

UNINTENDED CONSEQUENCES? RIGHTS TO FISH AND THE OWNERSHIP OF WILD FISH

GEORGE KAILIS*

Statutory schemes for fisheries management in Australia introduced between 1989 and 2007 sought to improve outcomes of fisheries management and enhance the ability of governments to raise revenue from fishing activities. A key method in doing so has been the creation of new forms of statutory fishing rights that necessarily affected pre-existing common law public rights to fish. In addition, some Australian state governments have gone further and asserted ownership of all wild fish in their waters. These legislative reforms will be assessed in the context of an apparent shift in the High Court's approach to the interpretation of fisheries and wildlife legislation in 2008. After a review of fishing legislation in Australia, possible unintended consequences of assertions of property and the abrogation of public rights to fish are highlighted. It is concluded that legislative drafters should specify more clearly the intended effects of fisheries legislation on the public right to fish, and the intended effects of provisions on the ownership of wild fish.

I INTRODUCTION

Between 1988 and 2007, all Australian governments managing marine fisheries¹ introduced new and substantially reformed legislative schemes for fisheries management. A key objective of those schemes was to improve the quality of fishing rights, typically by providing for the creation of more clearly defined rights of access under statutory plans of management.² The creation of new forms of fishing rights in this manner has necessarily affected the common law public right to fish. In addition, some states of Australia have sought to emphasise their rights to fisheries by asserting ownership of wild fish in the water, a novel legal concept.³

* B Juris, LLB(Hons), MBA; Professor of Management, The University of Notre Dame, Australia.

¹ The states of Australia, the Commonwealth of Australia (the federal government) and the Northern Territory. The Australian Capital Territory, although self-governing, is land-locked and does not abut a relevant marine jurisdiction.

² See, eg, *Fisheries Management Act 1991* (Cth) Pt 3. For a general discussion of fisheries management plans, see Warwick Gullett, *Fisheries Law in Australia* (LexisNexis Butterworths, 2008), 205–248.

³ *Fisheries Act 1995* (Vic) s 10(1); *Living Marine Resources Management Act 1995* (Tas) s 9(1); *Fisheries Management Act 2007* (SA) s 6(1).

The legal impact of fisheries legislation on the public right to fish depends on whether that legislation has wholly abrogated the public right, or has merely regulated the exercise of the right. After reviewing fisheries legislative schemes introduced since 1988, this article highlights some anomalous consequences of these reforms, including some speculation on the effect of assertions of state ownership of wild fish.

Three key decisions of the High Court of Australia are central to the assessment of legislative schemes enacted since 1988. These are *Harper v Minister for Sea Fisheries*,⁴ *Yanner v Eaton*⁵ and *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust*.⁶ In 1989, *Harper's Case*⁷ confirmed that the public right to fish, which originated in English common law, was part of Australian common law.⁸ In 1999, *Yanner v Eaton*⁹ provided a guide to the appropriate interpretative stance to be taken in relation to natural resource management legislation, albeit in the context of indigenous common law rights. In 2008, the *Blue Mud Bay Case*¹⁰ decided that fisheries legislation in the Northern Territory had wholly abrogated the public right to fish. As will be discussed below, that case undermined the authority of *Yanner v Eaton*.¹¹ The result has been that, since 2008, fisheries legislation is more likely to be judicially interpreted so as to wholly abrogate the public right to fish, and statutory declarations of ownership of fish are more likely to be given a wide effect.

In undertaking this analysis, it is acknowledged that fisheries legislation also affects indigenous rights to fish.¹² This article does not cover this issue in depth, but touches on it where cases such as *Yanner v Eaton*¹³ have influenced the statutory interpretation of natural resource management legislation. The effect of comprehensive fisheries legislation on public rights is, however, different to the effect of such legislation on native title. It is well accepted that indigenous rights do not revive when an extinguishing event has passed.¹⁴ Public rights to fish are however abrogated, not extinguished by legislation, and *may* revive once an abrogatory event has passed. The potential for public rights to revive is beyond the scope of this paper, but it is relevant to note that the public right is not referred to as having been extinguished in the *Blue Mud Bay Case*.¹⁵

⁴ (1989) 168 CLR 314 ('*Harper's Case*').

⁵ (1999) 201 CLR 351.

⁶ (2008) 236 CLR 24 ('*Blue Mud Bay Case*').

⁷ Public rights to fish 'were effectively ignored by Australian law until they were resuscitated in a public law context in *Harper*': *Gumana v Northern Territory* (2005) 141 FCR 457, 480 (Selway J).

⁸ (1989) 168 CLR 314.

⁹ (1999) 201 CLR 351.

¹⁰ (2008) 236 CLR 24.

¹¹ (1999) 201 CLR 351.

¹² As in *Dietman v Karpany* [2012] SASCF 53 (11 May 2012). The relationship between indigenous common law rights as protected and extended by the *Native Title Act 1993* (Cth) and the public right to fish was considered by the High Court of Australia in *Commonwealth v Yarmirr* (2001) 208 CLR 1. See generally: Richard Bartlett, *Native Title in Australia* (Butterworths, 2004); Gullett, above n 2.

¹³ (1999) 201 CLR 351.

¹⁴ *Fejo v Northern Territory* (1998) 195 CLR 96.

¹⁵ (2008) 236 CLR 24; Nor is the right referred to as having been extinguished in the cases leading up to it: *Gumana v Northern Territory* (2005) 141 FCR 457; *Gumana v Northern Territory* (2007) 158 FCR 349.

II NEW DIRECTIONS IN FISHERIES MANAGEMENT

A *Rights Based Approach to Fishing*

The right of the public to fish in the sea and tidal waters and access areas between the high and low tides is an ancient common law right.¹⁶ The origins of the right have been variously ascribed to the Magna Carta,¹⁷ a presumed past exercise of the rights of the Crown in favour of the public¹⁸ and the responsibility of the Crown to generally protect the interests and rights of its subjects.¹⁹ United States authors have claimed that the origins of the public right to fish lie in Roman Civil Codes, compiled in the 500s under the authority of Emperor Justinian.²⁰ Regardless of the ultimate origin of the right, *Harper's Case*²¹ not only confirmed the reception of the right into Australian law, but the leading judgment of Brennan J outlined the key elements of the right that applied under Australian law.²²

In economic terms, the public right to fish is an example of an 'open access' management regime. It provides for a right of access but, in the absence of private rights or regulation, marine and estuarine fisheries are susceptible to overfishing by the public.²³ The problem of over-exploitation of open access resources was highlighted in 1968 in the article by Garrett Hardin titled 'The Tragedy of the Commons'.²⁴ As early as 1882, the English courts recognised that the public's right to fish could lead to the 'destruction' of a fishery.²⁵ The Australian states were early adopters of fishing regulation, such as the setting of legal minimum sizes.²⁶ In the 1980s, a new form of fisheries management was introduced in Australia. This new 'rights-based'²⁷ approach had its genesis in criticisms of the outcomes of fisheries management based on traditional models of marine management.²⁸

¹⁶ Gullett, above n 2, 82–4; Bernard Walrut, 'The Public Rights to Use the Sea and Rivers' (2003) 20 *Environmental Planning Law Journal* 423, 428–9; Tim Bonyhady, *The Law of the Countryside* (Professional Books, 1987), 253.

¹⁷ *AG for British Columbia v AG for Canada* [1914] AC 153, 171.

¹⁸ Stuart Archibald Moore and Hubert Stuart Moore, *The History and Law of Fisheries* (Stevens and Haynes, 1903), 115.

¹⁹ *AG for British Columbia v AG for Canada* [1914] AC 153, 169.

²⁰ See, eg, Robert Haskell Abrams, 'Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in *Glass v. Goeckel*' (2007) 40 *University of Michigan Journal of Law Reform* 861, 877. Such accounts have been criticised in James L Huffman, 'Speaking of Inconvenient Truths — A History of the Public Trust Doctrine' (2008) 18 *Duke Environmental Law and Policy Forum* 1. (1989) 168 CLR 314.

²¹ *Ibid.*, 325–336 (Brennan J).

²² For a general description of problems with open access and the evolution of rights in natural resources towards property rights, see Anthony Scott, *The Evolution of Resource Property Rights* (Oxford University Press, 2008).

²³ Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

²⁴ *Goodman v Mayor of Saltash* (1882) 7 AC 633, 646 (Lord Chancellor Selbourne).

²⁵ Daryl McPhee, *Fisheries Management in Australia* (Federation Press, 2008), 93.

²⁶ Ross Shotton, 'FAO Fisheries Technical Paper 404/2 — Use of Property Rights in Fisheries Management' (Proceedings of FishRights99 Conference, Freemantle Western Australia, 11–19 November 1999); In other jurisdictions there is a reference instead to 'catch share' fisheries instead, for example Christopher Costello, Steven D Gaines and John Lynham, 'Can Catch Shares Prevent Fisheries Collapse?' (2008) 321 *Science* 1678.

²⁷ Alistair McIlgorm, 'Economics in Fisheries Management' in Warwick Gullett, Clive Schofield and Joanna Vince (eds), *Marine Resource Management* (LexisNexis, 2011) 197, 207–209.

Rights-based approaches were a response to defects in the management of the open access nature of fisheries, including over-fishing, a build up of excessive vessel numbers and fishery collapses.²⁹ Separate articles by Gordon³⁰ and Scott³¹ argued that in the absence of private rights, additional fishers will enter a fishery and fishing efforts will rise until it is uneconomical for even more fishers to enter that fishery. Gordon and Scott demonstrated that in the absence of private rights, the result would be an economically inefficient waste of resources. Although these seminal articles were published in the 1950s, it was not until the 1980s that their theoretical insights were reflected in the development of more economically and legally sophisticated mechanisms for fisheries management, particularly in Iceland and New Zealand.

Rights based approaches have been criticised as privatising public resources for private gain,³² and have even been characterised as undermining human rights.³³ They have however now achieved broad recognition for their contribution to improving the outcomes of fisheries management.³⁴

In the 1970s, Australian states such as South Australia³⁵ and Western Australia took partial steps towards rights based management regimes for commercial fisheries³⁶ by adopting increasingly restrictive 'limited entry' schemes.³⁷ These schemes restricted the number of licences in a fishery, typically associated with loosely binding restrictions on vessel and fishing gear type. Even where the number of licences is limited by regulation, fishers still have an economic incentive to increase their share of the catch at the expense of their fellow fishers through investment into bigger boats, better fishing technology or other factors of production.³⁸ Improved fishing rights can lead to a re-orientation of fishers away from wasteful competition over a finite resource and towards more economically beneficial activities.³⁹ In the 1980s, Australian fishery managers⁴⁰ began experimenting with

²⁹ Ibid, 197–8.

³⁰ H Scott Gordon, 'The Economic Theory of a Common Property Resource' (1954) 62 *Journal of Policy and Economics* 124.

³¹ Anthony Scott, 'The Fishery: The Objectives of Sole Ownership' (1955) 63 *Journal of Political Economy* 116.

³² See Daniel W Bromley, 'Abdicating Responsibility: The Deceits of Fishery Policy' (2009) 34 *Fisheries* 280; Quentin R Grafton et al, 'Comment on "Abdicating Responsibility: The Deceits of Fisheries Policy"' (2009) 34 *Fisheries* 291; Michael Harte et al, 'Individual Fishing Quotas and Responsible Fisheries Policy' (2009) 34 *Fisheries* 294.

³³ *The views of the Human Rights Committee on 24 October 2007 in the case Erlingur Sveinn Haraldsson and Arnar Snaevar Sveinsson vs. the Icelandic State (Communication No. 1306/2004).*

³⁴ Costello, Gaines and Lynham, above n 27, 1680.

³⁵ For a historical context see W Zacharin, C Dixon and M Smallridge, 'Towards Self Management for the Western King Prawn Fishery in Spencer Gulf, South Australia' in R Townsend, Ross Shotton and H Uchida, 'Case Studies in Fisheries Self-Governance' (FAO Fisheries Technical Paper, Fisheries and Aquaculture Department, FAO, 2008). This case study tracks the development of a limited entry fishery from the 1970s to the late 2000s.

³⁶ In all Australian marine jurisdictions, commercial fishing activities are managed separately from recreational fisheries.

³⁷ The Western Rock Lobster Fishery, one of Australia's largest, only converted to a full quota based scheme in 2009: Department of Fisheries (WA), 'Licensing and Allocation under a New Management Plan for the West Coast Rock Lobster Fishery: A Discussion Paper' (Discussion Paper, Department of Fisheries (WA). 2012) 4–5.

³⁸ McIlgorm, above n 28, 206–7.

³⁹ Quentin R Grafton et al, *Economics for Fisheries Management* (Ashgate, 2006) 130–1.

⁴⁰ At the national level this trend was confirmed in an influential policy paper: Commonwealth of Australia *New Directions for Commonwealth Fisheries Management in the 1990s* (Australian Government Public Service, 1989).

management schemes that created tradeable rights, giving fishers a specific share of the expected catch of a fishery. In Australia, where a fisher has an interest in a specified share of a catch, the fishery is typically described as a 'quota' managed fishery.⁴¹

B *Judicial Recognition of New Statutory Forms*

In 1989 the High Court considered the legal effects of a statutory scheme introduced to implement rights-based management. Although limited entry schemes can be characterised as a form of regulation of the public right to fish, the more comprehensive a statutory scheme becomes, the harder it is to classify it as merely regulatory in nature. In *Harper's Case*,⁴² the Court recognised that, in reality, the public right to fish abalone in Tasmania had not merely been regulated, but had been wholly abrogated and replaced with new statutory rights for both recreational and commercial fishers.

The dispute in *Harper's Case*⁴³ centred on the introduction of a quota scheme for the Tasmanian commercial fishery for wild abalone. The scheme was established by regulation under the *Fisheries Act 1957* (Tas).⁴⁴ Contemporaneously with the introduction of the quota scheme in the mid and late 1980s, there was a substantial increase in the market price of abalone. The effect was an increase in profitability of commercial abalone fishing and substantial increases in the value of commercial abalone licences. Complaints followed that the result was the enrichment of a small number of fishers to the detriment of the public.⁴⁵ The Tasmanian government responded to community concern and to the prospect of a new source of revenue by substantially raising the fees it levied on the commercial abalone fishery.⁴⁶ Commercial quota holders challenged those fee increases on the basis that they constituted a state excise duty that was invalid under s 90 of the *Australian Constitution*. The principal arguments put to the High Court focused on whether or not the State of Tasmania 'owned' wild uncaught abalone in the sea.⁴⁷ The relevance of this point was that if Tasmania owned wild abalone in the water, then any licence fees charged could be classified as a royalty for use of state property, and would not be classified as an excise on the production of fish. The licence fees would not then fall foul of s 90 of the *Australian Constitution*.

⁴¹ See, eg, *ibid*.

⁴² (1989) 168 CLR 314.

⁴³ *Ibid*.

⁴⁴ The relevant regulatory history is summarised in the leading judgement: *ibid* 326–8 (Brennan J).

⁴⁵ 'Abalone Licence Plea', *Hobart Mercury* (Hobart) 11 June 1988, 7.

⁴⁶ See *Harper's Case* (1989) 168 CLR 314, 326–8 (Brennan J).

⁴⁷ *Harper's Case* (1989) 168 CLR 314, 319 submissions of Counsel for the fishing interests; 320–1 (Bale QC) (during argument).

Justice Brennan delivered the leading judgement in *Harper's Case*.⁴⁸ His Honour did not focus on questions of state ownership as put to the Court by the parties, but rather on legislative arrangements between the Commonwealth and Tasmania for the management of fisheries. He held that these arrangements testified to 'the consent of the Crown to the creation of those rights', being rights created under statute.⁴⁹ After noting that the abalone resource was susceptible to over-exploitation, Brennan J concluded that:

The public right of fishing for abalone in State fishing waters is thus abrogated and private statutory rights to take abalone in limited quantities are conferred on the holders of commercial and non-commercial abalone licences. The Regulations thus control the exploitation of a finite resource in order to preserve its existence. They seek to achieve this end by imposing a general prohibition on exploitation followed by the grant of licences for the taking of limited quantities of abalone. The only compensation, if compensation it be, derived by the public for loss of the right of fishing for abalone consists in the amounts required to be paid by holders to obtain abalone licences under the Regulations.⁵⁰

Justice Brennan classified these new statutory rights as being 'analogous to a *profit a prendre*' and characterised licence fees as a 'charge for the acquisition of a right'.⁵¹ His Honour expressed doubt in relation to the claims of ownership by Tasmania of wild abalone,⁵² but he did not ultimately need to express a final opinion on this issue as he had decided that the fees paid by abalone fishers were for new statutory rights, and not for pre-existing rights in fish held by the State.⁵³

The joint reasons provided by Mason CJ, Deane and Gaudron JJ contrasted older forms of fisheries management with the statutory regime created for abalone. They emphasised the role of the state in creating new and exclusive rights, concluding that:

[w]hat was formerly in the public domain is converted into the exclusive and controlled preserve of those who hold licences ... [I]t is an entitlement of a new kind created as part of a system for preserving a limited public natural resource in a society which is coming to recognize that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all content ... [U]nder this licensing system the general public is deprived of the right of unfettered exploitation of the Tasmanian abalone fisheries ...⁵⁴

Although the High Court found that the fees in this instance did not amount to an excise duty, Dawson, McHugh and Toohey JJ warned that access fees might still constitute a duty of excise in some circumstances.⁵⁵ Uncertainty on when a fee might, or might not, be classified as an excise may have encouraged Tasmania to assert ownership of living marine resources in s 9(1) of the *Living Marine Resources Management Act 1995* (Tas). This explanation for the inclusion of s 9 of the Act was raised in parliamentary debate, but it received an equivocal response from the Tasmanian Minister for Fisheries.⁵⁶

⁴⁸ The other judges of the Court recorded their agreement with Brennan J. Ibid 325 (Mason CJ, Deane and Gaudron JJ), 336 (Dawson, Toohey and McHugh JJ).

⁴⁹ Ibid 332 (Brennan J).

⁵⁰ Ibid 335–336.

⁵¹ Ibid.

⁵² Ibid 335.

⁵³ Ibid 336. See also ibid 336–7 (Dawson, Toohey and McHugh JJ).

⁵⁴ Ibid 325 (Mason CJ, Deane and Gaudron JJ).

⁵⁵ Even if those fees also served 'the purpose of conserving a natural resource': ibid 336 (Dawson, McHugh and Toohey JJ).

⁵⁶ '[T]he fish belong to the State, to the people of Tasmania': Tasmania, *Parliamentary Debates*, House of Assembly 28 June 1995, 34–79 (Mr Robin Gray, Minister for Primary Industry and Fisheries).

C *The Impact of Indigenous Rights to Fish*

Two aspects of *Harper's Case*⁵⁷ limit the easy application of the High Court's approach to the interpretation of the legislative reforms to fisheries management discussed in this article. The first is the limited extent of the exclusive rights in that case as the statutory scheme in that case related only to the abalone fishery. The second aspect is that fisheries legislation was interpreted in the absence of consideration of indigenous interests.

The judgement in *Harper's Case*⁵⁸ was delivered prior the historic 1992 decision of the High Court in *Mabo v Queensland (No 2)*,⁵⁹ which established the survival of indigenous native title rights under Australian common law. Formal confirmation by the High Court that non-exclusive common law based indigenous rights extended to the sea and coast occurred in 2001 in *Commonwealth v Yarmirr*.⁶⁰

The recognition of common law native title rights prompted a re-consideration by the High Court of the appropriate stance to take when interpreting legislative schemes of natural resource management.⁶¹ The High Court in *Yanner v Eaton*⁶² considered the degree to which indigenous rights to wildlife had survived statutory schemes of regulation and control in Queensland. In this case, the indigenous defendant had been charged with hunting without a permit contrary to the *Fauna Conservation Act 1974* (Qld). Section 54(1) of the Act prohibited hunting unless a person was authorised under the Act. Section 7(1) of the Act provided that all fauna was the 'property' of the Crown and 'under the control of the Fauna Authority'.⁶³ Although these provisions of the Act appeared to create a comprehensive and exclusive licensing scheme, the High Court found that indigenous rights had not been extinguished.

On the issue of the effect of a general prohibition followed by the establishment of a licensing regime, Gleeson CJ, Gaudron, Kirby and Hayne JJ stated that native title rights were not severed by requiring 'a permit to be held to hunt or fish'.⁶⁴ The majority characterised the legislative scheme overall as being one of 'conditional prohibition',⁶⁵ and that indigenous common law rights to hunt had been highly restricted but not extinguished.⁶⁶ The majority

⁵⁷ (1989)168 CLR 314.

⁵⁸ (1989)168 CLR 314.

⁵⁹ (1992) 175 CLR 1.

⁶⁰ (2001) 208 CLR 1; *Mabo v Queensland (No 2)* (1992) 175 CLR 1, did not address indigenous interests in the seas and shores surrounding the Torres Strait Islands; See Bartlett, above n 12, 236 (note 2) for the reasons why this was so.

⁶¹ As seen in a shift in approach by the High Court when considering the same legislation in *Walden v Hensler* (1987) 166 CLR 561 compared to *Yanner v Eaton* (1999) 201 CLR 351. See further discussion below.

⁶² (1999) 201 CLR 351.

⁶³ That Act having been passed before 1975, any protection offered by the *Racial Discrimination Act 1975* (Cth) would not apply: See, *Western Australia v Ward* (2003) 213 CLR 1, 62 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁶⁴ *Yanner v Eaton* (1999) 201 CLR 351, 373 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). Justice Gummow applied a somewhat different test of whether the licensing provisions were 'clearly, plainly and distinctly' inconsistent with indigenous rights, but came to a similar conclusion: at 396.

⁶⁵ *Ibid* 373 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

⁶⁶ *Ibid*.

drew support for their conclusion from s 211 of the *Native Title Act 1993* (Cth).⁶⁷ Section 211 preserved indigenous rights to hunt and fish where a law ‘prohibits or restricts persons from carrying on [hunting and fishing] other than in accordance with a licence’. The majority observed that s 211 assumed that laws of conditional prohibition, such as in this case, did not ‘affect the existence’ of native title rights to hunt and fish.⁶⁸ Following this case, it appeared that only clear prohibitions of universal effect, such as in relation to conservation, would have an extinguishing effect.⁶⁹

On the impact of the statutory assertion of Crown property, Gleeson CJ, Gaudron, Kirby and Hayne JJ found sufficient flexibility in interpretation of the word ‘property’⁷⁰ as used in s7(1) of the Act to allow for the continuation of common law native title rights to hunt and fish. They characterised property as a term that could signify a ‘wide variety of different forms of interest’.⁷¹ They then held that the reference to ‘property’ in the *Fauna Conservation Act 1974* (Qld) should be interpreted as a way of describing the aggregate of State rights over wildlife and that, accordingly, the vesting of ‘property’ under Section 7(1) did not have an extinguishing effect on indigenous rights.⁷² The majority judgment referred with approval to the judgment of Chief Justice Vinson in the US Case of *Toomer v Witsell*,⁷³ who stated that ‘[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource’.⁷⁴

The relevance of *Yanner v Eaton* to fisheries legislation lies in the sceptical eye cast by the majority on the extinguishing effect of legislative provisions that asserted property in, as well as control over, wildlife.⁷⁵ By way of contrast, in *Harper’s Case*,⁷⁶ the outcome was a finding in favour of an abrogation, rather than regulation, of rights. There is nothing necessarily inconsistent with a wildlife licence scheme of general application being interpreted differently to a fishery scheme whose very purpose was to create an ‘exclusive and controlled preserve of those who hold licences’.⁷⁷ The common ground in these two cases lies in the methodology adopted in interpreting the legislation in question.

⁶⁷ That protection however, is limited in scope. Hunting and fishing must be for personal, domestic and non-commercial purposes and the activity must be authorised by indigenous law and custom, *Native Title Act 1993* (Cth) s 211(2)

⁶⁸ *Ibid* 373 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

⁶⁹ Eg, *Western Australia v Ward* (2003) 213 CLR 1; See also, the note to s 211 of the *Native Title Act 1993* (Cth) s 211 stating that ‘In carrying on the class of activity, or gaining the access, the native title holders are subject to laws of general application’.

⁷⁰ In s 7(1) of the then *Fauna Conservation Act 1974* (Qld).

⁷¹ *Yanner v Eaton* (1999) 201 CLR 351, 367 (Gleeson CJ, Gaudron Kirby and Hayne JJ); See also, Gummow J, in similar terms: at 388–9.

⁷² *Ibid*; Justice Callinan did not dispute that regulatory schemes that included a statutory declaration of ownership or licence requirements might preserve indigenous rights. He was of the view however, that the legislative schemes failed to do so in this case. He took as particularly relevant to his conclusions the removal of a previous indigenous exemption to the Act: at 408; See also, the view of McHugh J: at 375.

⁷³ *Ibid* 369 (Gleeson CJ, Gaudron Kirby and Hayne JJ) .

⁷⁴ *Toomer v Witsell* (1948) 334 US 385; As authority for this statement, Vinson CJ referred to Pound, *An Introduction to the Philosophy of Law* (1922): at 402; See also, *Baldwin v Montana Fish and Game Commission* 436 US 371 (1978), and *Hughes v Oklahoma* 441 US 322 (1979) for discussions of the issues raised in *Toomer v Witsell* (1948) 334 US 385.

⁷⁵ *Yanner v Eaton* (1999) 201 CLR 351, 369–71 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

⁷⁶ (1989)168 CLR 314.

⁷⁷ *Harper’s Case* (1989)168 CLR 314, 325 (Mason CJ, and Deane and Gaudron JJ).

In each case, the Court considered the general purpose of the legislative scheme for natural resource management, and then interpreted the words of the relevant act in that context. This broad methodological approach to statutory interpretation, which can be described as a 'text and context' approach,⁷⁸ was not followed by the majority of the High Court in *the Blue Mud Bay Case*,⁷⁹ which focused almost solely on the specific text of the relevant statutory provisions.

The *Blue Mud Bay Case*⁸⁰ resolved a longstanding conflict⁸¹ over public access to the tidal zone⁸² of the Northern Territory. At issue was whether the public right to fish, when combined with the *Fisheries Act 1988* (NT), preserved access by commercial and recreational fishers to the tidal zone covered by fee simple titles issued under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (*LRA*). The Schedules to the *LRA* were explicit in stating that the geographical boundaries of those titles extended down to the low water mark covering the tidal zone.⁸³ At first instance, Selway J held that the public right to fish did allow access to the tidal zone under *LRA* title.⁸⁴ On appeal, the Full Federal Court on appeal held that the legal effect of the *LRA* was to exclude public rights to fish over *LRA* title.⁸⁵

On appeal to the High Court, the majority approached the issues in the dispute in a different order and looked first to whether the provisions of the *Fisheries Act 1988* (NT) had abrogated the public right to fish.⁸⁶ According to the majority, it was not necessary to consider the effect of the *LRA* on the public right to fish, as the *Fisheries Act 1988* (NT) had already wholly abrogated the public right.⁸⁷ It is important to keep in mind that the majority did not resolve the conflict between the public right to fish and indigenous rights under the *LRA*, instead finding that no such conflict existed as the public right to fish had already been wholly abrogated.⁸⁸ The exclusion of recreational and commercial fishers from the tidal zone was an incidental effect of the loss of the public right to fish under the *Fisheries Act 1988* (NT), rather than a consequence of the *LRA*.

⁷⁸ See, eg. *Gumana v Northern Territory* (2007) 158 FCR 349, 373 (French, Finn and Sundberg JJ).

⁷⁹ *Blue Mud Bay Case* (2008) 236 CLR 24, 55–6 (Gleeson CJ, Gummow, Hayne and Crennan JJ).

⁸⁰ *Ibid.* See also, *Gumana v Northern Territory* (2005) 141 FCR 457 (first instance); and *Gumana v Northern Territory* (2007) 158 FCR 349 (appeal to Full Federal Court).

⁸¹ See A E Woodward, 'Commonwealth, Aboriginal Land Rights Commission: *Second Report*' (Report No 2, Aboriginal Land Rights Commission, 1974); See also B W Rowland, 'Examination of the Aboriginal Land Rights (Northern Territory) Act 1976-80' (Report to Minister for Aboriginal Affairs, 1980) .

⁸² The tidal zone in this context means the foreshore when exposed by tides, waters between the high and low water marks, tidal rivers and estuaries.

⁸³ Expert evidence lead by the Northern Territory was that *LRA* title could cover 84 to 88 percent of the Northern Territory Coast; *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2007) HCA Trans 721, [50].

⁸⁴ *Gumana v Northern Territory* (2005) 141 FCR 457, 486 (Selway J).

⁸⁵ *Gumana v Northern Territory* (2007) 158 FCR 349 (French, Finn and Sundberg JJ).

⁸⁶ *Blue Mud Bay Case* (2008) 236 CLR 24, 55–6 (Gleeson CJ, Gummow, Hayne and Crennan JJ). The parties' oral arguments before the Court centred on whether the public right to fish extended over tidal zones granted under the *LRA*: See, *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2007) HCA Trans 721; *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2007) HCA Trans 722.

⁸⁷ *Blue Mud Bay Case* (2008) 236 CLR 24, 55–6 58 (Gleeson CJ, Gummow, Hayne and Crennan JJ).

⁸⁸ *Ibid.* 55.

In assessing the effect of the *Fisheries Act 1988* (NT) on public rights, the majority stated that '[T]he statutory abrogation of a public right may appear not only from express words but by necessary implication from the text and structure of the statute'.⁸⁹ Counsel for the Northern Territory Government and counsel for commercial fishers had each argued that there needed to be evidence of clear intent for legislation to have the effect of abrogating a pre-existing public right,⁹⁰ an orthodox view of authorities relating to public rights such as *Potter v Minahan*.⁹¹ A finding of a *necessary* implication would seem to be sufficient to satisfy a test of clear intent. The real issue was why there was a finding of necessary implication in the first place.

On its face, s 10 of the *Fisheries Act 1988* (NT) appeared to be an example of a conditional prohibition of the type found in *Yanner v Eaton*.⁹² Section 10(1) stated that fishers 'shall not ... take any fish ... unless under and in accordance with a licence'. Section 10(2) substantially limited the effect of s 10(1) on recreational fishers by providing that 'nothing in this section shall apply to the taking of fish ... by a person for subsistence or personal use'. The majority did not explain why the words of the Act led to a finding of a necessary implication rather than the alternative of a conditional prohibition. There was no reference to *Yanner v Eaton*⁹³ by the majority despite it being cited in argument.⁹⁴ Certainly on its face, the *Fisheries Act 1988* (NT) is less comprehensive than the legislation considered in *Yanner v Eaton*.⁹⁵ Under the *Fauna Conservation Act 1974* (Qld), 'property' in wildlife was vested in the Crown.⁹⁶ Furthermore, the requirement to hold a licence was not relieved by broad exceptions similar to those in s 10(2) of the *Fisheries Act 1988* (NT).

In explaining their interpretation of the *Fisheries Act 1988* (NT), the majority did not review the regulatory history of fisheries management in the Northern Territory,⁹⁷ or the objects of the Act. Instead, the majority referred to cases on legislative regulation of prerogatives⁹⁸ of the Crown:

⁸⁹ Although referring here to the 'structure' of the Act, the majority focused almost entirely on the interpretation of s 10(2) of the Act: *ibid* 58.

⁹⁰ *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2007) HCA Trans 721: Mr Bennett 'a statute will not be taken to override common law rights unless it does so with great clarity': at [3360] (Mr Bennett) (in argument); '[An] express or clear intention': at [1700] (Ms Perry) (in argument).

⁹¹ (1908) 7 CLR 277; Although possibly an outdated view on common law rights: See, J J Spigelman, 'Legitimate and Spurious Interpretation' (Lecture delivered at University of Queensland, Brisbane, 12 March 2008)..

⁹² (1999) 201 CLR 351, 373 (Gleeson CJ, Gaudron Kirby and Hayne JJ)

⁹³ (1999) 201 CLR 351.

⁹⁴ *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2007) HCA Trans 722, [6730] (Jackson) (in argument).

⁹⁵ (1999) 201 CLR 351, 373. See above n 61 and accompanying text.

⁹⁶ *Fauna Conservation Act 1974* (Qld) s 7(1) (as at 1999).

⁹⁷ Cf the approach of Mansfield J in *Director of Fisheries (Northern Territory) v Arnhem Land Aboriginal Land Trust* (2000) 170 ALR 1, 15–18 (Mansfield J)

⁹⁸ Prerogatives are remnant rights of the English Crown that can be exercised directly and not by legislation. In Australia such prerogatives must have been received into Australian law and then survived constitutional and legislative changes since reception: See John Goldring, 'The Impact of Statutes on the Royal Prerogative: Australasian Attitudes as to the Rule in *Attorney-General v De Keyser's Royal Hotel Ltd*' (1974) 48 *Australian Law Journal* 434; For a recent case involving the prerogative, see *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 242 CLR 195.

When a prerogative power of the Executive Government is directly regulated by statute, the Executive can no longer rely on the prerogative power but must act in accordance with the statutory scheme laid down by the Parliament ... [W]hether and how a person may take fish or aquatic life in the Northern Territory are questions to be answered by resort to the Act, not any common law public right. The common law public right has been abrogated.⁹⁹

It is possible that the majority had been influenced by the view of Selway J at first instance that the prerogative is the ultimate source of the public right to fish.¹⁰⁰ It is not clear from the reasons provided by the High Court whether the majority was proposing a new general rule relating to ‘necessary implication’, a specific rule relevant to this legislative scheme only, or a rule relevant to fishery management because of an association between the public right to fish and the prerogative. It was possibly a mixture of all of the above. The High Court has commented on how competing canons of statutory interpretation can ‘jostle for acceptance’.¹⁰¹

Although the majority characterised the *Fisheries Act 1988* (NT) as ‘comprehensive statutory regulation’,¹⁰² they also held that licences under that Act did not provide a right of access to the tidal zone under *LRA* title. The majority held that ‘the *Fisheries Act* does not deal with where persons may fish. Rather, the *Fisheries Act* provides for where persons may *not* fish’.¹⁰³ The Act therefore removed a public right of access (albeit a very highly regulated one), but did not replace it with a statutory right of access. The High Court found a substantial, and in this case apparently unintended,¹⁰⁴ impact of abrogation on access. The result was that legislation intended to support the ability of the Northern Territory to develop and manage fisheries,¹⁰⁵ led to a significant reduction in the area in which recreational and commercial fishers could fish, at least without permission from *LRA* title holders.

The majority’s finding that fisheries licences issued under the Act had a limited effect substantially reduced the likelihood that the licensing scheme under the Act may have extinguished native title rights, as well as wholly abrogated the public right to fish.¹⁰⁶ Notwithstanding any differences between extinguishment and abrogation, the test for extinguishment¹⁰⁷ of common law based native title rights has been expressed in terms similar

⁹⁹ *Blue Mud Bay Case* (2008) 236 CLR 24, 58 (Gleeson CJ and Gummow, Hayne and Crennan JJ), citing *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410, 459 (McHugh J); See also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44; *Barton v The Commonwealth* (1974) 131 CLR 477; *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508. ¹⁰⁰ *Gumana v Northern Territory* (2005) 141 FCR 457, 476 (Selway J).

¹⁰¹ *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43, [51] (Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ).

¹⁰² *Blue Mud Bay Case* (2008) 236 CLR 24, 58 (Gleeson CJ and Gummow, Hayne and Crennan JJ).

¹⁰³ *Ibid* 60 (emphasis added).

¹⁰⁴ Particularly in relation to recreational fishing. In the second reading speech introducing this legislation, the Minister instead stressed the increasing importance of recreational fishing to the Northern Territory: Northern Territory, *Parliamentary Debates*, 13 October 1988, 4569–74 (Michael Reed, Minister for Primary Industry and Fisheries).

¹⁰⁵ See, above n 92.

¹⁰⁶ Eg, extinguishment in terrestrial parks in Western Australia in *Western Australia v Ward* (2003) 213 CLR 1.

¹⁰⁷ Eg, ‘The expression “clearly and distinctly” in relation to the required intention emphasises the burden borne by a party seeking to establish the extinguishment of subsisting rights...by necessary implication from the provisions of a statute’: *Wik Peoples v Queensland* (1996) 187 CLR 1, 185 (Gummow J).

to the test claimed for abrogation of the public right.¹⁰⁸ Indeed, counsel for the Northern Territory in the *Blue Mud Bay Case* drew to the High Court's attention the possible implications for native title of the interpretative stance eventually taken up by the majority in their written decision.¹⁰⁹ A regulatory scheme for fisheries management expressed in general terms will need to be 'just right'¹¹⁰ to wholly abrogate the public right without having the potential to extinguish common law native title rights.¹¹¹

The effect of fisheries legislation on native title rights was recently considered by the Supreme Court of South Australia in *Dietman v Karpany*.¹¹² In that case, the majority held that past South Australian regulation of fisheries had been so extensive that they extinguished native title based fishing rights in South Australia.¹¹³ Although the *Blue Mud Bay Case*¹¹⁴ was not directly cited in the majority judgment,¹¹⁵ it was an authority put to the court, and discussed in the minority dissenting judgment of Blue J.¹¹⁶ Leave to appeal to the High Court has been granted and the South Australian decision may well be reversed on appeal. The High Court is, however, generally considered to be reluctant to overrule its own recent decisions.¹¹⁷ Accordingly, even if *Dietman v Karpany*¹¹⁸ is reversed, the decision in *The Blue Mud Bay Case*¹¹⁹ is likely to be distinguished rather than overruled, and so remain an influential case on the abrogation of the public right to fish.

III AUSTRALIAN FISHERIES STATUTES AFTER 1989

A *A Continuum of Approaches*

*Yanner v Eaton*¹²⁰ is an authority for the proposition that licence schemes for natural resource management should generally be characterised as schemes of conditional prohibition. The *Blue Mud Bay Case*,¹²¹ on the other hand, is an authority for the proposition that fisheries management regimes cast in the licence form will wholly abrogate the public right to fish.

¹⁰⁸ See above n 92.

¹⁰⁹ *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2007) HCA Trans 722, [6750]; See also, Graham Hiley, 'Is Native Title as fragile as the Public Right to fish?' (2008) 8(10) *Native Title News* 166; In *Akiba v Queensland* (No 2) [2010] FCA 643, Finn J stated that the tests for common law public rights and indigenous rights were different: at [842]. Justice Finn's judgement was successfully appealed in *Commonwealth v Akiba* [2012] FCAFC 25. A further appeal has been made to the High Court.

¹¹⁰ Following the language of the story of Goldilocks and the Three Bears, just right being like the porridge somewhere between too cold and too hot.

¹¹¹ At least before taking into account the impact of the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth), the provisions of which would need to be considered if legislation was seen as having a potentially extinguishing effect. However, this issue is beyond the scope of this article. [2012] SASCFC 53 (11 May 2012).

¹¹² *Ibid* [35] (Gray J).

¹¹³ (2008) 236 CLR 24.

¹¹⁴ *Dietman v Karpany* [2012] SASCFC 53 (11 May 2012), (Gray J).

¹¹⁵ *Ibid* [80–86] (Blue J).

¹¹⁶ 'In accordance with recent High Court practice, [the High Court] superseded rather than overruled': J J Spigelman, 'Public Law and the Executive' (2010) 34 *Australian Bar Review* 10, 15; See also, Matthew Harding and Ian Malkin, 'Overruling in the High Court of Australia in Common Law Cases' (2010) 34 *Melbourne University Law Review* 519.

¹¹⁷ [2012] SASCFC 53 (11 May 2012).

¹¹⁸ (2008) 236 CLR 24.

¹¹⁹ (1999) 201 CLR 351.

¹²⁰ *Blue Mud Bay Case* (2008) 236 CLR 24

Reconciling these two different approaches to statutory interpretation is problematic. At the very least, broadly worded provisions in natural resource management legislation cannot safely be assumed to be ‘legislative shorthand’¹²² for full powers of management. This leaves the question of what might be relevant factors to the assessment of when a legislative scheme has the effect of abrogation. Even if the weight that the High Court applies to those factors may vary in the future, identification of relevant factors will assist legislative drafters¹²³ who wish to clarify whether their regulatory scheme rests on the regulation of the public right to fish, or instead on the abrogation and replacement of the public right.

In assessing the impact fisheries legislation may have on public rights, three factors appear relevant from the principal cases considered above. Firstly, whether there are assertions of ownership that are inconsistent with the public right to fish. Secondly, whether the legislation is in the form of a general prohibition on fishing, with rights of fishers then being of a statutory nature. Finally, whether there are additional aspects of the legislation that might clarify the effects of the legislative scheme. There is no fixed list of what these additional aspects might be, but statutory rights of access and the treatment of indigenous rights are considered below.

Based on these three factors, the legislative schemes of the states¹²⁴ can be arranged on a continuum of the degree to which they are likely to either abrogate public rights, or regulate but preserve public rights. Victorian legislation is at one end of the continuum, providing an explicit and exclusive statutory base for the rights created. New South Wales’ legislation is at the other end, and is regulatory in nature, preserving the public right to fish, at least for recreational fishers. The other state schemes can be arrayed along that continuum. Discussion of the legislative schemes in the Australian states will be prefaced by comment on Commonwealth fisheries legislation, the structure of which has been influenced by the Commonwealth’s focus on commercial fisheries management.

B Commonwealth Fisheries

The objectives of the *Fisheries Management Act 1991* (Cth) reflect the Commonwealth’s central concern for ‘efficient and cost-effective’ management of fisheries.¹²⁵ The Act is principally concerned with economic outcomes and the management of commercial fisheries.¹²⁶ The Act contains neither an assertion of the ownership of wild fish by the Commonwealth,¹²⁷ nor a general prohibition on fishing without a licence. Commercial fishing without a licence is however an offence under s 95 of the Act. Given s 95, the general public’s

¹²² See, *Toomer v Witsell* (1948) 334 US 385, 402 (Vinson CJ); *Baldwin v Montana Fish and Game Commission* 436 US 371 (1978); *Hughes v Oklahoma* 441 US 322 (1979).

¹²³ Eg, reform of fishing legislation in Western Australia is currently under review: Department of Fisheries (WA), Regulatory Impact Decision Statement: Fisheries and Aquatic Resources Management Bill 2011 (Regulatory Impact Statement, Department of Fisheries (WA), 2012), 2.

¹²⁴ Northern Territory legislation already being considered in the *Blue Mud Bay Case* (2008) 236 CLR 24.

¹²⁵ Section 3(1)(a)

¹²⁶ David Borthwick, ‘Review of Commonwealth Fisheries: Legislation, Policy and Management’ (Department of Agriculture Forestry and Fisheries (Cth), 2012), vi, 9.

¹²⁷ The principal objective of the *Fisheries Management Act 1991* (Cth) in s 3(1)(a) is ‘Fisheries management on behalf of the Commonwealth’.

right to fish commercially has almost certainly been wholly abrogated by the Act. It is theoretically possible for the general public's right to fish commercially to have been wholly abrogated, but for a commercial fisher's public right to fish to continue in some form, albeit subject to extensive regulation. In applying the general interpretative stance in the *Blue Mud Bay Case*¹²⁸ however, a finding of regulation rather than abrogation would need to be supported by clear and explicit words to that effect. The comprehensive nature of the provisions of the *Fisheries Management Act 1991* (Cth) instead supports the contrary proposition, that commercial fishers' rights depend wholly on the Act. For example, under s 17, the Australian Fisheries Management Agency has an obligation to implement plans of a management for all commercial fisheries, unless it determines that one is not needed.¹²⁹ Based on the overall structure of the Act, it so substantially regulates commercial fishing that it is almost certain that all public rights to fish commercially have been wholly abrogated.

The limited coverage in the Act of recreational fishing reflects the Commonwealth Government's focus on commercial fisheries. Most recreational fishing in Australia takes place close to shore and is managed by the states.¹³⁰ Offshore recreational fisheries are typically managed by the states under statutory arrangements agreed with the Commonwealth.¹³¹ There is very limited coverage of recreational fisheries in the provisions of the *Fisheries Management Act 1991* (Cth). The Act lacks a prohibition on recreational fishing without a licence equivalent to that for commercial fishing in s 95. Indeed, s 10(3)(a) of the Act provides that management plans will only apply to recreational fishing where that activity is specifically mentioned. In 2004, amendments to the Act¹³² clarified that recreational charter boat fishing¹³³ was to be classified as recreational fishing. This amendment further restricted the effect of general provisions of management plans on recreational fishers under the Act. Given the above, the *Fisheries Management Act 1991* (Cth) is very unlikely to have wholly abrogated recreational public rights to fish, although in relation to a specific fishery, those rights could be so extensively regulated by a management plan that they would have been abrogated. That the Act was not intended to create a fully comprehensive statutory regime for *all* fishing activities is supported by the lack of reference in the Act to the management of indigenous fishing.¹³⁴

C Victorian Fisheries Legislation

In the *Fisheries Act 1995* (Vic), a declaration of the ownership of wild fish has been combined with broadly worded prohibitions on fishing without a licence (or exemption). The combined effect is almost certain to have wholly abrogated public rights to fish, replacing them with statutory rights under the Act. Section 10(1) *Fisheries Act 1995* (Vic) includes an explicit assertion of Crown 'ownership' in wild fish 'found' in state waters. Gullett has

¹²⁸ (2008) 236 CLR 24.

¹²⁹ *Fisheries Management Act 1991* (Cth) s 17.

¹³⁰ Borthwick, above n 126, 9.

¹³¹ Gullett, above n 2, 251–2. Borthwick, above n 126, 9.

¹³² *Fisheries Legislation Amendment (High Seas Fishing and Other Matters) Act 2004* (Cth).

¹³³ Where the owner of a charter boat takes persons recreational fishing for a fee, it is a commercial activity for the charter boat owner, but a recreational activity for the passengers: See, *Fisheries Management Act 1991* (Cth) s 4.

¹³⁴ A significant exception is in the Torres Strait, where the Commonwealth is involved in the management of a number of commercial and indigenous fisheries under a different and complex legislative framework that takes into account Australia's treaty obligations to Papua New Guinea: See generally, Stuart Kaye, *The Torres Strait* (Martinus Nijhoff, 1997).

suggested that the reference to fish ‘found’ in Victorian waters in s (10)(1) of the *Fisheries Act 1995* (Vic) implies that property only applies to fish located in Victorian waters, avoiding the absurdity of ownership changing as fish move in and out of Victorian waters in an ‘unfound’ state.¹³⁵ If this was indeed the intent of the Act, it is not disclosed in the Explanatory Memorandum to the original Fisheries Bill, which emphasised prior Crown ownership.¹³⁶ The term ‘found’ is an undefined term in the Act, but the structure of s 10 makes it clear that a fish would be ‘found’ some time before actual possession by a fisher, so the support of s 10 for the conclusion that the public right to fish has been necessarily abrogated is not substantially affected.

Section 10(2) further provides that property in fish only ‘passes’ to fishers when taken lawfully under the Act. Section 150 provides for royalties to be levied on fishers, and as noted above in the discussion on *Harper’s Case*,¹³⁷ for a fee to be properly classified as a royalty there must first be state ownership. Indeed, if these provisions on ownership were intended to avoid fees being classified as excise duties, they would likely be ineffective in achieving this purpose unless they wholly abrogated the public right to fish.

That the public right to fish has been wholly abrogated is further supported by comprehensively worded licensing provisions under the Act. Section 36 (1) implements a comprehensive licensing regime for commercial fishing. A recreational licence is also required for marine fisheries under s 44(1).¹³⁸ Both ss 44 and 36 are in the form of a prohibition on the activity, with subsequent authorisation by licence or permit.

The cumulative effect of the provisions of the *Fisheries Act 1995* (Vic) is to create a comprehensive statutory regime, and consequently the abrogation of all public rights to fish.¹³⁹ That the Act was intended to create a truly comprehensive legislative regime is suggested by a lack of a general exemption in the Act for indigenous fishers, coupled with a very limited statutory provision for permits to be issued under s 49(2)(h) for a ‘specified indigenous cultural ceremony’. Indeed, given the assertion of state ownership of marine resources, indigenous rights to Victorian fisheries¹⁴⁰ would likely have been extinguished, and would only have survived the effects of the *Fisheries Act 1995* (Vic) if otherwise protected, for example, by a combination of the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth).

¹³⁵ Gullett, above n 2, 64. Although if fish were located and therefore ‘found’, but not then actually caught and landed, similar problems might still arise.

¹³⁶ ‘Clause 10 specifies the circumstances in which ownership of wild fish and other flora and fauna passes from the Crown to licence holders, permit holders or other persons’: Explanatory Memorandum, Fisheries Bill 1995 (Vic), 1.

¹³⁷ (1989) 168 CLR 314. See above n 46 and accompanying text.

¹³⁸ This was not an original feature of the Act, but included by the *Fisheries Amendment Act 1997* (Vic).

¹³⁹ At least to the extent of the legislative competence of the State. There may be constitutional restrictions on assertions of property in waters outside the limits of the State (generally the low water mark) and where the legal basis of that assertion is based on the Commonwealth and reciprocal state legislation. However, resolution of that question is beyond the scope of this article; See, Gullett, above n 2, 65.

¹⁴⁰ Presuming they have not been otherwise extinguished, which is a real possibility in Victoria. See *Yorta v Yorta* (2002) 214 CLR 422.

Given that the public right to fish has been wholly abrogated, then following the authority of the *Blue Mud Bay Case*,¹⁴¹ any vesting of waters in private individuals would be interpreted free of any common law assumptions in relation to the public right to fish and access for this purpose.¹⁴² Where land or waters are vested in a public authority, access by fishers for the purpose of fishing might depend on the goodwill of that authority, or alternatively specific authority for access might be required. In some circumstances, a fishing licence might be sufficient authorisation of access. Such an implication is more likely to be found in detailed management arrangements for fisheries in a specific area, analogous to the undefined something ‘more’ referred to by the majority in the order granted in the *Blue Mud Bay Case*.¹⁴³ That a fishing licence *might* be capable of providing such authority is suggested by s 50A of the Act, which clarifies that a licence does not of itself authorise access to ‘water authority property’.

D *Tasmanian Legislation*

Tasmanian legislation includes a statement of ownership of living marine resources. Section 9(1) of the *Living Marine Resources Management Act 1995* (Tas) states that ‘all living marine resources ... are owned by the State’. That Act however, is less emphatic in its assertion of ownership than the Victorian Act. For example, the Tasmanian Act does not have an equivalent provision to the statement that wild fish are owned by the ‘Crown in the right of Victoria’,¹⁴⁴ and there is no equivalent provision to s10(2) of the *Fisheries Act 1995*(Vic), which sets out the circumstances when property in fish will pass to fishers.

The provisions of the Tasmanian Act on the prohibition of fishing activity are similar to those found in s 10 of *Fisheries Act 1988* (NT). There is a general prohibition on taking fish without a fishing licence in s 60(1) of the *Living Marine Resources Management Act 1995* (Tas). This general prohibition on taking without a licence is relieved by a wide exemption for recreational fishers in s 60(2)(a),¹⁴⁵ and for Aboriginal fishers in s 60(2)(c). Given the similarity of s 60 to s 10 of the *Fisheries Act 1988* (NT), as considered in the *Blue Mud Bay Case*,¹⁴⁶ the Tasmanian Act will almost certainly have wholly abrogated the public right to fish for both commercial and recreational fishers. Recreational fishers’ rights therefore depend either on the general exemption in s 60(2)(a) of the *Living Marine Resources Management Act 1995* (Tas), or on a statutory management plan issued for a specific fishery. In a similar fashion, it could be argued that s 60(2)(c) concerning Aboriginal access is a statutory right in favour of Aboriginal persons, rather than a preservation of a common law indigenous right.¹⁴⁷

For commercial fisheries, s 32 of the *Living Marine Resources Management Act 1995* (Tas) provides a somewhat circular definition of management plans under the Act, stating that ‘a management plan consists of rules relating to a specified fishery’. The authority of a fishing licence is described in fairly restrictive language in s 63, stating that ‘a fishing licence

¹⁴¹ (2008) 236 CLR 24

¹⁴² Although general public rights of navigation would be unaffected.

¹⁴³ (2008) 236 CLR 24, 67 (Gleeson CJ, Gummow, Hayne and Crennan JJ).

¹⁴⁴ *Fisheries Act 1995* (Vic) s 10(1).

¹⁴⁵ Recreational licences are only required for some high value marine fisheries in Tasmania such as Rock Lobster. See *Fisheries (Rock Lobster) Rules 2011* (Tas) r 10.

¹⁴⁶ (2008) 236 CLR 24.

¹⁴⁷ Subject to any preservation under the *Native Title Act 1993* (Cth), or other legislation overriding the potentially extinguishing effects of the *Living Marine Resources Management Act 1995* (Tas).

authorises the holder of the licence to carry out fishing in accordance with the licence'. On the other hand, Parts 3 and 4 of the Act contain extensive provisions on management plans and quota rights.¹⁴⁸ Even without the authority of the *Blue Mud Bay Case*,¹⁴⁹ the provisions of the Act relating to commercial fishing would likely be sufficiently extensive to have wholly abrogated the public rights of all fishers to fish commercially and recreationally.

In summary, compared to Victoria, the provisions of the Tasmanian Act are less emphatic on ownership, and the requirement to hold a recreational licence is only valid for some fisheries. It is possible that, but for the *Blue Mud Bay Case*,¹⁵⁰ Tasmanian legislation might have been capable of being interpreted as merely regulatory in nature with respect to recreational fishing activities. *Yanner v Eaton*¹⁵¹ would then be authority for reading down the assertion of ownership to mean a general statement of the interests of the state in fisheries management. Nonetheless, a claim as to ownership combined with the similarity of s60 of Act to s10 of the *Fisheries Act 1988* (NT) makes it highly likely that all public rights to fish in Tasmania have been abrogated. Given differences in wording from that in Victorian legislation, whether wild fish are 'owned' by the State of Tasmania in a fashion analogous to private ownership will depend on the degree to which the authority of *Yanner v Eaton*¹⁵² has been weakened on this point.

E Western Australian Legislation

In Western Australia, the objects of the *Fish Resources Management Act 1994* (WA) include in s 3(1) 'to share and conserve ... the State's fish and other aquatic resources ... for the benefit of present and future generations'. The Act however does not include a specific assertion of property by the State in wild fish. For commercial fisheries, Part 6 of the Act sets up a system of management plans and authorisations. Although the Act does not explicitly require that all commercial fishers hold a commercial licence, reg 121 of the *Fish Resource Management Regulations 1995* (WA) does. That regulation provides that all persons who engage in commercial fishing must hold a licence under the Act.¹⁵³ By way of contrast, for recreational fishers, reg 123(1) provides only that a licence must be held for specified activities listed in reg 124. The activities listed in reg 124 are however quite extensive. From 2010, all recreational fishing activities from a boat came under a new licensing regime created under regs 124B–124D. Recreational fishing from a beach with a line however is not listed under reg 124 and so, consequently, a licence is not required.¹⁵⁴ Although there is no general exemption in the Act for Aboriginal fishers, s 6 of the Act provides that indigenous fishers are not required to hold a recreational licence when fishing for non-commercial purposes.

¹⁴⁸ *Living Marine Resources Management Act 1995* (Tas), Pts 3, 4.

¹⁴⁹ (2008) 236 CLR 24.

¹⁵⁰ *Ibid.*

¹⁵¹ (1999) 201 CLR 351.

¹⁵² *Ibid.*

¹⁵³ That this important provision is in the Regulations, rather than Act itself, demonstrates the range of legislative styles in Australia and the difficulty of comparing legislation across jurisdictions.

¹⁵⁴ *Fish Resource Management Regulations 1995* (WA) reg 124.

The Act and Regulations create a comprehensive regime for commercial fishers, almost certainly abrogating the public right to fish of commercial fishers, replacing those rights with a statutory scheme. Section 66 of the Act (on commercial management plans) is expressed in positive terms, authorising a person to undertake an activity, and not merely relieving them of a prohibition on an activity. Section 66(2) states that an 'authorisation may authorise a person... to engage in fishing or any fishing activity of a specified class in a managed fishery or an interim managed fishery'. A new s 73A was added in 1997 to clarify that managed fisheries authorisations were subject to marine reservations for conservation under the *Conservation and Land Management Act 1984* (WA).¹⁵⁵ That this amendment was deemed necessary suggests that its drafters were of the view that authorisations under Part 6 of the *Fish Resources Management Act 1994* (WA) might otherwise provide a statutory right of access.

In relation to recreational fishing, the Act and Regulations create an extensive, but not fully comprehensive, regime. Certainly, the public right to fish commercially has been wholly abrogated by reg 121. Whether regulation of recreational activities is so extensive that the public right to fish recreationally has also been wholly abrogated is less certain. It is a matter of interpretation and judgment when regulation of the public right to fish becomes an abrogation of the right and is replaced by a new scheme.¹⁵⁶ If all recreational fishing activities were licensed under the Regulations to the Act, such a threshold may have been passed in Western Australia. However, it would appear that the recreational activities for which a licence is unnecessary are sufficiently extensive that the public right to fish has not yet been wholly abrogated. This conclusion is all the more likely given that the Act lacks provisions on ownership comparable to the legislation in either Tasmania or Victoria.

In summary, the public right to fish for recreational purposes has been highly regulated, but is unlikely to have been wholly abrogated in Western Australia. It is likely however that a combination of reg 121 and the extensive provisions of the Act concerning licensing and management of commercial fishing, wholly abrogate the public right to fish commercially for both commercial and recreational fishers.

F *New South Wales Fisheries Legislation*

In New South Wales, the objectives section of the *Fisheries Management Act 1994* (NSW) does not contain an express declaration of ownership or assertion of property in wild fish. Section 3(1) merely includes an objective to 'share the fishery resources of the State'. There is no general prohibition of access in the provisions of the Act. Under s 6 of the Act, there is a broad power to define a fishery and declare 'fishery management strategies' for it under Part 1A.¹⁵⁷

All commercial fishing activity is required to be licensed under s 102(1) of the Act. Notwithstanding some differences in wording from the statutory provisions considered in the *Blue Mud Bay Case*,¹⁵⁸ on the authority of that case s 102(1) is likely to have wholly abrogated the public rights to fish commercially for both commercial and recreational fishers.

¹⁵⁵ *Acts Amendment (Marine Reserves) Act 1997* (WA) s 48.

¹⁵⁶ 'The line between regulation and abrogation may be an artificially fine one': *Arnhem Land Aboriginal Land Trust v Director of Fisheries* (2000) 170 ALR 1, 17 (Mansfield J).

¹⁵⁷ Specifically, *Fisheries Management Act 1994* (NSW) ss 7A–7D.

¹⁵⁸ (2008) 236 CLR 24.

This however leads to an anomaly in the Act over commercial access to inland waters. Section 38(1) creates an independent statutory right to fish from boats in inland waters (non-tidal rivers and creeks) for both commercial and recreational fishers. The result is that in New South Wales commercial fishers can rely on a statutory right to access water across private lands in inland waters, but as their public right to fish has been abrogated, there is no comparable right of commercial fishers to access marine and estuarine waters (whether private or otherwise). Section 38(1) suggests that it was either not the original intent of the Act to abrogate the rights of commercial fishers, or alternatively, it was taken for granted that they would have access to marine waters on some other basis. It is possible that, but for the *Blue Mud Bay Case*,¹⁵⁹ s 38(1) would have been interpreted as supporting the implication that the Act regulated, rather than wholly abrogated, the public rights to fish of commercial fishers.

In relation to recreational fishing in New South Wales, Division 5 of the Act creates a comprehensive system of recreational fees. There are significant differences between provisions relating to fees on recreational fishers compared to licence requirements on commercial fishers.¹⁶⁰ For commercial fishers, under s 102 the relevant offence is the taking of fish without a commercial licence. Under the Act, recreational fishing activities in New South Wales are *not* expressed as being conditional on the holding of a licence. For recreational fishers, it is the non-payment of a fee under s 34(J) that is the offence. To clarify, this means that it is not the take by recreational fee evaders that is *prima facie* unlawful, but non-payment of the fee. This difference in legislative approach supports the inference that recreational fishing derives its legality from the public right to fish, rather than the statutory provisions of the Act. That it was the intent of the drafters of the Act to preserve the public right to fish is clear from a note provided in s 3 of the Act. That note both summarises the common law public right to fish and explains that the purpose behind s 38(1) was to extend the rights of fishers by creating a statutory right to fish in inland waters.¹⁶¹ The Act does not expressly preserve indigenous rights, but scant guidance can be drawn from this omission as it is unlikely that indigenous rights have been extinguished by the Act.¹⁶²

Further supporting the inference that the public right to fish has not been wholly abrogated, the Act introduces the concept of 'public water land'. Under s 4(1), where land is vested in the Crown for a public purpose, the Act provides that it is still to be classified as 'public water'. Limited exemptions for exclusive possession of public water land are provided for in Pt 6, Div 3 of the Act. The limited nature of these exemptions indicates that the drafters' intent was to favour public access.

In conclusion, the *Fisheries Management Act 1994* (NSW) implements commercial and recreational fishing management without triggering the complete abrogation of the public right to fish, at least for recreational fishers. Although there are broad provisions in the Act that would authorise the adoption of management schemes for recreational fisheries, given the overall structure of the Act, it seems likely that they regulate but do not wholly abrogate

¹⁵⁹ Ibid.

¹⁶⁰ As compared to Victoria, where the provisions of the *Fisheries Act 1995* (Vic) relating to prohibition and licensing of recreational and commercial fishers are very similarly worded in ss 36(1) and 44(1).

¹⁶¹ *Fisheries Management Act 1994* (NSW) s 3.

¹⁶² See *Mason v Tritton* (1994) 34 NSWLR 572.

the public right to fish.¹⁶³ On the authority of the *Blue Mud Bay Case*¹⁶⁴ however, s 102 not only abrogates the general public's right to fish for commercial gain, it also has the likely effect of wholly abrogating commercial fishers' public rights as well, notwithstanding any anomalies that may arise.

G Other Jurisdictions

Based on the factors identified above, Victoria and New South Wales fisheries legislation represent opposite ends of a continuum of legislative approaches. Tasmanian legislation is broadly similar to that in Victoria, if less clearly comprehensive in nature. Western Australian legislation would fall somewhere in the middle of that continuum. Other state regimes can also be placed on this continuum. In South Australia, the *Fisheries Management Act 2007* (SA) includes an assertion of ownership of wild fish in broadly similar terms to that in Victoria.¹⁶⁵ The Act contains a general prohibition on commercial fishing except by licence,¹⁶⁶ but does not include an equivalent general prohibition on recreational fishing. Due to the lack of comprehensive recreational licensing provisions in the Act, the complete abrogation of public rights is less certain than that in Victoria. If the assertion of ownership of wild fish is interpreted literally, however, the Act is likely to have wholly abrogated all public rights to fish, replacing them with statutory rights or statutory exemptions. Based on the continuum referred to above, the *Fisheries Management Act 2007* (SA) would be classified somewhere between Victoria and Western Australia.

In Queensland the *Fisheries Act 1994* (Qld) refers to the 'community's fish resources' in s 3(1) but the Act does not include a declaration of ownership in wild fish. There is no general prohibition on commercial fishing in the Act itself. However, the *Fisheries Act 1994* (Qld), *Fisheries Regulation 2008* (Qld) and declared management plans¹⁶⁷ work together to limit fishing for commercial purposes to those holding licences under the Act. For example, the *Fisheries Act 1994* (Qld) includes wide provisions for the declaration of 'regulated fish' under s 78 and for setting out 'prescribed waters' under s 79A. Regulation 627 supplements these provisions by limiting the use of boats for commercial fishing activities to licensed commercial fishers.¹⁶⁸ A piecemeal approach to regulation makes a sweeping assessment of the impact on the public right to fish problematic, but it is likely the regulatory scheme in Queensland has abrogated the public right to fish commercially of both recreational and commercial fishers and replaced it with a statutory right to fish commercially. Although the Act provides for the management of recreational fisheries, including the creation of fishery management plans under s 32, there is no general prohibition on recreational fishing, and in practice a recreational licence is only required in limited circumstances.¹⁶⁹ Accordingly, the

¹⁶³ Presuming limited further changes in the law arise from High Court appeals from the Full Federal Court and South Australian Supreme Court: See, *Commonwealth of Australia v Akiba* [2012] FCAFC 25; *Dietman v Karpany* [2012] SASCFC 53 (11 May 2012).

¹⁶⁴ (2008) 136 CLR 24.

¹⁶⁵ *Fisheries Management Act 2007* (SA) s 6(1); This is arguably more extensive than that in Victoria as it refers to all wild fish in South Australian waters, not fish 'found' in those waters as in s 10(1) of the *Fisheries Act 1995* (Vic); See, above n 130.

¹⁶⁶ *Fisheries Management Act 2007* (SA) s 53.

¹⁶⁷ Under Part V of the *Fisheries Act 1994* (Qld).

¹⁶⁸ *Fisheries Regulation 2008* (Qld) r 627.

¹⁶⁹ Department of Agriculture, Forestry and Fisheries, *Recreational Fishing Rules for Queensland — A Brief Guide* (12 July 2012) Queensland Government: Department of Agriculture, Forestry and Fisheries <www.daff.qld.gov.au/28_2981.htm>.

right of the public to fish recreationally is unlikely to have been wholly abrogated. Based on the continuum referred to above, the Queensland Act and Regulations would be classified as lying somewhere between Western Australia and New South Wales, being less restrictive than Western Australia, but without the clarity of intent on public rights and access that exists in New South Wales' legislation.

IV INCIDENTAL CONSEQUENCES

A *Access for the Purpose of Fishing*

Even where the public right to fish has been extensively regulated, it nonetheless provides an underlying legal presumption in favour of access to the sea, foreshore and tidal rivers for the purpose of fishing. Where there are competing *private* interests over such areas, the presumption in favour of the public right to fish is however likely to be given little weight.¹⁷⁰ In reality, private grants of exclusive (fee simple) estates below the high water mark are rare in Australia, so the practical impact of private grants on the public right to fish is limited.¹⁷¹ *LRA* fee simple title to the tidal zone in the Northern Territory is an exception to the usual practice, not an example of it. Given the limited area over which competing private rights exist, access under the public right to fish to areas vested in a government agency is generally likely to be of greater importance to fishers. As noted by Selway J in *Gumana v Northern Territory*¹⁷² there has been extensive vesting of waters for ports and harbours in public authorities in Australia.¹⁷³ The Full Federal Court in *Gumana v Northern Territory* held that old common law assumptions in favour of the preservation of public rights should be applied with caution,¹⁷⁴ and the weight now to be given to those assumptions depends on the context in which they are being considered.¹⁷⁵ Based on the Federal Court's 'text, structure and context' approach to interpretation,¹⁷⁶ it would seem reasonable that the public right to fish would more likely be accorded a substantial weight where land or waters are vested in a public body for a public purpose. The Federal Court's approach to interpretation seems logical, but the degree of authority to be accorded to its view is uncertain given the successful appeal from the Full Federal Court to the High Court in the *Blue Mud Bay Case*.¹⁷⁷ Although the High Court majority did not directly overrule the Full Federal Court on this point, it adopted a very different approach to the issues in the case.¹⁷⁸ A partial reconciliation of the two approaches would see context as important to the application of old common law rules to

¹⁷⁰ *Re MacTiernan; Ex Parte Coogee Coastal Action Coalition* (2005) WAR 138; See also, *Georgeski v Owners Corporation SP* (2004) 62 NSWLR 534

¹⁷¹ A feature taken for granted in Australia, but not in other jurisdictions: See, Richard Hildreth, 'Australian Coastal Management: A North American Perspective' (1992) 9(3) *Environmental Planning and Law Journal* 165.

¹⁷² *Gumana v Northern Territory* (2005) 141 FCR 457, 479–80 (Selway J).

¹⁷³ *Ibid*; See also, *Georgeski v Owners Corporation SP* (2004) 62 NSWLR 534. For example the *Rottneest Island Authority Act 1987* (WA) covers the waters around Rottneest Island as well as the land, with control and management vesting in the authority under s 11(2).

¹⁷⁴ *Gumana v Northern Territory* (2007) 158 FCR 349 (French, Finn and Sundberg JJ).

¹⁷⁵ *Ibid* 374; The Court had already concluded that the public right to fish was excluded by the 'text, structure and context of the *Land Rights Act*': at 372.

¹⁷⁶ *Ibid* 374.

¹⁷⁷ (2008) 236 CLR 24.

¹⁷⁸ See, above n 82 and n 83, and accompanying text.

resolve conflicts between public rights and other rights, but for context to be less important to the preliminary question of whether the public right has been abrogated by fisheries legislation. This reconciliation however, leaves unanswered why context has less relevance to fisheries legislation.

Regardless of the appropriate test for abrogation, where the public right to fish has been wholly abrogated, a legal presumption in favour of access by fishers will have been lost. For example, the old English common law rule that applied to private grants of harbours or oyster leases was that those grants were subject to public rights of fishery and navigation, at least to the extent that those activities were consistent with the purpose of the grant.¹⁷⁹ It may well be true that the public right to fish is now a weak right. However, it still provides a starting point for the judicial interpretation of legislative vesting provisions. If the right has been wholly abrogated, then the public right to fish no longer forms part of the overall context of the legislation under consideration. It is arguable that where the public right to fish has been wholly abrogated by fishing legislation, then fishing and lawful access over such areas requires either specific legislative authority,¹⁸⁰ or the consent of the agency in which that area has been vested. Where access requires both a fisheries licence *and* the consent of another body, there is the potential for conflict over the management of access and of fishing activities.

Given the potential effect of abrogation on access to areas vested for public purposes, there is an advantage in fishing legislation clarifying access arrangements. Fisheries managers in some jurisdictions may already have the power to address access in statutory management plans for fisheries. For example, it is likely that in Western Australia, the relevant act includes such powers. This may resolve some conflict over access to those fisheries managed by means of detailed and highly specific management plans, but it is unlikely to be sufficient to clarify access generally. Recreational fishing management arrangements are typically less detailed than those governing commercial fishing activities. Recreational fishers might only have a generic statutory exemption supporting their right to fish.¹⁸¹ Access conflicts affecting recreational fishers are therefore unlikely to be resolved through the piecemeal development and application of fishery management plans. In relation to recreational access, the approach adopted in New South Wales of declaring areas as 'public water land' has merit.¹⁸²

B *Ownership of Fish and the Problems of Property*

As foreshadowed earlier, assertions of ownership of fish, and especially free-swimming fish, pose novel questions for legal analysis. That neither the Crown nor any other person could own free-swimming fish has been a long accepted legal proposition dating back to Bracton in the 1200s.¹⁸³ There have been only limited exceptions for so-called 'royal fish' such as whales, and that exception is highly unlikely to have made the transition from English law

¹⁷⁹ For eg, *Gann v Free Fishers of Whitstable* (1865) 11 ER 1305; *Mayor of Colchester v Brooke* (1845) 115 ER 518.

¹⁸⁰ For eg, provisions relating to 'public water land' in *Fisheries Management Act 1994* (NSW) s 4.

¹⁸¹ As in *Fisheries Act 1988* (NT) s 10(2).

¹⁸² *Fisheries Management Act 1994* (NSW) s 4(2).

¹⁸³ Samuel Thorne, *Bracton on The Laws and Customs of England II* (Harvard University Press, 1968), 39–40 65; The likely date of compilation is around 1256–1258, with some elements possibly dated as early 1215: See M T Clanchy, *England and its Rulers 1066 – 1272* (Fontana, 1983), 158–61.

into Australian law.¹⁸⁴ In *Fisheries Law in Australia*, Gullett doubted the validity of assertions of state *ownership* below the low water mark,¹⁸⁵ although not whether the states can exercise *jurisdiction* over fishing activities in those waters (under the *Coastal Waters (State Title) Act 1980* (Cth)). Justice Brennan was sceptical about the effectiveness of assertions of state ownership of wild abalone in *Harper's Case*.¹⁸⁶ Even if state declarations were invalid over waters subject to the *Coastal Waters (State Title) Act 1980* (Cth), there is no reason why declarations of ownership would not be valid over waters within the limits (generally above the low water mark) of an Australian state.¹⁸⁷ Potential conceptual problems with state ownership remain. Wild fish might pass out from state ownership as they leave a jurisdiction, re-acquiring that status if they return.¹⁸⁸ In addition, for fisheries partly within and partly outside the limits of a state, the effect would be the creation of further jurisdictional complexity in an area already replete with such.¹⁸⁹

If assertions of property are taken literally, then the effect is to import property concepts into the law of fisheries to a much greater degree than that anticipated by Brennan J in *Harper's Case*, with his analogy to the creation of limited property rights equivalent to a '*profit a prendre*'.¹⁹⁰ There is a significant difference between property in a right to take a fish, and property in the fish itself. Although the licences and permits created under new legislative schemes put in place since the 1980s are property, the courts have so far emphasised the limited statutory nature of the access rights created by such schemes.¹⁹¹ On their face, Victorian and South Australian declarations of ownership of wild fish go beyond governing access and merely being an 'instrument of regulation'.¹⁹² That in Victoria and South Australia property in fish 'passes'¹⁹³ from the State to the holder of a licence, strongly suggests that what is passed is a right more closely equivalent to private rights than a mere assertion of regulatory authority.

As an illustration of the possibilities that might arise from a property-based approach to fisheries management and legislation, a number of states have Criminal Code provisions that provide for statutory defences when property rights are involved.¹⁹⁴ Section 22 of the

¹⁸⁴ *Baldick v Jackson* (1910) 30 NZLR 343. On reception more generally see Bruce Harvey McPherson and Kay Saunders, *The Reception of English Law* (Supreme Court of Queensland Library, 2007).

¹⁸⁵ Gullett, above n 2, 65.

¹⁸⁶ (1989)168 CLR 314, 335 (Brennan J).

¹⁸⁷ But likely not valid in the Northern Territory, given limits on its legislative competence: See, Heather Ahlstrom Coldwell, 'Fee Simple Estate and Footholds In Fishing: The Australian High Court's Formalistic Interpretation Of The Aboriginal Land Rights Act' (2010) 19 *Pacific Rim Law & Policy Journal* 303, 324–6.

¹⁸⁸ *Yanner v Eaton* (1999) 201 CLR 351, 367 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

¹⁸⁹ See, Michael White and Nick Gaskell, 'Australia's Offshore Constitutional Law: Time for Revision?' (2011) 85 *Australian Law Journal* 504, 509; Marine jurisdictional arrangements have been described by one of Australia's most experienced public servants as 'the most 'flaky' the Reviewer has come across in dealing with cross-jurisdictional issues': Borthwick, above n 128, ix-xx.

¹⁹⁰ *Harper's Case* (1989)168 CLR 314, 329 (Brennan J).

¹⁹¹ *Bienke v Minister for Primary Industries and Energy* (1996) 63 FCR 567, 584 (Black CJ, Davies and Sackville JJ).

¹⁹² D E Fisher, *Australian Environmental Law: Norms, Principles and Rules* (Thomson Reuters, 2010), 272.

¹⁹³ *Fisheries Act 1995*(Vic) s 10(2); *Fisheries Management Act 2007* (SA) s 6(2).

¹⁹⁴ A statutory defence of this nature was also raised in the Queensland case of *Walden v Hensler* (1987) 166 CLR 561.

Criminal Code Act 1913 (WA) provides a general statutory defence of the exercise of an ‘honest claim of right’, provided that the offence also relates to ‘property’ (a defence referred to as ‘mistake’¹⁹⁵ in criminal law). Such a defence might become widely applicable if a state ‘owns’ wild fish, as most fisheries offences would involve property of the state. This possibility is somewhat theoretical in nature, but not inherently implausible. In the Western Australian case of *Mueller v Vigilante*, McKechnie J rejected an appeal by the state from a magistrate’s decision to dismiss a charge of the take of undersized fish. His Honour based his decision on the application of s 22 of the *Criminal Code Act 1913* (WA).¹⁹⁶ McKechnie J held that the statutory defence of ‘honest claim of right’ was available to the charges laid under the *Fish Resources Management Act 1994* (WA), as a claim of right based on native title was a right in relation to property.¹⁹⁷ If Western Australia adopted Victorian style legislative provisions relating to state ownership of, and property in fish, further extensions of this defence might be possible, as arguably all legal relationships to fish also become questions of property.

Ownership of wild fish is a legal concept fundamentally at odds with the common law tradition, and consequently, at odds with laws and regulations drafted on assumptions based on that tradition. Further anomalies might be identified in other areas of law, for example in relation to legislation on animal welfare. That they have not yet been identified may be due, in part, to the specialised nature of fisheries law and experts. At the very least, residents of South Australia and Victoria might be surprised to find that shark attacks are carried out by a fish ‘owned’ by their state. There is no clear offsetting advantage to the disadvantage of potential uncertainties raised by state ownership. At best, there is a very remote possibility that state ownership would validate licence fees that would otherwise be constitutionally invalid. Even discounting the doubts raised by Brennan J on arguments put forward on such a basis in *Harper’s Case*,¹⁹⁸ the practical utility of such an approach is severely limited. Not only would licence fees have to be so high as to be incapable of being characterised as access fees, but the resources on which they were assessed would have to be wholly within the limits of a state to avoid great jurisdictional difficulties in application.

V CONCLUSION

A key objective for the introduction of the new fisheries legislative schemes adopted since 1988 was to improve management outcomes through ‘the explicit allocation of access to fish resources between stakeholders’.¹⁹⁹ Uncertainty works against that objective. Australia’s fishers, researchers and managers have identified the establishment of clear allocated rights to fisheries as Australia’s second highest priority for reform.²⁰⁰ When expansive legislative language on ownership is mixed with rights-based management, there is a risk of unanticipated consequences from both the loss of rights of access and the reversal of common law assumptions on the ownership of wild fish. If it is intended to wholly abrogate public

¹⁹⁵ See generally, Thomas Crofts and Kelley Burton, *The Criminal Codes: Commentary and Materials* (Thomson Reuters, 2009), 589–633.

¹⁹⁶ *Mueller v Vigilante* [2007] WASC 259, [43]–[45] (McKechnie J).

¹⁹⁷ *Ibid.*

¹⁹⁸ (1989) 168 CLR 314, 335 (Brennan J).

¹⁹⁹ South Australia, *Parliamentary Debates*, Legislative Council, 22 November 2006, 1121 (G E Gago, Minister for the Environment).

²⁰⁰ Ridge Partners, Deborah Wilson Consulting Services and Fisheries Research and Development Corporation (Australia) *Evaluating Australia’s Marine Capture Fisheries: Final Report to the FRDC’s Resource Working Group* (Ridge Partners, 2009).

rights and replace them with a statutory scheme, then it is desirable that access issues are directly addressed, especially access to waters and lands vested in bodies for public purposes. In relation to legislative assertions of ownership, there is no evidence that the potential utility of such measures outweighs the risks associated with them.
