

**The report of the FRDC
(Fisheries Research and Development Corporation) Project 99/161**

**SUSTAINABLE FISHERIES MANAGEMENT THROUGH
ENHANCED ACCESS RIGHTS AND
RESOURCE SECURITY – Part I**

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NON TECHNICAL SUMMARY:

This project investigates fishing rights in Australia reviewing both legal and management aspects.

The implementation of limited entry in Australian fisheries in the 1970s and 1980s led to the development of new fisheries legislation. Since then, the perspective of the legislative framework has changed and broadened. In the 1990s, the critical challenge facing governments and the fishing industry has been how to strike a delicate balance between the public's ownership of fisheries resources and the need for a more secure access rights. Very often, the debate has been focused narrowly on the issue of property rights.

The project reviews fisheries legislation in Australia to determine the extent to which the legislative framework recognises fisheries entitlements as property rights. It is argued that the issue for industry is not so much whether fisheries entitlements constitute property rights in the legal sense, but the extent to which the legislative framework enhances such rights.

Australia was one of the first countries to adopt limited entry fishery licencing and to subsequently move to more advanced forms of rights based fisheries management implementing Individual Transferable Quotas (ITQs) in numerous, but not the majority of Australian fisheries, in contrast to New Zealand. This project examined empirical data for 105 managed fisheries in Australia and identifies some features of fisheries managed by ITQs and other rights methods.

It is proposed there are three major groupings in fish rights in Australia, being related to fish price, the nature of the species and catching method. ITQs are found to be extensive (22% by gross value) in high value non- trawling fisheries and in low value high quantity fisheries, such as pilchards. The second group is high valued species such as prawns, rock lobster and scallops, which may be regulated by transferable input controls and have chosen not to go to ITQs for a variety of reasons which need to be clarified. Finally the majority of Australian fishers are in lower priced fisheries, such as estuarine prawns and netting fisheries, in which the original licence has had few improvements in rights in the past twenty years.

There appear to be legislative, administrative and political impediments to further development of fishing rights in Australia. Has fishing rights development slowed down, and perhaps stalled in the different groups? Is it falling short of the hopes of those who conceived of rights based fishing under more autonomous arrangements for industry? We propose it is time to revitalise the investigation of rights and alternative governance arrangements for more sustainable fisheries management in Australia.

BACKGROUND:

It is internationally recognised that access rights and resource security for the fishing industry are potentially a way of achieving sustainable harvesting of fisheries. Rights work by clarifying responsibility, accountability and incentives for the industry making management more effective.

Australia has led the way in this area, but needs a new initiative to overcome some of the key impediments to industry gaining more certainty in access arrangements, resources security and involvement in resource management.

The application for the project 99/161 amended a previous one which was in two parts:

Part I: seeks to review a status of the rights based fishing management in Australia. This was presented in a paper at the FAO Conference in WA in November 1999

Part II: was not included in current project. Part II will focus on the identification of impediments to rights based fishery management and the development of rights regimes with industry and government.

Part I was funded by FRDC to provide review papers of rights in the Australian scene for the Fish Rights'99 Conference in Western Australia, November, 1999.

NEED:

The need was for a review paper (eventually two smaller papers) which reviewed legal and management by rights in Australian Fisheries. It would have two parts as follows:

Part A: Legal Review

The legal status of fishery access rights in each state needs clarified as they vary between little or no rights, to statutory fishing rights. The law can supply clarification on the rights held in a licence. It would be useful to describe these issues for all of Australia in a review paper for the FAO Conference.

Part B: Review of rights based management in Australian fisheries

There have been no reviews of rights based fishery management in Australia for some time. Industry often sees enhanced access rights as being a security issue, with sustainable considerations following behind. Alternatively government and community groups see sustainability as the paramount concern, not sufficiently recognising industry security.

The fishing industry need a review of alternative rights based fishing systems which may accommodate their desires to be more autonomous and responsible for achieving sustainable fisheries management. Enhanced right regimes are not “shelf ready” and must be developed between government and fishers. International fishery rights developments need to be examined to see what takes place in other countries compared to Australia.

In both areas of investigation significant impediments to the further development of rights based fishery management in Australia are identified. These are the challenges for all parties in the development of sustainable rights based fishery management.

OBJECTIVES:

- Identification of the legal status of fishery rights in all states of Australia and review the relevance of alternative forms of rights based management internationally.
- A paper was presented at the FAO Fishery Property Rights Conference in Western Australia in November 1999, giving a review of legal and management/economic characteristics of current fishery property /access rights and resource security in Australia.

METHODS:

The project methods are as follows:

- The project liaised with industry peak bodies and all state and Commonwealth fisheries departments re-fisheries rights. Legal cases, rights based fishery management in Australia and internationally relevant material was be accessed;
- Internationally relevant fishing rights material were reviewed and alternative system characteristics identified;
- Project results were to be presented in the FishRights'99 conference papers;
- The papers gave the current status of rights regime and legal aspects. A critical analysis of the strength and weaknesses of fishery rights in Australia scene point to solutions for many impediments that are in the way of developing fuller rights regimes.

RESULTS:

These come in several forms: *documents and significant findings*

Documents

1) Two papers from the WA FishRights'99 conference which are attached to the final report

McIlgorm, A. and M. Tsamenyi (1999b). Rights based fisheries development in Australia; has it stalled? A paper presented at the FAO FishRights'99 conference, Fremantle, WA, November.

Tsamenyi, M. and A. McIlgorm, A (1999). Enhancing fisheries rights through legislation – Australia's experience. A paper presented at the FAO FishRights'99 conference, Fremantle, WA, November.

2) The following document was also prepared during the duration of the project as a project contribution by the South Australian Fishing Industry

McIlgorm, A. and M. Tsamenyi (1999a). Fishing rights benchmarking project. A report to the South Australian Fishing Industry Council (SAFIC), Adelaide, S.A., October.

3) The project also assisted with the following contributions to industry conferences

McIlgorm, A (1999a). Corporate governance: an option for fisheries management. A paper presented at the Third International Rock Lobster Congress, Adelaide, SA, September.

McIlgorm, A (1999b). Enhancing fishery access rights: reality or dream? A paper presented at the Seafood Directions '99 conference, Australian Seafood Industry Council, Adelaide, SA, October.

Significant findings

In respect of property rights, the following conclusions can be drawn from the review of cases and fisheries legislation.

- Generally, Australian courts have acknowledged that various fisheries entitlements in the form of licences are capable of being considered 'property.'
- Fisheries licences are 'capable' of being property, but, as statutory rights, this is entirely dependant on the terms and interpretation of the relevant statute.

The issue for industry is not so much whether fisheries entitlements constitute property rights in the legal sense, but the extent to which the legislative framework enhances such rights. In this respect, generally, it can be said that current Australian fisheries legislation provides for weaker property rights.

The factors contributing to the lack of stronger rights include:

- the discretionary powers to intervene granted to fisheries administrators;
- the limitations on transferability of entitlements (generally transferability is subject to the consent of the fisheries administrator);
- the various Fisheries Acts provide for the suspension or cancellation of entitlements for the commission of specified or unspecified offences;
- inadequate provisions for the payment of compensation for loss of entitlements;
- the limited duration of most entitlements (one year in many cases).

It was also found that most of the limited rights research effort in Australia has:

- focused on Individual Transferable Quotas (ITQs) to the exclusion of 75% of licence holders in Australian fisheries who are under input regime management or have had little or no rights development in their fishing licence characteristics in the past twenty years.

- ignored many fishery sectors, such as prawn fisheries, who have chosen to avoid ITQs and developed their own rights regime based around input controls. This has been insufficiently investigated.
- regarded ITQs as an end in themselves and their development into fuller self governance /co-management arrangements has been insufficiently investigated.
- not sufficiently addressed the access security concerns of industry, particularly those in the estuarine and scale fish fisheries.
- not built enough social and community structure into rights research and development. The high costs of ITQs preclude their use in many fisheries.

The remedies for these issues form the basis of a subsequent application to FRDC early in the year 2000.

BENEFITS:

The benefits of the project are for the commercial fishing industry, with derived benefits for the recreational sector and community. The community benefits come from addressing how the commercial industry can be more involved in achieving sustainable fisheries management.

Nationally all sectors could benefit from clarification of fishery access rights and the overview of what has taken place in rights development in the past 20 years. The community should also be made aware of the impediments to sustainable fishery management by rights methods.

FURTHER DEVELOPMENT:

The findings indicate that further development is needed in

- Comparison of fisheries rights provisions in commonwealth, state and territory legislation;
- Identification of legal barriers to rights enhancement in legislation;
- Suggesting legislative solution to barriers identified
- Non ITQ rights regimes need to be investigated more fully as not all fisheries are going to go to ITQs. eg examine prawn fisheries, who have chosen to avoid ITQs and developed their own rights regime based around input controls.
- ITQs are not an end in themselves. Their development into fuller self governance / co-management arrangements has been insufficiently investigated.
- The access security concerns of industry, particularly those in the estuarine and scale fish fisheries who have had little rights development in 20 years needs to be investigated.
- Social and community structure needs to be introduced into fishing rights development and research.

CONCLUSIONS:

The research on rights based fishing has been limited and rather focused on ITQs rather than the security and sustainability issues that are faced by 75% of Australian fishers not under ITQ management.

Four directions are advocated for future work on fishing rights:

- 1) Comparison of fisheries rights provisions in commonwealth, state and territory legislation identifying and developing solutions to legal barriers;
- 2) R&D into non- ITQ rights development for 75% of Australian fishers, especially to allay access security fears;
- 3) Progression of ITQ and other fisheries management arrangements into fuller self governance;
- 4) Research and development of social and community rights based management arrangements as alternatives to ITQs and more complex regimes.

APPENDIX 1: Intellectual Property

Intellectual Properties (IP) should not be an issue with the review papers. Any IP issues will be negotiated with the FRDC as they rise.

APPENDIX 2: Staff

Dr. Alistair McIlgorm, Principal Investigator.

Prof. Martin Tsamenyi, Co-Investigator.

South Australian Fishing Industry Council (SAFIC) the host organisation.

Fishing Rights '99 - Fremantle, Western Australia, 18-19 November 1999.

Title: Enhancing Fisheries Rights through Legislation-Australia's Experience
by

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ABSTRACT

The implementation of limited entry in Australian fisheries in the 1970s and 1980s led to the development of new fisheries legislation. Since then, the perspective of the legislative framework has changed and broadened. In the 1990s, the critical challenge facing governments and the fishing industry has been how to strike a delicate balance between the public's ownership of fisheries resources and the need for a more secure access rights. Very often, the debate has been focused narrowly on the issue of property rights. This paper reviews fisheries legislation in Australia to determine the extent to which the legislative framework recognises fisheries entitlements as property rights. It is argued that the issue for industry is not so much whether fisheries entitlements constitute property rights in the legal sense, but the extent to which the legislative framework enhances such rights.

Introduction

This paper has two main objectives. First, it reviews judicial approaches to the concept of property and the recognition of fisheries entitlements as property. It will be shown that Australian Courts have recognised various types of fisheries entitlements as property. Second, the paper reviews Australian Commonwealth, states and territory fisheries legislation to assess the extent to which fisheries property rights are recognised. The review will be conducted under the following headings: (i) Types of Access Rights; (ii) Duration of entitlements; (iii) Transferability; (iv) Recognition of dealings in entitlements; (v) Payment of compensation. Following the summary, a general assessment will be made regarding the extent to which the legislative framework as a whole enhances fisheries property rights.

What is property in law?

The term 'property' is commonly used to refer to a 'thing' or to denote ownership of a 'thing'. Legally, however, this approach has been rejected. Property is not a 'thing' but 'a description of a legal relationship with a thing' (see: *Yanner v Eaton* [1999] HCA 53 Per Gleeson CJ, Gaudron, Kirby and Hayne JJ at para. 17 citing Bentham, 'An Introduction to the Principles of Morals and Legislation' in W. Harrison (ed.) (1948) sy 337, note 1; K. Gray and S. F. Gray, 'The Idea of Property in Land', in Bright and Dewar (eds.), *Land Law: Themes and Perspectives*, (1998) 15 at 15 and 27-30. See also *Yanner v Eaton* [1999] HCA 53 at 86 per Gummow J citing the observations of Finkelstein J in *Wily v St. George Partnership Banking Ltd.* (1999) 84 FCR 423 at 431, Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16 at 21-22). Neither can property be equated with ownership, as it is a far more complex relationship.

This legal relationship has been described by Australian courts as a 'bundle of rights' (first use by H. Maine; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285 per Rich J. Also *Yanner v Eaton* [1999] HCA 53 at para 27 per Gleeson CJ, Gaudron, Kirby and Hayne JJ although they recognise that 'this may have its limits as an analytical tool or accurate description'). Such an approach is consistent with that of Honoré who has suggested 11 indicia of property. Australian courts have, at various stages, attempted to identify these rights, or incidents, of property. Indicia identified have included identifiability, transferability, a degree of stability, a right to exclude and a right to use and enjoy. For example in *R v Toohey; ex parte Meneling Station Pty. Ltd.* Mason J noted that 'before a right or interests can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability' (*National Provincial Bank v Ainsworth* [1965] AC 1175 at 1248 per Lord Wilberforce; adopted by Mason J in *R v Toohey; ex parte Meneling Station Pty. Ltd.* (1982) 158 CLR 327 at 342). The Courts have held that these indicia are not all necessary to establish 'property' but neither are they individually sufficient. By way of example, in *Yanner v Eaton*, Gummow J noted that transferability is not itself a necessary incident of property (*Yanner v Eaton* [1999] HCA 53 at para 85 per Gummow J).

Australian courts have taken a broad view of property, recognising possession, managerial control, common law rights and privileges, (*Georgiadis v Australian & Overseas Telecommunications Commission* (1994) 179 CLR 297 where it was held that property exists in a chose in action), and statutory rights and privileges as property. For example, a statutory right to payment was considered property in *Health Insurance Commission v Peverill* (1994) 179 CLR 226. It has also been said that property extends 'to every species of valuable right and interest including real and personal property, incorporeal hereditaments ... rights of way, rights of profit or use in land of another, and choses in action' (*Minister for the State of the Army v Dalziel* (1944) 68 CLR 261 per Starke J at 290). With respect to statutory rights which receive the status of 'property', the limits of the property are defined by the statutory instrument creating them. Accordingly, the content of the term 'property' becomes a question of statutory interpretation.¹

Judicial Approach to Fisheries Entitlements as Property Rights

Australian courts have generally acknowledged that various fisheries entitlements in the form of licences are capable of being considered 'property', although in a sometimes restricted sense. In *Harper*, the High Court considered the statutory right to fish to be analogous to a profit-à-prendre.² In the Northern Prawn Fishery cases a single judge of the Federal Court held that a fishing licence can be considered as property: it brings with it a privilege and a right that is proprietary in nature, subject only to constraints in the legislation.³ However, on appeal to the Full Court it was said that the right to fish is based upon Commonwealth sovereignty rather than a private law proprietary right. The right to fish was held to be a public right, although amenable to change by a competent legislature. Each judge was, however, prepared to assume that the units were property. In *Bienke*, the full court of the Federal Court held that a fishing boat licence does not create an interest based on antecedent property rights. Rather, the licence is a new species of statutory entitlement

¹ *Yanner v Eaton* [1999] HCA 53 at para 85 per Gummow J.

² *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314.

³ *Fitti and Others v Minister for Primary Industries and Energy and Another*; and *Davey and Others v Minister for Primary Industries and Energy and Another* (1993) 40 FCR 286 at 292 per O'Loughlin J; *Davey and Others v Minister for Primary Industries and Energy and Another*; and *Minister of Primary Industries and Energy and Another v Davey and Another*; and *Minister for Primary Industries and Energy and Another v Fitti* (1993) 47 FCR 151.

dependant on the terms of the statute.⁴ In *Gasparinatos*, the Tasmanian Supreme Court held that fishing rights were 'capable' of being valuable property rights.⁵ Finally, in *Pennington* the South Australia Supreme Court held that a fishing licence did confer proprietary interest given that it had the indicia of property under the relevant statute.⁶

From these cases it can be observed that Australian courts have been willing to view fisheries licences as property.

Status of Fisheries Rights in Legislation

Fisheries entitlements are creatures of statute conferring a statutory right to fish. The scope of these rights as property must therefore be considered with reference to the relevant statute. This section reviews Commonwealth, state and territory legislation to determine the extent to which the legislation accords property rights to fisheries entitlements.

COMMONWEALTH

Types of Access Rights: The governing legislation is the *Fisheries Management Act* (Cth.) 1991. Rights are categorised in two ways. The first is a Statutory Fishing Right (SFR) (Div. 5) (s21); and the second is a Fishing Permit (Div. 5) (s32).

SFR apply to both the right to take certain fish and the right to use certain equipment for fishing. These rights include the right to take a particular quantity, type and proportion of fish, and the right to use a particular type and size of boat and equipment (s21(1)). Where a Management plan terminates, the holder of a SFR has the option of exercising his or her entitlements in another fisheries subject to a management plan; in which case the SFR becomes a SFR Option. A fishing permit, on the other hand, provides for the use of an Australian boat for fishing within a managed area (s32(1)).

Statutory fishing rights are issued by the Australian Fisheries Management Authority (AFMA) (s22) under management plans imposed by AFMA which the holder of the fishing right must comply with (s22(3)(a)). The rights may be granted by auction, tender or ballot or other procedure prescribed by AFMA (s25(b)). Fishing permits are also granted by AFMA, subject to specified conditions being met (s32(5)(a)-(e)).

SFR are renewable if the management plan remains in force until the date specified on the SFR. This is conditional on the holder having committed no offences in contravention of the SFR. The permit ceases to have effect if the holder surrenders the permit by written notice to AFMA (s32(9)).

Duration of Entitlement: The duration of the SFR may be specified (s22(4)(b)). However if not specified, it remains in force until cancelled or surrendered or otherwise ceases to have effect under the Act (s22(4)(c)). The duration of a fishing permit is specified, but must not be greater than five years (s32(6)(c)).

Transferability: A SFR may be transferred provided conditions specified by AFMA in the SFR are met (s22(4)(a)). In addition, the holder of a SFR option also has the option to deal with the option,

⁴ *Bienke and Others v Minister for Primary Industry and Energy and Others* (1996) 135 ALR 128 citing as authority *Harper v Minister for Sea Fisheries and Others* (1989) 168 CLR 314.

⁵ *Gasparinatos v State of Tasmania* (1995) 5 Tas. R. 301 citing *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314.

⁶ *Pennington v McGovern* (1987) 45 SASR 24.

subject to giving a good discharge for any such dealing (s 31J(1)). Except where a fishing permit is stated to be non-transferable, it can be transferred subject to the approval of AFMA (s 32(10)).

Recognition of Dealings in Entitlements: Interests can be created in SFR options (s 31F). Those interests, having the effect of creating, assigning, transmitting or extinguishing an interest must be registered with AFMA (s31F(3)). If the dealing creates a charge over the assets of those registered as having an interest, they must be notified of proposed changes, transfers etc. (s31F(9)). AFMA can only refuse to register an interest when it would be contrary to the proposed management plan, which the option relates to (s31F(7)). The Act is silent with respect to dealings relating to fishing permits.

Payment of Compensation: The Act provides that no compensation is payable because a SFR is cancelled, ceases to have effect or ceases to apply (s22(3)(e)). Likewise with respect to fishing permits (s 32(5)). However if the operation of the Act results in acquisition of property otherwise than on just terms, the Commonwealth must pay reasonable compensation to that person (s167A).

QUEENSLAND

Types of Access Rights: The regulating Act, the *Fisheries Act 1994* classifies entitlements as either a Statutory Fishing Right (Div. 5) (s 21); or a Fishing Permit (Div. 5) (s 32).

An Authority can be a licence, permit, quota or other authority in force under this Act. A licence may relate to fishing, crew, boat, storage or buyers licence. An Authority is renewable if the agency is satisfied the application is in the best interests of the management, use and development of the protection of fisheries resources (s59(1)). Conditions can be imposed on renewal (s61). A permit provides for a variety of activities, including possessing regulated fish, permit the use of boats, or permit the removal or destruction of marine plants (s51(1)).

Duration of Entitlements: The tenure for an Authority is for a term as specified on the Authority (s53(c)).

Transferability: An Authority (other than a permit) is transferable unless otherwise specified under a Regulation (s65(1)). Entitlements stated as not transferable are a fisher licence and crew license, and a licence bearing fish or shell symbols (Cl. 59 *Fisheries Regulations* 1995). A permit is not renewable (s57(1)).

Recognition of Dealings in Entitlements: The holder of an Authority can apply to have a third party interest noted on the Register of authorities (s73(6)).

Payment of Compensation: No compensation is payable if a fisheries agency cancels or suspends an authority (s68(7)), if the agency refuses to issue or renew an authority (s59(2)), or if the agency amends the authority (s63(7)). Likewise no compensation is due amends or repeals a management plan (s4040(1)). However the Act does provide that compensation may be payable if specified under a particular management plan or regulation (s68(8)). Compensation can be awarded for fishery resources or property destroyed in an emergency, if the Chief Executive so decides (s103).

NEW SOUTH WALES

Categorisation: The governing legislation for fisheries in New South Wales, Fisheries Management Act 1994, does not provide an explicit statement with respect to fishing licenses as property. Fishing rights are granted through a Commercial Fishing Licences, Commercial Boat Licences or Shares.

Licenses can also be endorsed for fishing in restricted areas such as lobster fishery (Div. 2). All fishers must have a commercial fishing license. Shares are issued with respect to any fishery declared as a share managed fishery (s42) under a management plan.

No person can take fish for sale from waters to which the Act applies without a commercial fishing licence (s102). In addition, a fisher cannot use a boat for commercial fishing unless it is licensed (s107). A commercial fishing licence can be endorsed to fish in a share managed fishery if the licensee holds enough shares (s68). Licenses are issued by the Minister to an eligible person upon application and meeting the criteria prescribed by the Regulations (s104). Shares are also issued by the Minister when a fishery becomes a share managed fishery (s46(1)).

A commercial fishing licence is renewable, upon application in writing (Cl. 139(1)) at the discretion of the Minister if all the conditions prescribed in the Act are met (Cl. 139(3)). Shares are also renewable after their initial term if there has been no new management plan issued (s73(2)(3)).

Duration: A commercial fishing licence remains in force for a period of one year or such other time as prescribed on the licence (Cl. 139(4)). Shares are issued for an initial period of ten years, calculated from the commencement of the management plan (s73(1)). Shares are renewable for a further ten years after this initial period (s73(2)(3)).

Transferability: The Act states that a commercial fishing licence issued under Part 4 Division 1 is not transferable (s104(4)(d)). In practice, however, commercial fishing licences are transferable as part of the transfer of an existing fishing business (see cl 135 (1) & (2) of regulations, 1995).

A commercial fishing boat licence is transferable in accordance with the regulations. According to cl. 150 the Director may approve an application for transfer made in writing and accompanied by an application fee (cl. 150(1)-(3)). The Director retains the discretion as to whether or not to approve the transfer (cl. 150(4)). The fishing boat licence is able to be transferred even if suspended or in abeyance (cl. 149 (cl. 150(8))).

Shares in a share management fishery are transferable (s71(1)). However, this is subject to any restriction imposed by the management plan for the fishery (s71(4)). A transfer is to be registered under Division 10 (s71(3)).

Recognition of Dealings: All dealings with respect to shares must be registered in the Share Management Fisheries Register (s89). Shares may be held by persons other than the holders of a commercial fishing licence (s49(1)). A share can also be mortgaged and assigned (s71(1)).

Payment of Compensation: Compensation is not provided for in the Act with respect to licenses. Compensation is not payable if a fishery ceases to be restricted (s115). Compensation is only provided for if the Minister cancels shares in a share managed fishery (s44 (3)).

NORTHERN TERRITORY

Types of Access Rights: The relevant legislation is the *Fisheries Act* (as amended by the *Fisheries Amendment Act 1997*). The Act provides for the following categories of entitlements: (a) licences (s11), (b) permits (s16), and (c) special permits (s17).

A licence enables the holder to take any fish to sell, process for sale, for the purposes of aquaculture, or exhibiting any of them for profit, and to use certain equipment (s 10(7)).

A permit entitles the holder to do things that impact on the marine environment, among other things, to release fish, or pollute waters or use an electric fishing device (s 15(1)). A permit may be subject to conditions as the Director considers appropriate or as may otherwise be prescribed (s 16(3)).

A special permit allows fish to be taken and certain fishing gear to be used for the purposes of education, research, sport or recreation in the case of a disabled person who, in the opinion of the Director, would otherwise be unable, by reason of the person's disability, to fish by the methods permitted by this Act; or any other purpose approved by the Minister. All fish or aquatic life taken must be disposed of as the Director directs, or as specified in the permit (s 17(2)).

A licence is renewable (s 12(1)) subject to a charge and conditions as outlined in s 12. The Director must be satisfied that the applicant has a commitment to the fishery in respect of which the applicant is licensed and to the fishing industry generally; that the conditions of the licence have been complied with (s 12(c)); and, that nothing in an instrument of a legislative or administrative character made under the Act prevents it (s 12(d)).

If the applicant is a corporation, an application for renewal of a licence must contain a statement indicating the current nominal and beneficial ownership of the shares in the corporation and each sale or transfer of that ownership since the grant or transfer of the licence to the corporation, or the last renewal of the licence, whichever is the later (s 12(3)). The corporation must also provide statements as to the share structure of the corporation (s 12(4)(b)).

If these criteria are satisfied, the Director must renew the licence on payment of the prescribed fee (if any) (s 12(4)(d)).

Every renewal of a licence is granted on the same terms and conditions as apply to the original licence, unless the terms and conditions have been or are amended pursuant to section 11 (s 12(5)).

The act is silent on the issue of renewing permits and special permits.

Duration of Entitlements: A licence may be granted for a period of not more than 5 financial years on payment of the prescribed fee (if any) for each financial year of the licence (s 10(7)).

A permit may be issued for such period as the Director thinks fit (s 16(3)).

A special permit may have a time specified in the permit (s 17(1)(a)(iii)) but can be revoked at any time by the Director, serving notice in writing on the holder (s 17(3)).

A licence or registration can be suspended or cancelled by the court (s 20(1)), or a licence suspended by Director, if the holder is found guilty of a related offence (s 20(2)).

Transferability: The Act provides for temporary licence transfer (s 12A) or a permanent licence transfer (s 12B).

A licensee may only permit another person to use the licence with the approval of the Director in writing (s 12A(1),(8)), and on payment of the prescribed fee (s 12A(3)). This is subject to the regulations, a fishery management plan or condition of the licence (s 12A(1)). This decision is 'in the Director's absolute discretion' (subject to section 12C) (s 12A(4)). This temporary transfer expires at such date, if any, specified in the agreement or at the end of the financial year in which it was entered into, whichever is the sooner (s 12A(6)). This approval can be revoked at any time on application by either party (s 12A(10)).

A licensee may permanently transfer the licence, on approval of the Director and payment of the prescribed fee (s 12B(2)). The transfer is subject to section 12B, the Regulations or a fishery management plan made in respect of the fishery for which a licence has been granted or a condition of the licence (s 12B(1)). This decision is in the Director's absolute discretion (subject to 12C) (s 12B(3)).

A licence or permit can only be transferred to Australian residents or Australian corporations (s 12C). The act is silent on the transfer of permits except for the above statement in section 12C.

Recognition of Dealings in Entitlements: Section 9 provides for the maintenance of a register to record, among other things, any interests held in a licence, permit or vessel (s 9(1)). Section 9(2) outlines the conditions on which persons may have access to the register.

Payment of Compensation: The Act is silent on the issue of compensation.

SOUTH AUSTRALIA

Types of Access Rights: The relevant legislation considered includes *Fisheries Act (SA)1982; Fisheries (Gulf St. Vincent Prawn Fishery Rationalization) Act (SA) 1987; and Fisheries (Southern Zone Rock Lobster Fishery Rationalization) Act (SA) 1987* The act uses the term 'authority' to refer to a licence, permit, registration or lease provided for by the Act (s 5(1)).

Specifically of interest is the licence (s 34(1)) and registration (s 34(2)). Licence means a fishery licence and registration means registration of a boat by endorsement of a fishery licence, or registration of the master of a boat by endorsement of a fishery licence (s 33).

A licence is required to engage in a fishing activity of a class that constitutes a fishery for the purpose of trade or business (s 34(1)). The Director can impose, vary or revoke conditions for the licence, as set out in s 37.

Registration is required for a boat to be used to engage in a fishing activity for the purpose of trade or business (s 34(2)).

Duration of Entitlements: Licences and Registrations remain in force until the expiration of the term prescribed for licences in respect of the fishery (s 39(1)).

The licence and registration 'run together' so that a licence cancelled or surrendered the registration is automatically cancelled or surrendered (s 39(2)(a)). If a licence is suspended, the registration is also suspended for that period (s 39(2)(b)).

An authority may be cancelled or suspended by the *Minister* if it is shown that the authority was obtained improperly, or, the holder has been convicted of a particular offence (s 57(1)).

An authority may be cancelled or suspended by the *Court* if the holder has been convicted of an offence against the Act (s 56).

The holder of an authority may at any time surrender it to the Director (s 61).

The *Fisheries (Gulf St. Vincent Prawn Fishery Rationalization) Act 1987* allows the Minister to cancel licences until there are no more than 10 licences in force in that fishery (s 5).

The Fisheries Act does not contain a direct provision regarding the renewal of authorities. However, the act does refer to renewal indirectly when it states that any Authority that has been suspended by the minister in accordance with s 57 may be renewed, but remains subject to suspension until the expiration of the period of suspension (s57(3)). And again, any Authority that has been suspended by the court in accordance with s 56 may also be renewed but remains subject to suspension until the expiration of the period of suspension (s 56(8)).

Transferability : Generally , a licence is not transferable. A licence can, however, be transferred if the scheme of management for a fishery allows a licence to be transferred with the consent of the Director (s 38(2)). In the event that a licence is transferred, the registration of the boat may also be transferred (s 38(4)). If a licence is transferable and the holder dies the licence vests in the personal representative of the deceased and forms part of the deceased's estate. However, it cannot be transferred in the course of administration of the estate except with the consent of the Director (s 38(5)).

If the deceased was also registered as master of the boat then, while the licence is vested in the personal representative, the boat can continue to be used for fishing if it is in the charge of a person acting with the consent of the Director (s 38(6)).

If the licence is not transferred within two years (or a further period approved by the Minister) of the death of the licence holder, the licence is suspended, pending such transfer (s 38(7)).

The *Fisheries (Gulf St. Vincent Prawn Fishery Rationalization) Act 1987* permits the transfer of a licence with the consent of the Director. This consent must be given if the criteria prescribed by the regulations are satisfied and the licensee's accrued liabilities by way of surcharge under the Act are paid to the Director (s 4).

Recognition of Dealings in Entitlements: The Director is to keep a register of all authorities granted under the Act (s 65(1)). The Director can make notations on the register that a specified person nominated by the holder of the licence has an interest in the licence (s 65(3)). Where the register includes a notation that the interested parties must consent to the surrender (s 61(2)) or transfer of the licence (s 38(2)(b)).

Payment of Compensation: The *Fisheries Act 1982* is silent on the issue of compensation. However, the *Fisheries (Gulf St. Vincent Prawn Fishery Rationalization) Act 1987* and *Fisheries (Southern Zone Rock Lobster Fishery Rationalization) Act 1987* both establish legislative schemes for the provision of compensation for the cancelled and surrendered licences with respect to the rationalisation of those fisheries.

The *Fisheries (Gulf St. Vincent Prawn Fishery Rationalization) Act 1987* provides for compensation in s 6 in the event that a licence is cancelled by the minister in accordance with the

rationalisation scheme. The amount of compensation is to be determined as outlined in s 6. Under the *Fisheries (Southern Zone Rock Lobster Fishery Rationalization) Act 1987* the amount is to be determined under s 10.

TASMANIA

Types of Access Rights: The governing legislation is the *Living Marine Resources Management Act (Tas) 1995*. The *Living Marine Resources Management Act (Tas) 1995* explicitly says that the State owns all living marine resources present in Tasmanian waters (waters defined by s 5(1)(a)-(c)) (s 9(a)). Further, 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 (s 9(b)).

The act establishes a system of 'licences' and 'permits'. The three categories of licence are the Fishing licence (Pt. 4 Div. 1, s 60), the Marine farming licence (Pt. 4 Div. 2, s 64) and the Fish processing licence (Pt. 4 Div. 3, s. 67). There can be many different classes of fishing licence (s 34).

A Fishing licence authorises the holder to carry out fishing in accordance with the licence (s 61). The licence is subject both to the rules of a management plan applicable to that licence and any condition specified in the licence (s 62(a)-(b)). Generally, a fishing licence allows a person to participate in fishing in state waters and to take fish or use apparatus for the purpose of fishing or take any other action permitted under the licence (s 60(1)(a)-(d)).

A Marine farming licence authorises the holder to carry out marine farming in accordance with the licence (s 65). The licence is subject to marine farming development plan and conditions specified in the licence (s 66(a)-(b)). Generally, it enables a person to carry out marine farming in State waters or to take live fish for that purpose, or operate a fish hatchery or breed, culture or farm fish in inland waters or on land where fish would have ended up in state waters (s 64(1)(a)-(c)).

A Permit allows the holder to take action which would otherwise contravene the Act for the purpose of scientific research, promotion of fishing or fish products, development of fishing technology, educational and community awareness programs, fish stock depletion or enhancement, collection, keeping, breeding, hatching or cultivating rare or endangered fish or sport and recreation purposes that require methods otherwise illegal under the Act due to the holder's disability (s 12(1)(a)-(h)).

A licence holder can apply to the minister for the licence to be renewed (s 81(1)). The minister must renew the licence if the applicant has complied with the conditions of the licence in the previous 5 years, has not been convicted of an offence under the Act which the Minister considers relevant to holding the licence, has not been disqualified from holding the licence, is a fit and proper person, where there are no environmental or resource constraint on doing so and the minister thinks it appropriate (s 81(2)). The licence can only then be renewed on the payment of the prescribed fee (s 81(2)).

Duration of Entitlements: A Licence remains in force for a period not exceeding 10 years, as specified in the licence (s 80(1)). A Permit, on the other hand, remains in force for a period not exceeding 12 months, specified in the permit unless the Minister sooner revokes it (s 16). The Act is silent on the issue of renewing a Permit.

Transferability: The holder of a licence can apply to the Minister to transfer either the licence to another person (s 82(1)(a)) or a quota or entitlement under the licence to another licensee (s 82(1)(b)). The Minister may grant the application for transfer on payment of the prescribed fee (s

82(2)). With respect to entitlements under a licence, rules may be made in relation to the authorisation of the temporary transfer of any entitlement (s 36(g)). A fishing licence can be leased, sub-leased, or lent under with the minister's approval (s 87).

Recognition of Dealings in Entitlements: The Secretary is to keep a register of details relating to grant, renewal, variation, transfer etc. of authorisations (s 298(1)). A person may apply for registration of an interest in a deed of agreement (s 101).

Payment of Compensation: Compensation is not payable to the holder of an authorisation if a management plan is amended or revoked, limitations are prescribed for fishing, there is a reduction in total allowable catch, if the Minister takes any reasonable action under the Act or as a result of any requirement complied with under an order made under section 272 (s 300 (1)) . However, if the Minister takes action, which is not consistent with the purpose of the Act, s 300(1) does not apply (s 300(2)).

VICTORIA

Types of Access Rights: The governing legislation is the *Fisheries Act (Vic) 1995*. The *Fisheries Act (Vic) 1995* explicitly states that the Crown in the right of Victoria *owns* all wild fish and other fauna and flora found in Victorian waters (s 10(1)). The Act provides that property passes: to the holder of licence or permit when taken in accordance with the licence or permit: s 10(2)(a). to any other person when lawfully taken or where no licence or permit is required under the Act for that purpose: s 10(2)(b).

The Act provides for two categories of access rights: 'Licences' and 'Permits'. Licences can be either fishing licences or any category of licence created by the regulations under Clause 3.2 of Schedule 3 (s4).

The main fishing licence is the Access licence (s 38). The regulations may create different classes of access licences and may specify that the holder of an access licence of a particular class can do certain things. Other licences include the aquaculture licence (s43), recreational fishing licence (s 45 (individual), s 46 (group)) and fish receivers licence (s 41).

The main permit is the General permit (s 49). Other permits include the protected aquatic biota permit (s 72) and noxious aquatic species permit (s 81).

An Access licence may enable the holder to take specified fish and / or fishing bait for sale, or use a boat and certain equipment for fishing (s 38(1)(a)-(g)). The Secretary must give a quota notice setting out details of individual quota allocated to the licence (s 65 (1)).

A General permit may authorise the holder to take fish for research, education, fish management, aquaculture, compliance or scientific purposes; to take fish from a developing fishery; to carry out research, exploitation, work or operation for the purpose of developing any fishery or aquaculture; to investigate any species of fish or any fishery or any device; to sell or dispose of any fish obtained under the permit; or to use certain equipment (s 49(2)).

An Access licence is renewable in accordance with s 57 (s 38(6)). The holder must continue to satisfy the eligibility criteria, be a fit and proper person and be actively, substantially and regularly engaged in the activities authorised by the licence. In addition, the holder must show sufficient

cause for renewing the licence. If the Secretary considers these criteria satisfied and the holder has a record of compliance with the Act, the Secretary must renew the licence (s 57(2)-(6)).

A General permit is not renewable. However, the secretary can issue another general permit to a person whose permit is about to expire or a person who has previously held a permit (s 49(6)).

Duration of Entitlements: An Access licence continues in force for up to one year, as specified in the license, unless it is cancelled or suspended in accordance with the Act (s 38(4)-(5)).

A General permit continues in force for up to three years, as specified in the permit, although it may be cancelled at any time without notice (s 38(3),(4),(8)).

Transferability: Fishery licences (of which an Access licence is a specific type) of a particular category or class are not transferable unless the regulations allow (s 50B). If the regulations allow a particular category or class of fishery licence to be transferable, the transfer is dealt with by s 56.

If the regulations allow an Access licence to be transferable when the holder dies the benefit of the license is deemed to be an asset of the estate of the deceased (s 38(7)(a)) The personal representative of the deceased is deemed to be the holder of the licence until it is transferred from the personal representative to an eligible person in accordance with the Act (s 38(7)(b)).

An access licence permits the transfer of quota subject to the approval of the Secretary (s 65(3)).

A General permit is not transferable (s 49(7)).

Recognition of Dealings in Entitlements: A person, not the holder of an access licence, but who has a financial interest in that licence can register details of that financial interests with the secretary (s 59(1)).

The Secretary must notify the holder of a registered financial interest within 21 days of receiving an application to transfer the licence (s 59(3)). The holder can then give his or her approval or disapproval of the proposed transfer (s 59(4)). If the holder disapproves, the Secretary must not transfer the licence (s 59(5)).

If a transferable licence is cancelled by the court the secretary must notify each holder of a registered financial interest in the licence of the cancellation (s 60 (1), (2)).

Payment of Compensation: The Minister may issue directions for licence reduction arrangements and requiring the Secretary to cancel licenses (s 61(1)(b),(c)). If licences are cancelled in this way, compensation *is payable* to the person who held the licence, and any person who held a registered financial interest in the licence at the time it was cancelled (s 63(2)). Compensation is for the financial loss suffered as a natural, direct and reasonable consequence of the cancellation of the licence, in proportion to the extent of their respective interests (s 63(2)). The amount of compensation is to be determined by the Secretary in accordance with the regulations (s 64(4)) and Parts 10 and 11 and section 37 of the *Land Acquisition and Compensation Act 1986*, with necessary modifications also apply as if the claim were a claim under section 37 of that Act (s 64(6)).

Apart from this, no compensation is payable by the Crown to any person for any loss or damage as a result of the enactment of the Act and the repeal of the *Fisheries Act 1968*.

WESTERN AUSTRALIA

Types of Access Rights: The governing legislation are the *Fish Resources Management Act 1994* and the *Fishing and Related Industries Compensations (Marine Reserves) Act 1997*. All Access rights are generally referred to as an 'authorization' which can either be a licence or permit (s 4(1)). In relation to managed fisheries and interim managed fisheries in particular, 'authorization' is used to refer to two particular types of licence and permit: the Managed fishery licence (s 53(a)) and the Interim managed fishery permit (s53(b)). The Act also allows for the issue of an Exclusive licence (s 251).

Generally, a Managed fishery licence and an Interim managed fishery permit authorise a person to engage in fishing or any fishing activity in a managed fishery or interim managed fishery (s 66(2)). A commercial fishing licence or any other licence does not authorise a person to engage in fishing in a managed fishery or interim managed fishery (s 73).

A Managed fishery licence and an Interim managed fishery permit is subject to conditions in the relevant management plan and any conditions specified by the Executive Director in accordance with s 69 (s 69(1)).

An Exclusive licence allows a person to take fish from a specified area of coastal waters and the foreshore above high water-mark (s 251(1)). It can be granted subject to such terms and conditions as the Minister thinks fit (s 251(3)). These conditions can include the period/s which fish can be taken, the type and quantity, the method and fees etc (s 251 (4)).

Both Managed fishery licences and an Interim managed fishery permits are issued by the Executive Director (s 66). An Exclusive licence is issued by the Minister (s 251 (1)).

An application can be made to the Executive Director for the renewal of authorizations generally (s 135). It must be accompanied by the fee prescribed (if any) or specified in the relevant management plan (s 135(1)(b)).

An authorization can be renewed if an application is made within 60 days after the day on which it expired (139(1)). In this event, the authorisation is of no effect between the date of expiry and the date of renewal (s 139(2)(b)). The regulations may prescribe, or a management plan may specify an additional fee payable by way of penalty if renewed after the date of expiry (s 139(3)).

In particular, a Managed fishery licence and an Interim managed fishery permit are renewable. If a person applies for a renewal the Executive Director must renew them (subject to s 143 which relates to times when the Executive Director does not have to renew an authorisation generally) (s 68).

However, the Managed fishery licence and Interim managed fishery permit can be renewed subject to such conditions as the Executive Director thinks fit and specifies in the authorisation (s 69(2)).

An Exclusive licence may renewed by the minister from time to time for any further period or periods not exceeding 7 years in each case (s 251(2)(b)). It may be renewed subject to such terms and conditions as the Minister thinks fit (s 251(3)).

Duration of Entitlements: A Managed fisheries licence and Interim managed fishery Permit remains in force for 12 months, or such other period as is specified in the relevant management plan, from the day on which it is granted or renewed (s 68). However, if the management plan is revoked or expires, the authorisation also ceases to have any effect (s70).

A Management plan can specify a period for which a Managed fishery licence and an Interim Managed fishery permit remains in force after it has been granted or renewed under section 58(2)(i).

If a subsequent management plan is determined for that fishery, the fact that a person had a previous Managed fishery licence or Interim managed fishery permit does not confer any right to the grant of another (s 72(1)). However, the Executive Director must take that fact into account when determining whether or not to grant the person another Managed fishery licence or Interim managed fishery permit (s 72(2)).

An Exclusive licence may be granted for an initial term not exceeding 14 years (s 251(2)(a)). The minister may vary or revoke an exclusive licence in the manner provided for in the licence (s 251(5)).

Transferability: An application can be made to the Executive Director for the transfer of any Authorization or part of an entitlement under an Authorization (s 135). It must be accompanied by the fee prescribed (if any) or specified in the relevant management plan (s 135(1)(b)).

The Executive Director must transfer the Authorization or part of the entitlement if the Director is satisfied that the requirements under s 140(2) and (3) are satisfied (s140(1)).

Recognition of Dealings in Entitlements: The *Fish Resources Management Act* recognises 'security interests' in authorizations. A security interest, in relation to an authorisation, is defined as an interest in the authorization (however arising) which secures payment of a debt or other pecuniary obligation or the performance of any other obligation (s4).

The Act establishes a register of authorisations and exemptions (s 126). A holder of an authorization may apply to the Registrar to have noted on the register that a specified person has a security interest in the authorization (s 127). Upon application and payment of the prescribed fee (if any), the Registrar must make a notation on the register (s 128) with the details required in s 128(2).

The effect of the registration is that a person with a security interest in an authorization must be notified if the holder is convicted of a prescribed offence, if there is an application for transfer or a partial transfer of the authorization, if the Executive Director proposes to cancel or suspend, or not renew the authorization or, if a fisheries adjustment scheme is established in respect of authorizations of that class (s 130).

Payment of Compensation: The *Fish Resources Management Act 1994* is silent on the issue of compensation except to say that no compensation is payable in respect of anything done or omitted to be done in good faith relating to the register (s 133).

The *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* establishes a scheme for the provision of compensation to holders of leases, licences and permits under the *Fish Resources Management Act 1994* on account of the effect of marine nature reserves and marine parks constituted under the *Conservation and Land Management Act 1984* (CALM). The *Compensation Act* specifies the particular events, which cause an entitlement to compensation, including the CALM Act coming into operation (s 4). The Act states that a person who holds an authorization is entitled to fair compensation for any loss suffered as a result of a relevant event (s 5(1)). Generally, a person is considered to suffer 'loss' if and only if the market value of the authorisation is reduced because an authorization will not be able to be renewed (s 5(2)(a)), or, that the authorisation relates to an area and will only be able to be renewed in respect of part of that area

or another area (s 5(2)(b),(c) or because an area will not be available for commercial fishing after the renewal of the authorization (s 5(2)(e)). However, in the latter case, it is noteworthy that this only applies to a person who obtains a certificate from the Executive Director state that, in the Executive Director's opinion, the history of the authorization shows that the area has been fished under the authorization on a long term and consistent basis (s 5(5)). Section 5 outlines the method for determining the amount of compensation.

Conclusions

In respect of property rights, the following conclusions can be drawn from the review of cases and fisheries legislation.

- Generally, Australian courts have generally acknowledged that various fisheries entitlements in the form of licences are capable of being considered 'property.'
- Fisheries licences are 'capable' of being property, but, as statutory rights, this is entirely dependant on the terms and interpretation of the relevant statute.
- The issue for industry is not so much whether fisheries entitlements constitute property rights in the legal sense, but the extent to which the legislative framework enhances such rights. In this respect, generally, it can be said that current Australian fisheries legislation provides for weaker property rights. The factors contributing to the lack of stronger rights include:
 - the discretionary powers to intervene granted to fisheries administrators;
 - the limitations on transferability of entitlements (generally transferability is subject to the consent of the fisheries administrator);
 - the various Fisheries Acts provide for the suspension or cancellation of entitlements for the commission of specified or unspecified offences;
 - inadequate provisions for the payment of compensation for loss of entitlements;
 - the limited duration of most entitlements (one year in many cases)

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Fishing Rights '99 - Fremantle, Western Australia, 18-19 November 1999.**Title: Rights based fisheries development in Australia: has it stalled?***by***Dr Alistair McIlgorm, Director, Dominion Consulting Pty Ltd, Suite 7&8, 822 Old Princes Highway, NSW 2232. Email: mcilgorm@tradesrv.com.au****Professor Martin Tsamenyi, Director, Centre for Maritime Policy, University of Wollongong, NSW 2522. Email: Martin_Tsamenyi@uow.edu.au****Abstract**

Australia was one of the first countries to adopt limited entry fishery licencing and to subsequently move to more advanced forms of rights based fisheries management implementing Individual Transferable Quotas (ITQs) in numerous, but not the majority of Australian fisheries, in contrast to New Zealand. This paper examines empirical data for 105 managed fisheries in Australia and identifies some features of fisheries managed by ITQs and other rights methods.

It is proposed there are three major grouping in fish rights in Australia being related to fish price, the nature of the species and catching method. ITQs are found to be extensive (22% by gross value) in high value non- trawling fisheries and in low value high quantity fisheries, such as pilchards. The second group is high valued species such as prawns, rock lobster and scallops which are regulated by transferable input controls and have chosen not to go to ITQs for a variety of reasons which need to be clarified. Finally the majority of Australian fishers are in lower priced fisheries, such as estuarine prawns and netting fisheries, in which the original licence has had few improvements in rights in the past twenty years.

There appear to be legislative, administrative and political impediments to further development of fishing rights in Australia. Has fishing rights development slowed down, and perhaps stalled in the different groups? Is it falling short of the hopes of those who conceived of rights based fishing under more autonomous arrangements for industry? We propose it is time to revitalise the investigation of rights and alternative governance arrangements for more sustainable fisheries management in Australia.

Keywords

Rights based fishing; Australia; rights development

Introduction

Australia is huge continent with a mix of fisheries. It is assumed the reader realises the:

- λ Diversity in Australian fisheries – from Antarctic, mid-lat, to the tropics;
- λ Commonwealth Government with 6 States each with autonomous fisheries departments;
- λ 36,000 km of coastline and huge EEZ;
- λ Limited continental shelves, few finfish, but many high value crustaceans;

- Many small producers in estuarine & inshore fisheries;
- Seafood industry is export oriented.

In the 1960's several Australian fisheries moved from open access to become limited entry licenced fisheries. This continued through the 1970's and 1980's by which time most commercial Australian fisheries were managed by limited entry.

In 1980 a conference was held on limited entry licencing in Australia. Meany (1982) reviewed the nature and adequacy of rights in Australian fisheries. Since the debate 20 years ago we have come further than expected, but have made limited progress in codifying rights for the fishing industry in fisheries legislation.

During the 1970's various regulations were added to limited entry criteria primarily to address the rise in effective effort.

In the 1980's the regulated licencing was found to have led to overcapacity and three approaches were taken:

- i) **Unitisation:** Units based on different fishing vessel inputs were applied as a measure of vessel capacity and hence effort.
- ii) **Buy-back and voluntary adjustment regimes:** These were to address the over capacity of fishing vessels which had increased effort in many fisheries.
- iii) **Output regimes:** A change of fisheries management to management regimes based on limiting catch, usually by Individual Transferable Quotas (ITQs).

Different rights and management approaches were being developed in different Australian jurisdictions.

The significant influences on the development of different fishing rights in the 1980's were:

- a) **Legal experience in the implementation of new fisheries management arrangements:** Several decisions were supplied on fishing licences as "proprietary rights" from non fisheries legal cases (Pennington v McGovern; inheritance case; and Kelly v Kelly divorce settlement) in South Australia. Some fishers also took fisheries administrations to court to test their fishing rights (Fitti case, Commonwealth). These test cases became fundamental in subsequent rights development.
- b) **Pressure to go to ITQs:** Fisheries departments came under the influence of "economic rationalism" and the much publicised implementation of ITQs in New Zealand and in the SBT fishery in Australia
- c) **Changing management arrangements:** The statutory authority model was implemented with the formation of the Australian Fisheries Management Authority (AFMA) in 1990.

In the 1990s the following features have been noted:

- i) **Legal issues:** Significant legal challenges were made, particularly in association with the implementation of new ITQ arrangements in fisheries previously under management by input

controls. The statutory fishing right (SFR) emerged at the Commonwealth level where fishing rights were linked to management plans.

ii) New rights based regimes: Several ITQ schemes were introduced with controversy and legal action over wealth reallocation between new and former management regimes. Most states implemented some ITQ regimes with NSW developing the “share management” system, possibly the most advanced rights fishery management system in Australia?

iii) New institutional arrangements: The inclusion of stakeholders in Management Advisory Committees gives them greater participation in the management of fisheries.

iv) Cost recovery: Recovering the costs of fisheries management from industry has led to more involvement in the management process by industry.

In spite of all these developments the fishing industry have access security concerns and debate the quality of fishing rights. Are fishing rights secure? Management and academics have been calling for implementation of output based regimes such as ITQs. This may have left fisheries which do not progress to ITQs with little real rights advancement.

In this paper we will analyse the current state of rights development in Australia and review Australian rights management regimes. This will show which industry sectors have gone to ITQ and which are under other rights regimes. It will also show future rights development needs in Australian fisheries.

Rights development

According to Scott (1988 and 1989) new property rights develop through a process of demand and supply. Demanders seek an increase in the characteristics of their rights (ie duration, transferability, exclusivity, and security (quality of title), also divisibility, flexibility – Scott, 1998 and 1989). Scott notes these historically rights developments have been through:

- informal processes;
- violent means and conquests;
- customary sources and processes;
- judge made rights and;
- government, political, bureaucratic means – legislation.

Scott proposes historically the arena for demanders and suppliers to contest fishery rights development was in:

- Villages and manors where custom was law;
- In conquered and lawless lands;
- In the courts;
- In the legislating organs of government.

In the fisheries case the villages and manors may be analogous to the culture of the fishing industry and conquering to the “new world” of rights development in the ocean. The courts and government refer to the political and legislative fisheries management process.

Demanders

These are parties “that seek relief from the constraints of an existing standard interest” (Scott, 1988) wanting change through combining one or more of its characteristics. The timing of change, the extent of change demanded and amount they are willing to pay for it, are crucial issues (Scott, 1989). The absence of some characteristic has started to cost them more profit or rent than before (Scott, 1989).

The relationship between rent and the need to change rights will be difficult to test empirically as few fisheries have had rent assessments undertaken. Total fishery value may indicate potential rent. In this study average price is taken as potentially the most significant indicator of the existence of rent from the information available. Demanders may also be driven by resource scarcity which may be reflected in the market price of fish.

Suppliers

Scott (1989) suggests these are institutions, persons or groups who can add to or subtract from the characteristics in existing rights. Why do they respond to demands when they do? The extent of the change they provide and the reward they would ask are significant issues in rights development.

In the Australian situation, rights are supplied by the policies of government, political opportunities, the courts and the fisheries administration. Government in Australia has jurisdictional divisions between the State and Commonwealth governments which may impact supply of new rights regimes differing between Commonwealth and State systems.

Management and enforcement costs are also part of the supply equation, as when high the move to make demanders pay these under cost recovery may make the supply of increased rights through ITQs a less attractive pathway. Administration costs also influence supply with ITQs being desired by government, but contested by fishers who face resource fluctuations and uncertainty. Governments may also see rights for fisheries in the Exclusive Economic Zone as being desirable to defend national rights.

In this paper we wish to analyse the progress towards fuller rights in this demand and supply framework using available empirical data.

Analysis – the demand and supply of fuller fishery rights in Australia

The study reviews the data available for 105 fisheries listed in annual reports of all state and Commonwealth Fisheries Departments in Australia for the year 1997-98. This data gives the type of fishery, species taken, licences held, value, volume and average price of product. From knowledge of management arrangements it is possible to work out whether a fishery is managed by ITQs or not. The fisheries are grouped by method and industry sector with the main species being indicated.

In the review all fisheries are under limited entry licencing regimes and the move to ITQ is taken as being an increase in rights characteristics (Scott, 1989). The fisheries management data is analysed in this framework to appraise the rights status of fisheries and attempt to determine the impediments to rights development.

The data

The number of licences and gross revenue of product of fisheries at first sale are reported in Table 1, with production statistics. The data for 1997-98 indicate that the managed Australian fisheries sector, not including pearling or aquaculture or production of fish from fisheries not under management, had a Gross Value of Production (GVP) of \$1.47 billion producing 209,600 tonnes of product. This had a weighted average price of \$7.03 per kilo.

In all these fisheries there are a minimum of 14,585 fishing licences (the statistics on multiple endorsements held are complex). These are fishing rights of different qualities (McIlgorm and Tsamenyi, 1999; and Tsamenyi and McIlgorm, 1999). Some fisheries have gone to output management regimes, usually Individual Transferable Quota. Table 1 also reports ITQs management in Australia as number, value and volume for each production sector.

Table 1: Review of the methods, fisheries licences, production and extent of ITQs in Australian fisheries.

Method	Species/Sector	Number of licences	Value		Tonnes t	Av. price	ITQ by number	%ITQs by no.	%ITQs by value	%ITQs by wt.
			\$m	(1997-98)						
Diving	Abalone	294	181	5,249	34.48	7/7	100%	100%	100%	
Line/LL	Snapper/tuna	2,449	131	18,558	7.08	5/9	56%	59%	61%	
Purse Seine	Pilchards etc	155	33	41,543	0.79	3/7	43%	23%	42%	
Others	Assorted methods	1,460	50	9,150	5.50	5/16	31%	63%	43%	
Pots	Rock Lobster/ Crab	2,656	440	19,539	22.52	6/21	29%	31%	38%	
Trawling	Finfish	2,024	182	59,125	3.08	2/7	29%	36%	54%	
Nets	Scale/fin fish	2,603	64	21,906	2.92	1/21	5%	0%	2%	
Prawn trawl	Prawns	2,944	391	34,547	11.32	0/18	0%	0%	0%	
		14,585	1,473	209,617		29/105	28%	22%	34%	
				WAP	7.03					

Results

ITQs in Australian fisheries

Table 1 reports that 28% of the 105 fisheries have gone to ITQ (including some in progress). These constitute 22% of the total value of production and 34% of the total volume of production.

From the sectoral review:

- i) The Abalone sector is high value, with a high average price and has 100% management by ITQs;
- ii) The longline sector has 56% of fisheries managed by ITQs (tuna and snapper);
- iii) The purse seine sector has 43% of this low value product managed by ITQs.
- iv) The fish trawling sector has 29% by number and 54% by weight (South East Fishery);
- v) Other methods have 31% ITQ with higher value scallop species;
- vi) The Rock lobster and crab potting sectors have 29% of fisheries by number managed by ITQs in this valuable sector.

- vii) Scale fish/net fish have a low average price (<\$10) and minimal ITQ management (5%);
- viii) No Prawn fisheries have ITQ management (0%);

The limited number of fisheries under ITQ management in the Prawn and Rock Lobster sectors contributed to the 22% by value result for the whole nation. It is noteworthy that the Prawn and Rock Lobster sectors are 56% of the total value of Australian fisheries production.

ITQs and fish prices

From earlier discussion our theoretical expectation would be that fisheries with high market price would dominate fisheries managed by ITQs. This is further investigated in Figure 1 which reports the relationship between the market price of fish and individual fisheries under ITQ or non-ITQ management.

Figure 1 confirms that all Abalone and some rock lobster fisheries have gone to ITQ, but also that all prawn, and some rock lobster and scallop fisheries have not. Considering an average price greater than \$20 per kilo there are 12/19 fisheries under ITQ.

In the \$10-20 segment 3 from 20 fisheries are under ITQs, mainly tuna and scallop fisheries. All prawn, some scallop and high value fin fisheries are not under ITQs.

Under \$10 per kilo, 14 from 56 fisheries are under ITQ being tuna, crab, pilchard, salmon and mackerel. Those not under ITQ are finfish, scale fish and estuarine prawn fisheries. Figure 2 reports that the frequency of managed fisheries for different average prices and indicates that lower priced fish have less ITQ management than higher priced species, but that is not to say all high valued species are managed by ITQ.

The scalefish, finfish and estuarine prawn fisheries with product below \$10 per kilo remain almost untouched by ITQ management, with the exception of the high volume purse seine fisheries. These “small fisher” sectors represent a large number of licence holders (estimated >30% nationally), but are generally small fisheries being only 20% of national fisheries gross value of production.

Figure 1: Plot of average price and number of Australian fisheries under ITQ/other rights management

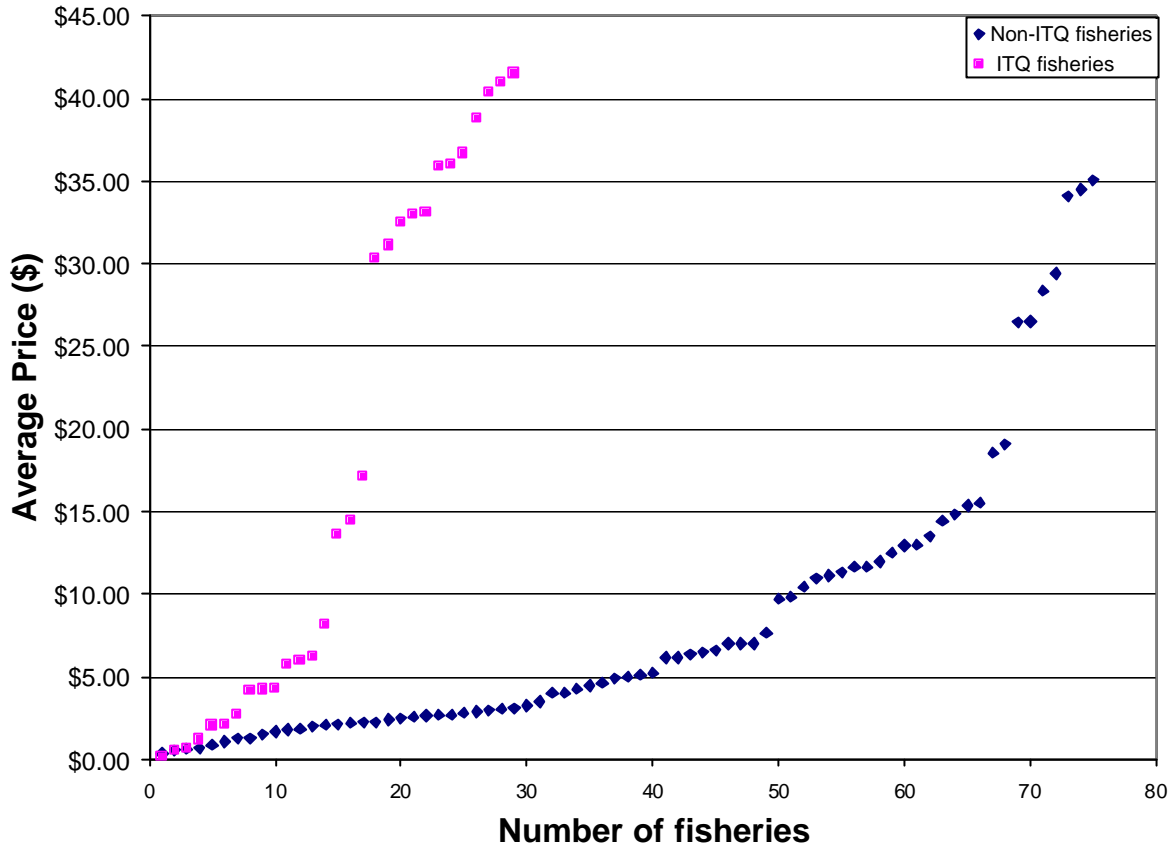
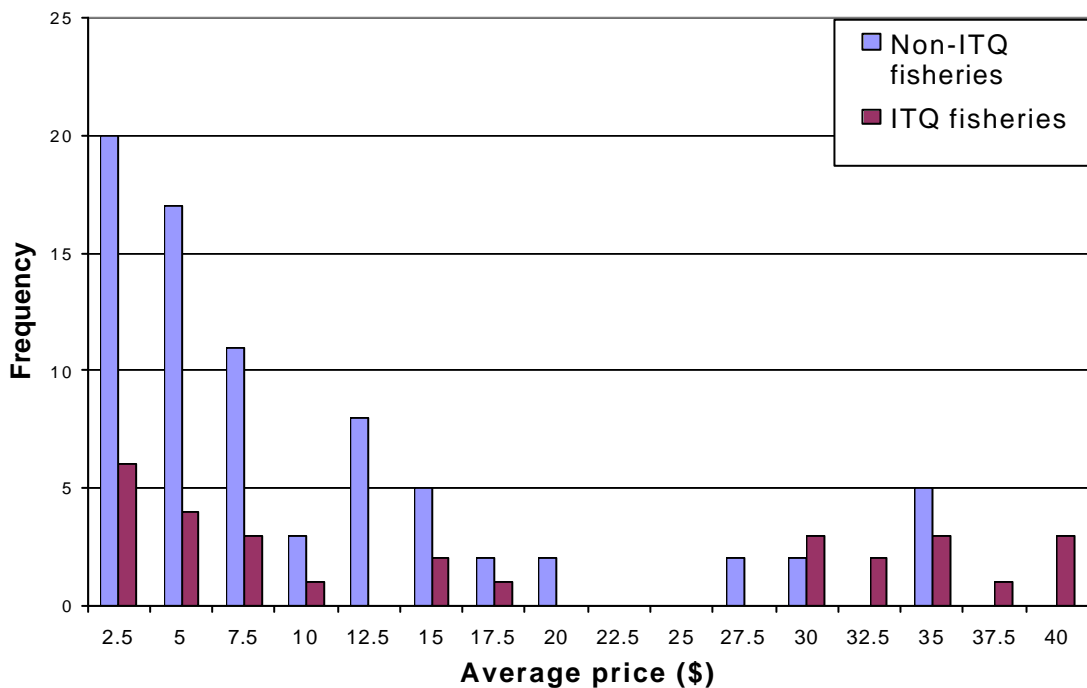


Figure 2: Frequencies of ITQ and other rights managed fisheries with average fish price in Australian fisheries



From the price analysis it appears we have three distinct groups of rights managed fisheries in Australia. These are presented in Box 1 below.

Box1: Proposed price groups of rights managed fisheries

Group I - ITQ managed fisheries (a and b) (25% of all licences)

- a) High Priced /Medium priced - ITQ fisheries, representing 10% of licence numbers
- b) Low priced - ITQs fisheries representing 15% of licence numbers

Group II – ITE managed fisheries (14% of all licences)

High Priced /Medium priced - Other Rights managed fisheries (ITE)

Group III – Other rights (61% of licences)

Low priced - Other rights - some ITEs

From Box 1 it can be seen that the majority of licence holders in Australian fisheries have not had any significant improvement in the status of their fish licence in the last 20 years of management. Rights enhancement for these fisheries may be limited by fears of overcapacity due to licence splitting.

Discussion - Rights development in Australia - Has it stalled?

The international impression generated over the last 20 years is that Australia has moved significantly towards fuller fishing rights regimes. Much attention has been given to ITQs implementation, particularly in the academic literature, yet the extent of ITQs across Australian fisheries is limited (approximately 25% of all licence holders). We can analyse the limitations under Scott's demand and supply framework.

Demanding increased rights

Scott (1988) predicts that fishers will demand increased rights due to some perceived inadequacy with the current rights or a profit opportunity. There is currently a desire among fishers across Australia for fuller access rights and greater investment security. Some of this position may be driven by potential erosion of their current rights by marine park declaration and potential diminution of the resource through pollution. Each group has been identified in Box 1.

Group I - Moving to ITQs

Industry has been divided by the perceived need to move to ITQ management. Strangely the demand for ITQs has generally come from government. The rate of progress towards management by ITQs may have slowed in the 1990s, primarily due to a lack of demand among fishers. The price of fuller rights through ITQs may be restructuring, uncertainty in new allocations, and higher administration, management and enforcement costs with the potential of paying rent charges to the community. There is a significant impasse as industry see the move to ITQs as being driven by philosophy and the administrative and financial expedience of government. Those in ITQs rights regimes have also queried the rights advances incorporated in an ITQ. Rights characteristics of ITQs can be enhanced as illustrated by the NSW share management regime.

Group II - Those managed by ITEs

The prawn and crayfish sector are examples where greater rights are demanded, in forms other than ITQs. This is worthy of further investigation, but is probably explained by the uncertainty of their position under the new regime against the certainty of their current form of management. There may also be a mistrust of government, thought to be implementing rights management as a restructuring and wealth reducing tool.

The Group III – licenced fisheries

The demand for rights are driven by fear of licence removal or reduction in economic return due to marine park declaration or pollution incidents. Similarly they wish their continued access to promote investment security and be more transparent for the banking sector.

Supply of rights - Impediments and restrictions

Scott suggests that institutions such as government and the courts, groups and persons can add or subtract to fishery rights.

ITQs supplied by philosophy?

The Commonwealth government has had a policy in the 1990s to supply fishers with output based rights regimes a “One size fits all” policy. At the state government level there has been less explicit promotion of ITQs, usually recommending it as the “best tool for the job”. The meaning of Scott’s riddle “When is a right not a right?; when it is a means of administration” has not been understood by many fisheries departments. ITQs may be supplied as another form of management, not necessarily as a means of giving improved control and autonomy to industry in order to improve sustainable outcomes.

The push towards ITQs has left some sectors of industry confused about fishing rights. Why can there not be diversity in fishing rights? There is a need to examine ITEs and alternative rights regimes and their efficiency.. ITEs are considered to be "optimal" on some rational basis by those fishers who endorse them and resist ITQs.

Statutory rights

Fishing rights today come from statute law and can be classed as statutory fishing rights. The SFR term has been used in Commonwealth fisheries to describe their mode of rights management in connection with management plans.

One test of such rights developments is the possibility of compensation. At the Commonwealth level there has to have been “acquisition” under the Australian constitution. State jurisdictions vary in their policies to compensation.

Government can supply investment security for industry by making current rights more explicit. A simple increase in a one year duration period to five or ten years, would assist the fisherman when approaching bankers and financiers. Until recently Departments have not increased permit duration due to a lack of incentive to do so and the possible need for restructuring in the future of the management of the fishery.

Issues for rights development

From the previous analysis there are several key questions for rights development in Australia.

1. What rights regimes and options are there?

There needs to be research on the design of rights systems, not just ITQs. For example prawns fishers see ITEs, contracts, and time and performance based agreements as preferable to ITQs in their highly variable fishery. This should be investigated and evaluated in the light of Australian industry experience which has not convinced any prawn fisheries in Australia to move to ITQs.

For the lower priced fisheries it is recommended that ITQs will always be an expensive form of management. Fishers should investigate socially based management alternatives using community structure.

2. Increasing licence duration.

If licences can be increased to a “5 years +” basis at minimal cost, this should be implemented for industry security.

3. Statutory fishing rights

SFRs have potential for rights development based around management plans. They are really a permit with more recognised duration. Are they more than this?

4. Compensation

Compensation should be part of any rights regime. Adjusting rights systems creates winners and losers and hence the need for compensation to usher in the new regime.

5. Which fisheries can go to corporate governance?

Self governance should be considered for fisheries which have more defined rights and no restructuring problems. The NSW Share management scheme is illustrative of this next step, as ITQs have been advanced into legally recognised and compensatable shares of resource access with ten years of duration and renewal. Other self governance initiatives may develop. This is one way that rights also develop.

Discussion of rights development

The analysis revealed different segments in fishing rights development in Australian fisheries. Is Australia moving towards management by ITQs across all species? It does not look likely. At the “top end”, where ITQs predominate, fisheries such as Abalone could consider corporate governance models for management.

Prawn fisheries have major resistance to ITQs, still preferring input regulations and ITEs. The reasons for this may be the variability of the prawn resource, the high cost of quota system management, and possibly wanting to avoid rent under an ITQ regime? Several major Rock Lobster fisheries have a similar perspective. The message from the prawn sector is that ITEs are suited to prawn fishery management.

In our price analysis the low priced finfish / scale fish are the most difficult management cases in each state. There is little economic surplus in these fisheries and many low income fishers. ITQs would be an expensive form of management. This segment need rights incorporated in more socially based management framework.

Impediments to rights development

Impediments to fuller fishing rights development come at different levels and from different sources. Impediments to further ITQ development are the cost of administering these systems and the high social impact of implementing ITQs. Many fishers are not demanding ITQs and their implementation has been a restructuring ploy, rather than a rights development.

The demand for increased fishing rights comes from those seeking security of access and increased duration in their current rights. The supply of fuller rights will come from government and the courts. The administrative annual issuing of licences is a major impediment to further rights development. A simple way to change this is to add to the duration of these licences, making 5, 10 or 15 year licences. The linking of rights from statute (ie any licence) to a management plan under an empowering Fishery Act leads to a recognised statutory fishing right. These are becoming popular as a mechanism to increase industry access security.

A fear among government fisheries managers is that fuller rights may augment fishing capacity and hence create an expensive restructuring requirement and sustainability problems. However some sections of industry are questioning the degree to which their rights have been increased. Has fishing right development stalled? Our analysis indicates it has not progressed uniformly for all sectors of industry.

Conclusion

Rights development has concentrated on ITQs with limited attention to rights development in non ITQ fisheries. ITEs are an established mode of management in Australia's prawn fisheries where operators are not moving to ITQs.

The linking of licences with management plans have assisted in making statutory fishing rights a way to increase industry access security.

There needs to be investigation of the benefits and impediments of further fishing rights development. In the high value fisheries under ITQ management, corporate governance experiments could be implemented; for example in the Abalone sector. In the low priced fisheries there is a simple need for more duration in fishing rights. It is apparent from the study that:

- (I) Industry need real improvements in fishing rights: industry security to gain better resource security;
- (II) A more diverse applied research on fishing rights is required.

Has rights development stalled? It will, if we do not continue to go forward across the full range of Australian fisheries.

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