 161 F.3d 584 and the line of cases cited therein.

76 Wertheimer (2000).

prevent over-accumulation of quota share, and community rights should be considered where appropriate.

Canada

Introduction

Canada is a federation with a diversity of fisheries, inland, coastal and marine. The federal government has the constitutional responsibility to provide for the regulation, protection and preservation of all Canadian fisheries. The allocation of fisheries management and legislative responsibilities between federal and provincial governments was resolved by the *Resources Transfer Act of 1930*, under which provinces acquired proprietary rights to resources, including where applicable fisheries, and responsibility for administration of the federal legislation, by delegation. So the Canadian *Fisheries Act of 1985* authorises the granting of leases and licences, but provides at section 3: "Nothing in this Act shall be taken to authorize the granting of fishery leases that confer an exclusive right to fish in property belonging to a province."

Fishing rights systems in Canada have developed piecemeal as an ad hoc extension of the licensing system, occurring mainly at the instigation of the fishers themselves and without being preceded by enabling legislation.[77] The proclamation of the 200-nautical mile EEZ in 1977 saw in an era of rapid development of the domestic fishing fleet in a wide range of fisheries and overfishing finally resulted in many significant fisheries moving to some form of quota system in the last 10-20 years. The federal Act contains very little detail as to allocation of licences, thereby permitting a wide range of variation and experimentation. Most control is carried out as a matter of policy only. This applies to such processes as:

- limited numbers of licences
- a buy-back scheme (termed "compensation" to avoid any inference of property) where fishing effort is to be reduced
- a de facto transfer scheme whereby the licensing authority abides by the advice of a fisher departing the industry as to who should be reissued his surrendered licence thereby creating a market for transfers).

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77 Burke & Brander (2000) p. 151.

Hence, licences under the federal Act display many of the characteristics of property which are not however specifically granted by legislation. Once the TAC is set for a fishery, and apportioned as fleet quotas, Canada's licensing system already closely resembles a fishing rights system in operation. Licence-holders continue their involvement in the management process in the fields of planning, monitoring and research.

As more formalised IQ systems developed, allocation was usually made on the basis of recent catch history, with other factors playing a part on a fishery case by case basis. IQ shares are essentially catch limit conditions in licences. The major issue is usually the extent of transferability of quotas. Fully open transferability could pass involvement in a fishery to outside corporate interests. However, a measure of transferability is necessary to benefit the fishers themselves. Approximately half of Canadian fisheries still have no transferability, while those that do often contain stringent conditions. Security and exclusivity is based on precedents within the fishery, and although licences are usually issued on an annual basis, they are rarely suspended or not renewed.[78] Recent years have seen a move to integrated Management Plans devised, sometimes on a multi-year basis, in consultation with industry, and some fisheries are considering a move to the formalisation of the ITQ system.

Manitoba

There are however exceptions to this scenario. The inland freshwater fisheries of Lake Winnipeg in Manitoba Province[79] first established non-transferable quotas for licence-holders in 1972, which depended on seasons and areas. A quota entitlement programme which separated licence and quota and introduced limited transferability of quota was finally established in 1986. The system was entrenched in legislation in 1993, by a new Part V to the Manitoba *Fisheries Act of 1987*, and regulations to implement the programme.

Description of rights

Part V of the Act establishes the Quota Entitlement System. Section 32 describes an Individual Quota Entitlement (IQE) as "a property interest of a fisherman in a right to fish a certain quantity of one or more species of fish,

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78 Ibid., p. 154.

79 For a full account of the history of this fishery see Gislason (2000a), pp. 118 ff.

in a particular area and for a particular season, for commercial purposes". And again at section 33(3), the allocation of an IQE to a fisherman under the regulations constitutes "a property interest of the fisherman in a right to fish the specified quota".

Transferability

In general, a fisherman may buy, sell or pledge an IQE as security (sec. 33(3)); but IQEs in Northern Manitoba must first publicly offer the IQE to others holding or entitled to hold IQEs in that area.

Regulations

Matters of allocation, qualifications of fishers, rights and obligations of IQE-holders upon injury, death, sickness, retirement and change of residence, suspension and revocation of IQEs etc. are governed by regulations made under the Act.

Other matters

Section 14.1(2) contains a presumption that the bed of all wetlands and bodies of water, other than Indian reserves or national parks, are owned by the Crown in right of Manitoba. By section 14.2(1), property in all wild fish is vested originally in the Crown.

British Columbia

By contrast, the major ocean fisheries in British Columbia are managed by a system of Individual Vessel Quotas (IVQs) attached to licences, which are issued annually as a proportion of the TAC for that year. These quotas are not considered as property but as a privilege. Transfers are permitted annually between licensed vessels, and "stacking" of more than one quota each vessel is permitted - the cap depends on the fishery. The sablefish and groundfish trawl fisheries do not permit permanent transfers, with the industry itself resisting any move towards opening the fishery to outsiders, particularly non-operator entrepreneurs, but permanent transfers with capping conditions are now permitted in the halibut fishery and the geoduck clam fishery[80].

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80 This is taken from Turris (2000), Gislason (2000b) and Heizer (2000).

The success of these systems depends on:

- a stable industry with virtually automatic renewal of licences as a matter of policy
- strong industry involvement in decision-making
- high-quality reporting and monitoring systems.

South Africa[81]

Following the first democratic elections in South Africa in 1994, a major revision of South Africa's laws was undertaken to improve the social and economic status of formerly marginalised groups. Inter alia, new fisheries legislation was to be prepared to replace the *Sea Fisheries Act* 1988.

The process of establishing a new fisheries policy was commenced immediately. The aim was to provide greater access to those who had been previously denied it, as well as bringing about a reduction in the existing levels of pressure on the resource. A Green Paper and then a White paper were prepared, which set out the basic directions for the fisheries policy of South Africa. As part of that exercise, an "Access Rights" Panel was established. The main recommendations of the Panel were that:

- an appropriate percentage of the total allowable catch of all quota species be sold to a Commercial Public company to rent, let or contract to emerging fishery operators;
- all rights would be sold by a tender and competitive bidding process, with the price paid for over the period of the duration and that the right would diminish at an appropriate rate to the state;
- established companies that had made significant strides in transforming themselves would be eligible to tender;
- the rights would be real, transferable, divisible, saleable and inheritable, subject to sustainability constraints;

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[81] The FAO Legal Office participated in a technical cooperation project funded by NORAD, and executed by the Institute of Marine Research, Bergen. This project had as its objective the preparation of a fisheries law to give effect to the policy on fisheries. FAO's participation was initially funded through the Fisheries Management and Law Advisory Programme, funded by Norway. This section is adapted from Lería and Van Houtte (2000), Hersoug and Holm (2000) and Bailey (2000).

- people in coastal communities, within specified areas and zones and within sustainable limits and appropriate fishing management constraints, would have access to local marine resources in order to provide for their subsistence needs according to traditional patterns of use.

These proposals, with some modifications, were then translated into legislative proposals, and the Bill presented to Parliament in 1997 addressed these matters in the following manner:

In respect of commercial fishing (as opposed to recreational and subsistence and foreign fishing), the Minister was given the power to determine annually the allowable annual catch, the total applied effort or a combination of such methods in relation to commercial fishing. This determination could be made in relation to a particular area, or in respect of a particular species or group of species of fish, or in relation to the use of particular gear, fishing methods or types of vessels.

An important element was provided in the original section 22, which stated:

> (3) If the allowable commercial catch in respect of which rights of access exists, increases, and the increase exceeds a maximum determined by the Minister, the amount of allowable catch in excess of this limit shall be available for allocation to others in accordance with criteria that may be set by the Minister and in order to achieve the objectives contemplated in section 9(2) of the Constitution.

This was more important than it appeared, as it was intended to set clearly the objectives to be pursued in the context of the constitutional goals referred to.[82] It also reflected the overriding policy consideration that the new law had to play an important part in restructuring South African society in the aftermath of apartheid. This, it will be seen shortly, became a crucial consideration in shaping the final version of the Act as it was adopted by Parliament.

The legislation as submitted to Parliament provided for a "right of access" for commercial fishing. The legislation aimed at enabling certain social and political objectives to be achieved. Clause 23(3)stated:

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[82] Section 9(2) provided "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. "

> In granting a right of access the Minister shall, in order to achieve the objectives contemplated in section 9(2) of the Constitution, have particular regard to:
>
> (a) the need to permit new entrants, particularly those from historically disadvantaged sectors of society; and
>
> (b) the need to promote stability within the commercial fishing industry.

However, the legislation sought not only to achieve those objectives but to introduce a system of fishery quota rights for the commercial fisheries of South Africa. Thus, in addition to those objectives, the Bill included the following features:

- the right of access would be valid for a period to be determined by the Minister, but not to exceed 50 years;
- only South African citizens may have rights of access , unless otherwise determined by the Minister;
- the right is to be saleable, leasable, inheritable, divisible or otherwise transferable;
- transfer of a right of access is subject to approval by the Minister;
- the Minister was then given extensive regulation making powers, which covered the formula by which a right of access as a portion of the allowable catch or total applied effort may be determined;
- provision was also made for the selling of rights of access by a tender process.

The scheme was to be backed up by the establishment of a company, incorporated under South African law. The main object and business of this company was stated to be:

> In order to achieve fair and equitable access to fish, the memorandum of association of the Company shall inter alia provide that the main object and main business of the Company shall be to lease rights of access, according to criteria prescribed by the Minister, to small and medium size enterprises which do not already have such rights of access.

The management and control of the company was to be placed in the hands of a board of directors to be appointed by the Minister. The Minister would also have had the power to issue criteria and guidelines for the operation of the company. These criteria and guidelines would have been at the heart of the system set up, as they would have been the means by which the

government's policy of restructuring the fishing sector along lines of more equitable access to the resources would have been achieved.[83]

The other provisions were largely standard company law provisions aimed at ensuring that the company operated to the extent possible like any other company notwithstanding that it was in effect to be owned by the state.

When the Bill was presented to the Portfolio Committee of the South African Parliament, it was changed quite radically, largely because it was perceived by the Committee that the system it provided did not permit the necessary degree of restructuring to overcome the historic imbalances in South African society.

Whereas the Bill as presented had set out different types of fishing, in particular subsistence fishing, recreational fishing, mariculture, fish processing establishments and commercial fishing, the right of access was applicable only to commercial fishing. While this did not matter so much in substantive terms, it gave the impression that commercial fishing was to continue as a privileged area accessible only to a few.

Under the legislation as it was restructured by the Portfolio Committee, the right to fish covered all types of local fishing. Thus section 18(1) provides:

> No person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister.

Thus commercial fishing was to be placed on the same level as other local fishing activities, in particular recreational and subsistence fishing. Some features of the original Bill were however retained. Thus section 21 (1) states: *"Subject to the provisions of the Act, a commercial fishing right may be leased, divided, or otherwise transferred."*

Indeed, many of the features of the Bill were retained in respect of commercial fishing, with the end result that a form of transferable fishing right still exists in the law. As regards the duration of a right, this was stated to be, in section 18(6), for a period "*to be determined by the Minister, which period shall not exceed 15 years, whereafter it shall automatically terminate and revert back to*

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83 Interestingly, it was provided that "No person who has a direct interest in any manner whatsoever in commercial fishing or mariculture shall be appointed in terms of this section. "

the State."[84] This was done to ensure that the entrenched white-controlled firms did not simply buy out new holders and revert to the former *status quo*. The limited-period right was to be replaced at a later date by a more permanent right.

The Bill became law in 1998 as the *Marine Living Resources Act*. In summary, it provides a fishing rights system of :

- catch controls
- leasing of rights to persons and companies
- partial transferability only
- limited duration
- no community participation.

However, further investigation is to be carried out into ways of developing rights for indigenous coastal communities, and a subsistence fishing right has been created which enables subsistence communities to sell their catch.

Namibia

Like its former occupier South Africa, Namibia is concerned to throw off the stigma of apartheid and the former exploitation of its fisheries resources by predominantly foreign or white interests. Fisheries policy began at independence in 1990, and unlike other nations who already had a body of participants willing and capable of deeper involvement in more responsible fisheries harvesting, Namibia was primarily concerned to remove the pre-Independence participants from the industry and replace them with Namibians.

Under Namibia's *Sea Fisheries Act* 1992, limited-access rights were established for all commercial fishing, 90 percent of which was regulated by output controls in the form of quotas. In granting exploitation rights, the Minister was to have regard to such factors as citizenship (whether or not the beneficial control of company applicants was vested in Namibian citizens) and the ability of the applicant to exercise the right in a "satisfactory manner" (sec. 14(6)). The right could be suspended or terminated if the Minister considered that "the continued participation of the exploiter

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84 In fact, this provision applied to all rights of access, not only commercial fishing.

concerned is no longer in the interest of either the industry or the resource in question" (sec. 14(8)). Quotas were issued to rights-holders in the Minister's discretion: Section 16. Rights and quotas were only transferable with the approval of the Minister, and rights and quotas were required to be transferred together (secs. 14(10) and 18). Quotas could be suspended, cancelled or reduced in the interest of the promotion, protection or utilization on a sustainable basis of a particular resource (sec. 17(4)). There is no reference to any compensation measures.

Under this Act, exploitation rights were granted for relatively short periods, between four and ten years, to reflect the government's desire that the fishing industry should move as expediently as possible to an industry which will see greater Namibian participation. Permission to transfer rights and quotas was rarely given, as transfer was considered a bar to the induction into the industry of previously disadvantaged citizen groups and enterprises. Together with the limited duration of rights, the non- or limited-transferability of rights and quotas served as a means of controlling industry participation.[85]

The recent *Marine Resources Act* 2001 replaced the *Sea Fisheries Act*, expanded the scope of controlling measures, and increased the limitations on resource exploitation rights. In addition to citizenship considerations, under section 33(4) of the new Act the Minister may also have regard to such factors as:

> (c) the beneficial ownership of any vessel which will be used by the applicant;
>
> (d) the ability of the applicant to exercise the right in a satisfactory manner;
>
> (e) the advancement of persons in Namibia who have been socially, economically or educationally disadvantaged by discriminatory laws or practices which were enacted or practised before the independence of Namibia;
>
> (f) regional development within Namibia;
>
> (g) cooperation with other countries, especially those in the Southern African Development Community;
>
> (h) the conservation and economic development of marine resources;
>
> (i) whether the applicant has successfully performed under an exploratory right in respect of the resource applied for;

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85 Iyambo (2000).

(j) socio-economic concerns;

(k) the contribution of marine resources to food security;

Where it is "appropriate" not to allocate quotas to individuals, they can be allocated to groups of right-holders: Section 39(4). Transfers remain within the discretion of the Minister.

Morocco

In 2000, the FAO provided the assistance of a legal consultant to the Moroccan ministry of Maritime Fisheries to review and revise Moroccan fisheries law. A team of international experts had already reviewed the Moroccan cephalopod fishery in 1997, and made extensive recommendations for modernisation, including that of the introduction of quotas in the fishery. The 2000 review further developed this work and examined *inter alia* the legal problems posed by the introduction of a quota system in Moroccan fisheries.[86]

The governing law of 1973 provided that an annual licence was required for fishing in national waters. The licence was valid for a specified vessel, for fishing for specified species in a specified zone. The licensee was required to provide regular catch reports, and failure was to result in suspension or non-renewal of the licence. It was noted, however, that these licence conditions were only poorly enforced. In 1999, the law was amended to provide for a VMS system.

The new law was to constitute a complete reformulation of fisheries law. It included a chapter governing safety at sea, and another regarding protection of the maritime environment and fisheries ecosystems against pollution. Management plans were to be prepared. The system of licences, permits and authorisations was to be retained, although they were non-transferable. A fisheries rights system is foreshadowed in the provisions for management plans, whereby licences could be issued for a set quantity of fish by weight, volume or number[87].

The cephalopod fishery of Morocco had been recognised in the 1997 review as severely overfished, and conservation measures were needed. The recommendations for a fisheries rights system for octopus were as follows:

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86 The consultant report appears as Cacaud (2000). This section is derived from that report.

87 Specific reference to quotas was not made for political reasons.

- divide the fleet into three segments: freezer, coastal and artisanal;
- Ministerial determination of a TAC for octopus;
- allocation of authorised catch (FACs) between the three segments - these FACs are fixed;
- establish quota portions (SQs) as a percentage of each FAC for each proprietor within each of the three segments;
- establish individual quotas (IQQs) by volume for each operator, which may fluctuate according to fluctuations in the TAC;
- SQs and IQQs are divisible and transferable within each fleet segment.

The determination of TAC, as is usual, was made a requirement under the governing law and moreover was to be gazetted. There were however two options for the establishment of the quota system: to require it explicitly under the governing law, as is the case in New Zealand, or to follow the USA procedure of enabling Management Plans for each fishery, under which a system of limitation of access can be determined. The latter was chosen for the Moroccan octopus fishery.

The segmentation of the fishing fleet and the determination of the FAC for each segment was decided upon because the composition of the fleet was too diverse to establish a simple quota system. Within each segment, FACs were to be allocated based on catch history, the precise factors of which remained to be determined.

The potential conflicts over initial allocation of FACs were resolved by establishing a review panel along the lines of Australia's Allocation Review Panels, to ensure transparency and fairness. Catch history was recommended as the basis for initial allocation, except in the artisanal fishery, where the data was insufficient due to the mobility of boats between areas. Instead, collective quotas were to be issued to villages rather than individuals. The coastal fishery revealed differences in opinion as to the estimates of capacity. It was recommended that catch history be combined with some other criterion such as vessel and/or gear specifications. This may also become the only basis of allocation in a new fishery where there is no catch history available.

CONCLUSIONS

Development of Property Rights in Fisheries

It is apparent from a study of fisheries rights legislation and case law[88] that the types of property rights regimes devised by fishing nations around the world vary widely. The classification of fisheries Access regimes described in Part I is subject to many variations and exceptions. However, the development of property rights in fisheries has proceeded along generally similar lines, as follows:

0. Open access - anyone can fish
1. A licensing regime - virtually anyone can obtain a licence to fish
2. Licence limitations - cap on licence numbers, who they may be issued to. At this stage, licences tend to acquire a significant measure of security (unless, for example, they are auctioned off every year or deliberately issued to new entrants). When licences are automatically renewed, they begin to acquire some degree of *de facto* permanence.
3. Fishing limitations (input controls). Licences may be limited by:
   - who may hold
   - limitations on vessel and/or gear type and capacity
   - fishing seasons
   - area of fishing
   - catch species, etc.

   At stage 4, when licence numbers for a fishery are limited, the licences start to acquire value in themselves, and begin to develop property characteristics. This is furthered if licences are made transferable to some extent. Licence-holding can acquire

[88] See Annex 2 for a detailed study of the case law of various jurisdictions in which fisheries rights of a property or quasi-property nature have been established.

entrepreneurial characteristics, with lessees doing the actual fishing.[89]

4. Catch limitations or quotas (output controls) are applied to licences. Quotas are essentially a portion of the TAC for a fishstock, allocated amongst a limited number of individuals or fishing units (such as vessels). They may become transferable to various extents and acquire a measure of value.

5. Quotas are unlinked from licences, and become a form of tradable property with intrinsic value. The unlinking is rarely complete — quotas are usually issued subject to a condition that the holder and any transferee must also have or operate the appropriate vessel or gear.

A further development is that from a regulatory system which takes account only of commercial fishing, leaving recreational and traditional fishers to continue to enjoy the rights of open access, to a stage where even the harvest of these fishers is to be regulated, usually by limitation on recreational catch and restriction of traditional fishers, by processes such as restriction to traditional techniques, areas and/or purpose of fishing, such as domestic or ceremonial purposes only. New Zealand provides an example of a fully comprehensive system where a proportion of the TAC is reserved for such purposes, and the remaining TACC is allocated amongst commercial fishers.

That having been said, it must be noted that the fisheries rights development process does not form a single line of progression. There are as many different fishing limitation processes and forms of fishery property rights as

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89 Connor (2000) at page 3 analyses the fisheries rights development process in five stages (presented here in reverse order) as:

- open access without restrictions
- revocable privileges granted over resources by the state which holds them in trust
- various methods of quantifying a licence, which is subject to revocation without compensation for breaches of conditions
- full property rights in fishing (as opposed to ownership of the fishstocks, which is vested in the state). Rights are permanent, transferable, divisible and subject to registration of third-party rights
- a first step towards fully privatised fisheries where fishstocks or fish habitat and their management rights become private property.

there are fisheries and the states that devise and implement them. Individual transferable rights may be quota-based, as in:

- individually-held transferable quotas (ITQs)
- statutory fishing rights (Australia)
- a combination of permanent percentage-based quotas and an annually allocated catch effort (New Zealand).
- a share-based rights system (NSW).

But not all individual transferable rights are output-based, as in the individual transferable effort units of Western Australia and the Northern Territory, which are input-based but otherwise resemble quota units.

These variations are often driven by geographical, political, social and economic considerations that may have little to do with fish. New Zealand and Iceland, the two nations which have framed their quota legislation in terms of near-absolute property, are similar in that they are isolated from neighbouring states, and have unitary parliamentary systems, which means that they can manage their fishing industries as separate entities with comparatively little concern for straddling stock management and the apportionment of responsibilities between federal and subordinate legislatures. Federated states such as Australia, Canada and the USA are bound by constitutional provisions for the apportionment of jurisdiction, responsibilities and ownership or sovereignty between the dominant and subordinate legislatures. Where state and federal laws conflict, provision is usually made for predomination, but at a practical level, conflicts still remain e.g. jurisdictional issues in enforcement.

At the other end of the spectrum are countries such as Namibia and South Africa, which, being primarily concerned with overturning apartheid by localising their industries, have opted for strong government control and very limited transferability of fisheries rights. Along with other developing countries, they are also grappling with the problem of making provision for traditional rights and groupings. Canada and New Zealand provide examples of developed countries which have established methods of incorporating the rights and interests of indigenous peoples into their quota management structures.

As well as limits to guard against quotas falling into the hands of the politically undesirable, most systems, even the strongest, have developed methods of preventing the over-accumulation of quotas into the hands of

too few. On the other hand, systems in which there is strong industry participation have developed a "closed-shop" approach to permitting the entry of outsiders and non-fishers, by applying stringent conditions to would-be new entrants.

Fisheries Rights as Property

At some point along this development continuum, today's fishing right develops property characteristics. The precise location of that point, however, is not clear. Courts may hold a different view from that of the framers of the scheme. It is clear that a fishing right which is permanent, exclusive, transferable and secure to a reasonable degree is a type of property. But it is also clear that these characteristics themselves may be apparent in varying degrees. The point of emergence of property characteristics is governed by a multiplicity of factors.

Whether or not a governing statute has in fact created something in the nature of property in fishing rights depends in the first instance on the design and wording of the statute. But courts appear to have also drawn distinctions on the basis of the purpose for which they are being asked to make a determination of property: adjustment of rights between private persons, or the rights of private persons as against the state. Even then, the courts of different jurisdictions have come to different conclusions when starting from similar premises. The factors guiding these variations are often the existence of basic doctrines or express constitutional provisions.

The Right to Legislate for Fisheries

This has occasionally been a contentious issue in the development of fisheries rights systems, and indeed in the enforcement of exclusionary fishing licensing regimes in general. Roman law and later Magna Carta have given the law the public right of fishing in tidal waters, and the principle that the living fish in them are *animae naturae ferae* and there could be no absolute property in them[90]. The right of the public to take fish has been described as "paramount" and the state was precluded from granting a private right to fish.[91] In order to implement the conservation measures becoming necessary to preserve the sustainability of the resource, courts have been obliged to revisit this centuries-old rule. In *Harper's Case*, it was found that the right to

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90 Halsbury's Laws of England 4th ed., Vol. 18, para. 652.

91 *Harper* v. Minister for Sea Fisheries.& Others (1969) 168 CLR 314.

fish was a "public", not a "proprietary" right, and was therefore capable of abrogation by statute. This public right is not limited by the need to preserve the sustainability of a fishery. In New Zealand, where every effort was made in the establishment of the scheme to make ITQs as close to private property as possible, the courts in *New Zealand Federation of Commercial Fishermen Inc. v. Minister of Fisheries* nevertheless considered that the proprietary right was capable of abrogation by statute, and could not truly be equated with a fee simple.

The right of states to legislate in respect of this fishing is based on sovereignty, not ownership, of the resource, and limited-access fisheries rights are appropriately established and regulated by statute. It is therefore for the statute in question (and that statute is not necessarily the governing Act, but may be Regulations as in the US halibut and sablefish fishery, or a Management Plan under the Tasmanian Act) in each case to determine the legal nature of its creation.

The reclassification of fisheries rights as something less than, or different to, private property is necessary to avoid the necessity of dealing with the rule of *nemo dat quod non habet*. If state rights to legislate are not founded in private property law, then the question of giving good title does not arise when licences and quotas are issued. It may be that statements such as those found in Victoria's and Tasmania's legislation to the effect that the living marine resources in state waters are "owned" by the state are superfluous. Certainly, other jurisdictions have not felt the need to follow suit.

Ultimately, of course, as with any lawsuit, the question of ownership and the extent of the property nature of fisheries rights will be decided by the courts within the context of the question actually before the court. As between private persons, fisheries rights may be and usually are classed as property, for the multitude of purposes for which private rights require adjustment. As between the state and private persons, however, the question may well be viewed differently.

Freedom to Fish

The establishment of property rights systems, with all their implications of the inclusion of some and exclusion of others, to a greater or lesser degree of permanence, conflicts directly with the hallowed right of the public to

take fish from the sea[92]. For this reason, the introduction of property rights in fishing has encountered considerable difficulty, and sometimes, downright opposition. Policy-makers and legislators have been cautious in designing the new concept; normally non-litigious citizens have fought long and hard court battles in which the decision often turns on the nature of the rights, and of property, and the declaration and adjustment of the relative rights of the state and the public.

The courts which were called upon to adjudicate on this point have rarely found a conflict. One exception was the Icelandic Supreme Court's finding in 1998 that non-transferable quotas were indeed unconstitutional. A legislative amendment to render them transferable satisfied the Court in 2000 that their transferability did not effect any discrimination. In other jurisdictions, judges at first instance have sometimes held unconstitutionality, only to be overturned on appeal.

In common law regimes, recourse was usually had to drawing the distinction between the principles of private ownership in property law, and the state's radical title and sovereignty over tidal waters.[93] The public right to fish derives from the state's sovereignty. The state may, by constitutional means (usually legislation, and not executive act), abrogate or qualify the right it has bestowed upon its subjects. States have done this by issuing exclusionary permissions for commercial fishing, although the qualification of the rights of recreational fishers or traditional fishing rights of indigenes has been somewhat slower. Nevertheless, recreational fishers are gradually becoming increasingly subject to licensing, tackle, season, area and bag restrictions, and those claiming traditional rights are usually restricted to fishing for domestic or ceremonial purposes, or by the fishing methods used. Traditional claims of property in or exclusionary ownership over tidal waters or the seabed in jurisdictions with multiple legal systems may be qualified by judicial finding that the rights extend only to the exclusion of other indigenes (as in the *Croker Island Case* in Australia) or by limiting the ownership to, at most, the three-mile limit (as in Papua New Guinea, where commercial licences are issued subject to a ban on entry within three miles of the shore). Elsewhere,

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92 This has been expressed differently in various jurisdictions - in Iceland, for example, it was couched in terms of violating the constitutional principles of economic freedom and equality before the law.

93 Detailed and illuminating discussion on these points is found in *Harper v. Minister for Sea Fisheries & Others* (1989) 168 CLR 314 (Tasmania); and *The Commonwealth v. Yarmirr; Yarmirr v. Northern Territory* [2001] HCA.

indigenous interests are absorbed into the commercial fishing regime by recognizing indigenous groupings and issuing permissions and quotas in a non-preferential manner, as in New Zealand (although certain fisheries are statutorily reserved for Maoris only).

Constitutional Taking

This refers to a principle appearing in many constitutions and bills of rights, to the effect that no person shall be unjustly deprived of his property without fair compensation. For example, the USA and the Australian Commonwealth Constitutions both contain a provision to the effect that:

> "... nor shall private property be taken for public use, without just compensation"
>
> *Amendment V, Constitution of the United States*

> "The Parliament shall, subject to this Constitution, have power to make laws … 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"
>
> *Section 51(xxxi.) Constitution of the Commonwealth of Australia*

But quotas and other fishing rights are subject to diminishment or extinction for management purposes. If fisheries rights are private property, then such diminishment or extinction can theoretically become an acquisition of property by the state, which is then liable to pay compensation. With this in mind, he Australian Commonwealth legislation has specifically stated that what is created is a right, rather than property. The High Court eventually decided that the Australian SFRs are property, but any extinction of rights does not constitute unjust deprivation. Other jurisdictions however are not inclined to go so far. The USA, bound by the Fifth Amendment and traditions of open fisheries access and the freedoms of the open market economy, is unwilling to create property in fisheries rights, and the legislation states specifically that the rights are a privilege rather than property.

The Public Trust Doctrine

Issues such as those raised in *Harper's Case*, which challenged the right of a state to legislate to permit some and exclude others in respect of the original public right of fishing in tidal waters, and in Iceland where the issue of fishing permits was claimed to be discriminatory contrary to the Icelandic Constitution, are actually general fishing issues and not specifically linked to the property nature of the rights. But indirectly they are linked. It is the development of the property characteristics of exclusion and security which

have given incentives to those who have been excluded from enjoying those rights to challenge their very nature in the courts.

The public trust doctrine applies to public assets which the state holds in trust for all of its citizens and which cannot be alienated. The United States legal system has gone further than that of English law-based jurisdictions such as Australia and New Zealand in developing the doctrine. Although on its strict interpretation the doctrine can only apply to the fish and not to the fishery right, it has been urged successfully in many USA cases. The USA system has therefore insisted that quotas are not property, but a form of revocable privilege.

Other Constitutional Issues

The possibility of creating property in fisheries rights can raise other problems for states with written constitutions. Iceland, with a constitutional guarantee of economic freedom and equal treatment before the law, has been obliged by court decisions to state in its Fisheries Management Law that the holding of fishing permits does not constitute ownership or any irrevocable right. Uruguay has had to confront the problem that the creation of a property right under law creates an absolute right to dispose, by establishing a new "special" right, which creates rights to the licence but not to the resources[94].

Where there is no explicit constitutional or doctrinal bar to the creation of property in fisheries rights, as in New Zealand and the Australian states which rely on common law rules regarding property, the courts tend not to hesitate to find that fisheries rights have the nature of property. The New Zealand legislature has felt free from the outset to proceed directly to devise a detailed property scheme. The courts of the Australian states have repeatedly found that limited access fisheries rights are property for the various purposes of their legislation. On the other hand, Australian Commonwealth and US cases show that courts will only find a property right when they have also found that other aspects of the constitutional provision have not been satisfied, or where they are able to so decide on other grounds.

A Different Kind of Property

In their decisions, courts have appeared to resile somewhat from the traditional view of the nature of "property" and its "ownership". There is

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94 Bertullo (2000) p. 225. This problem may well be faced also by other countries with civil law systems which have retained the Roman law concept of *dominium*.

general agreement that property can be created which is in some measure less than fully owned i.e. that the "bundle of rights" which makes up ownership of property is capable of apportionment between private persons and the state. This tallies with Harris' categorisation of "non-ownership property interest", i.e. a quasi-ownership interest which lacks the essential element of open-endedness: the privileges and powers they comprise are finite.[95] This theoretically places them somewhere in the category of a *profit à prendre*, although the courts of some jurisdictions have had occasion to view them as something more.

Further factors upon which courts often rely are: whether there is an adequate appeal process governing initial allocation procedures; and whether the legislation provides a compensation scheme for extinguishment of rights. Where these are available, property questions before the courts tend to be reduced to the determination of rights as between private citizens. In these situations, it is probably convenient for the courts to find that the rights are property. They can then be dealt with similarly to any other form of private property. This leads to the conclusion that difficulties only arise when courts are called upon to determine the rights of private persons as against the state. Here, the state has the ultimate say, for it is the state which promulgated the governing legislation in each case.

The question is not yet settled. It never may be, because neither legislatures, courts nor fishers are concerned with general argument as to the nature of a right. Rather, they are all stakeholders in various ways in an ongoing process of adjustment of rights. If fisheries rights are to be considered "a species of property", dependent for definition of their nature upon the legislation which created them, then it is the legislature's privilege to create in its own interests. And so it seems that, as between private persons and the state, it is the state which will inevitably escape liability, unless the state has chosen to provide otherwise. The ultimate determinant is the form of its legislation, which is shaped by the nature of its Constitution and often, other overriding social, political and economic considerations and interests.

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95 See discussion in Part I above.

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PART III

LEGISLATING FOR FISHERIES PROPERTY RIGHTS

INTRODUCTION

Many property rights systems have developed on an ad hoc basis, with amendments being made to laws as problems arise and are brought to the attention of policy-makers, either by industry representation or by court decision. In Canada, for example, IQ programmes developed piecemeal, in conjunction with industry. All that was needed was a legislative framework which enabled the declaration of a TAC and which did not specifically prohibit the development of fleet shares of this TAC. The shift to a more entrenched form of property right then took place as a measure of transferability was enabled by legislation.[96]

However, fisheries rights systems cannot operate in a complete legislative vacuum. A legislative framework, however brief, is needed to provide authority for collecting fees and rents, requiring reports and enforcement. If fisheries rights are property the nature of which is defined by statute, as courts have held, then a defining statute must be in place. This legislation must be carefully drawn. As the Australian *Austral Fisheries Case* has demonstrated:

> management systems now have to be planned with an eye to potential legal challenge in which the courts will scrutinise the arrangements and strike down those which are contrary to the legislation or that do not meet requirements of fairness and equity.[97]

Ideally, the scheme for a property rights or quasi-property rights system should be worked out thoroughly in advance of implementation by all stakeholders, present or potential: policy-makers, fisheries mangers and economists, planners, industry representation, environmental interests and relevant local and community groups. At this stage, it would be advisable also to have input from lawyers to ensure that the scheme stays on the legal tracks. Many lessons can be learned and much litigation can be avoided if pitfalls are foreseen and taken care of at this stage. But even if the scheme has been worked out in the comparative absence of legal advice, or has developed with little planning, the legislative drafter should be mindful of the complex issues that arise when property concepts are introduced into fishing rights. Complete insulation from litigation, however, is probably an impossible goal, when it is recalled that fisheries rights have the potential to become extremely valuable property, so that the costs of litigation are a small

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96 Burke And Brander (2000) pp. 158 and 159.

97 Palmer (2000) p. 70.

price to pay for the possibility of acquiring initial or additional allocations of quota.

This Part will give an indication of the issues involved in legislating for fisheries rights, including some matters which managers and policy-makers may not have fully addressed in their enthusiasm to launch their grand new scheme; or the programme may have been already implemented in part at least, and the drafter is now being called upon to implement some aspect which is considered necessary in order to further development. Many matters may already be addressed fully or in part by existing fisheries laws. But mainly because of the property nature of fisheries rights, such matters should be revisited in the process of preparing legislation. The case law on fisheries rights shows that, because of their exclusionary and comparatively permanent nature, bitter court battles may be fought by rejected quota applicants and by those claiming rights over quotas once issued. These legal challenges take many forms, and some grounds strike deep to the heart of fundamental legal and constitutional issues.

THE DEVELOPMENT OF THE SCHEME

The Scope of Legislation

Once the policy decision has been taken regarding the establishment of a ITQ, quasi-ITQ or other fisheries rights system in national fisheries, fisheries managers and lawyers must determine whether, how and to what extent, it should be entrenched in fisheries legislation. This Part assumes that the system to be introduced has already been devised, at least in outline, and the legislative drafter is now being called upon to implement it into law. It is not intended here, however, to present a single model "fisheries rights law". Quite apart from the variations in management decisions taken as to the nature and properties of the right, each country has its own style of legislating, of combining and separating statutes; their fisheries laws and management practices are at different stages of development; and there are significant differences in their approaches to legislative intervention of any kind.[98]

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[98] This has been noted even for such comparatively straightforward legislative processes as the implementation into national legislation of international agreements: see Edeson, Freestone and Gudmundsdottir (2001) p. ix.

Some examples of the variations in legislative approaches:

- Include everything in an Act of Parliament (New Zealand). This was possible because New Zealand is a small unitary state without a rigid Constitution, comparatively isolated from its fishing neighbours, and the intention was to establish permanent ITQs which would be as close to private property as possible. The drawback of this approach is its rigidity - any alterations (such as those necessitated by the recognition of Maori treaty rights) required parliamentary enactment. The continuance of the previous fisheries legislation and the phased commencement of the new ITQ legislation has also led to considerable confusion about the state of the law.

- Certain essential matters are included in the governing statute, and detail is left to subordinate legislation (regulations) or management plans. Commonly accepted essentials are: management matters; the setting of TAC; the holders of licences or fisheries rights if they are unlinked from licences; the appropriate transferability provisions; and enforcement provisions. This allows for far greater flexibility than the New Zealand approach, but it requires a fairly high degree of advance planning. Iceland's legislation falls somewhere between this and the New Zealand approach. If management plans are to be relied upon, the governing statute must ensure that they have legal effect.

- Ensure that the governing statute enables, or at least does not prevent, the implementation of fisheries rights in subordinate legislation or management plans, or simply as management decisions. This has been the Canadian approach, which depends in large part on strong political will to implement promptly in legislation that which has been decided upon through management/industry consultation. Certain Australian states have also followed this approach. Again, the governing statute should ensure that management plans have the force of law.

COMPONENTS OF A FISHERIES RIGHTS SYSTEM

A considerable amount of literature has already addressed the components of a property rights system in fisheries which policy-makers must take into account. Anderson99 enumerates these as:

- the nature of the property right
- management units
- determination of TAC
- monitoring and enforcement
- need for other regulations
- rent extraction and cost recovery
- initial allocation.

Burke suggests the following matters for inclusion in legislation:

- the policy-making framework and process
- the decision rules required for determining TAC, and preferably a conservation policy or reference to the conservation goals of the legislation
- the creation of property rights, or specification of the type of right to be created. It is best to apply a gradual approach to the introduction of property rights, so the legislation should enable but not necessarily require them
- cost recovery or rent collection
- the delegation of responsibility to and structure of the management authority (department, management agency, rights-holders). This may already be in the legislation.
- requirements for the provision of data
- the enforcement regime and enforcement officers
- the role of judiciary and any other specialist tribunals.[100]

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99 Anderson (2000) pp. 26 ff.
100 Burke (2000) p. 60.

This Part uses a combination of these approaches, augmented by consideration of matters noted in Part II in legislation already promulgated for fisheries property rights and issues raised in case law. Additionally, from the point of view of the legal planners involved in the implementation of a fisheries property rights system, there are a number of threshold or process issues which must be addressed first. Consideration must be given to:

- the existing body of fisheries law and the extent of the need for new legislation
- jurisdictional issues
- whether the constitution is written or unwritten
- whether fisheries legislation is prescriptive or merely an outline.[101]

Components of legislation are discussed in the following framework:

0. Process Matters
0. Fishing Management
0. Holding and Allocation of Rights
0. Nature and Characteristics of the Right
0. Management Structures
0. Fees and Charges.

1. Process Matters

Existing Fisheries Law

As pointed out above, all that is needed for the commencement of an IQ system is legislation that does not specifically prohibit it. The enabling of the declaration of a TAC, whether specific or indirect, is a fundamental factor. Some form of licence or permit issuing system is of course necessary, but it assumed that this already exists in national fisheries legislation. The existing law must be scrutinised carefully to decide whether new legislation is required or simply some measure of amendment to the existing law. This depends on a combination of factors such as:

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[101] These matters have been expanded from Palmer (2000) p. 66.

- the extent to which the new scheme diverges from that already in place
- drafting practice in the jurisdiction – this ranges from a practice of promulgating new law for every change, to that of continual amendment and updating of a basic framework law which may have been originally promulgated quite some decades previously
- social and political considerations such as those in South Africa and Namibia, where new legislation was thought necessary to indicate the national desire to break with the former apartheid regime

Essentially, it is the extent of the property nature of the quota system decided upon which dictates the need for amendment to existing law. For example, if the existing law provides for periodically renewable licences, and does not provide for transferability, then alterations to the law will be required.[102] If the quota is to have a property or quasi-property nature, then thought must be given to all the incidents of property in existing jurisprudence, and possible problems must be anticipated and provided for.[103] It is also advisable in most situations for legislation to enable, but not mandate, a fisheries rights system.

Drafting practice in each jurisdiction will also dictate the structure of the new law. This may range from a comprehensive and detailed Act of Parliament such as New Zealand's, to a simple framework law which relies on regulations to provide detail, or even a system where the issuing of quotas is simply enabled in specific management plans. The Icelandic *Law Concerning the Management of Fisheries* establishes an entire ITQ regime in 23 succinct articles, including formality provisions.

Territorial Jurisdiction

Most states today conform to the marine zone framework established by LOSC, namely that of sovereignty over a territorial sea, which usually extends 12 nm. from the territorial baselines, and sovereign rights (and duties) over a 200 nm. EEZ. However, the internal apportioning of marine jurisdiction can assume significance in a federal or colonial situation. *Harper's Case* involved *inter alia* a challenge to the right of the State of Tasmania in Australia to limit the taking of abalone in tidal waters. The Commonwealth

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102 This was the Lake Winnipeg IQ experience described in Gislason (2000a).

103 Situations such as death, divorce, mortgaging etc. must be foreseen.

High Court decided that the Commonwealth *Coastal Waters (State Title) Act* 1980 extended state rights to the seabed beneath the waters which became Tasmanian waters by virtue of that Act. Moreover, by arrangement between the state and the Commonwealth under the *Commonwealth Fisheries Act* 1952, the state was entitled to issue licences and charge fees in the nature of a royalty for the right to take abalone. Canada avoided such problems by leaving all legislative power with the federal legislature, with provinces able to negotiate legislative intervention where required, and only transferring proprietary rights and administrative responsibilities for resources to the provinces.[104] The USA permits state regulation of state fishing vessels outside state waters (defined under federal law) provided state laws are consistent with federal regulations and relevant management plans. Management and administration, including the issuing of licences and permits, may also be delegated to states or arrangements may be drawn up.

The matter of apportionment of powers and responsibilities can also assume significant proportions where a colony or territory is involved. The relative rights of a governing state and a colony or territory to legislate in respect of the surrounding seas and the fishing activity carried on in those seas must be examined carefully. It is likely however that this issue has been already addressed in basic fisheries law. The apportionment of powers between federal and state/provincial governments, or a colony and its governing power, can also assume practical significance when it comes to drawing up legislation for the issue of licences and quotas, and the levying of fees, royalties and cost recovery measures.

The question of territorial jurisdiction assumes particular significance when management units are developed, particularly in the case of migratory or straddling fishstocks. What may work out well for management purposes may cause considerable problems for the drafters of the law.

Plural Legal Systems

The problem is aggravated when the principles of the national legal system conflict with a non-Western legal system where ownership or use-rights over rivers, lakes, beaches, reefs and their resources is traditionally vested in individuals or more commonly, kin groups such as clans or tribes. The success or otherwise of traditional rights claims will depend on the extent of the historical background to and constitutional recognition of traditional

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104 Gislason (2000a) p. 121.

laws and rights, which varies widely throughout the world.[105]. The recent recognition of native title in Australia, for example, included the recognition of Aboriginal rights in waters and seabed as well as land, but stopped short of recognising these rights as exclusionary.[106]

A common approach to accommodating traditional rights in respect of fishing grounds and fishing activities in a fisheries rights system is to include legally recognised traditional groupings, such as the Maori *iwi* in New Zealand, in the quota allocation process. Another approach is to reserve an inshore zone, such as 3 nautical miles, which is conceivably within the range of traditional fishing effort, for traditional fishing and to exclude outside commercial fishing from that zone. The success of this depends on the range of traditional fishing vessels: where the vessels are capable of ranging further afield, as in Morocco and Indonesia, a more complex set of zones determined by breadth or vessel capacity (or both) and origin must be established.[107] In this area, possibly more than any other, current internal arrangements must be carefully scrutinised and possible future conflicts foreseen.

2. Fishing Management

Conservation and Management Principles

It is advisable, if it has not already been done, to insert in the preamble, long title or objects of the governing Act a reference to the conservation and management principles and objectives governing the legislative regime. Among other things, this can serve as a useful guide to those called upon to construe the statute, in cases where unpopular or controversial management measures are being taken, such as closure of a fishery, or reduction in or cancellation of quotas.

The wording used may echo and amplify that used in LOSC.

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105 For an example see the discussion in Cassidy (2000).

106 Majority decision in The Commonwealth v. Yannir; Yannir v. Northern Territory of Australia HCA 2001

107 Indonesia provides an example of a complex system of zones determined by all these factors plus provincial boundaries. The system is fraught with conflict.

Examples:

8. Purpose

(1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.

(2) In this Act:

"Ensuring sustainability" means

(a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and

(b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment:

"Utilisation" means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being.

9. Environmental principles

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following environmental principles:

(a) Associated or dependent species should be maintained above a level that ensures their long-term viability:

(b) Biological diversity of the aquatic environment should be maintained:

(c) Habitat of particular significance for fisheries management should be protected.

10. Information principles

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles:

(a) Decisions should be based on the best available information:

(b) Decision makers should consider any uncertainty in the information available in any case:

(c) Decision makers should be cautious when information is uncertain, unreliable, or inadequate:

(d) The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

New Zealand Fisheries Act 1996

3 Objectives

(1) The following objectives must be pursued by the Minister in the administration of this Act and by AFMA in the performance of its functions:

…

(b) ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development and the exercise of the precautionary principle, in particular the need to have regard to the impact of fishing activities on non-target species and the long term sustainability of the marine environment; and

…

(2) In addition to the objectives mentioned in subsection (1), or in section 78 of this Act, the Minister, AFMA and Joint Authorities are to have regard to the objectives of:

(a) ensuring, through proper conservation and management measures, that the living resources of the AFZ are not endangered by over-exploitation; and

(b) achieving the optimum utilisation of the living resources of the AFZ;

but must ensure, as far as practicable, that measures adopted in pursuit of those objectives must not be inconsistent with the preservation, conservation and protection of all species of whales.

Commonwealth of Australia Fisheries Management Act 1991

3 Objects of Act

(1) The objects of this Act are to conserve, develop and share the fishery resources of the State for the benefit of present and future generations.

(2) In particular, the objects of this Act include:

(a) to conserve fish stocks and key fish habitats, and

(b) to conserve threatened species, populations and ecological communities of fish and marine vegetation, and

(c) to promote ecologically sustainable development, including the conservation of biological diversity,

New South Wales Fisheries Management Act 1994

Even if a reference to conservation and management principles has already been included in a previous Act being amended to provide for fisheries rights, it is advisable to revisit and update it. The lengthy and detailed

amendments to the USA *Magnuson Fishery Conservation and Management Act* effected by the 1996 *Sustainable Fisheries Act* provide an elaborate example of such revision.

Management Planning

Management planning is essential for the process of setting TACs, upon which quota rights are based. Responsibility for planning may be undertaken in various ways. The USA manages its fisheries through 8 Regional Fishery Management Councils appointed by statute. The Australian Commonwealth established AFMA, which is tasked with the preparation and supervision of management plans. In New Zealand, there is no provision for management plans as such in the Act, instead the Minister declares quota management stocks and the quota management areas for those stocks.

This process highlights the essentials of management planning: to delineate the parameters of the plan. As well as fishstocks, determination of area and method of fishing may also be necessary. Area allocation may be employed to particularly good effect in sedentary fisheries.

For example:

- The cephalopod fishery or Morocco was divided not by area, but by vessel type into three fleets.[108]
- The Canadian Lake Winnipeg fisheries are divided into three, two of which are open-water fisheries using skiffs, and the other is a winter fishery over lake ice. They are also divided by area. The seasonal division provides a management tool by limitation of quota transfer between seasons.[109]
- The Canadian Nova Scotian groundfish fisheries moved from categorisation by vessel size to redefine fleets by area or by recognition of "like-minded" local groups which became the basis of the community-based management structure of today.[110]

Management planning should be enabled in the governing legislation, even if it is not termed as such, as in the New Zealand Act. It should not be limited, but should enable any appropriate management unit divisions. The process

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108 Cacaud (2000).
109 Gisalson (2000) p. 121.
110 Peacock and Hansen (2000) p. 161.

of making and notifying a management plan should be spelt out. If the provisions of a management plan are to be relied on to have the force of law, then the governing statute should make it clear, by indicia appropriate to the jurisdiction, that the plan is intended to serve the role of subordinate legislation.[111]

Here is an example from the *Australian Fisheries Management Act 1991:*

17 Plans of management

(1) Subject to subsection (1A), AFMA must, in writing, after consultation with such persons engaged in fishing as appear to AFMA to be appropriate and after giving due consideration to any representations mentioned in subsection (3), determine plans of management for all fisheries.

(1A) If, in all the circumstances, AFMA is of the view that a plan of management is not warranted for a particular fishery, AFMA may make a determination accordingly, including in the determination its reasons for making the determination.

(1B) A determination under subsection (1) must be notified:

(a) in the *Gazette*; and

(b) to all persons and organisations listed in the register established under section 17A, at their addresses as shown on the register.

(2) Before determining a plan of management for a fishery, AFMA must prepare a draft of the plan and, by public notice:

(a) state that it intends to determine a plan of management in respect of the fishery; and

(b) invite interested persons to make representations in connection with the draft plan by a date specified in the notice, not being less than one month after the date of publication of the notice in the *Gazette*; and

(c) specify:

(i) an address from which copies of the draft plan may be obtained; and

(ii) an address to which representations may be forwarded.

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[111] For discussion of management plans as delegated legislation, and the indicia observed in the Act, see the Australian *Austral Fisheries Case*. It should be noted however that courts are reluctant to strike down delegated legislation except in extreme cases of unreasonableness.

(2A) In addition to issuing a public notice under subsection (2) and before determining a plan of management for a fishery, AFMA must notify the persons and organisations listed in the register established under section 17A, at their addresses as shown on the register, of the terms of the public notice.

(3) A person may, not later than the date specified in the notice, make representations to AFMA in connection with the draft plan.

(4) In this section, a reference to public notice is a reference to notice published:

(a) in the *Gazette*; and

(b) in each State and Territory, in a newspaper circulating throughout that State or Territory; and

(c) in such other newspaper or publication (if any) that appears to AFMA to be appropriate in the circumstances.

(5) A plan of management for a fishery is to set out:

(a) the objectives of the plan of management; and

(b) measures by which the objectives are to be attained; and

(c) performance criteria against which the measures taken may be assessed.

(5A) The measures to be set out under paragraph (5)(b) in a plan of management for a fishery include:

(a) providing for AFMA, after such consultations (if any) as are set out in the plan of management, to direct that fishing is not to be engaged in the fishery, or a particular part of the fishery, during a particular period or periods; and

(b) providing for holders of fishing concessions in respect of the fishery to be notified of the direction; and

(c) obliging those holders to comply with the direction.

(5B) A direction under paragraph (5A)(a) in relation to a part of a fishery may identify the part concerned in any way or ways, including by reference to a particular area, a particular species or type of fish, a particular kind or quantity of fishing equipment, a particular method of fishing, or any combination of the above.

(6) Without limiting the operation of subsection (5), a plan of management for a fishery may:

(a) determine the method or methods by which the fishing capacity of the fishery or a part of the fishery is to be measured, which may be or include, but are not limited to, a method based on a particular area, a particular species or type or a particular quantity of fish, a particular kind, size or quantity of fishing

equipment, a particular number of boats, a particular period of fishing, or any combination of the above; and

(aa) determine, or provide for AFMA to determine, the fishing capacity, measured by that method or those methods, permitted for the fishery or a part of the fishery in respect of a particular period or periods; and

(b) provide for the management of the fishery by means of a system of statutory fishing rights, and other fishing concessions; and

(c) contain a description of the fishery by reference to area, fish species, fishing methods to be employed or any other matter; and

(d) subject to section 28, formulate procedures to be followed for selecting persons to whom fishing concessions are to be granted including, in the case of fishing rights:

(i) the holding of an auction; or

(ii) the calling of tenders; or

(iii) the conducting of a ballot; and

(e) specify the kind and quantity of equipment that may be used in the fishery; and

(f) specify the circumstances in which a statutory fishing right may authorise fishing by or from a foreign boat; and

(g) impose obligations on the holders of fishing concessions; and

(h) prohibit or regulate recreational fishing in the fishery; and

(i) prohibit or regulate fishing for scientific research purposes in the fishery.

(6A) Paragraph (6)(aa) authorises the making of a determination in respect of the fishing capacity of a fishery or a part of a fishery that has the effect that no fishing capacity is permitted for the fishery or that part of the fishery in respect of a particular period or periods.

(6B) A direction given by AFMA under paragraph (5A)(a) or a determination made by AFMA under paragraph (6)(aa) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

(6C) If a plan of management for a fishery provides for the management of the fishery by means of a system that consists of or includes statutory fishing rights, the plan:

(a) may oblige a person who holds, in respect of the fishery, a fishing concession of a particular kind or fishing concessions of particular kinds also to hold, in respect of the fishery, a fishing

concession of another kind or fishing concessions of other kinds, as stated in the plan; and

(b) without limiting the generality of paragraph (a), may oblige a person who holds, in respect of the fishery, a fishing right of a particular kind or fishing rights of particular kinds also to hold, in respect of the fishery, a fishing right of another kind or fishing rights of other kinds, as stated in the plan; and

(c) in respect of each kind of fishing right that a person holds in respect of the fishery—may do either or both of the following:

(i) oblige the person to hold not fewer than such number of fishing rights of that kind as is stated in the plan or worked out using a formula so stated;

(ii) oblige the person not to hold more than such number of fishing rights of that kind as is stated in the plan or worked out using a formula so stated.

(6D) A plan of management for a fishery must contain provisions for the incidental catch of non-target commercial and other species to be reduced to a minimum.

(7) A plan of management for a fishery must:

(a) if the plan makes provision in relation to the management of the fishery by means of a system of statutory fishing rights — provide for registration of persons who are to be eligible for the grant of fishing rights and specify the conditions relevant to such registration; and

(b) contain a statement of any right of review that a person has in relation to such registration or the grant, or refusal to make a grant, of a fishing concession.

(8) A plan of management may make provision in relation to a matter by applying, adopting or incorporating, with or without modification:

(a) a provision of any Act or any regulation made under an Act, or of any other determination, as in force at a particular time or as in force from time to time; or

(b) any matter contained in any other instrument or writing as in force or existing at the time when the determination takes effect.

(9) A plan of management has no effect to the extent that it is inconsistent with a provision of this Act.

(10) While a plan of management is in force for a fishery, AFMA must perform its functions, and exercise its powers, under this Act in relation to the fishery in accordance with the plan of management.

(11) AFMA may, by writing under its common seal, delegate any powers conferred on it under a plan of management in accordance with paragraph (5A)(a) or (6)(aa) to the Managing Director of AFMA, but to no other person.

This is a comprehensive provision which ensures that public consultation takes place. Whether or not to go to these lengths in the main statute is a matter for policy decision. By contrast, the New Zealand legislation provides that after the initial declarations of quota management areas, they may only be altered by Act of Parliament.

Management plans should be given legal effect in the governing statute, especially if they are to be relied on for determination of many of the characteristics of the fishery rights, or their provisions should be formalised by regulation.

Northern Territory (Australia): Fisheries Act 1996:

27. MANAGEMENT PLANS ENFORCEABLE AS REGULATIONS

(1) Every provision of an operative management plan shall have the force and effect of a regulation in force under this Act.

(2) In the event of an inconsistency between a provision of an operative management plan and the Regulations or a notice given under section 28, the provision of the plan shall prevail to the extent of the inconsistency.

(3) Where a word or phrase used in a fishery management plan or a notice under section 28 is not defined by this Act or the plan but is defined by the Regulations, it shall have the meaning it has under the Regulations in relation to the management plan or the notice, as the case may be.

Queensland: Fisheries Act 1994:

42. Regulation may make provision about management plan matters

(1) Anything that may be declared by a management plan may also be declared by regulation.

(2) A regulation may also make provision about anything else about which provision may be made by a management plan.

(3) If there is an inconsistency between a regulation and a management plan, the regulation prevails to the extent of the inconsistency.

Tasmania: Living Marine Resources Management Act 1995:

PART 4 - LICENCES, QUOTAS AND AGREEMENTS

SECT 76 Management plan prevails

(1) Any provision of a management plan which is inconsistent with any provision of this Part prevails over the latter provision to the extent of that inconsistency.

Again, existing provisions in law for the making of management plans should be revisited and updated where this becomes necessary, as was the case with the USA *Sustainable Fisheries Act*.

Total Allowable Catch

Article 61 of LOSC requires each coastal state to "determine the allowable catch of the living resources in its exclusive economic zone". Apart from this requirement of international law, the determination of Total Allowable Catch for a commercially exploited fishstock is crucial to the operation of a quota system in respect of that stock. It follows then that the process of determining TAC and the frequency of the determination should be included in the governing statute and not left to subordinate legislation. As it is a state function, it usually falls to the Minister as state representative to perform the formal declaration. TACs for most fisheries are usually calculated annually, although in some fisheries they may be calculated by fishing season. The setting of TAC should adhere to the precautionary principle and take cognisance of the best scientific data available.

Examples:

Iceland Law Concerning the Management of the Fisheries 1991:

Article 3

Having received recommendations from the Icelandic Institute for Marine Research, the Minister of the Fisheries shall determine through an ordinance the total catch permitted to be caught over a certain period of time – or a season – from the various stocks of marine resources around Iceland. These regulations only apply to those species or stocks where limits on catch are though to be necessary. Fishing permits shall according to this legislation be based on the total catch permitted.

New Zealand Fisheries Act 1996

13. Total allowable catch

(1) Subject to this section, the Minister shall, by notice in the Gazette, set in respect of the quota management area relating to each quota management stock a total allowable catch for that stock, and that total allowable catch shall continue to apply in each fishing year for that stock unless varied under this section.

(2) The Minister shall set a total allowable catch that:

(a) Maintains the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; or

(b) Enables the level of any stock whose current level is below that which can produce maximum sustainable yield to be altered

(i) In a way and at a rate that will result in the stock being restored to or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks and any environmental conditions affecting the stock; and

(ii) Within a period appropriate to the stock and its biological characteristics; or

(c) Enables the level of any stock whose current level is above that which can produce the maximum sustainable yield to be altered in a way and at a rate that will result in the stock moving towards or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks.

(3) In considering the way in which and rate at which a stock is moved towards or above a level that can produce maximum sustainable yield under paragraph (b) or paragraph (c) of subsection (2) of this section, the Minister shall have regard to such social, cultural, and economic factors as he or she considers relevant.

By contrast, the NSW *Fisheries Management Act* at sections 26–34 provides for an elaborate but effective process whereby a Total Allowable Catch Setting and Review Committee is established, with independence from Ministerial direction and control, and provisions for public consultation before TACs are determined. The determination is then gazetted by the Minister.

The steps from TAC to individual quota determination depend in part on the way in which fisheries are divided. In Morocco, the cephalopod fleet is divided into three: freezer, coastal and artisanal. The TAC is likewise divided

into three fixed fleet allocations (FACs). Individual quotas are then expressed as a percentage of the appropriate FAC.

New Zealand calculates TACs for each fishery to cover all resource extraction including Maori and recreational fishing. From this, a Total Allowable Commercial Catch (TACC) is extracted, and ITQs are determined as percentages of the TACC. Based on the annual TACC, quota holders are allocated an Annual Catch Entitlement (ACE) expressed (usually) in tonnages.

Where a proportion of catch quota is to be reserved for community or indigenous groups, or for recreational fishing, this must be deducted from the TAC before individual quotas are determined. The exact proportion is often a matter of estimation only.

3. Holding and Allocation of Rights

Holders

Before instituting a fisheries rights system, the possible holders must be defined. Traditional fishing licences are usually issued in respect of the vessel where one is used in the fishery. But with the move to fisheries rights, the tendency is to vest the right in a person, legal or natural, although in some fisheries (British Columbia in Canada, for example) IVQs are issued. Any existing licensing system which is to be continued must be reviewed for possible conflicts, embellishment etc. Social, economic, geographical and political factors may come into play here.

The range of holders may be determined by inclusionary or exclusionary factors, or a combination of both.

Inclusionary factors and community-based fisheries

The most straightforward system is one in which rights are held by individuals, legal or natural persons. The system becomes more complicated when local fishing communities or traditional rights-holders are to receive special consideration. Community-based fisheries management is taking place worldwide, with communities organising themselves alone, or in various degrees of collaboration with governments, non governmental organisations and international agencies. The initiatives take many forms, ranging from the promotion of long existing community management practices, resources tenure systems and indigenous knowledge, to the creation of new institutions and new partnerships between local groups,

NGOs and the state.[112] In Morocco's artisanal fishery, quotas are to be allocated to village/local collectives.[113] In New Zealand, a proportion of quota is reserved for indigenous Maoris. The community-based management system of Nova Scotia in Canada is based purely on geography.[114]

However, there is often one characteristic underpinning these initiatives and this is the relative weakness of the legal basis. Legal insecurity and uncertainty is likely to arise where legal regimes do not allow local people to establish enforceable legal rights to the resources on which they depend, or to play a meaningful role in the planning and managing of such resources. state-centred approaches have on the one hand undermined traditional community-based fisheries management and on the other hand driven local people and progressive government officials to look into new "community" rights-based fisheries management systems.[115] Community-based fishing may be seen as the next step forward in the development of property rights in fisheries.[116]

In each of these situations, internal management procedures must be devised, if they do not already exist. This is where the drafter must take cognisance of existing management structures, incorporated or otherwise recognised in domestic law. If no such structure exists, it must be created. There are several ways of doing this:[117]

- laws may recognize local ownership (or other substantial property rights) over fisheries resources based on historical or traditional claims. An example of this is Samoa, where local council by-laws entrench traditional management and conservation practices.
- laws may provide mechanisms for site specific delegation to local people (often fishers) of some measure of management responsibility over state land and fisheries resources, either on an indefinite basis or for a definite period. A compromise is sought between state level concerns in fisheries management for efficiency, and local level concerns for self-governance, self-regulation and

112 Pomeroy (1999).
113 Cacaud (2000).
114 Peacock & Hansen (2000) p. 163.
115 Lindsay (1998).
116 Scott (2000b) p. 116.
117 Adapted from Lería & Van Houtte (2000).

active participation. Examples of this are Japan, and Nova Scotia in Canada.

- laws may enhance decentralization. Depending on the level of decentralization this may result in an effective and meaningful local people/community-based participation in the management of the fisheries resources which support the community. It is not however merely a simple matter of delegation to a local authority. Partnership arrangements must be made in which the Government, community of local users (fishers), external entities (NGOs, research institutes) and other interested parties (tourism, boat owners) share responsibility and authority in the decision making over the management of the fishery

While it is impossible to present legal models for the formal recognition of authorities for community-based fisheries, due to the great diversity of social groupings and the differing legal recognition of traditional rights, it is nevertheless possible to set out some basic matters that must be addressed:

- the interaction between the "community" and the outsiders
- the limits of state power, i.e. the extent to which the state will respect local autonomy and when and where it will be empowered to intervene
- the level of protection granted to individual members of the community against abuse of the local power
- the protection of wider societal interests such as environmental protection. No private property right can be absolute but on the other hand, the state vision of "societal interests "should not be indefinitely expanded.

It must also be remembered that reservation of quota for traditional groups is not as straightforward a process as it may seem at first glance. Traditional fishing communities are eager to embrace many aspects of new fishing and gear technology, marketing processes and so on, which soon puts them on a par with non-traditional fishers. Traditional and artisanal groupings may need careful definition using criteria such as the technique used and the use (domestic consumption, traditional ceremonial etc) to which the catch is put,

as well as consideration of membership qualifications to the group, if they are not already clearly defined by law or by internal group processes.[118]

Exclusionary factors

The commonest exclusionary factor is that of citizenship. The exclusion of non-citizens may not necessarily be total - New Zealand for example has put a cap on the percentage of quota which may be held by non-citizens, and included it in the Act. Where local, community or indigenous groups are being protected or promoted, rights may be drawn up specifically to exclude anyone classed as outsiders to those groups. Exclusion of outsiders, however defined, assumes greater significance in offshore fisheries, particularly those targeting migratory species and straddling stocks. In the latter case, regard may need to be taken of bilateral, multilateral, regional and international fishing agreements.

Another technique used to inhibit the accumulation of quota in the hands of non-fishing entrepreneurs is to attach conditions to quotas or licences which prevent non-fishers from acquiring them, or to restrict holders to those already involved in a particular part of the industry concerned (e.g. separating fishing from processing rights). In these situations, however, there is a danger that the criteria and conditions employed are impossible to monitor: for example, a condition that the quota-holder must be aboard the vessel at all times while it is fishing.

If there is to be some sort of limitation on accumulation of quota, or ban on certain persons (such as non-citizens) acquiring quota, then it is advisable to put this into the governing statute. If flexibility is required to allow for changing circumstances, the principle can be written into the Act and the proportions, or the details of excluded or included classes, can be left to subordinate legislation such as regulations or gazettal notices. Alternatively, reliance can be placed on general anti-trust legislation where it exists.

Other holding methods

Not all quotas are held by legal or natural persons, or by groups. For example, the IVQs of British Columbia, in Canada are attached to licensed vessels. In such a situation, if the quota system is to be written into legislation, the terminology used will need to reflect, or at least enable, this process. This was not done in British Columbia, where, in keeping with

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118 Feral (2001).

Canadian practice, few of the quota systems were included in legislation. In British Columbia the licences themselves are made transferable under the *Fisheries Act* 1996.

Allocation Procedures

Once the parameters of entitlement to hold have been determined, the process of allocation must be established. The initial allocation of quotas can be a highly contentious matter. Many court challenges to initial allocation have ended up in final appellate courts, where the fundamental legal principles underlying the property nature of fisheries rights have been analysed. The degree of contention increases proportionately with the level of value placed on fisheries rights as property.

There are many methods of conducting the initial allocation, for example:

- distribution in equal shares
- lottery
- auction
- sealed tender
- catch history
- vessel or gear specification
- the significance of the applicant's investment in the sector.

The allocation method selected will depend in part on whether there is an oversupply of applicants for a limited amount of quota. Where there is only a limited number of operators already in the industry, and fleet reduction is not an issue, distribution in equal shares is possible. This is usually done by issuing quota to all existing licence-holders.

In other cases, it will probably be necessary to set out the procedures clearly in legislation, although this can be subordinate legislation or a management plan which has been given the force of law by governing legislation.

The most straightforward and arbitrary process is that of lottery. To bring in a considerable measure of income, auctions or sealed tenders can be used. This does not necessarily require predetermination of those entitled to bid. It does however favour those who are better able to afford high bids and

disadvantages smaller operators. It also fails to protect those already in the industry.

Thus, in the *Australian Fisheries Management Act 1991, we find:*

24 Notice of intention to grant fishing rights

(1) AFMA may, by public notice, declare that it intends to grant a fishing right or fishing rights specified in the notice in relation to fishing in a specified managed fishery.

…

25 Contents of notice

AFMA must, in a notice under section 24:

(a) describe the fishing activities that will be authorised by the fishing right or fishing rights; and

(b) specify the way in which the grant is to be made and, if the grant is to be made otherwise than by auction, tender or ballot, give full particulars of the procedures to be followed for selecting a person to whom the grant will be made available under section 29; and

(c) set out the conditions (if any) that are to be satisfied by persons applying under section 26 for registration as eligible persons for the grant before they may be so registered; and

(d) if an auction is to be held, specify the lowest bid that will be a qualifying bid for the purposes of subsection 29(1); and

(e) specify:

(i) the fees (if any) payable by persons applying for registration; and

(ii) the period (if any) for which the fishing right will be in force unless it is sooner cancelled or otherwise ceases to apply or have effect; and

(iii) if the grant is to be made otherwise than by auction or by calling tenders — the amount (if any) that is the amount of charge on the grant for the purposes of the Statutory Fishing Rights Charge Act 1991; and

…

27 Tenders for fishing rights

(1) This section applies where, under a plan of management, tenders are to be called in respect of the grant of a fishing right or fishing rights.

(2) An application for registration must be accompanied by a tender made in accordance with subsection (3).

(3) The tender must:

(a) specify the amount that the applicant is willing to pay to the Commonwealth for the grant; and

(b) be enclosed in a sealed, opaque envelope on which is written only:

(i) the name and address of the applicant; and

(ii) words identifying the grant to which the tender relates.

(4) AFMA must take reasonable steps to ensure that the envelope containing the tender is kept in such a way as to prevent premature disclosure of the amount specified in the tender and, in particular, must take reasonable steps to ensure that the envelope is not interfered with until it is opened in accordance with the regulations.

28 Prescribed procedures for grant of fishing rights

(1) Where a grant of a fishing right is required to be made by auction, tender or ballot the regulations must prescribe the procedures to be followed for selecting the person to whom the grant will be made available under section 29.

…

29 Grant made available to highest bidder etc.

(1) Where an auction has been held in respect of the grant of a fishing right, the grant is available to the person who made the highest qualifying bid for the grant at the auction.

(2) Where tenders have been called, or a ballot conducted, in respect of the grant of a fishing right, the grant is available to the person ranked highest on the precedence list prepared for the purposes of the grant.

(3) Where subsections (1) and (2) do not apply in relation to a grant of a fishing right, the grant is available to the person selected in accordance with the procedures specified for that purpose in the plan of management relating to the grant.

…

To reward those who have already shown commitment to the industry, catch history, vessel/gear specifications or a more general criterion such as previous commitment to the industry can be used. Of these, catch history is the most commonly used criterion, though experience has proved that, no matter how carefully drawn, the process is complex, fraught with ambiguities and likely to lead to challenges. A decision to rely on catch history, if

developed over several years, can lead to operators deliberately building up fleet effort in order to qualify for allocation. On the other hand, it can reward operators who have honestly reported catch over the determinant years.

The New Zealand provisions for allocation on the basis of catch history are very detailed. The example set out below from the NZ Fisheries Act 1996 is not the entirety of the provisions relating to allocation.

Provisional Catch History

30. Provisional catch history to be mechanism for allocation of quota

(1) Except as provided in subsection (2) of this section, provisional catch history is the mechanism by which quota shall be allocated under this Part of this Act.

…

31. Manner of calculating provisional catch history

…For the purposes of allocating quota, provisional catch history shall be calculated,---

(a) In the case of any stock controlled exclusively, as at the date of the publication of the relevant notice made under section 18 of this Act, by means of an individual catch entitlement, in accordance with section 40 of this Act:

(b) In the case of any other stock, in accordance with section 34 of this Act.

Calculation of Provisional Catch History if No Individual Catch Entitlement

32. Criteria of eligibility to receive provisional catch history for quota management stock---

(1) If a stock is declared by notice under section 18 of this Act to be subject to the quota management system but the stock was not, immediately before the date of the publication of the notice, controlled by means of individual catch entitlements, a person is eligible to receive provisional catch history for the stock if the person—

(a) Either,—

(i) In the case of a stock that is a controlled fishery under the Fisheries Act 1983 immediately before the stock was declared to be subject to the quota management system, at any time during any qualifying year held a controlled fishery licence for the stock and a fishing permit issued under section 63 of that Act; or

(ii) Was issued a fishing permit under section 2 (2) of the Fisheries Amendment Act 1994; or

(iii) In the case of a stock that is a species of tuna, held, at any time during any applicable qualifying year, a fishing permit issued under section 63 of the Fisheries Act 1983 or section 91 of this Act that authorised the holder to take the stock; or

(iv) In any other case, held, at any time during any applicable qualifying year, a fishing permit issued under section 63 of the Fisheries Act 1983 for any species of fish, aquatic life, or seaweed; and

(b) In any case, is not an overseas person or, if an overseas person, is exempt under section 56 of this Act or has been granted permission to hold provisional catch history or quota under section 57 of this Act;---

and has provided the chief executive with eligible returns for the stock for the applicable qualifying year or qualifying years.

(2) For the purposes of this Part of this Act, an eligible return is a lawfully completed catch landing return or a catch effort landing return as referred to in the Fisheries (Reporting) Regulations 1990 that,---

(a) In the case of any stock referred to in subparagraph (ii) or subparagraph (iii) of subsection (1) (a) of this section, was given to the chief executive on or before the 15th day after the close of each applicable qualifying year; or

(b) In any other case, was given to the chief executive on or before the 15th day of October 1994.

33. Qualifying years

For the purposes of this Part of this Act, the qualifying year or qualifying years are,---

(a) In the case of a person eligible to receive provisional catch history under section 32 (1) (a) (ii) of this Act, the first consecutive 12 months after the 30th day of September 1992 in which the person was authorised to take fish, aquatic life, or seaweed:

(b) In the case of a person eligible to receive provisional catch history under section 32 (1) (a) (iii) of this Act, such fishing year or fishing years as the Minister may from time to time set for the purpose by notice in the Gazette:

(c) In any other case, the fishing years commencing respectively on the 1st day of October 1990 and the 1st day of October 1991.

34. Calculation of provisional catch history

(1) The provisional catch history of a person is,---

(a) If the qualifying year is the one referred to in section 33 (a) of this Act and the person is eligible to receive provisional catch history under section 32 (1) (a) (ii) of this Act for any stock, the total weight of eligible catch reported in the person's eligible returns:

(b) If the qualifying year or years are set under section 33 (b) of this Act and the person is eligible to receive provisional catch history under section 32 (1) (a) (iii) of this Act for any stock, the total weight of eligible catch reported in the person's eligible returns in respect of the period of 12 consecutive months within the qualifying years relating to the person, which period shall be---

(i) Chosen by the person in accordance with section 35 (3) (c) (iv) or section 35 (4) (b) of this Act; or

(ii) If the person has not made such a choice, chosen by the chief executive in accordance with section 35 (1) (d) of this Act:

(c) In the case of any other person who is eligible to receive provisional catch history under paragraph (a) (i) or paragraph (a) (iv) of section 32(1) of this Act, the total weight of eligible catch reported in the person's eligible returns in respect of a period of 12 consecutive months within the qualifying years relating to the person, which period shall be---

(i) Chosen by the person in accordance with section 35 (3) (c) (iv) or section 35 (4) (b) of this Act; or

(ii) If the person has not made such a choice, chosen by the chief executive in accordance with section 35 (1) (d) of this Act.

(2) For the purposes of this Part and Part XV of this Act, the term ``eligible catch'' means the total weight of all the catch of the relevant stock lawfully taken and lawfully reported as landed or otherwise lawfully disposed of by a person eligible to receive provisional catch history under section 32 of this Act during the applicable qualifying years; and also includes fish, aquatic life, or seaweed of that stock reported as taken and used as bait; but does not include---

(a) Fish, aquatic life, or seaweed seized by a fishery officer under section 80 of the Fisheries Act 1983 or section 207 of this Act, if the fish, aquatic life, or seaweed (or the proceeds of sale thereof) were forfeit to the Crown:

(b) Fish, aquatic life, or seaweed, other than southern bluefin tuna, taken outside New Zealand fisheries waters (even though such fish, aquatic life, or seaweed may be deemed to have been taken within New Zealand fisheries waters by the operation of this Act or the Fisheries Act 1983):

(c) Fish, aquatic life, or seaweed (other than fish, aquatic life or seaweed taken by persons granted fishing permits under section 2 (2) of the Fisheries Amendment Act 1994) taken under a special permit granted under this Act or under section 64 of the Fisheries Act 1983.

…

37. Transfer of provisional catch history

(1) Provisional catch history in respect of any stock, other than a stock to which section 40 of this Act applies, may be transferred only if---

(a) The transferor is not eligible to receive quota for the stock; and

(b) The transferee is a current fishing permit holder; and

(c) Any appeal against the amount of provisional catch history for the stock allocated to the transferor has been finally determined or withdrawn; and

(d) The transfer takes effect during the transfer period and the Registrar of Quota has been notified on the approved form of the transfer during that period; and

(e) The transfer is for an amount of provisional catch history expressed in whole kilograms.

New Zealand Fisheries Act 1996

The making of provision for exceptional cases where failure to conform to exact catch history requirements through circumstances beyond the operator's control also presents problems. The New Zealand Act allowed discretion to the Minister to adjust allocation in the case of unfairness to a person who had shown "commitment to, and dependence on, the taking of fish…", and the generality of this provision led to a considerable number of appeals over allocations.

In order to reduce the litigation load, it is advisable to establish by legislation an appeals tribunal, such as the Quota Appeal Authority of New Zealand or the Share Management Fisheries Appeal Panel of NSW. Recourse may also be provided in the legislation to an existing appellate tribunal such as the Australian Administrative Appeals Tribunal.

Nielander and Sullivan suggest that, in order to minimize legal challenges:

- the allocative decision process in each case should be thoroughly documented

- the allocation formula and resultant process should permit some exercise of discretion to address situations of gross unfairness
- strict time limits should be placed on the appeal process. [119]

Subsequent allocation procedures (where, for example, increased quota is to be issued) can be done on a *pro rata* basis, unless new entrants into the industry are to be catered for.

Permits and Licences

Even in a fully developed ITQ system such as those of New Zealand, New South Wales and Iceland, one of the limits on allocation and holding is the requirement that a fisher must also hold a fishing licence or permit. Initial allocation is frequently carried out on the basis of prior licence-holding, but the licensing system does not then expire. This separate requirement of a licence or permit to fish then becomes a limitation on the transferability of quota. A non-licence holder is less inclined to purchase valuable quota unless he is intending to speculate in it or lease it to a licensed fisher. It is, however, possible to conceive of a system where no licence or permit is required, and qualifications on quota holders such as citizenship or accumulation limits are checked upon registration.

4. Nature and Characteristics of the Right

Rights as Property

The constitutional and doctrinal problems in some jurisdictions of creating property in fisheries rights and indeed in fishing licences generally have been discussed in Part II above. Social policy considerations may also inhibit (or on the other hand promote) the creation of a right of a proprietary nature. It is as well then for legal advisers to determine, well in advance of the preparation of law, just what is the nature of the right to be created, and how best to go about this. There are various approaches that can be taken:

- recognise the right as permanent property, and provide some other measure of allowable catch which is capable of variation (New Zealand). New Zealand also provides for preferential treatment in future management plans for quota-holders whose rights are extinguished by the abolition of a management plan.

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[119] Nielander & Sullivan (2000a) p. 69.

- declare in the governing statute that the right is or is not property (Iceland - a declaration that it is not)
- create a "special" property-right while declaring in the statute that fisheries resources in the natural environment belong to the state (Uruguay)
- issue permits and class them as revocable privileges(USA)
- declare that no compensation is payable in the case of extinguishment (Australia, USA)
- rely on the courts to find that any property nature of a fishing right is an incident of crown sovereignty rather than a proprietary right under private law (Australia, in *Harper's Case)*; or that the right is not fully indefeasible and does not confer any benefit on any one party (Australia, in *Davey's Case*)
- provide for payment of a specified kind in the case of cancellation for management purposes (Victoria, Australia)

Statutory declarations that fisheries rights are not property (as was done in Iceland and Uruguay) nevertheless give rise to their own problems. Australia attempted to do this, and named the rights Statutory Fishing Rights, but it was eventually recognised that the creation of property in SFRs would not give rise to any real problems at law.[120] In Iceland however, the clear declaration that there is no ownership in fishing permits has left a situation of some uncertainty. Declarations are often subject to court reinterpretation. However, experience has shown that the distinction that courts have drawn between "public" and "proprietary" rights, and the reliance on the terms of the statute for the quality of the property-right it creates, are often sufficient to ensure that fisheries rights will rarely be considered full privatised property, to the detriment of the state and the general public.

Characteristics of ITQs

The extent of the property nature of fisheries rights can be measured by the strength of the four essential characteristics by which economists judge them: transferability, durability, security and exclusivity. To ensure that fisheries rights will be considered as property, it would be as well to ensure

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120 Palmer (2000) p. 66.

that these characteristics are present in some significant measure. Conversely, to lessen the likelihood that the fisheries rights have a property nature, they should lack, or only possess a limited degree of, some or all of the characteristics.

Transferability

Transferability is the key defining feature of property rights in quotas. It is the ability to transfer and accumulate quota that gives it its value, creates a market in quotas and initiates the process of transformation of a right into a property right. It is the process by which all are potentially included in the industry. The acknowledgement of the demand for some measure of transferability of quota often marks the point where legislative intervention is required to formalise a developing fisheries rights system.[121]

"Traditional" fishing licences were and still are issued for short and finite periods, and whether they pertained to a holder or a vessel, they are not usually transferable. This is in large part a monitoring and control measure, although in the case of a licence attached to a vessel, this creates a logical absurdity as it is not the vessel that transgresses, it is the operator.

Transferability of quota can be achieved gradually, as in the case of Lake Winnipeg where the licences to which the quota was attached were first made transferable within families only, and subsequently became almost completely transferable subject only to residency (area) and experience requirements. Or transferability can be implemented fully from the outset, as in New Zealand and Iceland.

There are many variations in transferability. Fisheries rights may be:

- fully transferable
- fully transferable subject only to some conditions
- transferable for limited periods only
- transferable as a whole only
- divisible with parts separately transferable
- transferable separately or together with ACE
- non-transferable but ACE is transferable

---

121 This was the experience in the Lake Winnipeg fisheries, for example.

- transferable separately from the licence
- transferable only by transfer of the licence
- leased or sold
- leased but not sold.

The fully transferable right is an ideal rather than a reality. Some limits are usually imposed, such as:

- only citizens may hold
- accumulation of quota may be capped
- minimum holdings may be required
- the transferee must already hold a valid fishing permit
- the transferee must fulfil residency or experience qualifications
- the transferee must belong to a certain group
- transfer is only possible in defined circumstances such as the death of the holder or the loss of a vessel

The various restrictions and limitations on transfer suggested above must be clearly spelt out in legislation or enabled in management plans or regulations that have the force of law. Transferability may be expressed positively, as is usual in a strong property rights system. Where the protection of certain groups is of concern, it may be expressed negatively, as in Namibia. Strong restrictions are usually imposed where certain groups such as disadvantaged nationals, indigenous populations, or local regions or groups dependent on fishing are to be protected; foreigners, absentee owners or certain vessel or gear types are to be excluded; or fleet reduction or stringent management measures to protect an endangered fishery are necessary.

Because some limits, however minimal, are usually imposed on transfers, prior approval is usually required. Iceland has gone so far as to create a Quota Exchange to facilitate trading in quotas. In other countries, quota-brokering has become part of the transfer process.

The process of control over transfers is usually undertaken by the state, via its fishing management authority. Where quotas are held by communities, however, the process of holding by and transfer to individuals may be left to the group to determine, without formal recognition in legislation. The

incorporation of traditional rights, which may rely on the fundamental principle of attachment to specific land and waters, into an ITQ system can create serious problems *vis-à-vis* the transferability of rights.[122]

The Australian *Fisheries Management Act* provides an example of a transferability provision:

> **48 Power of holder of fishing right to deal with fishing right**
>
> (1) Except where a condition of a fishing right provides otherwise, a holder of a fishing right may, subject only to any rights appearing in the Register to be vested in another person and to section 49, deal with the fishing right as its absolute owner and give good discharges for any consideration for any such dealing.
>
> (2) Subsection (1) only protects a person who deals with such a holder as a purchaser in good faith for value and without notice of any fraud on the part of the holder.
>
> (3) Equities in relation to a fishing right may be enforced against the holder of the fishing right except to the prejudice of a person protected by subsection (2).
>
> **49 Approval of AFMA etc. to dealing required in certain circumstances**
>
> (1) A person must not transfer the ownership of a fishing right unless AFMA has, in writing, given its approval to the transfer.
>
> (2) AFMA may only refuse to give an approval for the purposes of subsection (1) if the transfer would be contrary to the requirements of the relevant plan of management or a condition of the fishing right.
>
> (3) A purported dealing in contravention of subsection (1) has no effect.

A common limitation on transferability of fisheries rights is the provision of an upper limit or cap on accumulation of quota, to prevent monopolisation of the fishery by any one enterprise. Caps are usually imposed on a fishery-specific basis, as circumstances require. The drawbacks of capping are that the provisions are usually difficult to enforce, requiring a considerable amount of information particularly where companies are involved; and from a fisheries management point of view, they may serve to keep more efficient operators out of the fishery.

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122 Roberts & Tanna (2000) p. 298.

Being fishery-specific, aggregation limits may be placed in regulations or management plans. New Zealand, however, has opted to include them in the governing Act:

59. Aggregation limits

(1) Notwithstanding the provisions of this Act relating to the transfer of quota, no person shall be entitled to own:

(a) A number of quota shares for any one species the total quota weight equivalent of which is more than 45 percent of the combined total allowable commercial catches for every stock of that species (which species shall be a species named in the Fifth Schedule to this Act):

(b) More than 10 000 000 quota shares (10 percent of the total allowable commercial catch) for spiny rock lobster in any one quota management area:

(c) More than 20 000 000 quota shares (20 percent of the total allowable commercial catch) for paua in any one quota management area:

(d) In the case of bluenose (Hyperoglyphe antarctica), a number of quota shares for that species the quota weight equivalent of which is more than 20 percent of the combined total allowable commercial catches for every stock of that species:

(e) In any other case, a number of quota shares for any one species the total quota weight equivalent of which is more than 35 percent of the combined total allowable commercial catches for every stock of that species.

(2) Subject to subsection (5) of this section, nothing in subsection (1) of this section prevents any person being allocated more than the permitted number of quota shares; but, except as may be permitted by any consent granted under section 60 of this Act, no such person may acquire any more such quota.

(3) Nothing in subsection (1) of this section prevents any person, after an alteration of a quota management area under section 25 of this Act, being allocated more than the permitted number of quota shares; but, except as may be permitted by any consent granted under section 60 of this Act, no such person may acquire any more such quota.

(4) Nothing in subsection (1) of this section prevents any person who has quota shares transferred to that person under section 22 or section 23 or section 52 of this Act from holding those shares; but, except as may be permitted by any consent granted under section 60 of this Act, no such person may acquire any more such quota.

(5) If any person acquires any provisional catch history other than by allocation for any stock, the person is not entitled to be allocated any quota in respect of that provisional catch history to the extent that the allocation of such quota would result in the person being in breach of this section, and such provisional catch history shall be cancelled.

(6) For the purposes of this section, the term ``person'' includes a person associated with that person.

(7) The Governor-General may, by Order in Council made on the recommendation of the Minister, following consultation with such persons or organisations who are representative of those classes of persons the Minister considers have an interest in this section, add the name of any new species to, or delete the name of any existing species from, the Fifth Schedule to this Act.

(8) Subsection (1) of this section does not apply to the Chatham Islands Enterprise Trust or to the Crown.

(9) The Minister shall, on or before the 1st day of January 2000, review the aggregation limits set by subsection (1) of this section, prepare a report containing the result of that review, and lay a copy of the report before the House of Representatives.

60. Minister may consent to persons holding quota in excess of aggregation limits

(1) Notwithstanding section 59 of this Act, the Minister may from time to time, after consultation with such persons or organisations the Minister considers are representative of those classes of persons having an interest in this section, by notice in the Gazette, consent to any named person holding:

(a) In the case of spiny rock lobster, up to a specified number of quota shares exceeding 10 000 000 for any one quota management area:

(b) In the case of paua, up to a specified number of quota shares exceeding 20 000 000 for any one quota management area:

(c) In any other case, quota shares for any one species having a combined quota weight equivalent less than or equal to a specified percentage of the combined total allowable commercial catches for all stocks of that species (which percentage is greater than the percentage specified in section 59 (1) of this Act for the stock concerned).

(2) Any consent under subsection (1) of this section may be given subject to such conditions as the Minister may impose, including any limit on the number of quota shares for any particular stock, and may be given for any specified year or years or generally.

(3) The Minister shall, in considering whether to grant any consent under subsection (1) of this section, consider:

(a) The willingness and ability of other members of the New Zealand fishing industry to acquire quota of the relevant species:

(b) The likely effect of the granting or withholding of the consent on:

(i) The development of any new or existing stock or species:

(ii) Other quota owners or commercial fishers:

(iii) The processing and marketing of that stock or species:

(iv) The ability of the applicant to take any other stock or species:

(v) The efficiency of the New Zealand fishing industry or any person engaged in the New Zealand fishing industry:

(c) Such other matters as the Minister considers relevant.

(4) The Minister shall not grant any consent under subsection (1) of this section in any case if quota shares have been acquired by any person in excess of the then permitted number of shares before the consent is obtained.

61. Quota held in excess of aggregation limits to be forfeit

(1) If the chief executive believes on reasonable grounds that any person has acquired any quota in breach of section 59 of this Act or any consent given by the Minister under section 60 of this Act, the chief executive:

(a) May direct that a caveat be registered in the appropriate register under Part VIII of this Act in respect of all quota owned by that person; and

(b) Shall notify in writing the owner that quota acquired in breach of section 59 of this Act or any consent given by the Minister under section 60 of this Act shall be forfeit to the Crown without compensation unless, within 60 working days after the date specified in the notice, the owner applies to the High Court for a declaration as to whether that quota was acquired in breach of section 59 of this Act or any consent given by the Minister under section 60 of this Act.

(2) Any caveat directed to be registered under subsection (1) (a) of this section shall remain on the register until removed by direction of the chief executive or order of a court pursuant to any proceedings referred to in subsection (1) (b) of this section.

> (3) If any person whose quota has been caveated under subsection (1) of this section fails to apply to the High Court under that subsection or the High Court declares the quota to have been acquired in breach of section 59 of this Act or any consent given by the Minister under section 60 of this Act, then any quota held in breach of those sections (which quota shall be the quota acquired most recently in time) shall be forfeit to the Crown without compensation.
>
> (4) Any quota forfeit to the Crown under subsection (3) of this section shall be dealt with in accordance with section 62 of this Act.
>
> *New Zealand Fisheries Act 1996*

Some measure of aggregation may often be a good idea if a major goal of management is to reduce vessel numbers. In addition to maxima, minimum levels of quota may also be imposed to this end.

Durability

Together with transferability, the durability of fisheries rights is one of the main determinants of their property nature. All quotas seem to be issued for periods longer than merely one year or fishing season, and some are explicitly issued in perpetuity. Management and, sometimes, political considerations play a large part in determining the extent of durability of fisheries rights. The greater the durability, it is argued, the more security is provided to encourage investment in the industry, and rights-holders will have greater incentive to take a long-term view of the sound management of the fishery. This argument is one of the mainstays of the movement towards fisheries rights, and hence the rights are rarely issued for short periods.

New Zealand ITQs are granted in perpetuity, the only restraint on their use is the existence or otherwise of commercial catch to be harvested. Political reasons may cause rights to be issued for lesser terms, as in Namibia where the performance of rights-holders and the advancement of disadvantaged groups were to be reviewed after some years of operation; or the property nature of the rights is de-emphasised through a lessening of their durability, as in the USA and to a lesser extent Australia, where rights may expire when the fishery is closed or its management plan is cancelled. Rights may also be issued for a limited time to permit evaluation of the quota programme, for example, the *NSW Fisheries Management Act 1994*:

73 Duration of shareholding

(1) Shares in a share management fishery are to be issued initially for a period of 10 years (calculated from the commencement of the management plan for the fishery).

(2) If during that 10-year period (or any subsequent period for which the shares are renewed) a fishery review is not conducted and a new management plan is not made under this Part, the shares are taken to be renewed, at the end of their current period, for a further period of 10 years.

(3) If during that 10-year period (or any subsequent period for which the shares are renewed) a fishery review is conducted and a new management plan is made under this Part, the shares are taken to be renewed (from the date the new plan commences) for a further period of 10 years and the balance of the current period is terminated.

In Australia, SFRs are not totally permanent:

(3) A fishing right is granted subject to the following conditions:

(a) the holder of the fishing right must comply with any obligations imposed by, or imposed by AFMA under, the relevant plan of management on the holder of such a fishing right;

(b) the fishing right will cease to have effect if the plan of management for the fishery to which the fishing right relates is revoked under subsection 20(3);

(c) the fishing right may, under subsection 75(7), cease to have effect or, under subsection 79(3), cease to apply to a fishery;

(d) the fishing right may be cancelled under section 39;

(e) no compensation is payable because the fishing right is cancelled, ceases to have effect or ceases to apply to a fishery.

Australia: Fisheries Management Act 1991

Security

Security of title is achieved in legislation by a register. Fisheries legislation should already provide for the keeping of registers of licences and permits, and the maintenance of a register alone does not increase the security aspect of fisheries rights over that of ordinary fishing licences. But a quota register may contain special features. The New Zealand system has two registers, a Quota Register and an Annual Catch Entitlement Register. And a register of quotas may go further. If quota rights are valuable property, then the matter of the extent of registration of interests arises. It is argued that to attain true value, the right should be capable of being used as collateral for lending

purposes.[123] To achieve this end, it should be possible to register mortgages, liens and other interests in the register.

The New Zealand register provisions are comprehensive:

> **124. Registers**
>
> (1) The chief executive shall keep, in respect of each quota management stock, —
>
> (a) A register to be called the Quota Register:
>
> (b) A register to be called the Annual Catch Entitlement Register; and there shall be separate Annual Catch Entitlement Registers for each fishing year.
>
> (2) The registers may be kept in the form of information stored by means of a computer.
>
> (3) The registers may be kept in conjunction with any other register required to be kept under this Act.
>
> (4) The Crown owns all information contained in any Quota Register or Annual Catch Entitlement Register that is required by this Act to be contained in that register.
>
> (5) Without limiting anything in section 297 of this Act, regulations under that section may provide for the operation of the registers under this section, including the electronic transmission of documents and information for the purposes of notifying any matter and inspection of the register.
>
> …
>
> **126. Registrar to have use of seal**
>
> (1) Each Registrar shall have and use a seal of office bearing the impression of the New Zealand Coat of Arms and having inscribed in the margin the words ``Registrar of Quota, New Zealand'' or ``Registrar of Annual Catch Entitlement, New Zealand'', as the case may be.
>
> (2) Every document bearing the imprint of the Registrar's seal of office, and purporting to be signed or issued by the Registrar or a Deputy Registrar shall, in the absence of proof to the contrary, be deemed to be signed or issued by or under the direction of the Registrar.
>
> **127. Matters to be shown in Quota Register**
>
> (1) Each Quota Register shall contain the following particulars (if applicable) for each stock to which that Quota Register relates:

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[123] Decisions in this regard are the domain of fisheries management and policy-making. See for example the arguments for and against in Ford (2000) at 293.

(a) The total allowable catch:

(b) The total allowable commercial catch:

(c) The individual transferable quota allocated to each person:

(d) Every registered transfer of individual transferable quota (whether by operation of law or otherwise) and every registered transfer of provisional individual transferable quota by operation of law, and —

  (i) The names of the transferor and the transferee; and

  (ii) The number of quota shares transferred; and

  (iii) The time and date of the registration of the transfer:

(e) The provisional individual transferable quota allocated to each person:

(f) The provisional catch history allocated to each person:

(g) Every registered transfer of provisional catch history (whether by operation of law or otherwise), and —

  (i) The names of the transferor and the transferee; and

  (ii) The amount in kilograms of provisional catch history transferred; and

  (iii) The time and date of the registration of the transfer:

(h) Every increase and every decrease of the number of quota shares held by any person that results from the transfer by the Crown of any quota by virtue of the operation of section 22 or section 23 or section 52 of this Act:

(i) The aggregate holding of each kind of quota and provisional catch history held by each person:

(j) Every caveat registered in respect of any quota shares under section 159 of this Act, and —

  (i) The names of the caveator and the quota owner over whose quota shares the caveat is registered; and

  (ii) The time and date of the registration of the caveat; and

  (iii) The number of quota shares over which the caveat is registered; and

  (iv) The type of caveat being imposed; and

  (v) The date (if any) on which the caveat will lapse; and

  (vi) The date on which the caveat is withdrawn:

(k) Every mortgage registered under section 159 of this Act, and —

(i) The names of the mortgagor and the mortgagee; and

(ii) The time and date of the registration of the mortgage; and

(iii) The number of quota shares secured by the mortgage; and

(iv) Every variation of the terms of the mortgage; and

(v) The time and date of discharge of the mortgage:

(l) Every memorial registered under this Act, and the reason for the memorial:

(m) Every forfeiture of quota or provisional catch history under this Act, including —

(i) The time and date of the registration of the resulting transfer to the Crown of the quota or provisional catch history; and

(ii) The number of quota shares or kilograms of provisional catch history transferred to the Crown:

(n) Such other matters as may be required by regulations made under section 297 of this Act.

(2) Each Quota Register shall contain the last known postal address of the quota owner and persons having a registered interest in the quota.

(3) Each Quota Register shall contain corrections made under section 165 of this Act and the time and date of the corrections.

128. Matters to be shown in Annual Catch Entitlement Register

(1) Each Annual Catch Entitlement Register shall, in respect of the year to which it applies, contain the following particulars (if applicable) in respect of the stock to which it relates:

(a) Every annual catch entitlement held by any person at any time:

(b) The amount of annual catch entitlement that is generated or created, and held by any person:

(c) Every registered transfer of annual catch entitlement (whether by operation of law or otherwise), and —

(i) The names of the transferor and the transferee; and

(ii) The amount (in kilograms) of annual catch entitlement transferred; and

(iii) The time and date of registration:

(d) Every transfer of annual catch entitlement received for registration under section 133 of this Act that is to be effective on and from the first day of the next fishing year, and —

(i) The names of the transferor and the transferee; and

(ii) The amount (in kilograms) of annual catch entitlement to be transferred; and

(iii) The time and date of the Registrar's receipt of the transfer document:

(e) Every caveat registered in respect of the annual catch entitlement under section 159 of this Act, and —

(i) The names of the caveator and the annual catch entitlement owner over whose annual catch entitlement the caveat is registered; and

(ii) The time and date of the registration of the caveat; and

(iii) The amount (in kilograms) of annual catch entitlement over which the caveat is registered; and

(iv) The type of caveat being imposed; and

(v) The date (if any) on which the caveat will lapse; and

(vi) The date on which the caveat is withdrawn:

(f) Every forfeiture of annual catch entitlement under this Act, including —

(i) The time and date of the registration of the resulting transfer to the Crown of the annual catch entitlement; and

(ii) The amount (in kilograms) of annual catch entitlement transferred to the Crown:

(g) All reported catch of the stock taken in the year to which the register relates and notified by the chief executive under section 80(11) of this Act:

(h) Such other matters as may be required by regulations made under section 297 of this Act.

(2) Each Annual Catch Entitlement Register shall contain the last known postal address of the annual catch entitlement owner and persons having a registered interest in the annual catch entitlement.

(3) Each Annual Catch Entitlement Register shall contain corrections made under section 165 of this Act and the time and date of the corrections.

129. Registers to be open for inspection

(1) The registers kept under this Part of this Act are public registers for the purposes of the Privacy Act 1993, and, subject to section 130 of this Act, shall be open for inspection on payment of the prescribed fee (if any) during ordinary office hours; and the Registrar shall, on request and

on payment of a reasonable charge, supply to any person copies of all or part of a register.

(2) The Crown is not liable in damages for any loss or damage resulting from any inaccuracy in any search of a register or a correct search of an inaccurate entry in a register, including any search by, or on behalf of, the Registrar.

(3) If a Registrar is satisfied, on the application of any person, that the disclosure of that person's address (as entered in any register) would be prejudicial to the personal safety of that person or his or her family, the Registrar may direct that such information shall not be available for inspection or otherwise disclosed.

…

155. Transactions not effectual until registered

No transaction has any effect for the purpose of this Act until it is registered in accordance with this Part of this Act.

…

159. Registration procedure

On receipt of an application that complies with section 157 of this Act and is completed to the satisfaction of the relevant Registrar, that Registrar shall —

(a) Record in the appropriate register the particulars set out in the instrument required by this Act to be registered and the time at which the particulars are so recorded; and

(b) Issue, within 2 days (which days are days on which the register is open) after the date of registration, a registration notice as to the particulars recorded under paragraph (a) of this section; and

(c) Forward the registration notice to the person who presented the instrument for registration and forward duplicates of the notice to each of the other parties to the transaction; and

(d) If a caveat is registered over any quota shares, give notice of the registration of the caveat to the owner (if not otherwise notified) and any mortgagee of those shares and to any other caveator of those shares; and

(e) If a caveat is registered over any annual catch entitlement, give notice of the registration of the caveat to the owner (if not otherwise notified) and any other caveator of that annual catch entitlement.

…

163. Chief executive may transfer quota or annual catch entitlement

(1) The power of the chief executive to transfer any quota shares or annual catch entitlement to the Crown or any other person as a consequence of---

(a) A reduction in the total allowable commercial catch under section 22 of this Act or an increase in the total allowable commercial catch under section 23 of this Act; or

(b) The determination of any appeal under section 51 of this Act or the resolution of any dispute under section 38 of this Act; or

(c) Any forfeiture to the Crown of any quota shares or annual catch entitlement —

may be exercised notwithstanding the existence of any mortgage or caveat over any quota shares or annual catch entitlement.

(2) The Registrar shall make on the register any entry necessary to show that any quota shares or annual catch entitlement have been transferred in accordance with this section, and alter any relevant mortgage or caveat accordingly.

…

168. Guarantee of ownership rights

(1) The production of a certified copy in hard copy form signed by or on behalf of the Registrar or a Deputy Registrar, and sealed with the Registrar's seal, of a record in any register kept under this Part of this Act as to the ownership of any individual transferable quota, shall be held in every court of law or equity and for all purposes to be conclusive proof that the owner shown in the certified copy was, as at the time of the issue of the certified copy, owner of the quota to which the certified copy relates.

(2) Subsection (1) of this section does not apply in respect of any action brought by any person deprived of rights in relation to any quota or of any rights as mortgagee of any quota, by fraud, as against —

(a) The person registered as owner of the quota through fraud; or

(b) A person deriving otherwise than as a transferee bona fide for value from, or through, a person registered as owner of the quota through fraud.

(3) Subsection (1) of this section does not apply in respect of provisional individual transferable quota, annual catch entitlement, or provisional catch history.

The Act includes many other provisions regarding registers. It creates a very detailed system of registration, designed to ensure the maximum security for quota holders.

NSW, which operates a share system of fisheries rights, has similar but somewhat simpler provisions in its *Fisheries Management Act* 1994 —

89 Establishment and keeping of Share Register

(1) The Director is required to establish and keep a Share Management Fisheries Register (the *Share Register*).

(2) The Share Register may be kept wholly or partly by means of a computer.

(3) If the Share Register is kept wholly or partly by means of a computer:

(a) references in this Act to an entry in the Share Register are to be read as including references to a record of particulars kept by means of the computer and comprising the Share Register or part of the Share Register, and

(b) references in this Act to particulars being registered, or entered in the Share Register, are to be read as including references to the keeping of a record of those particulars as part of the Share Register by means of the computer, and

(c) references in this Act to the rectification of the Share Register are to be read as including references to the rectification of the record of particulars kept by means of the computer and comprising the Share Register or part of the Share Register.

90 Registration of shares

(1) The Director must register any shares in a share management fishery issued by the Minister by entering in the Share Register the following particulars:

(a) the name of the person to whom the shares are issued,

(b) the number of shares issued,

(c) the share management fishery for which the shares are issued,

(d) the period for which the shares are issued,

(e) such other particulars (if any) as are prescribed by the regulations.

(2) The Director must register any renewal of shares in a share management fishery by entering in the Share Register the following particulars:

(a) the fact that the shares have been renewed,

(b) the period for which the shares are renewed,

(c) such other particulars (if any) as are prescribed by the regulations.

91 Registration of dealings in shares

(1) A transaction that purports to have the effect of transferring, assigning, transmitting, mortgaging or otherwise creating an interest in a share in any share management fishery does not have that effect until it is registered in the Share Register.

(2) A party to such a transaction may make an application to the Director for the transaction to be registered.

(3) Such an application must be in a form approved by the Director and must be accompanied:

(a) by the document that embodies the transaction, and

(b) by a document setting out such particulars (if any) as are prescribed by the regulations for the purposes of this paragraph, and

(c) by duplicates of the documents referred to in paragraphs (a) and (b), and

(d) by such fee (if any) as is prescribed by the regulations.

(4) When such an application is made to the Director, the Director must:

(a) register the transaction by entering in the Share Register particulars of the name of the person acquiring the interest and a description of the transaction, and

(b) endorse on the document relating to the transaction and the duplicate of that document the fact of the entry having been made, together with the date and time of the making of the entry.

(5) When those entries in the Share Register have been made:

(a) the duplicate of the document relating to the transaction is to be retained by the Director and made available for inspection in accordance with this Division, and

(b) the original document is to be returned to the person who made the application for registration.

(6) The Director is not to register a dealing in a share in any share management fishery if the dealing would result in a shareholder acquiring more shares in the fishery than is permitted by this Act or if the dealing would otherwise contravene this Act.

92 Trusts not registrable

(1) The Director is taken not to have notice of any kind of trust relating to shares in a share management fishery.

(2) Notice of any such trust must not be registered by the Director.

93 Power of holder to deal with shares

(1) The holder of any share in a share management fishery may, subject to this Part, deal with the share as its absolute owner and give good discharges for any consideration for any such dealing.

(2) Subsection (1):

(a) is subject to any rights appearing in the Share Register to belong to another person, and

(b) only protects a person who deals with the holder of the share as a purchaser in good faith for value and without notice of any fraud on the part of the holder.

(3) Equities in relation to a share in a share management fishery may be enforced against the holder of the right except to the prejudice of a person protected by subsection (2).

94 Surrender of shares to be noted in Share Register

If a share in a share management fishery is surrendered, the Director must make an entry in the Share Register to that effect.

95 Cancellation or forfeiture of shares to be noted in Share Register

(1) If a share in a share management fishery is cancelled, forfeited or otherwise ceases to have effect, the Director must make an entry in the Share Register to that effect and cancel the registration of the share.

(2) If, because of a decision made by the Minister or a court, an entry made by the Director under subsection (1) is no longer correct, the Director must rectify the Share Register.

(3) If:

(a) the Director makes an entry in the Share Register under subsection (1), or rectifies the Share Register under subsection (2), concerning a share, and

(b) a person other than the holder of the share has an interest in the share, and

(c) the interest is one in relation to which a transaction has been registered under section 91 (Registration of dealings in shares),

the Director must give the person written notice of the entry or rectification.

96 Director not concerned as to the effect of documents lodged for registration

The Director is not concerned with the effect in law of any document lodged under section 91 (Registration of dealings in shares) and the registration of the transaction concerned does not give to the document any effect that it would not have if this Division had not been enacted.

97 Inspection of the Share Register and registered documents

(1) On payment by a person of the prescribed fee (if any), the Director must, during the ordinary business hours of the Director's office, make available for inspection the Share Register and all copies of registered documents retained by the Director in accordance with section 91 (Registration of dealings in shares).

(2) If the Share Register is kept wholly or partly by means of a computer, this section is taken to be complied with by providing a computer print-out or providing access to a computer terminal that can be used to view the Share Register.

98 Evidentiary provisions

(1) The Share Register is evidence of any particulars registered in it.

(2) If the Share Register is wholly or partly kept by means of a computer, a document issued by the Director producing in writing particulars included in the Share Register, or the part kept by means of a computer, is admissible in legal proceedings as evidence of those particulars.

(3) A copy of the Share Register or an entry in the Share Register is, if purporting to be signed by the Director, admissible in evidence in legal proceedings as if the copy were the original.

(4) A copy of a document, or part of a document, retained by the Director under section 91 (Registration of dealings in shares) is, if purporting to be signed by the Director, admissible in evidence in legal proceedings as if the copy were the original.

(5) The Director must, on application made by a person in a form approved by the Director, provide the person with a document or copy that is admissible in legal proceedings because of this section.

…

100 Exculpation for liability for anything done under this Division

The Minister, the Director and other persons employed in the administration of this Division are not liable in any civil proceedings for anything done or omitted to be done in good faith in the exercise or purported exercise of any function imposed or conferred by this Division.

101 Offences under the Division

A person must not:

(a) make, or cause to be made or concur in making, an entry in the Share Register knowing it to be false or misleading in a material respect, or

(b) produce or tender in legal proceedings a document knowing that it falsely purports to be an instrument (or copy of an instrument)

> lodged with the Director under this Division or a copy of the Share Register or of an entry in the Share Register.
>
> Maximum penalty: 50 penalty units.

It is also possible to issue a Certificate of Title analogous to that used in the Torrens land registration system, to guarantee optimum security. This has been recommended but does not so far appear to have been enacted in any jurisdiction.

Exclusivity

Exclusivity is the factor that assures fishers much the same control over their resource as a farmer has over his land and its produce. So long as fishers do not own the resource until it is harvested, the race for fish will continue.

The exclusive nature of fisheries rights differs from that of mere fishing licences. The issue by the state of any form of fishing permit is a guarantee that the right may be held and managed without outside interference from private individuals, whether or not they themselves are quota-holders. This is prevented by the monitoring and enforcement procedures and offences established by the state in its legislation.[124] But a licensing system does not protect licensed fishers from each other, as they "race for fish".

In a quota system, the quota right has a higher degree of exclusivity than a mere licence. But this is not absolute. Quota-holders hold rights in common with all other quota-holders, and must be guaranteed protection not only from the unlicensed, but also from any of their counterparts who may be inclined to exceed their share. New and improved data collection, monitoring and enforcement controls are therefore required. [125] Burke and Brander note that New Zealand experienced a significant increase in quota-busting, misreporting, high-grading and bycatch problems with the introduction of ITQs, and they suggest that an effective monitoring and enforcement programme be developed before implementation of ITQs, which does not simply load new requirements on top of existing regulations.[126]

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124 The "trespassory rules" which are an essential element of a property institution by the legal view of property.

125 Edwards (2000) p. 78; Nielander & Sullivan (2000b).

126 Burke & Brander (2000) p. 159.

In addition to the pre-existing offences of unlicensed fishing, fishing contrary to licence conditions, misreporting etc, new offences need to be created, such as:

- fishing without a quota where one is required
- exceeding quota or failing to fish according to any carry-forward provisions which may be provided by law (e.g. New Zealand)
- transfer of quota contrary to transfer provisions
- exceeding any cap or upper limit on accumulation of quota
- holding quota contrary to statutory restrictions on holding.

The creation of new offences relating to fisheries rights also brings with it a new dimension to liability. In addition to the "traditional" owner, operator, crew and agent liability, liability may now be incurred by the quota- or shareholder, who may be a different person again. It is also at the point of creating property rights in quotas that many jurisdictions are moving towards providing administrative rather than criminal procedures against transgressors, if they have not already done so in fisheries or in other fields.

The exclusive nature of fisheries rights, however strongly they may manifest various property characteristics, does not guarantee freedom from interference to the holding by the state. The very nature of fishing rights as creatures of statute means that the state can interfere, at least to the extent provided by the statute, and further when it is considered that the state may vary the terms of the governing legislation at any time (subject only to any obligation of just compensation for deprivation of property). State interference can extend to alteration, suspension and cancellation of quotas, for management purposes or for breach of laws or conditions, or of the management plan which provides for them. The termination of fisheries rights, or of the licences with which they are held, is also a function of their durability, and is linked to considerations of just compensation.

Suspension and cancellation may take place for two basic reasons:

- commission by the holder or his agents of an offence or breach of conditions, for which forfeiture is provided by the law
- fishery management purposes.

Consideration must be given to the consequences of alteration to management plans and the various methods of cancelling quota. Options include:

- reallocation of forfeited quota
- preferential treatment to quota-holders in new management plans where a management plan is altered or cancelled
- cancellation without compensation
- cancellation with compensation or adjustment.

Where quota is linked to and a characteristic of the fishing licence under which it is held, it usually expires with the termination of the licence or the management plan. Where termination is due to the termination of the management plan, the legislation may state clearly that no compensation is payable, as in the USA where IFQs are not considered property, but privileges which may be withdrawn; or the legislation may provide for compensation, in itself or under subordinate legislation, as in various of the Australian states, which mainly treat quotas as an attribute of licences. NSW has much the same provision for compensation:

> **44 Omission of share management fishery**
>
> (1) This section has effect if the description of a share management fishery is omitted from Schedule 1, including an omission for the purpose of redefining an existing share management fishery.
>
> (2) When the description of the fishery is omitted, all shares in the fishery are cancelled.
>
> (3) If the description of the fishery is omitted after the commencement of the management plan for the fishery, the holders of the cancelled shares are entitled to compensation from the State for the market value before the cancellation of the shares they held.
>
> (4) The amount of compensation payable is to be determined by agreement between the Minister and the person entitled to compensation. If the amount of compensation is not agreed, it is to be determined by the Valuer-General.
>
> (5) A person entitled to compensation may agree to accept instead shares in another share management fishery which replaces the omitted fishery wholly or partly.
>
> (6) A person who is dissatisfied with the amount of compensation offered to the person under this section or with any delay in the payment of compensation may appeal to the Land and Environment Court.

> (7) The regulations may make provision for or with respect to the payment of compensation in accordance with this section.
>
> *NSW Fisheries Management Act 1994*

But in NSW, quota shares have a more strongly property nature. Forfeited shares still exist as property which may be sold by the Minister, and the proceeds are treated as government revenue.

In Australian Commonwealth fisheries, where a management plan is revoked, SFRs cease to have effect and no compensation is payable, although holders have preference for rights under any new plan.

In New Zealand, where ITQs have the strongest property nature, they exist in perpetuity. The catch entitlement they give rise to can however be reduced to zero if the TACC is reduced to zero. The Crown may hold ITQs, as for example if they are forfeited for infringement of the law, and it may reallocate any quota shares it holds in the case of a reduction in TACC. Where a TACC is increased, the Crown may allocate its shares or deduct a set number of shares from all quota holders and reallocate them, to new eligible entrants.

5. Management Structures

Prior to the introduction of a fisheries rights system, there will already be some form of fisheries management structure in place, be it line department, other governmental agency, or government-owned incorporated company. However, fisheries rights bring an increased level of need for a wide range of administrative functions, such as:

- calculation of TACs
- preparation of management plans
- making and promulgation of delegated legislation (such as rules, by-laws and management plans)
- establishment and administration of a quota register
- approval of transfers
- increased need for data collection and monitoring
- enhanced enforcement capabilities.

There are various approaches that may be taken within the socio-political context. The USA has established regional Councils, which manage all federal fisheries. Iceland has established a special enforcement agency with monitoring facilities at all landing ports. Legal recognition may be given to community management boards. Customary management groupings may need to be included in the quota allocation and hence in the administrative processes. There may be a desire to shift towards greater privatisation of management. Industry involvement may be enhanced by formalising the consultative process. The relationship of the managing authority to research bodies must be considered.

All or any of these matters may require enabling by new or amending legislation. Of particular concern to the drafter is the delegated legislation-making power, and any increase in powers given to enforcement officers. Prosecutorial functions should also be reviewed.

6. Fees and Charges

Before fisheries rights, charges for the privilege of commercial fishing in national waters usually took the form of licence fees, which in some cases provided income directly to the management authority,[127] and various primary produce and export taxes, which effected revenue to the state. But the matter becomes more complex with the introduction of a fisheries rights system, particularly if the system is comprehensive and covers a variety of fisheries. Costs of administration, data collection and collation, research, monitoring and enforcement may well increase significantly.

Charges may be made in various ways:

- a charge for initial allocation
- management cost recovery
- a royalty or sales levy
- resource rents
- a tax upon transfers of rights.

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127 *Harper's Case* in Tasmania held that, even though fees may on occasion be seen as taxes or duties of excise, the fee for fishing is a *quid pro quo* to compensate the public, through laws, for abrogation of the traditional right to fish.

Charges for initial allocation of rights may be made where the allocation has been carried out by a process other than auction or tender. Setting these too high, however, may discourage the acceptance of a fisheries rights system where this is being newly implemented.

Resource rents bring problems with the setting of levels: too low may create problems with maintaining fishery rights in the face of the rights of other water users, as for irrigation by inland waters, recreational fishing, tourism etc;[128] on the other hand, high resource rents could destroy the incentive to invest.

More importantly from the legal viewpoint is the fact that the charging of resource rents can give rise to questions about the state's right to claim "ownership" of the resource and the consequent right to extract a rent. This was the case in New Zealand,[129] and eventually a cost recovery system was relied upon. Resource rental was achieved by reliance upon the general taxation system.

Royalties calculated on net revenue bring with them a degree of flexibility. They may be seen as a form of tax, and care must be taken with the state's powers to impose taxes. Provisions must be harmonised with the general taxation system.

An example of a simple and effective cost-recovery and resource-rent system comes from NSW:

> **Division 7 Management charges and community contributions**
>
> **76 Management charges**
>
> (1) The Minister may, subject to this section, determine the management charges payable by the holders of shares in a share management fishery for each fishing period during which the commercial fishing licences of the holders (or their nominees) are endorsed to take fish in that fishery.
>
> (2) The management charge is to be such amount as the Minister considers necessary to meet the costs of management for that fishery, being costs of management that are attributed to industry by the management plan for the fishery.
>
> (3) The management charge is not to exceed the amount prescribed by the management plan for the fishery.

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128 Gislason (2000) p. 125.
129 Edwards (2000) p. 86.

(4) The management charge is payable by shareholders in proportion to their shareholding.

(5) The management plan may authorise the payment of management charges by instalments. If an instalment is not paid by the due date, the balance then becomes due and payable (together with any interest for late payment prescribed by the management plan).

(6) Until the commencement of the management plan for a fishery, the Minister may (after consultation with the Management Advisory Committee for the fishery) determine the matters required by this section to be determined by the plan.

77 Community contribution by shareholders for access to fishery

(1) Shareholders in a share management fishery are required to make a periodic contribution for their right of access to the fishery (a community contribution).

(2) The community contribution is payable after the commencement of, and in accordance with, the management plan for the fishery.

(3) The community contribution is to be credited to the Consolidated Fund.

(4) The community contribution is to be based on the size of the shareholding in the fishery.

(5) The rate of the community contribution, method of its payment and other matters concerning its payment are to be prescribed by the management plan, and not otherwise.

(6) The management plan for the fishery may exempt a shareholder from making the community contribution (or reduce any such contribution) if the full rights to take fish in the fishery in accordance with the shareholding have not been exercised during the relevant period.

(7) The Treasurer's concurrence is required before any provisions relating to community contributions are inserted in a management plan.

It is also possible to exact a form of tax upon quota transfers. Transfer taxes can operate to inhibit profiteering, but constraining transfers in this manner can diminish the efficiency of the system. Again, care must be taken with the state's right to impose taxes.

CONCLUSION

Finally, the drafters involved in preparing the appropriate laws to manage a fisheries rights system must be prepared for a process of ongoing change and consequent amendment. Experience in various countries has shown that this is the way that successful fisheries rights systems have developed. This is not because nobody knows how to draft laws for such a system. It is because system requirements themselves are continually evolving. An industry initially opposed to change gradually becomes aware of the benefits it brings them, and is more ready to cooperate and even initial desirable changes. As measures initially established to protect threatened fishstocks gradually prove successful, some stringent controls may be relaxed. On the other hand, more controls may need to be imposed in different ways. Political considerations may require new measures for the protection of disadvantaged and indigenous groups. And most importantly for the drafter, judicial decisions and interpretations of the new regime frequently call for amendment, sometimes quite radical, to the scheme as it was initially devised.

In saying this, however, it must be recalled that any major overhaul to a fisheries rights system carries with it the possibility of undermining the security and predictability associated with the system. The more the fisheries right is capable of being viewed as property, the more a guarantee of security will be required. Hence it is important to give careful consideration to the exact nature of the right to be created, and the consequences of that creation.

Annex 1
CASE LAW STUDY:
THE NATURE OF FISHING RIGHTS

INTRODUCTION

Under the common law system, rights of the public to take fish from tidal territorial waters of the kingdom can trace their origins back prior to Magna Carta:

> "the right of the owner of the soil over which the waters flow (whether the owner be the Crown or not) to enjoy the exclusive right of fishing in those waters or to grant such a right to another as a *profit à prendre* is qualified by the paramount right to fish vested in the public…. after Magna Charta, the Crown, in whom the title to the bed of tidal navigable rivers was vested, was precluded from granting a private right of fishery, the right of fishery being in the public…."

Harper v. Minister for Sea Fisheries & Others (1989) 168 CLR 314 (Tasmania)

In the USA, the leading case of *Arnold v Mundy* 6NJL 1 (1821) affirmed this principle underlying public fishing rights. The defendant asserted the common law tradition of public rights of fishing in navigable waters, and succeeded in overturning the plaintiff's claim to exclusivity of a staked-off oyster bed. The consequence was the view that property in navigable waters and the submerged lands beneath them was vested in the sovereign (be it the Crown, the state or the People), not for the sovereign's use but for the use of citizens. The sovereign therefore was trustee for public use, and was charged with the duty of protecting the rights of the citizen. The principles of this case were later confirmed by the US Supreme Court in *Martin v Waddell* 41 US (16 Pet.) 367 (1842). These two cases represented the beginnings of the growth of the public trust doctrine of the United States.[130]

It is only recently, with the problems of overfishing and stock depletion becoming alarmingly apparent worldwide, that policy has changed, in varying degrees, from this open-access view of marine fisheries and restrictive regulation has commenced. The law has consequently been obliged to resile a little from its long-held *laissez-faire* attitude to fisheries management, and is now obliged to discover the means by which fisheries access can be limited and stocks sustainably managed. This new policy has been implemented to varying degrees in different common-law jurisdictions.

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130 Macinko (1993).

The High Court in *Harper's Case*, quoted above, continued:

> "But the right of fishing in the sea and in tidal navigable rivers, being a public not a proprietary right, is freely amenable to abrogation or regulation by a competent legislature."

The "competent legislatures" have focused on this abrogation and regulation power, and thus the limited access fishing right has been created. But its essential nature differs from jurisdiction to jurisdiction.

NEW ZEALAND

Early Cases

From the outset, New Zealand courts affirmed the intent of the legislature, that ITQs were a form of property. In the unreported allocation case *Jenssen v. Director-General of Agriculture and Fisheries & The Quota Appeal Authority* CA 313/91, reference was made to the fact that guaranteed minimum individual transferable quotas were "valuable assets". Mr. Jenssen got his quota. Later, however, the High Court in *Cooper v. Attorney-General* [1996] 3 NZLR 480 decided that ITQs were property rights, but absent a provision such as the US Constitutional Fifth Amendment, Parliament, having created the property by statute, was entitled to take it away again without compensation when it was in the public interest to do so.

A series of unreported cases, the *New Zealand Federation of Commercial Fishermen Inc. v. Minister of Fisheries*[131], dealt with the Minister's right to reduce the TAC, and hence the amount of quota in the Snapper 1 management area. The various applicants applied to the High Court for judicial review of the Minister's decisions for the fishing years of 1995-96 and 1996-97.

The governing legislation at the time was already in a state of flux, commencing with the relevant provisions of the *Fisheries Act* 1983, which were partially replaced with provisions of the *Fisheries Act* 1996 in

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131 New Zealand Federation of Commercial Fishermen (Inc.), New Zealand Fishing Industry Association (Inc), Simunovich Fisheries Limited, North Harbour Nominees Limited and Moana Pacific Fisheries, Area 1 Maori Fishing Consortium and Ngapuhi Fisheries Limited, Hauraki Maori Trust Board, and Paepae/Taumata 2 v. Minister of Fisheries, Chief Executive of the Ministry of Fisheries, New Zealand Recreational Fishing Council Inc Consolidated CP237/95; Treaty of Waitangi Fisheries Commission v. Minister of Fisheries and Chief Executive of the Ministry of Fisheries, Consolidated CP 294/96, at first instance. Appeal as CA82/97, CA 83/97, CA 96/97.

combination with certain parts of the 1983 Act which remained in force. Part of the applicants' claim was that both Acts had as an underlying purpose to afford proper respect to the property rights of those holding quota, and the Minister's decision represented a failure to have regard to those rights.

Both Courts accepted that the Minister's decision was flawed, and set it aside. But the decision was taken on other grounds, so that what was said regarding the "property" nature of quota was *obiter*. However, both courts were adamant that there had been no unlawful dealing with property involved in the Minister's decision.

The learned judge at first instance in the application for judicial review accepted "without difficulty" that ITQs were a form of property right, but a right "subject to override". He examined the effect of 1990 amendments to the 1983 Act, which introduced a proportional ITQ whereby a reduction in Total Allowable Commercial Catch meant a proportionate reduction in the tonnage that may be harvested under ITQ, without compensation. This, His Honour considered, placed a qualification on the property right, but the right nevertheless was a very important one - it is sought after and traded or leased for considerable sums. However, it had what His Honour termed a "rather special character": it is "subservient to the Minister's [statutory] powers". The right is susceptible, by the clear provisions of statute, to reduction without compensation. "It is not as though the Minister will be invading a fee simple," His Honour pointed out.

Considering the principle of the sanctity of property, as embodied in the New Zealand *Bill of Rights Act*, His Honour concluded that "there is no unlawful seizure when the law permits it ... sanctity of property has its place in law and society, but much depends on the terms of which the property is held."[132]

The Court of Appeal went further, and considered the matter "quite straightforward". Quota was a "species of property", and valuable. In fact the court preferred to view quota as "property", rather than as a "property right", a term which it referred to as the appellants' expression.

However, the Court continued, the rights inherent in such property are not absolute, but are subject to the provisions of the legislation which creates them. The disadvantage of having the nature of the property altered so that

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132 CP 237/95, at pp. 90–92 of the written judgement.

its value is reduced, without compensation (as must now happen following an overall reduction in TACC) is an "incident integral" to that species of property.[133]

Later Cases

This approach of the Court of Appeal, that ITQs are a species of property, has been confirmed in later cases. The Court was asked to decide questions of ownership of a fishing permit, catch history and "catch history benefits" in *Matiriki Ltd. v. Deadman & Lees* (Unreported CA15/99, 2 September 1999), on the basis of arguments of estoppel and constructive trust. Although the Court did not decide, and referred the matter back to the High Court for further decisions on questions of fact, the language used throughout the judgement indicates a settled belief in ownership of property, in relation to the permit and quota entitlements under it. That these things could be treated as property was not in issue, only the question whether or not the estoppel had arisen or the constructive trust had been created. Similarly, in *Kareltrust v. Wallace And Cooper Engineering (Lyttelton) Limited* (Unreported, CA192/99, CA211/99, 17 December 1999) the Court of Appeal, in discussing an action *in rem* against forfeited fishing vessels, accepted the wording of section 107C of the *Fisheries Act* 1983, and treated forfeited quota as property similar to vessels and fishing equipment.

Allocation Challenges

Not surprisingly, the earliest ITQ cases in New Zealand, as elsewhere, were challenges to the initial allocation of quota under the 1983 Act as amended. The Director-General of Agriculture and Fisheries took a narrow view of the meaning of "commercial fisherman" which was successfully challenged in *Gunn v. Quota Appeal Authority* [1993] NZAR 102 and in *Jenssen's Case*[134], where the Court of Appeal held that the words "commitment to, and dependence on" in section 28(3) were deliberately wide and the Director-General's interpretation was too literal. The matter was resolved by legislative amendments, which required applicants for initial allocation of quota to hold a fishing permit already, and imposed a time bar on appeals.

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133 CA 82/97, 83/97, 96/97, at p. 16 of the written judgement.

134 Op. cit.

Indigenous Rights

Traditional fishing rights were guaranteed to the Maori of New Zealand under the Treaty of Waitangi of 1840, but the 1983 Act made no mention of Maori rights as a defence. However, *Te Weehi v. Regional Fisheries Officer* [1986] 1 NZLR 680 held that customary practices had been observed by the defendant, who was not guilty of breaching the Act. This was followed by a line of cases, one of the most recent being *Taranaki Fish and Game Council v. McCritchie* Unreported, in the District Court Wanganui 1997, which held that the exemption of fishing for home consumption by traditional means applied to introduced species as well as native fish.

The result of challenges such as these and the courts' liberal interpretation of the terms of the Treaty of Waitangi was a negotiated settlement represented by the interim *Maori Fisheries Act* 1989 and the later *Treaty of Waitangi (Fisheries Claims) Settlement Act* 1992, which between them established a Maori Fisheries Commission, recognized Maori commercial fisheries interests by securing a proportionate allocation of TACC for Maoris, and recognized fisheries areas of customary significance.

Summary

The paucity of New Zealand cases, coupled with the definitive language of the Acts, indicates that the question of the nature of ITQs has been settled at New Zealand law, even before the more definitively-worded 1996 Act is fully commenced. ITQs and related rights such as catch history may be regarded as "property", although it remains an integral part of the nature of these forms of property that they may be altered by the legislature that created them.

ICELAND

Several cases and administrative decisions under Iceland's Fisheries Law have confirmed that quotas can be used as collateral for lending purposes; that they are subject to payment of inheritance tax; and that they should be treated as property in divorce cases.[135]

Another line of Iceland cases challenged various aspects of the law. In 1998 the Supreme Court decided that the requirement for fishers to hold, in addition to ITQs, an annual non-transferable fishing permit, was

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135 Gissurarson (2000) p. 5.

unconstitutional as it violated the two constitutional principles of economic freedom and equal treatment under the law. The following year, however, the Court decided that the use of ITQs as collateral did not violate the principle that fish stocks in Iceland waters were the declared common property of the Iceland nation.

In 2000, a more direct challenge was mounted against the issue of ITQs on the basis of catch history, again based on the argument that the principles of economic freedom and equal treatment before the law were thereby violated. The Supreme Court however rejected the argument. One of the reasons for the Court's view was that the transferability of ITQs meant that they were not confined to any narrow group of people but were theoretically available to all.[136]

AUSTRALIA

Although Australian states and the Commonwealth are all separate jurisdictions each with its own jurisprudence, nevertheless an extremely high persuasive value is placed in each jurisdiction on the law of the others. Hence it is possible to consider Australian cases together, notwithstanding that they are based on different statutes.

In contrast to New Zealand, where there has been very little litigation over the nature of ITQs, Australia has produced a spate of litigation concerning fisheries quotas, mainly under the Commonwealth legislation but partly also under state legislation. Many of the early cases were challenges to initial allocation processes, but another line of cases questioned the very nature of limited access licences and other authorities, as they were gradually imposed under legislation that was, in the main, later repealed over the last decade.

Early Cases

The first cases, from the late 80's, questioned the nature of the rights granted under various state Acts which have since been replaced. These repealed statutes, in their amended forms, represented the first evolution of the initial methods of imposing access restrictions on fishers. Questions were frequently posed as to the nature of the newly created concept of limited access rights; the questions arose in various contexts.

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136 Case citations are not available.

One of the earliest, if not the first, of these is the 1987 case of *Pennington v. McGovern* (1987) 45 SASR 27, in which the Full Court of the Supreme Court of South Australia held that a fishing licence, held pursuant to the *Fisheries Act* 1982 (SA) which was linked to the registration of a boat, was property for the purpose of becoming the subject of a trust. The court said:

> "It is clear from the provisions of the Act and regulations ... that the licence in question is no mere personal, inalienable right. It is a transferable right which is contemplated as having value … [t]he valuable nature of the right is confirmed by its transferability and by its being linked in both the Act and the regulations with the registration of boat and equipment and to the transfer thereof . The provisions of the regulations ... 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 ... indicia of rights of property ... the rights conferred by the licence are proprietary in character."

Subsequently, it was held in *Austell v Commissioner of State Taxation* (1989) 89 ATC 4905 (WA), a Western Australian case, that a fishing licence relating to a boat was property for the purposes of levying stamp duty on a sale. At the same time, though, in the Victorian case of *Pyke v Duncan* (1989) VR 149, licences under Victorian and Commonwealth legislation were not property available to a sheriff for seizure in satisfaction of a writ of *fi fa*. In *Pyke's Case*, though, the licences were not related to a boat, and the decision as to their proprietary nature was for different purposes. The Court considered that transferability did not assist in this situation, and declared that there was "a substantial and significant difference between the capacity of a licence holder to market a licence and that of the Sheriff to pass on a good title to a bona fide purchaser in order to satisfy a judgment." And as was noted subsequently in *Poulos Bros (Wholesale) Pty. Ltd. v Abbott* Supreme Court of Tasmania Judgment No. A88/1994, distinguishing this case and others like it, *Pyke's Case* was concerned with the question of whether a personal licence relating to a particular boat was capable of constituting property independently of that boat.

Soon afterwards in 1990, the High Court on appeal in *Kelly v Kelly* (1990) 92 ALR 74 (SA) decided that an abalone authority issued under the South Australian Managed Fisheries Regulations 1971, referable to a particular boat, gave rise to rights which were capable of being held so as to constitute partnership property. Transfer of the authority for consideration, although heavily restricted, was nevertheless possible and thereby increased the value of the boat with which it was connected.

Harper's Case

The foregoing cases all arose in the context of the application of the law of various states. In 1989, however, the High Court of Australia was required to examine the essential nature of the right granted under a quota system and the right of a state to legislate to limit fishing rights. The case of *Harper v. Minister for Sea Fisheries & Others*[137] concerned the abalone fishery of Tasmania, then governed by the now repealed Tasmanian *Fisheries Act* 1959. A proportional quota system was established in 1985 in connection with the statutory requirement to purchase a fishing permit. The number of permits issued was limited, for the preservation of the fishery. The plaintiff challenged the validity of the permit fee, on the ground that it amounted to an excise. The defendants argued *inter alia* that the amount required to be paid to obtain a licence could be said to be paid for a *profit à prendre* – for the right to take abalone rather than for the abalone taken.[138] A case was stated to the High Court of Australia, which involved questions of state rights *vis-à-vis* those of the Commonwealth.

The abalone fishing grounds underlaid tidal waters. The Court acknowledged the paramount right to fish in tidal waters vested in the public by the common law. In non-tidal waters, the right of the owner of soil over which waters flow is to enjoy the exclusive right of fishing in those waters or to grant such a right to another as a *profit à prendre*. But in tidal waters, that right is qualified by the public right of fishing, which predominates even where title is granted to the seabed. However, that right is a public, not a proprietary right, and may be abrogated by legislation. There is a difference between a proprietary right and legislative jurisdiction.

If title is required to validate the right of the Tasmanian legislature to grant a licence, that was derived from the arrangement between the Commonwealth and the State of Tasmania regarding the right to legislate in respect of the Tasmanian abalone fishery. So a competent legislature has excluded the public by granting licences to a limited number of persons to take from the fishery. The right the licensees consequently enjoy resembles the common law right of piscary – a right to fish in another's waters to the exclusion of the public, which is a kind of *profit à prendre*.[139]

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137 Op. cit.

138 Halsbury's Laws of England, 4th ed., vol. 18, p. 254, para. 601.

139 Halsbury's Laws of England, 4th ed., vol. 6, p. 215, paras. 581 and 582.

At common law such a right is not available in tidal waters. However, through the introduction of a new statutory regime limiting the public rights of access, a right had therefore been created which is analogous to a *profit à prendre*, although it is in reality "an entitlement of a new kind". The Court said:

> "A statute which prohibits the public from exercising a common law right to exploit the resource and confers statutory rights on licensees to exploit the resource to a limited extent confers on those licensees a privilege analogous to a *profit à prendre* in or over the property of another. A fee paid to obtain such a privilege is analogous to the price of a *profit à prendre*; it is a charge for the acquisition of a right akin to property."

Following Harper

In *Harper's Case*, the High Court was apparently inclined to renege somewhat from the clear position that transferable fishing rights are property. The Administrative Appeals Tribunal in 1992 in *Re Ollrich* AAT No. 8082 decided that an endorsement for Southern Bluefin Tuna quota on a fishing licence issued under the Commonwealth *Fisheries Act 1952* was separate from the licence so that its cancellation did not amount to cancellation of the licence. In rejecting a claim by the plaintiff that both the licence and the endorsement were property rights due to their transferability and consequent value, the Tribunal said:

> "It is the view of this Tribunal that the endorsement possessed by the applicant could not be categorised as a proprietary right. In this regard, I have been assisted by the view expressed by the High Court of Australia in *Harper v Minister for Sea Fisheries and Others*…"

The Tribunal was, of course, bound to follow the High Court's findings. But subsequent cases did not continue the distinctions that *Harper's Case* drew. Two series of cases before the Federal Court concerning fishing rights in the Northern Prawn Fishery managed under the Commonwealth *Fisheries Act* 1952 decided that the rights were property. This fishery is managed not by quotas, but by "unitizing" the vessels involved: a B unit representing the right of the vessel to fish in the fishery, and A class units representing the vessel's fishing power, measured by size, engine capacity etc. In other words, they were not quota units, taking their definition from vessel capacity rather than amount of catch taken. But the units were tradable and became the currency of the fishery. However, when a progressive reduction for management purposes resulted in a loss of value of units held and of fishing capacity for those holding units, several applicants challenged the reduction on Constitutional grounds.

Section 51 (xxxi) of the Australian Constitution provides that:

> "51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> (xxxi.) 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."

A group of appeals from the initial Federal Court decisions were heard together and cited as *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151. At first instance[140], the Court had decided that the fishing units held by the applicants were property, and followed the statement in *Harper's Case* that:

> "In that context, the commercial licence fee is properly to be seen as the price exacted by the public, through its laws, for the appropriation of a limited public natural resource to the commercial exploitation of those who, by their own choice, acquire or retain commercial licences. So seen, the fee is the quid pro quo for the property which may lawfully be taken pursuant to the statutory right or privilege which a commercial licence confers upon its holder."

The Court also agreed with the High Court in *Kelly v Kelly*[141], and disagreed with the conclusions of *Pyke v. Duncan*[142], saying:

> "In my opinion a licence to fish brings with it a privilege and a right that is proprietary in nature. Subject only to such constraints (if any) as may be found in the governing legislation, it is properly classified as "property". In principle I can see no difference between such a licence and the units of fishing capacity in the case at bar. They are as important to the fisherman as his licence and his boat. Without them, he cannot fish even though he is licensed and his boat is registered. I hold that the units are property."

This court also decided that the property had been "acquired" in the terms of the Constitution, and that the acquisition was unjust. Subsequently, the Management Plan was amended so that in the second of these cases, *Davey and Fitti v Minister of Primary Industry and Energy* (1993) 113 ALR 335, a

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140 Cited as Fitti v. Minister for Primary Industries and Energy (1993) 40 FCR 286.

141 Supra.

142 Supra.

different Federal Court judge held that acquisition of property on just terms had been provided for.

Appeals from these 2 cases were heard concurrently, and the appellate Court affirmed the decision that the fishing units were property for the purposes of the Constitution:

> "Of the use of the word "property" in this constitutional guarantee, it has been said that it "extends to every species of valuable right and interest including real and personal property, incorporeal hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action. And to acquire any such right is rightly described as an 'acquisition of property'… "

However, the Court continued:

> For the respondents it was submitted that the units constituted property analogous to a *profit-à-prendre* in the N.P.F. The analogy is not exact. The right to fish within territorial waters is an attribute of the Commonwealth's sovereignty, rather than a proprietary right available under private law; see *Harper v Minister for Sea Fisheries* ….
>
> In the instant case, the units may be transferred, leased, and otherwise dealt with as articles of commerce. Nevertheless, they confer only a defeasible interest, subject to valid amendments to the N.P.F. Plan under which they are issued. The making of such amendments is not a dealing with the property; it is the exercise of powers inherent at the time of its creation and integral to the property itself."

The following year, the Federal Court also decided, in *Bienke v Minister For Primary Industries And Energy* (1994) 125 ALR 151, that alterations to the Management Plan for the Northern Prawn Fishery under the *Fisheries Act* 1952, continued by the *Fisheries Legislation (Consequential Provisions) Act 1991*, did not infringe Constitutional guarantees; were not invalidly done and therefore no claim for damages could lie; the Management Plan itself had the force of law; fishing units were issued subject to the Plan which was to be amended from time to time, and they therefore had an element of instability from the time of their creation. The court noted:

> "It also is significant for this case that the common law right or liberty to fish in the sea and in tidal navigable rivers is a public not a proprietary right and as such is amenable to abrogation or regulation by legislation: *Davey* at 160, 168-169."

And further:

> "However, the licensing system of which the Plan was a significant part, did not operate to create, by means of the units of fishing capacity, any

> right in substitution for what had been previously existing private interests in the natural resources of the fishery. The legislation is cast so as to impose prohibitions which may be lifted by compliance with the licensing system. The imposition of the prohibitions did not abrogate what, in the case of the operators and potential operators in the NPF, were common law rights…. They were public rights, as discussed, in particular, in the authorities referred to by Burchett J in *Davey* at 168-169. Contrary to what was contended by counsel for the applicants, the reference by Mason CJ, Deane and Gaudron JJ and by Brennan J in Harper at 325, 334-335, to a privilege which might be compared to a *profit à prendre* was not to the pre-existing situation at common law."

An appeal from this decision was decided in 1996.[143] The appellant had contended that alterations to the Management Plan constituted legislation extinguishing a cause of action against the Commonwealth, which amounted to acquisition of property under section 51(xxxi) of the Constitution. The Court said:

> "… [It was} argued that the appellant's right to reap a resource was "analogous" to a *profit à prendre* or to a cause of action. This submission was primarily directed to the question whether the fishing boat licence could be regarded as property for the purposes of section 51(xxxi). …. But a fishing boat licence granted under section 9(2) of the Fisheries Act does not vest in the holder a cause of action under the general law, nor does it create an interest based on antecedent rights recognised by the general law …. 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 and extent of which depends entirely on the terms of the legislation**... Thus, the fact that the holder of the 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. **It also does not mean that the licence is incapable of modification or extinguishment without constituting an acquisition of property**, if that course is permitted by its terms."
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> *(emphasis added).*

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143 *Bienke v. Minister for Primary Industries & Energy* No. NG 657 of 1994 No. G 547 of 1993 FED No. 35/96.

The Court applied *Davey's Case* in holding also that there was no acquisition of property in the sense required by section 51(xxxi) of the Constitution, and therefore there was no compensation required. The Court said:

> the compulsory surrender of units effected by NPF 11 did not result in the Commonwealth, or any other person, acquiring an identifiable proprietary interest in the NPF or in any other species of property. Nor did the Commonwealth, or any other person, acquire a direct financial benefit or gain commensurate with any interest of the appellants that was extinguished or terminated. Whether attention is directed to the units of fishing capacity, as in Davey, or to the fishing boat licence, as in the present case, the compulsory restructuring scheme did not result in any other person acquiring the entitlement to take prawns from the NPF previously enjoyed by the first appellant as the licence and unit holder….

Nor did the imposition of a fee constitute an acquisition of property; rather, it was a levy on items of value, the fishing units.

Fitti, *Davey* and *Harper* were all cited with approval in the *Poulos Bros Case*.[144] In that case, the question was whether a bill of sale effected a transfer of boat, equipment and licence issued under the Tasmanian Sea Fisheries Regulations 1962, or not. Clearly, no legal transfer of the licence could have taken place, as the transfer process had not been undertaken in accordance with the requirements of the Regulations. However, the Tasmanian Supreme Court found that as the licence was property, a beneficial interest nevertheless arose, so as to create a mortgage in equity.

Similarly, the Tasmanian Supreme Court in *Gasparinatos v. The State of Tasmania* (1995) 5 Tas R 301 followed *Harper* in deciding that rights to take abalone in Tasmanian waters were valuable property rights.

Recent Cases

Subsequent cases in the last decade have followed the reasoning in the earlier state cases, the pattern of which was set by *Kelly v Kelly*. The *Poulos Bros Case*[145] was concerned with the completeness of a purported assignment of a boat, craypots and licence under the Tasmanian *Sea Fisheries Regulations* 1962. The Tasmanian Supreme Court reviewed the previous cases on the property nature of licences, and drew distinctions between licences that related to a boat, and those that did not, and were not proprietary in nature. The court's

144 Supra.
145 Supra.

decision was also based, like the cases before it, on the fact of the transferability of the licence for value.

The Court then drew a further distinction. It said:

> "...it is necessary to emphasise the distinction between the grant of a licence, which confers a personal right, and the nature of that licence once it has been granted when it becomes proprietary in nature in that the bundle of rights may constitute property."

Edwards v Olsen (1996) 67 SASR 266 also continued this line of cases in holding that a licence issued under South Australian legislation, as amended between the 60's and the 80's, was property capable of being held in trust. Following *Pennington v McGovern* and *Kelly v Kelly*, the Court held that licences, permits, registrations and authorities were all "clearly 'property', the beneficial ownership of which can form the subject matter of legal relationships, absent some express statutory provision to the contrary".

In 1998, the South Australian Supreme Court in *Lukin v Lovrinov* [1998] SASC 6614 again affirmed that a transferable tuna fishing quota introduced in 1984 by the Commonwealth Government under its *Fisheries Act* 1952 was property capable of becoming a partnership asset (although in this case it was held not to be so). And most recently, in *Tasmanian Seafoods Pty Ltd v Peters* [1999] QSC 144, the Queensland Supreme Court was concerned with a trochus collection licence issued under the Queensland Fisheries Act 1976 and continued under the replacement Fisheries Act 1994 and Regulations made under it. When originally issued, the licence was non-transferable, but upon the making of Regulations under the 1994 Act, it became transferable. A deed of sale of the licence/authorisation was executed in 1993 under which the Vendor agreed to hold the licence in trust for the Purchaser until it became transferable, whereupon it was to be transferred. The Queensland Fisheries Management Authority refused to give effect to any transfers.

On the question of the right to just compensation for deprivation of property, when scallop licences were cancelled under Victorian state legislation due to closure of the fishery, the case of *Stockdale v. Alesios*[146] held that the common law rule did not apply where the statute had already made provision for compensation (whether or not the compensation was just or

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146 Fully cited as The Honourable Alan Robert Stockdale (Treasurer For The State Of Victoria) & Anor v. Michael Alesios & Ors (1999) VSCA 128.

adequate). The court found that despite the original bar on transfer of the legal interest in the legal interest in the licence, nevertheless it was property the beneficial interest in which was capable of assignment. Although assignability is usually a characteristic of property, it is a consequence, not a test.

Finally, in the recent native title case series known as the *Croker Island Case*,[147] the High Court upheld the lower court decision that native title to the seabed and superjacent waters does not "confer possession, occupation, use and enjoyment of the sea and sea-bed within the claimed area to the exclusion of all others", but only to the exclusion of other Aboriginal groups. This decision was based on a finding that native title rights could only co-exist with common law rights to the extent that they were not inconsistent, and a claim of exclusive right over an area of territorial sea was inconsistent with common law public rights of navigation and fishing and the international law right of innocent passage. The two sets of rights therefore could not stand together.

Features of Australian Cases

The Test of Property

Transferability is but one of the "bundle of rights" that go to make up property in the Anglo-Australian legal system. However, the Australian cases have overwhelmingly relied on the transferability test to determine the property nature of the limited-access licence or other authority. *Kelly v Kelly* , *Pennington v McGovern*, *Austell Pty Ltd v Commissioner of State Taxation, Fitti v Minister for Primary Industries and Energy & Anor* and the cases that approved and followed them all turned on the transferability point, even though the transfer may be restricted. Transferability creates value; and the ascription of value creates the property nature.

The *Tasman Seafoods Case*, however, makes the point that transferability is not a *sine qua non*. A line of authorities[148] guided the Court away from the

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147 Yarmirr & Ors. v. The Northern Territory & Ors. (1998) 156 ALR 370; Commonwealth of Australia v Yarmirr (1999) 101 FCR 171; The Commonwealth v Yarmirr, Yarmirr v Northern Territory [2001] HCA 56.

148 National Provincial Bank Ltd. v Ainsworth [1965] A.C. 1175; Reg. v. Toohey; Ex parte Meneling Station Pty. Ltd. (1982) 158 C.L.R. 327; Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106; Commissioner of Stamp Duties (N.S.W.) v. Yeend (1929) 43 C.L.R. 235.

transferability test as a determinant. It is not necessarily an essential characteristic of property; some statutes render inalienable what is clearly property. In general, the test is merely that the proprietary right should be, in some way, capable of assumption by third parties; lack of this ability does not defeat the proprietary nature, but only tends against the conclusion that it is property.

Rights Against Whom?

However, not all the Australian cases have considered this aspect of property rights. Those which have may be characterised by the fact that in each one, an adjustment of rights as between private parties is under consideration. But when it comes to an adjustment of rights as between a citizen and the state, the courts have been a little less swift to find a complete characterisation of property.[149]

The leading case in this respect is *Harper*, which did not, in fact, find that the abalone licence in question was property at all, but that the licence fee was analogous both to the price of a *profit à prendre*, and to a charge for the acquisition of a right "akin to" property. What this actually meant was that while the privilege of commercial exploitation of a public resource for profit may be compared to a *profit à prendre*, it is actually "an entitlement of a new kind".

The *Bienke Case* confirmed the *Harper* approach, and added:

> "Thus, the fact that the holder of the 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."

And again:

> "... the right is not a common law right, but rather a new species of statutory entitlement, the nature and extent of which depends entirely on the terms of the legislation."

In that case, the Court merely assumed, without deciding, that the licence created an interest "capable of amounting to" property. It was not necessary

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149 McFarlane (op. cit.) argues that the Australian cases have tended towards a "purposive" analysis, taking the question no further than the confines of the particular case.

to decide, as the appellant's claim to unconstitutional acquisition of property was defeated on other grounds.

The *Davey Case*[150], which was referred to extensively in the *Bienke Case*, confirmed that this new creation stopped short of being full property, although finding that it was property for the purposes of section 51(xxxi) of the Constitution. The Court said:

> "In the instant case, the units may be transferred, leased, and otherwise dealt with as articles of commerce. Nevertheless, they confer only a defeasible interest, subject to valid amendments to the N.P.F. Plan under which they are issued. The making of such amendments … is the exercise of powers inherent at the time of its creation and integral to the property itself."

In this, the Australian courts appear to be in agreement with the New Zealand Court of Appeal in *New Zealand Federation of Commercial Fishermen Inc. v. Minister of Fisheries*. Limited access fishing licences, quota allocations etc. are a species of property, but the rights in them are not the same as antecedent rights that attach to other property under common law: ownership of this property is not full, but qualified, ownership. A portion of the "bundle of rights", including the right to vary and even extinguish the species, remains with the state, which created the property through legislation.

State Title

To say that a species of property may be created by statute enacted by a "competent legislature" then begs the question: by what right does the state create and allocate the property? What radical title does the state hold, that it may choose to grant to private persons? [151]

Harper's Case considered this question, in noting that since Magna Carta, the Crown held the title to the seabed beneath the waters but was prevented from granting a private right of fishery. The public had rights to fish in tidal waters, but that that right is a public, not a proprietary right, and may be abrogated by a competent legislature. There is a distinction between proprietary rights and legislative jurisdiction.

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150 Minister for Primary Industry and Energy v Davey (1993) 47 FCR 151, supra.

151 For a detailed discussion of state claims to "ownership" of natural resources in Australia, see B. McFarlane, op. cit.

The situation was summed up recently in the related case of *Yanner v Eaton* [1999] HCA 53*,* a High Court appeal from the Court of Appeal of the Supreme Court of Queensland regarding the Fauna Conservation Act 1974 (Q). The Court commenced by affirming that there could be no property in wild animals, including living fish of the sea. State ownership of such things is more a form of guardianship for social purposes. The right to legislate in respect of sea fish, which belong to no-one while living in the wild[152], is an incidence not of ownership but of sovereignty[153].

The *Croker Island Case*[154] affirmed that rights over the territorial sea cannot be held as property. The common law has bequeathed a legacy of public rights of fishing and navigation in tidal waters, and the rights of the state are of a different kind.

It is possible, therefore, that the claims of Tasmania and Victoria to "ownership" of living marine natural resources are not well founded. These assertions have not been challenged in the courts, but resolution of the question, if it arises, will turn on the implications of the term "ownership" in the context of state sovereign rights.[155]

Allocation

Numerous challenges were made to the initial allocation procedures of the various Commonwealth and state fisheries. The most significant is the *Austral Fisheries Case*,[156] which held firstly that the Minister's declaration of a management plan for the South East Trawl Fishery made under the Commonwealth *Fisheries Act* 1952 is delegated legislation, and not an administrative act; and secondly that the formula used to determine catch history, even applying the most stringent tests as was appropriate for scrutiny of delegated legislation, was manifestly unreasonable. The plan was therefore *ultra vires.*

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152 Halsbury's Laws of England, 4th ed. ,Vol .6, p. 215, paras. 581and 582.

153 *Re Vincenzo, Lucia And Rocco Musumeci & Ors* Nos. A89/63-68 AAT No. 5607 Fisheries (1989).

154 Op. cit.

155 See McFarlane (2000) pp. 3 and 45.

156 *Re: Austral Fisheries Pty. Ltd. v. Minister for Primary Industries and Energy* (1992) 37 FCR 463. An appeal to the Full Court of the Federal Court was dismissed.

Summary

In Australia, the limited access fishing rights which have been created under the fisheries legislation of the various states and the Commonwealth are usually property for the purposes of adjustment of rights as between private citizens. The principal indicator of the property nature is the transferability of the authorisation, although this is not a determinant test but more an indicator.

As between private persons and the state, however, the right-holder is not usually entitled to assert his right in the face of a lawful variation by the state of that right for management purposes. The state's underlying right of guardianship for social purposes means that this guardianship may be exercised against individual right-holders for the good of the community as a whole. The state or its management agency retains some measure of the cluster of rights that go to make up the property right.

This gradation of levels of ownership had long been the situation in the general law in relation to, for example, interests in land. But because open access to the sea and its resources has been a public right since the early days of the common law, the concept of divided rights has not been so well developed in the case of sea fisheries.

The Australian cases have not established a clear-cut determination of the nature of limited-access fisheries rights. However, the cases so far have been almost invariably concerned with determination of rights under legislation, both state and Commonwealth, which has now been repealed and replaced with new legislation. Despite the fact that these new legislative regimes have been in operation for more than half a decade, in most instances, there has been so far little evidence of litigation under their terms, at least in respect of determination of the rights conferred under the legislation. This is partly, at least, due to the fact that it is now settled Australian law that limited access fisheries rights are considered to be property for most purposes, including those of the Australian Constitution; but partly also to the fact that Australian legislatures must have been forewarned by the spate of cases that followed the introduction of the first quota systems, and devised new laws accordingly. Nevertheless, the very fact that no legislature has gone so far as to establish a fully transferable right in perpetuity, as has been the case in New Zealand, indicates that Australian legislatures may still be wary of the consequences of doing so.

Tsamenyi & McIlgorm (2000) at p.95 sum up rights in Australian legislation as interpreted by case law as follows:

- courts have generally acknowledged that the various forms of rights are capable of being considered "property";
- licences are "property", but only on the terms as provided by statute;
- the property rights are in general weak. Factors contributing to this include discretionary intervention powers vested in fisheries managers; transferability is limited by the consent required and other statutory conditions; entitlements may be suspended or cancelled for commission of offences; compensation provisions are generally inadequate; many entitlements (usually licences) are limited in duration.

USA

Like New Zealand, the USA case law discussing the nature of IFQs is limited, although for a different reason: only three IFQ programmes have been fully implemented in federal waters, although more are expected now that the ban on new programmes has been lifted. But the US courts have come to different conclusions as to the nature of the rights created by the legislation.

The combined cases of *Sea Watch International et al. v. Mosbacher* and *Pearson et al. v. Mosbacher* 762 F.Supp. 370, 9 April 1991 dealt with the introduction of a proportional quota system into the surf clam and ocean quahog fisheries, following a proposal by the Mid-Atlantic Regional Fishery Management Council. The IFQs are described as "transferable permits to fish for a fixed percentage of the annual aggregate catch quota for the species and area".

The plaintiffs argued that the introduction of IFQs amounted to privatisation of the fishery; these private rights could be transferred; and this was not authorised by the Magnuson-Stevens Act. However, the Court pointed out that:

> "Congress did authorize the creation of quotas. The Act expressly authorizes the Council and the Secretary to impose permit requirements and to establish limited access systems. 16 U.S.C. §§ 1853(b)(1), (6) ... the language of the section broadly embraces the possibility of quotas. Nothing in its terms, and nothing else in the Magnuson Act cited to this Court, precludes making quotas transferable."

The court continued:

> "... the interests created by [the IFQ system] fall short of actual full-scale ownership... The new quotas do not become permanent possessions of those who hold them, any more than landing rights at slot-constrained airports become the property of airlines, or radio frequencies become the property of broadcasters. These interests remain subject to the control of the federal government which, in the exercise of its regulatory authority, can alter and revise such schemes … An arrangement of this kind is not such a drastic departure from ordinary regulation, nor is it so akin to the sale of government property, that the Court must require a more precise expression of congressional intent to uphold it."

Clearly, the Court in the *Seawatch Case* was reluctant to find any trace of "privatisation" of a public resource. It did this both by finding that the clear words of the statute enabled the issue of quotas, provided the statutory requirements regarding appropriate evidence of the need for closer management, appropriate prior consultation, and appropriate conformity with the standards elaborated in the Act and elsewhere, had been met; and by finding that there was no property granted or transferred in the quota issue process, such that it could amount to privatisation. In this, it has both upheld the principle of public right of fishing, and avoided any suggestion of privatisation of a public resource.

By contrast, however, the US Court of Appeals in the later case of *Foss v. National Marine Fisheries Service* 161 F.3d 584 (9th Cir. 1998) found, in relation to the appellant's claim that he had a constitutionally protectable property interest in obtaining an IFQ permit in the North Pacific Halibut and Sablefish Fishery, that:

> "There can be no doubt that the IFQ permit is property. It is subject to sale, transfer, lease, inheritance, and division as marital property in a dissolution."

The Court however proceeded to distinguish the property right in obtaining the specific permit from any claim of owning the fish themselves, which was "pure fantasy". More significantly, the Court found that:

> "Unlike the specific, mandatory regulations implementing the IFQ programmes, the language of the Magnuson Act does not confer any claim of entitlement or property rights."

It is this last point upon which the *Foss Case* may be distinguished from the earlier *Seawatch Case*. The challenge in the *Seawatch Case* was founded on the language of the Magnuson Act itself. In the *Foss Case* however, the appellant's claim looked in the first instance to mandatory directives in

fishery-specific Regulations. Moreover, it was a different fishery, governed by different Regulations.

Again, Courts have stressed that the nature of the right depends on the statutory rules creating it. A person entitled by the rules to receive a permit had a protectable property interest. However, like the Australian cases dealing with the constitutional issue of section 51(xxxi.), the Court in the *Foss Case* was able to avoid finding liability for property deprivation on other grounds – it decided that procedural due process had been observed by the government when the initial allocation process was undertaken.

It is notable also that in the *Foss Case* the court was not called upon to decide the nature of the IFQ permit itself, but merely the right in the plaintiff to obtain the permit. This is a long way from the mere usufruct or revocable privilege view first taken in the USA towards IFQs, and appears to be somewhat removed from the language of the Act itself, which the Court was careful to distinguish. It appears that, despite the crafting of the Sustainable Fisheries Act by Congress to avoid any suggestion of property rights, in one US fishery at least, limited access fishing rights, and even the rights associated with them, are in fact property.

Fisheries prosecution case law is also limited in the USA, as most infringements are dealt with under the administrative law system.

SOUTH AFRICA

In 1998/99, following the commencement of the new Marine Living Resources Act, which provided for the allocation of fishing rights, a legal challenge was mounted to the redistribution of rights in the rock lobster fishery. The challengers, who held rights under the old pre-apartheid legislation, were successful in the Supreme Court, triggering a stream of similar applications from former rights-holders. Fortunately, this situation has not lasted and new allocations soon commenced under the new legislation. However, the administrative chaos caused led to political upheaval.[157]

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[157] Account taken from Hersoug and Holm (2000) 177. Case citations are not available.

Annex 2

LIST OF LEGISLATION

(Principal fisheries management Acts currently in force are shown in bold)

New Zealand

Fisheries Act 1983, as amended from time to time, principally by:

- **Fisheries (Amendment) Act 1986**
- Maori Fisheries Act 1989
- Fisheries (Amendment) Act 1990
- Fisheries (Amendment) Act No. 1991
- Treaty of Waitangi (Fisheries Claims) Settlement Act 1992
- Fisheries (Amendment) Act 1992

Fisheries Act 1996

Australia

Commonwealth

Fisheries Act 1952 (repealed)
Fisheries Management Act 1991
Fisheries Administration Act 1991
also:
Seas and Submerged Lands Act 1973
Coastal Powers (State Powers) Act 1980
Coastal Waters (Northern Territory Powers) Act 1980

New South Wales

Fisheries and Oyster Farms Act 1935
Fisheries Management Act 1994

Northern Territory

Fisheries Act (1988)

Queensland

Fisheries Act 1976 (repealed)
Fishing Industry Organisation and Marketing Act 1982 (repealed)
Fisheries Act 1994

South Australia

Fisheries Act 1982

Tasmania

Fisheries Act 1959 (repealed)
Living Marine Resources Management Act 1995

Victoria

Fisheries Act 1968 (repealed)
Fisheries Act 1995

Western Australia

Fisheries Act 1905
Fish Resources Management Act 1994

Iceland

Act Regarding the Management of Fisheries 1990

USA

Submerged Lands Act 1953
Magnuson-Stevens Fishery Conservation and Management Act 1980
as amended by the **Sustainable Fisheries Act 1996**

Canada

Resources Transfer Act of 1930

Fisheries Act of 1985

Manitoba

Fisheries Act of 1987

Sea Fisheries Act 1988 (repealed)

***Marine Living Resources Act* 1998**

Namibia

Sea Fisheries Act 1992

Marine Resources Act, 2001

Annex 3

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Jenssen v. Director-General of Agriculture and Fisheries & The Quota Appeal Authority Unreported, Court of Appeal CA 313/91

Ngãi Tahu Trust Board v. Director-General of Conservation [1995] NZLR 553

Cooper v. Attorney-General [1996] 3 NZLR 480

New Zealand Federation of Commercial Fishermen (Inc.), New Zealand Fishing Industry Association (Inc), Simunovich Fisheries Limited, North Harbour Nominees Limited and Moana Pacific Fisheries, Area 1 Maori Fishing Consortium and Ngapuhi Fisheries Limited, Hauraki Maori Trust Board, and Paepae/Taumata 2 v. Minister of Fisheries, Chief Executive of the Ministry of Fisheries, New Zealand Recreational Fishing Council Inc Consolidated CP237/95; *Treaty of Waitangi Fisheries Commission v. Minister of Fisheries and Chief Executive of the Ministry of Fisheries*, Consolidated CP 294/96, at first instance. Appeal as CA82/97, CA 83/97, CA 96/97.

Taranaki Fish and Game Council v. McCritchie District Court Wanganui 1997

Te Weehi v. Regional Fisheries Officer District Court Wanganui 1997

Matiriki Ltd. v. Deadman & Lees Unreported CA15/99, 2 September 1999 (obtained from Austlii New Zealand case database).

Kareltrust v. Wallace and Cooper Engineering (Lyttelton) Limited, Unreported, CA192/99, CA211/99, 17th December 1999 (obtained from Austlii New Zealand case database).

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State jurisdiction:

New South Wales v. The Commonwealth (1976) 135 CLR 337

Fishing rights cases:

Pennington v. McGovern (1987) 45 SASR 27 (SA)

Austell v Commissioner of State Taxation (1989) 89 ATC 4905 (WA)

Pyke v Duncan (1989) VR 149 (Vic and Commonwealth)

Re Vincenzo, Lucia and Rocco Musumeci & Ors Nos. A89/63-68 AAT No. 5607 Fisheries (1989) (Cwlth)

Harper v. Minister for Sea Fisheries & Others (1989) 168 CLR 314 (Tasmania)

Kelly v Kelly (1990) 92 ALR 74 (SA)

Re Ollrich AAT No. 8082 (1992) (Cwlth)

Fitti v. Minister for Primary Industries and Energy (1993) 40 FCR 286 (Cwlth)

Davey and Fitti v Minister of Primary Industry and Energy (1993) 113 ALR 335; (1993) 41 FCR 342 (Cwlth)

Minister for Primary Industry and Energy v Davey (1993) 47 FCR 151 (Cwlth)

Bienke v Minister For Primary Industries And Energy (1994) 125 ALR 151 (Cwlth)

Poulos Bros (Wholesale) Pty. Ltd. v Abbott Supreme Court of Tasmania Judgment No. A88/1994 (Tas)

Bienke v. Minister for Primary Industries & Energy No. NG 657 of 1994 No. G 547 of 1993 FED No. 35/96 (Cwlth)

Gasparinatos v. The State of Tasmania (1995) 5 Tas R 301 (Tas)

Edwards v Olsen (1996) 67 SASR 266; [1996] SASC 5703 (SA)

Lukin v Lovrinov [1998] SASC 6614 (Cwlth)

Tasmanian Seafoods Pty Ltd v Peters [1999] QSC 144 (Qld)

Yarmirr & Ors. v. The Northern Territory & Ors. (1998) 156 ALR 370; Commonwealth *of Australia v Yarmirr* (1999) 101 FCR 171; The *Commonwealth v Yarmirr, Yarmirr v Northern Territory* [2001] HCA 56 (the *Croker Island Case*)

Just compensation:

The Honourable Alan Robert Stockdale (Treasurer for the State of Victoria) & Anor v. Michael Alesios & Ors (1999) VSCA 128

Allocation:

Re: Austral Fisheries Pty. Ltd. v. Minister for Primary Industries and Energy (1992) 37 FCR 463; Re*: The Minister for Primary Industries and Energy v. Austral Fisheries Pty. Ltd.* (1993) 112 ALR 211, (1993) 40 FCR 381

State Title:

Yanner v Eaton [1999] HCA 53

Re Vincenzo, Lucia and Rocco Musumeci & Ors Nos. A89/63-68 AAT No. 5607 Fisheries (1989)

USA

State jurisdiction:

United States v. Florida, 425 U.Section 791 (1976)

Tingley v. Allen 397 So. 1166 (Fl. App. 1981)

Anderson Seafoods, Inc. v. Graham, 529 F. Supp. 512 (M.D. Fla. 1982)

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Arnold v Mundy 6NJL 1 (1821)

Martin v Waddell 41 US (16 Pet.) 367 (1842)

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