

# STATUTORY ENTITLEMENTS AS PROPERTY: IMPLICATIONS OF PROPERTY ANALYSIS METHODS FOR EMISSIONS TRADING

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*Legislatures are increasingly developing novel, tradeable statutory entitlements, such as transferable licences or allowances, to respond to a range of social and environmental issues. However, the statutes that establish such entitlements commonly overlook the nature and scope of the legal interests, personal or proprietary, which may exist in relation to an entitlement. As a result, courts are increasingly dealing with issues that stem from the uncertain legal nature of statutory entitlements. Issues that have arisen include whether a statute dealing with property transfers is applicable to a particular statutory entitlement, whether a regulator must pay compensation for withdrawing an entitlement or whether a statutory entitlement is capable of supporting rights that are enforceable against third parties. To determine the legal nature of statutory entitlements, courts undertake a property analysis that involves considering the attributes of a statutory entitlement against particular indicia of property. In this article, we focus on the different conceptions of property and its indicia in the United States, Australia, the United Kingdom and Canada. This comparative analysis illustrates the distinct approaches being adopted to resolve the uncertain legal nature of statutory entitlements. Using emissions trading schemes as a case study, we explore how the different property analyses adopted impact the rights and liabilities of parties as well as the functioning of statutory entitlement schemes.*

## I INTRODUCTION

A predominant notion in economic and environmental governance is that property concepts, specifically property rights, have an essential role in regulatory responses to some of the greatest challenges facing humanity, from

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poverty to sustainable natural resource management to climate change. In particular, the allocation of various statutorily created entitlements to access, use or release a particular resource has increased over the last several decades. These entitlements take various forms including licences, permits, allowances, quotas, and concessions, but collectively they represent one of the main market-based responses to public policy issues in contemporary times.<sup>1</sup>

Underpinning the creation of statutorily created entitlements is the notion that traditional command-and-control measures have been ineffective at preventing ‘the tragedy of the commons’, that is, the theory that commonly-held, openly-accessible resources will be over-exploited by individuals to the disadvantage of the general public.<sup>2</sup> The atmosphere is one example of a commonly held and over-exploited resource.

Arguably, a more economically efficient way of regulating and rationing access to the commons is through administratively allocating permissions to use or release a resource or to engage in a particular activity. Where these permissions, or entitlements, are transferable, the notion is that the market will be able to allocate the entitlements in a way that will incentivise particular behaviour at the lowest cost to the government and to individuals.<sup>3</sup> For instance, facilities may find it more cost effective to purchase additional entitlements rather than implement a new technology, whereas other facilities may incur less costs when reducing their emissions, and so will find it profitable to reduce their emissions and on-sell their entitlements. Meanwhile, the government has comparatively less administrative costs for the same or better outcomes than if it were executing more command-and-control type responses.<sup>4</sup> These cost efficiencies are a key rationale underpinning emissions trading schemes.<sup>5</sup>

Emissions trading schemes provide a salient example of the often-uncertain legal nature of administratively allocated entitlements. Typically, legislatures have not specified, or have inadequately specified, the legal nature of statutory entitlements

- 1 See, eg, Tom Tietenberg, ‘The Tradable-Permits Approach to Protecting the Commons: Lessons for Climate Change’ (2003) 19 *Oxford Review of Economic Policy* 400.
- 2 This perspective stems from the ‘tragedy of commons’ economic theory from Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162 *Science* 1243 where Hardin posits that individuals will act for their own self-interest even where to do so is contrary to the public interest. Accordingly, Hardin’s theory is that individuals will use a shared resource to the extent that it becomes depleted and no longer available to others. Thus, individuals will reduce a resource that is open to all. Thus, private property can prevent the ‘tragedy of the commons’ occurring by allocating interests: Cédric Philibert and Julia Reinaud, ‘Emissions Trading: Taking Stock and Looking Forward’ (Organisation for Economic Co-Operation and Development, COM/ENV/EPOC/IEA/SLT(2004)3, 2004) 10 <<https://www.oecd.org/env/cc/32140134.pdf>>.
- 3 This economic theory is based on the work of R H Coase, ‘The Problem of Social Cost’ (1960) 3 *Journal of Law and Economics* 1. See also Dallas Burtraw et al, ‘Economics of Pollution Trading for So<sub>2</sub> and Nox’ (2005) 30(1) *Annual Review of Environment and Resources* 253.
- 4 This theoretical basis for statutory entitlement stems from the work of Ronald Coase; Coase, above n 3. The Coase Theorem was expanded upon by Thomas D Crocker, ‘The Structuring of Atmospheric Pollution Control Systems’ in Harold Wolozin (ed), *The Economics of Air Pollution* (W W Norton, 1966) 61; J H Dales, *Pollution, Property and Prices: An Essay in Policy-Making and Economics* (University of Toronto Press, 1968); W David Montgomery, ‘Markets in Licenses and Efficient Pollution Control Programs’ (1972) 5 *Journal of Economic Theory* 395.
- 5 Stefan E Weishaar, *Emissions Trading Design: A Critical Overview* (Edward Elgar Publishing, 2014).

and the scope of the rights and obligations that they grant.<sup>6</sup> Statutes that establish entitlements ('enabling Acts') commonly fail to recognise entitlements as capable of supporting proprietary interests, even when creating entitlements that are intended to be transferable and of high commercial value.<sup>7</sup> Emission entitlements are no exception.

As part of a larger project, we have found that the vast majority of state-based emissions trading schemes in force are silent as to the nature of emission entitlements. Instead, most schemes provide a brief, quantified definition of an entitlement as tradeable units equated to a certain quantity of greenhouse gases.<sup>8</sup> A minority of the enabling Acts for emissions trading originating from New Zealand, Canada and the United States of America (US), expressly state that the entitlements created are not property.<sup>9</sup> For instance, Washington's *Clean Air Rule*, which establishes an emissions trading scheme, defines an emission reduction unit as 'an accounting unit representing the emissions reduction of one metric tonne of CO<sub>2</sub>' and that they 'exist solely as an accounting mechanism and are not property rights'.<sup>10</sup>

Regardless of how an enabling Act has characterised a statutory entitlement, market actors tend to treat tradeable statutory entitlements as property like any other tradeable commodity, and courts tend to consider statutory statements to the contrary as inconclusive.<sup>11</sup> Without clarification of the legal nature of such entitlements though, market actors cannot be sure of which rules apply to the transfer, cancellation or theft of entitlements or whether they are able to create

- 6 Maguire and Phillips note: 'Most legislatures have decided to avoid the final determination of whether interests in environmental resources are property-based and instead referred to such interests as rights': Rowena Maguire and Angela Phillips, 'The Role of Property Law in Environmental Management: An Examination of Environmental Markets' (2011) 28 *Environmental and Planning Law Journal* 215, 227. Hepburn has identified the lack of specification in a range of articles. See, eg, Samantha Hepburn, 'Statutory Verification of Water Rights: The "Insuperable" Difficulties of Propertising Water Entitlements' (2010) 19 *Australian Property Law Journal* 1.
- 7 See, eg, Sharon Christensen et al, 'Statutory Licences and Third Party Dealings: Property Analysis v Statutory Interpretation' [2015] *New Zealand Law Review* 585, 587.
- 8 We examined the instruments that established 16 of the 17 emissions trading schemes ('ETSs') in force according to 'Emissions Trading Worldwide' (Status Report, International Carbon Action Partnership (ICAP), 2016 <[https://icapcarbonaction.com/images/StatusReport2016/ICAP\\_Status\\_Report\\_2016\\_Online.pdf](https://icapcarbonaction.com/images/StatusReport2016/ICAP_Status_Report_2016_Online.pdf)>), as well as several ETSs that are under consideration or are scheduled for implementation including those originating from Mexico and Washington. Ukraine and Saitama have ETSs, but these were left out due to a lack of translated documents.
- 9 The *Resource Management Act 1991* (NZ) s 122(1) states that '[a] resource consent is neither real nor personal property'. See also *Crown Minerals Act 1991* (NZ) s 92(1) which is in similar terms. For US examples, see *Clean Air Act of 1970* 42 USC § 7651b, specifying that an SO<sub>2</sub> emissions allowance 'does not constitute a property right'. Cf *Fishery (General) Regulations*, SOR/93-53, s 2 (definition of 'document') and s 16, where the legislature specified that a fishery licence was the property of the Crown and non-transferable.
- 10 *Clean Air Rule*, 173-442 WAC §§ 020, 120.
- 11 In relation to the *Resource Management Act 1991* (NZ) s 122(1), see *Greenshell New Zealand Ltd (in rec) v Tikapa Moana Enterprises Ltd* [2014] NZHC 1474 (27 June 2014), [34], [36]; *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268, 279 [35]. See also *Dodds v Shamer*, 663 A 2d 1318 (Md, 1995).

derivative financial products from entitlements.<sup>12</sup> Thus, entitlements are legally uncertain instruments that nonetheless underlie the various and often highly developed markets for tradeable statutory entitlements.

As disputes have arisen in relation to statutory entitlements, courts have undertaken property analyses to determine the legal nature of the particular entitlement and the scope of rights and liabilities. As Worthington explained: ‘Rights are either specifically categorised as “property,” or they are not. If they are not, then they are merely personal — they are “obligations”’.<sup>13</sup> From this it follows that standard tests tend to focus on whether a particular relationship with an entitlement exemplifies attributes that indicate a proprietary interest. We refer to these standard tests as ‘property analyses’.

Property analyses are shaped by underlying conceptions of property, the relevant statute as well as the particular context, but all involve placing particular weight on the existence or absence of specific attributes, particularly certain rights and duties, in relation to an entitlement.<sup>14</sup> The objective of such analyses is to determine whether a particular legal relationship exhibits characteristics that commonly form proprietary interests.<sup>15</sup> The distinct methodologies employed by courts to determine the legal character of entitlements have, however, lead to significantly different characterisations across jurisdictions. Different legal classifications for tradeable statutory entitlements could have widely applicable implications including on how parties transfer and use entitlements and how regulators modify or cancel entitlements.<sup>16</sup>

In this article, we explore the various factors courts in the US, Australia, the United Kingdom (‘UK’) and Canada have given weight to when conducting a property analysis. The jurisdictions were selected because of their similarities culturally, politically, and historically in relation to property concepts. These similarities suggest that each jurisdiction would adopt relatively comparable characterisations of entitlements, and that inter-linking entitlement markets between these jurisdictions would be especially viable based on the jurisdictions’ pre-existing compatibility.<sup>17</sup> In this article, we aim to identify and evaluate the

12 See, eg, Financial Markets Law Committee, ‘Emission Allowances: Creating Legal Certainty: Legal Assessment of Lacunae in the Legal Framework of the European Emissions Trading Scheme and the Case for Legislative Reform’ (Issue 116, Financial Markets Law Committee, October 2009) 4–5 <<http://www.fmlc.org/uploads/2/6/5/8/26584807/116e.pdf>> where similar observations are made.

13 Sarah Worthington, ‘The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation’ (2007) 42 *Texas International Law Journal* 917, 923.

14 See, eg, *Saulnier v Royal Bank of Canada* [2008] 3 SCR 166 (‘*Saulnier*’).

15 Worthington, above n 13, 923.

16 See, eg, Kelvin F K Low and Jolene Lin, ‘Carbon Credits as EU Like It: Property, Immunity, TragiCO<sub>2</sub>medy?’ (2015) 27 *Journal of Environmental Law* 377.

17 As hypothesised in Erik Haites, ‘Lessons Learned from Linking Emissions Trading Systems: General Principles and Applications’ (Technical Note 7, Partnership for Market Readiness, February 2014) 2 <<https://www.thepmr.org/system/files/documents/PMR%20Technical%20Note%207.pdf>>.

various challenges that arise from the unclear legal characterisation of entitlements for courts, parties and for the achievement of relevant public policy goals.<sup>18</sup>

To structure our analysis, we have developed a conceptual framework in Part II that places the different approaches to property analysis along a continuum marked by conceptualism at one end and instrumentalism at the other. Parts III to VI respectively consider the property analyses undertaken by US, Australian, UK and Canadian courts in the context of statutory entitlements, and apply the methods adopted to emission entitlements as a case study. For this article, we are directly interested in those schemes that create ‘compliance markets’, that is, those entitlement schemes where a government body regulates and originally allocates entitlements.<sup>19</sup> Following this, in Part V, we compare and explore the implications in the context of emission entitlements of unclear statutory characterisation and differing property analysis methodologies.

## II THE INDICIA OF PROPERTY FROM CONCEPTUALISM TO INSTRUMENTALISM

Property is an evolving concept without static or commonly agreed to indicia to definitively establish the existence of a property interest. Moses observed:

For each object, there is a body of literature and case law as to whether or not property rights should be recognised. Reasons offered for or against treating each thing as property are usually *ad hoc* — there is no single set of tests or considerations offered for deciding whether a thing ought to be treated as an object of property that can be applied across contexts.<sup>20</sup>

Despite this, the right to exclude has traditionally been a predominant feature of property and a key point of distinction between property and other legal rights and concepts, particularly contractual rights. Thus, the exclusiveness of a legal relationship in regards to tangible or intangible assets is often considered a key, if not essential, feature of property.<sup>21</sup>

18 The US, Australia and Canada were selected because the Western, liberal and common law construct of property has significantly influenced the development of property and environmental law in other jurisdictions due to, for instance, colonisation and globalisation. Potentially then, broader lessons can be drawn from the discussion here about the future directions of property as a concept and statutory entitlements as a policy mechanism. For a critical review of the influence of Western property constructs and law, see, eg, Wade Mansell, *A Critical Introduction to Law* (Routledge, 4<sup>th</sup> ed, 2015) ch 4.

19 See, eg, Christian Flachslund, Robert Marschinski and Ottmar Edenhofer, ‘Global Trading versus Linking: Architectures for International Emissions Trading’ (2009) 37 *Energy Policy* 1637. Partly, the article was limited to compliance markets because voluntary emissions trading schemes developed by non-state actors have not been the subject of many court cases nor is their characterisation of entitlements always provided.

20 Lyria Bennett Moses, ‘The Applicability of Property Law in New Contexts: From Cells to Cyberspace’ (2008) 30 *Sydney Law Review* 639, 641.

21 See, eg, Thomas W Merrill, ‘Property and the Right to Exclude’ (1998) 77 *Nebraska Law Review* 730, 741.

Over time, however, more abstract conceptions of property have emerged that are less associated with dominion over a thing, and more concerned with the legal relationships between people.<sup>22</sup> Graham describes this as a shift from a ‘person-thing’ model of property to a ‘person-person’ model.<sup>23</sup> Because of the emergence of the person-person model of property, the criteria used to determine the existence of a property interest has become broader and more influenced by context and policy considerations.<sup>24</sup>

Bell and Parchomovsky have grouped the theories of property into ‘conceptualist’ and ‘instrumentalist’ perspectives. Conceptualism is a formalist approach to property that emphasises the *in rem* nature of property. From a conceptualist perspective, property entails rights in a thing enforceable against the world, and gives primacy to the rights to use and transfer the thing and to exclude others from it.<sup>25</sup> In contrast, instrumentalists do not consider property to be unique from *in personam* rights, that is, personal rights that attach to specific persons. Instead, instrumentalists regard property as a variable collection of use rights (‘bundle of sticks’) lacking any fixed or essential content.<sup>26</sup>

Economic discourses regarding property were a key influence on instrumentalism, as economic literature and theories have tended to assume that anything with economic value is something that is capable of supporting property rights.<sup>27</sup> To summarise, Hamilton and Banks described the two poles as follows: ‘For some, property is a category worth analysing and understanding for its own sake (conceptualism); for others, it is merely a means to another end, such as economic efficiency (instrumentalism)’.<sup>28</sup>

Bell and Parchomovsky’s categorisation of property theories is a useful starting point as it arranges the many and varied theoretical debates and evolving conceptions of property into two neat groups. Because of this, however, the instrumentalist and conceptualist frames are necessarily superficial. To engage in some of the complexities of approaches to property analysis, we place conceptualism and instrumentalism at opposite poles of a spectrum with various conceptions regarding the indicia of property placed at different points between the two poles. A continuum based on conceptualism and instrumentalism provides a way to order the various tests put forward for determining proprietary interests in accordance with the underlying conceptions of property.

22 For a more in-depth overview, see Eric R Claeys, ‘Property 101: Is Property a Thing or a Bundle?’ (2009) 32 *Seattle University Law Review* 617.

23 Nicole Graham, *Landscape: Property, Environment, Law* (Routledge, 2011) 138.

24 See, eg, Gregory S Alexander and Eduardo M Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012); Abraham Bell and Gideon Parchomovsky, ‘A Theory of Property’ (2005) 90 *Cornell Law Review* 531.

25 Bell and Parchomovsky, above n 24, 534–6.

26 *Ibid* 535–6.

27 Thomas W Merrill and Henry E Smith, ‘What Happened to Property in Law and Economics?’ (2001) 111 *Yale Law Journal* 357.

28 Jonnette Watson Hamilton and Nigel Bankes, ‘Different Views of the Cathedral: The Literature on Property Law Theory’ in Aileen McHarg et al (eds), *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010) 19, 22.

Towards the conceptualist end of the spectrum, we suggest, are ‘essentialist’ approaches to property analysis, which share with conceptualism an emphasis upon pre-defined and determinative indicia of property.<sup>29</sup> The importance of the right to exclude as an indicium of property is high at this end of the spectrum. In the middle-ground are those ‘bundle of rights’ conceptions of property that value other attributes of property, and do not give the right to exclude any particular weight.

Towards the instrumentalist end of the spectrum we place those approaches that start with the values which property, as an institution, should serve, and then work backwards to determine whether a proprietary interest *should* be recognised. The question becomes, therefore, not whether a relationship has the pre-defined indicia of property, but whether for broader societal purposes a proprietary interest ought to be recognised. We divide the differing interpretations about the ends that property, as an institution, should serve into the ‘Commercial Realities’ and the ‘Social-Obligation’ approaches based on the literature and relevant case law.

## A Essentialism

Essentialism grants the right to exclude a primary role in the conception of property and, as identified by Merrill, it has two main variations: single and multiple-variable.<sup>30</sup> Overall, essentialist approaches to property analyses maintain the distinction, originating from Roman law, between rights *in personam*, that is, personal rights that attach to specific persons generally in the form of contractual arrangements, and rights *in rem*, which are those rights that reside in persons in relation to a thing and are exercisable against an indefinite class of people.<sup>31</sup> Put differently, property rights are *in rem* because they avail against other persons, even those without knowledge of the holder’s rights, while personal rights are ‘right[s] in the behaviour of some person’ and are enforceable against specific individuals.<sup>32</sup>

‘Single-variable essentialism’ holds that the right to exclude is the only indicium of a property interest. This approach stems from Blackstone, who originally positioned the right to exclude as the essential and alone sufficient to support the existence of property in a thing.<sup>33</sup> Jeremy Bentham and other notable legal

29 ‘Essentialism’ was a term used in Merrill, ‘Property and the Right to Exclude’, above n 21, 734.

30 Merrill, ‘Property and the Right to Exclude’, above n 21.

31 See, eg, David Lametti, ‘The Concept of Property: Relations *through* Objects of Social Wealth’ (2003) 53 *University of Toronto Law Journal* 325.

32 See, eg, J E Penner, *The Idea of Property in Law* (Oxford University Press, 1997) 23.

33 William Blackstone, *Commentaries on the Laws of England: In Four Books: Book the Second — Of the Rights of Things* (Harper & Brothers, 1857) 1.

theorists have supported the single-variable approach.<sup>34</sup> For instance, Hirsch described the right to property as: ‘the power to exclude others from or give them access to a benefit or use of the particular object’.<sup>35</sup> Similarly, Hart and Moore posited: ‘[T]he sole right possessed by the owner of an asset is his ability to exclude others from the use of that asset’.<sup>36</sup> Merrill agreed with the single-variable approach to property and argued: ‘Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property’.<sup>37</sup> Thus, single-variable essentialism centres on a simple dichotomy of exclusion and non-exclusion.

How the notion of exclusion applies in the context of statutory entitlements is not immediately clear. Accordingly, a property analysis based on single-variable essentialism would need to interpret what exclusion meant in the context of a particular statutory entitlement and whether the statutory entitlement conferred rights sufficiently exclusive to be *in rem* in character. Balganesch observed: ‘In focusing on the element of exclusion, courts and scholars have paid little attention to what an owner’s right to exclude means and the forms in which this right might manifest itself in actual property practice’.<sup>38</sup> It is difficult, therefore, to comment on how a single-variable property analysis would function in relation to statutory entitlements, as much would depend on how a court conceived of exclusion.

For instance, a court may interpret the right to exclude as non-existent where a regulator can change or cancel rights conferred by an entitlement.<sup>39</sup> As Justice Holmes observed: ‘Property depends upon exclusion by law from interference’.<sup>40</sup> If a government is legally able to withdraw an emission allowance without meeting particular conditions, then a court may consider that a holder of an emission entitlement has no ‘right to exclude’ because there is no correlative duty on outsiders to not violate the asset.

Alternatively, ‘the right to exclude’ in the context of statutory entitlements may be understood as the exclusive privileges conferred by an entitlement. For instance, the Supreme Court of British Columbia concluded in *Surdell-Kennedy Taxi Ltd v City of Surrey* that a taxi licence conferred on the holder ‘the right to carry on a taxi business to the exclusion of others’.<sup>41</sup>

34 J H Burns and H L A Hart (eds), *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1996) 208–11. For an explanation of Bentham’s position, see Bhikhu C Parekh, *Jeremy Bentham: Critical Assessments* (Routledge, 1993) 512. For other legal theorists that support this perspective, see, eg, Felix S Cohen, ‘Dialogue on Private Property’ (1954) 9 *Rutgers Law Review* 357, 370–1; Penner, above n 32, 4.

35 Werner Z Hirsch, *Law and Economics: An Introductory Analysis* (Academic Press, 1979) 18.

36 Oliver Hart and John Moore, ‘Property Rights and the Nature of the Firm’ (1990) 98 *Journal of Political Economy* 1119, 1121.

37 Merrill, ‘Property and the Right to Exclude’, above n 21, 730.

38 Shyamkrishna Balganesch, ‘Demystifying the *Right* to Exclude: Of Property, Inviolability, and Automatic Injunctions’ (2008) 31 *Harvard Journal of Law and Public Policy* 593, 593.

39 Such an interpretation was put forward by Balganesch, *ibid*, who relied on the inviolability principle to interpret the right to exclude.

40 *International News Service v Associated Press*, 248 US 215, 246 (Holmes J) (1918).

41 *Surdell-Kennedy Taxi Ltd v City of Surrey* [2001] BCSC 1265 (28 September 2001), [48].



The second school of thought, ‘multiple-variable essentialism’, also stems from Blackstone’s conception of property, and regards the right to exclude as a necessary and fundamental right to establish a proprietary interest.<sup>42</sup> Yet this school of thought considers a broader set of rights as indicia of property, comprising the right to exclude, the right to use/enjoy and the right to transfer.<sup>43</sup> A property analysis based on this second school of thought would recognise the right to exclude as fundamental, but would also consider the existence of other rights weighted equally as important to establishing property.

The notion that exclusion is an intrinsic attribute of property is closely connected with deriving economic value from an asset and concerns regarding the tragedy of the commons hypothesis. After all, owners derive more value from an asset where they limit and control the access of others.<sup>44</sup> Exclusion is, therefore, associated with the assumption in property law that property rights are generally held by a unitary owner subject to the owner dividing some of their rights into other standardised forms recognised by property law.<sup>45</sup> In sum, the essentialist assumption that property entails a right to exclude, typically held by a single owner, can potentially provide a cost-effective way of organising resource use and protecting it from overexploitation.<sup>46</sup>

Essentialist theorists have focused on how vesting property rights in a unitary owner reduces the information costs and improves market efficiency.<sup>47</sup> Smith explains:

Property, particularly in its core right to exclude, allows a lot of what goes on internal to the property to be of concern only to the owner. If I see a car parked in a parking lot, I know not to take it whether it is owned by a person or a corporation...<sup>48</sup>

In other words, people generally do not have to search for and understand information about their duties in relation to another’s asset or thing as they can automatically assume that they owe the duty to not interfere with another’s resource.<sup>49</sup> Thus, the role of property and the assumption that it entails a right to exclude sends clear and relatively standardised signals. Undoubtedly, the traditional centrality of the right to exclude to property has tended to reduce legal uncertainty in the control and transfer of assets and improve market efficiency.<sup>50</sup>

42 Merrill, ‘Property and the Right to Exclude’, above n 21, 736; Blackstone, above n 33, 433.

43 Merrill, ‘Property and the Right to Exclude’, above n 21, 736–8.

44 Bell and Parchomovsky, above n 24, 587.

45 See, eg, Henry Hansmann and Reinier Kraakman, ‘Property, Contract, and Verifiability: Understanding the Law’s Restrictions on Divided Rights’ (Working Paper Series, Berkeley Program in Law and Economics, 1 July 2001) <<http://escholarship.org/uc/item/9bc674vm>>.

46 Henry E Smith, ‘Exclusion versus Governance: Two Strategies for Delineating Property Rights’ (2002) 31 *Journal of Legal Studies* S453, S485.

47 See, eg, Merrill and Smith, ‘What Happened to Property in Law and Economics?’, above n 27.

48 Henry E Smith, ‘Mind the Gap: The Indirect Relation between Ends and Means in American Property Law’ (2009) 94 *Cornell Law Review* 959, 968.

49 Merrill and Smith, ‘What Happened to Property in Law and Economics?’, above n 27, 389.

50 Note, Merrill and Smith interpret the right to exclude as enabling an actor to control, transfer or develop an asset without others having to look for more information about what their duties are in relation to the asset: Thomas W Merrill and Henry E Smith, ‘Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle’ (2000) 110 *Yale Law Journal* 1.

This discussion on the role of the right to exclude in reducing transaction costs illustrates how essentialist perspectives are informed by overarching policy objectives and particular values relating to economic efficiency.<sup>51</sup> While essentialism focuses on intrinsic attributes of property, its focus is informed by value judgements. Specifically, essentialism has positioned property as an instrument to protect value and improve market efficiency in line with neoclassical economic theory.<sup>52</sup> As Netanel observed ‘neoclassicism counsels strongly in favour of expansive, exclusive proprietary rights that are concentrated, at least as an initial matter, in a single owner’.<sup>53</sup>

The work of Merrill and Smith further illustrates the underlying policy rationale for essentialism. While Merrill and Smith argue for the distinct nature of property rights as rights *in rem*, they support this argument with references to the economic efficiency of recognising property rights as *in rem*.<sup>54</sup> In other words, property as an institution should serve economic efficiency and the way to do this is by focusing on the intrinsic attributes of property and in particular the right to exclude. The only difference between the essentialist perspective and more instrumentalist views of property is that essentialists do not explicitly engage with the ultimate purposes of property as an institution, that is, who or what economic efficiency should serve. It is this point of distinction that makes essentialism less instrumentalist in nature, even though prioritising the right to exclude incidentally supports particular values and outcomes.

## B ‘Bundle-of-Rights’ Metaphor

The third school of thought, the classic ‘bundle-of-rights’ conception, holds that the right to exclude is not an essential indicium of property and has no determinative weight in property analysis. Instead, the ‘bundle-of-rights’ conception holds that property has no essential attributes, duties or rights that must exist before a proprietary interest will be recognised.<sup>55</sup> In contrast to essentialism,

- 51 Smith disagrees with this perspective. He argues that progressive property views downplay the important role property plays in reducing transaction costs, and that property rights in a given context are a small part of a bigger whole that need not be aligned with ultimate goals in all instances. Smith favours government interventions where a complex issue arises that has social significance and requires more precise responses than what property, the right to exclude, can provide: Smith, ‘Exclusion versus Governance’, above n 46; Smith, ‘Mind the Gap’, above n 48. Alexander responded to Smith’s critique in Gregory S Alexander, ‘The Complex Core of Property’ (2009) 94 *Cornell Law Review* 1063. For a similar critique, see Eric R Claeys, ‘Exclusion and Exclusivity in *Gridlock*’ (2011) 53 *Arizona Law Review* 9.
- 52 For similar observations, see, Shyamkrishna Balganesh, ‘Debunking Blackstonian Copyright’ (2009) 118 *Yale Law Journal* 1126; Duncan Kennedy, ‘Law-and-Economics from the Perspective of Critical Legal Studies’ in Peter Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Macmillan Reference Limited, 1998) vol 2, 465.
- 53 Neil W Netanel, ‘Why Has Copyright Expanded? Analysis and Critique’ in Fiona Macmillan (ed), *New Directions in Copyright Law* (Edward Elgar Publishing, 2007) vol 6, 3, 18.
- 54 See, eg, Merrill and Smith, ‘Optimal Standardization in the Law of Property’, above n 50; Merrill and Smith, ‘What Happened to Property in Law and Economics?’, above n 27.
- 55 A M Honoré, ‘Ownership’ in A G Guest (ed), *Oxford Essays in Jurisprudence: A Collaborative Work* (Oxford University Press, 1961) 107.

which focuses on the right to exclude held by individuals, the ‘bundle-of-rights’ conception constructs property as a legal relationship between persons, that is, a bundle of divisible rights and correlative obligations.<sup>56</sup> This understanding embraces complexity in property relationships among people and across time, and is centred on the social context in which a particular relationship exists rather than specific attributes.<sup>57</sup> From this perspective, property has no requisite rights that must exist before a proprietary interest will be recognised.<sup>58</sup>

The ‘bundle-of-rights’ understanding of property arose from the work of Wesley Newcomb Hohfeld on legal conceptions of claim-rights, privileges, immunities and duties, as well as A M Honoré’s incidents of ownership.<sup>59</sup> Hohfeld provided a more nuanced understanding on the nature of rights and the effects of liberty, while Honoré outlined ‘the standard incidents of ownership’, that is, the common legal rights, liabilities and other incidents that make up full ownership.<sup>60</sup> These standard incidents include the right to have exclusive control over a thing, the right to use, the right to manage, the right to income and the ability to transfer.

For Honoré, however, ‘the listed incidents are not individually necessary, though they may be together sufficient, conditions for the person ... to be designated “owner” of a particular thing’.<sup>61</sup> In line with Honoré’s disentangling of the rights and liabilities that make up the bundle, Storey has examined the potential attributes that a statutory entitlement may require in the bundle of rights they confer to be considered property. He states that statutory entitlements, which Storey terms ‘statutory property’, will ideally be definable, identifiable, permanent to some degree, imply a right to use and enjoy, connote a right to exclude and alienable.<sup>62</sup>

A property analysis based on the ‘bundle-of-rights’ metaphor would be significantly shaped by the circumstances and specifically the various relations that existed around and in regard to a particular asset. To determine whether a proprietary relationship existed, a court would need to consider the series of rights an entitlement holder had against others and the correlative duties of other stakeholders. No one right or other characteristic would determine alone whether a proprietary interest existed. Accordingly, a property analysis based on this school of thought would likely involve weighing the existence or absence of particular rights and duties in relation to a thing.

Arguably, the ‘bundle-of-rights’ metaphor is more instrumentalist than essentialist because it allows for a more precise analysis of property as an institution and makes property more adaptable to new needs and contexts. Dagan pointed out

56 See, eg, John Page, *Property Diversity and Its Implications* (Routledge, 2016) 18.

57 See, eg, Jane B Baron, ‘Rescuing the Bundle-of-Rights Metaphor in Property Law’ (2013) 82 *University of Cincinnati Law Review* 57.

58 Honoré, above n 55.

59 Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 *Yale Law Journal* 710; *ibid*.

60 Honoré, above n 55, 112.

61 *Ibid* 112–13.

62 Mathew Storey, ‘Not of this Earth: The Extraterrestrial Nature of Statutory Property in the 21<sup>st</sup> Century’ (2006) 25 *Australian Resources and Energy Law Journal* 51, 53.

that the bundle metaphor triggers a more instrumentalist analysis of property because:

legal decision makers have no choice but to shape the particular configuration of property for the issue at hand, thus making inevitable the application of normative judgment. Rather than resorting to internal deductive reasoning, decision makers must ask whether it is justified that a certain category of people (i.e., owners) will enjoy a particular right, privilege, power or immunity over a category of resources (land, chattels, copyrights, patents, and so on) as against another category of people (spouses, neighbors, strangers, community members and so on).<sup>63</sup>

Baron has also illuminated the instrumentalist dimensions of the ‘bundle-of-rights’ conception by highlighting the metaphor’s ability to embrace complexity and adapt to new situations and needs. The fact that the ‘bundle-of-rights’ metaphor is modifiable to the context and to stakeholder needs is a feature more aligned with an instrumentalist conception of property than conceptualism. Thus, we position the ‘bundle-of-rights’ approach very loosely towards the middle of the continuum from conceptualism to instrumentalism.

### **C Property as a Means to Achieve Identified Ends**

A more instrumentalist approach to property analysis asks whether recognising property rights in a given thing is consistent with the objects and intrinsic values that property as an institution should serve. If recognising a particular relationship as proprietary will best achieve the stated objective or value, then this approach to property analysis would consider such proprietary interests to exist.

The ends that property should be designed to achieve depends on underlying values and ideologies. We suggest that two key objectives have emerged from the literature and case law. The first, the ‘commercial realities approach’, is the notion that property should aid and facilitate market transactions. The second perspective, the ‘social-obligation’ norm, holds that property should ultimately serve the public interest, whether by facilitating market transactions, increasing obligations or restricting particular rights.

#### **1 Commercial Realities Approach**

The ‘commercial realities’ approach, alternatively termed the ‘commercial expectations’ approach, involves characterising the nature of the rights to a statutory entitlement based on how it is treated in the commercial arena.<sup>64</sup> It concentrates, therefore, on the role of property as a mechanism that enables and

63 Hanoch Dagan, ‘The Craft of Property’ (2003) 91 *California Law Review* 1517, 1533.

64 See, especially, *Sugarman v Duca Community Credit Union Ltd*, 38 OR (3d) 429, (1998); *Re Celtic Extraction Ltd* [2001] Ch 475. This is not a method discussed widely by legal theorists. See, however, Barry Barton, ‘Property Rights Created under Statute in Common Law Legal Systems’ in Aileen McHarg et al (eds), *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010) 80; Lyndon Maither, *Canadian Bankruptcy/Insolvency and Companies’ Creditors Arrangement Law: Provisions, Precedents and Materials* (Google Books) 1227.

secures business transactions and structures. Property analyses that adopt this approach tend to focus on whether actors customarily sell for consideration the particular kind of entitlement or use it to secure a debt. The right to transfer an entitlement is given significant weight in the commercial realities approach, which follows from the fact that being able to transfer an entitlement to others for consideration is part of the economic value.<sup>65</sup>

The judgement of Kennedy CJ of the Nova Scotia Supreme Court in *Royal Bank of Canada v Saulnier*, a case concerning the proprietary nature of fishing licences, is useful for illustrating not only how the commercial realities approach operates but also how it contends with the right to exclude.<sup>66</sup> Kennedy CJ stated:

It is not necessary that the holder have the complete power of exclusion to allow those rights to be property in the real and practical context. ... I conclude that the fair and correct approach is to characterize the federal fishing licenses based on the reality of the commercial arena.<sup>67</sup>

In reference to affidavits from bank officers, the receiver and the trustee in relation to the marketability and value of licences, Kennedy CJ observed:

That evidence confirms my understanding, that on the east coast of Canada fishing licenses, particularly for lobster, are commonly exchanged between fishermen for a great deal of money. ... Fishing vessels of questionable value are traded for small fortunes because of the licenses that are anticipated to come with them. ... To accept the argument of the respondent that there can be no property in these licenses in the hands of the holder, because of ministerial control would, I conclude, foster an unrealistic legal condition based on an historic definition of property that ignores what is actually happening in the commercial world that the law must serve. ... [A]lthough those licenses do not give exclusive control to the holder, they do in fact provide a bundle of rights which constitute marketable property capable of providing security.<sup>68</sup>

As illustrated in Kennedy CJ's judgement, the 'commercial realities' approach is focused on exchange value as a fundamental characteristic of property. In some ways, then, the approach is similar to single-variable essentialism in that it has a narrow focus on a singular aspect. Nevertheless, the 'commercial realities' approach lies towards the instrumentalist end of property conceptions because it focuses on property as a means to carry out commercial dealings. The intrinsic attributes of a legal relationship with an entitlement is not of significance when characterising the relationship as proprietary or otherwise. Instead, the value attributed to the entitlement by the market is the main indicator of a proprietary interest.

65 Bell and Parchomovsky, above n 24, 587–8.

66 [2006] NSSC 34 (31 January 2006).

67 Ibid [48]–[49].

68 Ibid [51]–[54].

## 2 Social-Obligation Norm

Perhaps the most instrumentalist understanding of property comes from a school-of-thought termed ‘progressive property’ or, more precisely, the ‘social-obligation norm’. Under this approach, the right to exclude is neither a significant nor a necessary part of property. Instead, progressive property theorists argue that the conception of property and the rights that it entails should be based on and determined by commonly held values including environmental stewardship, autonomy and human flourishing.<sup>69</sup> Rosser explained: ‘The progressive camp ... argues that property is about more than just exclusion and sees more areas of law that should be changed to account for societal interests.’<sup>70</sup> Accordingly, this approach to property is critical of the prevailing ideology that privileges the rights of owners and instead emphasises the limitations on the right to exclude. From this perspective, property rights and the corresponding duties must be conducive to achieving underlying social goals and values.<sup>71</sup> The question becomes not which intrinsic attributes will establish a property right but what *should* the effect of property rights be and what limitations on property rights are required to achieve particular goals.

Alexander, a leading scholar in progressive property, asserts that a range of values, including efficiency and utilitarianism, should guide the rights and duties that make up property with the ultimate obligation being to contribute to human flourishing.<sup>72</sup> He terms this approach to property the social-obligation norm and explores how some US property law cases are aligned with the norm without it being explicit. The social-obligation norm is linked with the notion of citizenship and citizen rights and obligations.<sup>73</sup> Thus, from Alexander’s perspective: ‘The law has relegated the social obligations of owners to the margins, while individual rights, such as the right to exclude, have occupied the center stage’, and so the rights and obligations that make up property should be founded and limited by the interests of human flourishing, fairness, and justice.<sup>74</sup>

Property analysis in line with this school of thought would centre on the surrounding policy and contextual factors, and in particular, the duties of the parties involved. It would further emphasise commonly held values enshrined in law. A property analysis based on the social-obligation norm would also more

69 See, eg, Gregory S Alexander et al, ‘A Statement of Progressive Property’ (2009) 94 *Cornell Law Review* 743; Joseph William Singer, ‘Property as the Law of Democracy’ (2014) 63 *Duke Law Journal* 1287; John A Lovett, ‘Progressive Property in Action: The Land Reform (Scotland) Act 2003’ (2011) 89 *Nebraska Law Review* 739.

70 Ezra Rosser, ‘The Ambition and Transformative Potential of Progressive Property’ (2013) 101 *California Law Review* 107, 109.

71 See, eg, Laura S Underkuffler, ‘A Theoretical Approach: The Lens of Progressive Property’ (2014) 3 *Property Law Review* 152; Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2008) 6.

72 Gregory S Alexander, ‘The Social-Obligation Norm in American Property Law’ (2009) 94 *Cornell Law Review* 745.

73 Joseph William Singer, ‘The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations’ (2006) 30 *Harvard Environmental Law Review* 309, 328.

74 Alexander, ‘The Social-Obligation Norm in American Property Law’, above n 72, 748.

closely examine the correlative duties that rights-holders and other stakeholders have in relation to a resource. Foster and Bonilla explain the rationale for the focus on corresponding obligations in property relationships as follows: 'property owners have social responsibilities to others that extend beyond the highly individualized, and atomized, conventional account of property rights'.<sup>75</sup> From the perspective of progressive property theorists, the purpose of a property analysis in the context of a statutory entitlement should be to determine whether upholding a proprietary right is consistent with operationalising the public values underlying the existence of the entitlement and whether recognition of a proprietary right would have a disproportionate impact on an infringer or a particular group or otherwise frustrate duties owed to broader society.

Furthermore, a property analysis based on the social-obligation norm would not give primacy to the right to exclude; but, the right may be considered as part of a comprehensive, policy-oriented and values-based analysis. For instance, the ability to exclude people from using or accessing a resource would be a significant attribute tending towards a proprietary interest where such an ability is important for physical and psychological well-being.<sup>76</sup> Alternatively, the right to exclude as an attribute of property may be qualified or subordinated to the social purpose of enabling equitable access to, or sustainable use of, a particular resource.

In the context of statutory entitlements, the social-obligation norm seems a particularly suitable basis for property analyses because of the public policy objectives and dimensions of such statutorily-created rights. Where a statutory entitlement is tradeable, such as those traded under emission entitlement schemes, the private interest in excluding others and the ability to transfer would be seen as an important part of achieving the overarching public policy goals using market mechanisms. However, if the case concerned, for instance, a regulator's ability to adjust a statutory scheme without interfering with private property rights, a social-obligation approach would place significant weight on the freedom of the regulator to make changes as required to achieve long-term policy objectives.

### **III THE UNITED STATES**

#### **A Approach to Property Analysis**

Generally, US courts have undertaken property analyses in relation to statutory entitlements where a regulatory action has interfered with the rights granted to the

75 Sheila R Foster and Daniel Bonilla, 'The Social Function of Property: A Comparative Perspective: Introduction' (2011) 80 *Fordham Law Review* 1003, 1008. For a discussion on the benefits analytically and functionally for focusing on duties in private property issues, see, Jeremy Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1993) 68 *Chicago-Kent Law Review* 841.

76 Alexander, 'The Social-Obligation Norm in American Property Law', above n 72, 816.

holder through the entitlement.<sup>77</sup> The ‘Takings Clause’ in the Fifth Amendment to the *United States Constitution* provides that ‘private property’ shall not be taken for public use without just compensation.<sup>78</sup>

US courts previously held that the Takings Clause only applied to direct and corporeal interferences with property in the owner’s physical possession, which therefore meant that the constitutional protection did not extend to statutory entitlements.<sup>79</sup> Since *Pennsylvania Coal Co v Mahon*,<sup>80</sup> courts have recognised that regulator decisions that alter or cancel proprietary interests are subject to constitutional limits. The Wisconsin Supreme Court in *Noranda v Strom* explained the position in the US as follows: ‘[a]lthough a state may redefine property rights to a limited extent, it lacks the power to restructure rights so as to interfere with traditional attributes of property ownership, such as the right to exclude others’.<sup>81</sup> Specifically, regulator decisions that wholly deprive an owner of their right to use their property in a productive or economically beneficial way are the equivalent of a physical taking of their asset.<sup>82</sup>

A plaintiff must show, inter alia, that she had a ‘constitutionally cognisable property interest’ at the time of the alleged taking in order to qualify for constitutional protections.<sup>83</sup> Yet US courts have not formulated a clear or consistent method to determine whether an interest can be characterised as ‘constitutionally cognisable property’, and most cases concern more traditional, tangible forms of property than novel intangibles.<sup>84</sup> Instead, the scope of constitutionally protected property interests is determined by ‘existing rules and understandings’ and ‘background principles’ sourced from statutory or common law.<sup>85</sup> These rules and principles

77 There are a few exceptions such as *Columbia Salmon Co v Berg*, 5 Alaska 538, 542 (D, 1916) where a dispute arose in relation to a fish trap site and the Court stated ‘[t]he territorial [fishing] license merely authorizes the holder to carry on a certain business, to wit, that of catching fish, but does not grant to the holder any place of business, any more than the issuance of a saloon license grants to the holder a building in which to conduct a saloon’.

78 *United States Constitution* amend V. The Takings Clause is made applicable to the states through the Fourteenth Amendment’s Equal Protection Clause. Most US states have similar clauses in their constitutions.

79 *Transportation Co v Chicago*, 99 US 635, 642 (1878).

80 260 US 393 (1922).

81 *Noranda v Strom*, 335 NW 2d 596, 603–4 (Wis, 1983).

82 *San Diego Gas & Electric Co v City of San Diego*, 450 US 621, 652 (1980) (Brennan J dissenting); *Agins v City of Tiburon*, 447 US 255 (1980); see also *Nollan v California Coastal Commission*, 483 US 825, 834 (1987); *Keystone Bituminous Coal Association v DeBenedictis*, 480 US 470, 495 (1987); *Hodel v Virginia Surface Mining & Reclamation Association Inc*, 452 US 264, 295–6 (1981).

83 *M & J Coal Co v United States*, 47 F 3d 1148, 1153–4 (Fed Cir, 1995); *American Pelagic Fishing Co LP v United States*, 379 F 3d 1363, 1372 (Fed Cir, 2004). The holder of an entitlement may have a claim for deprivation of property without due process under *United States Constitution* amend XIV, but this is not relevant to whether the entitlement is ‘property’ under the Takings Clause: *Kafka v Montana Department of Fish, Wildlife and Parks*, 201 P 3d 8, 47 [153] (Mont, 2008) (‘Kafka’); *Arctic King Fisheries Inc v United States*, 59 Fed Cl 360, 372 n 27 (2004).

84 Thomas W Merrill, ‘The Landscape of Constitutional Property’ (2000) 86 *Virginia Law Review* 885, 969; Dustin Marlan, ‘Trademark Takings: Trademarks as Constitutional Property under the Fifth Amendment Takings Clause’ (2013) 15 *University of Pennsylvania Journal of Constitutional Law* 1581.

85 *Lucas v South Carolina Coastal Council*, 505 US 1003, 1030–1 (1992); *Maritrans Inc v United States*, 342 F 3d 1344, 1352 (Fed Cir, 2003).



place weight on the person's 'relation to the physical thing, as the right to possess, use and dispose of it'.<sup>86</sup> In other words, the central indicia of property are the right to transfer, the right to use and the right to exclude.

A key case in this area is the *Members of the Peanut Quota Holders Association Inc v United States* ('*Peanut Quota Holders*') where the Federal Circuit Court examined the authorities on the question of whether a government licence or permit can be a compensable property interest for purposes of the Takings Clause. The Court concluded:

[A] compensable interest is indicated by the absence of express statutory language precluding the formation of a property right in combination with the presence of the right to transfer and the right to exclude.<sup>87</sup>

Since the *Peanut Quota Holders* case, US courts have principally adopted this test, and interpreted the test as requiring *both* the right to transfer and the right to exclude.<sup>88</sup> Thus, the third element in the multiple-variable school of thought, that is, 'the right to use', is omitted from this formulation. Instead, the right to use in the US approach to property analysis has collapsed into the right to exclude. If a holder can exclude others then it follows that they have the right to use and enjoy the thing for oneself.<sup>89</sup>

Overall then, the US courts are adopting an essentialist approach to property analyses. This is evidenced through their focus on a few hallmark rights and the emphasis on the intrinsic attributes of the entitlement, that is, whether the entitlement itself has the indicia of transferability and excludability. Given that these traditional property rights have largely only been applied in the context of tangible assets, it could be assumed that courts struggle to find such rights conferred by an intangible statutory entitlement. However, US courts have tended to overlook the fundamental tension between orthodox property conceptions and novel forms of property.<sup>90</sup> Instead, US courts focus on whether the government interferences are significant enough to be the equivalent of a physical appropriation.<sup>91</sup>

In a further reflection of the essentialist approach, US courts consider the Takings Clause to be concerned 'solely with the "property," i.e., with the owner's relation as such to the physical thing and not with other collateral interests which may be incidental to his ownership'.<sup>92</sup> Presumably, 'collateral interests' would encompass the public and commercial interests an entitlement is intended to serve. This is

86 *United States v General Motors Corporation*, 323 US 373, 378 (1945); *Members of the Peanut Quota Holders Association Inc v United States*, 421 F 3d 1323, 1330 (Fed Cir, 2005); *Loretto v Teleprompter Manhattan CATV Corporation*, 458 US 419, 435–6 (1982).

87 *Peanut Quota Holders*, 421 F 3d 1323, 1331 (Fed Cir, 2005).

88 *Filler v United States*, 116 Fed Cl 123, 130 (2014); *Kafka*, 201 P 3d 8, 22 [46] (Mont, 2008).

89 Merrill, 'Property and the Right to Exclude', above n 21, 741.

90 This was comprehensively investigated in Adam Mossoff, 'Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause' (2007) 87 *Boston University Law Review* 689, 707.

91 *Lucas v South Carolina Coastal Council*, 505 US 1003, 1017 (1992).

92 *United States v General Motors Corporation*, 323 US 373, 378 (1945).

an important distinction in the context of statutory entitlement schemes with significant public policy goals like emissions trading. For instance, the focus on the relationship a holder has with an entitlement incidentally subordinates the purposes for such entitlements existing in the first place. By not examining collateral interests, the essentialist property analyses adopted in the US may not be appropriate for those statutory entitlements clearly established to serve such collateral interests.

US courts have provided some guidance regarding how they will interpret transferability and excludability in the context of statutory entitlements. Generally, the claimant must show that the relevant regulator must approve a transfer of an entitlement if conditions are met (the right to transfer), and that the entitlement confers a right to a specific portion of a thing (the right to exclude). We will explore each of these requirements in turn.

In relation to the right to transfer, statutory entitlements have been found to be transferable even if the transfer requires the approval of a regulator and is permitted only under specified statutory conditions.<sup>93</sup> For example, in *Kafka v Montana Department of Fish, Wildlife and Parks*,<sup>94</sup> the Supreme Court of Montana held that a licensee had a right of transfer where the regulator had no broad discretionary power to withhold approval provided the statutory conditions were met. Therefore, US courts adopt a fairly flexible understanding of the right to transfer.

Despite recognising the right to transfer as a requisite element for establishing a property right, the Supreme Court has still emphasised the primacy of right to exclude.<sup>95</sup> In *Lingle v Chevron USA Inc*, for instance, the Supreme Court said that the right to exclude is ‘perhaps the most fundamental of all property interests’.<sup>96</sup> In contrast to the flexible interpretation of the right to transfer, US courts adopt a narrow interpretation of the right to exclude. Where the ‘Takings’ cases involve entitlements, exclusion is understood as the right to exclude others from participating in the resource or economic benefit in a way that dilutes the benefit enjoyed by the holder of the entitlement.<sup>97</sup>

US courts have drawn a distinction between licences and quotas that further illustrates how the right to exclude operates in the context of statutory entitlements.<sup>98</sup> A fishing licence is an example of a statutory entitlement that is not

93 As, for example, in *Peanut Quota Holders*, 421 F 3d 1323, 1332–3 (Fed Cir, 2005).

94 201 P 3d 8, 22 [47] (Mont, 2008).

95 See, eg, *Kaiser Aetna v United States*, 444 US 164, 179–80 (1979); *Dolan v City of Tigard*, 512 US 374, 384 (1994); *Lucas v South Carolina Coastal Council*, 505 US 1003, 1044 (1992).

96 544 US 528, 539 (2005).

97 See, eg, *Mitchell Arms Inc v United States*, 7 F 3d 212, 216 (Fed Cir, 1993); *Peanut Quota Holders*, 421 F 3d 1323, 1334 (Fed Cir, 2005); *Minneapolis Taxi Owners Coalition Inc v City of Minneapolis*, 572 F 3d 502, 508–9 (8<sup>th</sup> Cir, 2009); *Kafka*, 201 P 3d 8, 23 [53], 24 [58], 31 [89] (Mont, 2008); *Dennis Melancon Inc v City of New Orleans*, 703 F 3d 262, 274 (5<sup>th</sup> Cir, 2012).

98 This distinction stems from *Peanut Quota Holders* and has been referred to in a number of cases, including: *Filler v United States*, 116 Fed Cl 123, 130 [16] (2014); *Webster v United States*, 74 Fed Cl 439 (2006) (medical licence found to not be a protectable property interest); *Minneapolis Taxi Owners Coalition Inc v City of Minneapolis*, 572 F 3d 502, 508–9 (8<sup>th</sup> Cir, 2009).

likely to be capable of supporting proprietary interests in the US. Fishing licences represent a restricted exemption to the restrictions imposed by government on fishing. Put differently, a fishing licence only grants the holder an exemption from particular government regulations related to fishing and the government can choose to allocate fishing licences, so the number of market entrants is theoretically unrestricted. Accordingly, US courts consider fishing licences to be a limited administrative concession enjoyed by the holder, not a property right enforceable against others.

*Conti v United States*<sup>99</sup> exemplifies this approach. The Court of Appeals held that Conti's fishing permit was a revocable licence, and so he did not have a property interest capable of being the subject of a taking.<sup>100</sup> The permit lacked the usual indicia of a property right, because it was non-transferable and gave the holder no authority to exclude others from the fishery.<sup>101</sup> The government always had the right to issue additional licences, which adversely affects the exclusionary aspects of an entitlement. In addition, the enabling Act was inconsistent with the creation of a property interest, as the permit was expressly subject to the government's power to revoke, suspend or modify the permit.<sup>102</sup>

However, this interpretation of the right to exclude has a different outcome in the context of quotas. The Court in *Peanut Quota Holders* found that the quota had the indicia of property and 'represented a right to plant and produce a certain amount of peanuts at a certain price in specific crop years'.<sup>103</sup> The quota was transferable, albeit subject to regulatory approval and specified conditions. Furthermore, the statutory scheme establishing peanut quotas in this case was limited, and each quota holder was awarded a set price for delivering the required proportion of peanuts. Thus, the government had established 'a defined market for each quota holder — a market exclusive to that quota holder', and so the quota's value could not be diluted by the award of additional quotas to others.<sup>104</sup>

Based on *Peanut Quota Holders*, a property interest may be recognised in an entitlement where the government has reserved a defined quantum of a resource or market for a limited group of individuals. Hence, the right to exclude is not a right to exclude others so much as a right to exclude the entry of other market actors. It is not, therefore, the right of the holder to exclude others from using their statutory entitlement. This interpretation of the right to exclude and closed markets, evidenced in *Peanut Quota Holders* and *Conti*, is perhaps more analogous with a commercial realities approach than a conceptualist conception of property. In fact, the Court stated in *Peanut Quota Holders* that '[t]he salient

99 291 F 3d 1334 (Fed Cir, 2002).

100 Ibid 1341–2.

101 Ibid.

102 Ibid 1342. Note that the court applied this decision in *American Pelagic Fishing Co LP v United States*, 379 F 3d 1363, 1374 (Fed Cir, 2004), in which the government's power to revoke or vary permits was conditional.

103 *Peanut Quota Holders*, 421 F 3d 1323, 1334 (Fed Cir, 2005).

104 Ibid.

difference between the licenses in the noted cases and the peanut quota allotment is that the value of the peanut quota is considerably more concrete'.<sup>105</sup>

The interpretation of the right to exclude in *Peanut Quota Holders* has been tested in cases where a regulator has uncapped the number of licences to be issued, thereby causing the market value of existing licences to decline. In *Minneapolis Taxi Owners Coalition Inc v City of Minneapolis*,<sup>106</sup> the US Court of Appeals dismissed a takings claim brought by a number of taxicab licensees. As the City always had the power to issue additional licences, the Court held that the licensees lacked the 'guaranteed minimum' and 'the concreteness of value' that attached to the peanut quota.<sup>107</sup> Just as in the fishing permit cases, the taxicab licensees had no right to exclude new entrants from the market.<sup>108</sup> Even if the licence was property,<sup>109</sup> the court rejected the argument that there was any compensable property interest in the market value of licences produced by a regulatory cap.<sup>110</sup>

In sum, US courts adopt an essentialist view of property through their focus on the right to transfer and the right to exclude. While the right to transfer is not difficult to satisfy, the test for whether an entitlement confers the right to exclude sets a high threshold. At the same time, the interpretation of the right to exclude seems to be incidentally correlated with the economic value of an entitlement. Where an entitlement holder has been conferred the ability to exclude others from a market through a statutory entitlement, it seems likely that the commercial value of such an entitlement would be higher than in cases where an exclusive share of the market was not conferred. Nevertheless, even if an entitlement is commercially valuable, the right to exclude is not considered to exist if the regulator has the power to dilute the entitlement's value by issuing additional entitlements.<sup>111</sup> Unless the enabling Act or surrounding circumstances indicates an intention that it is irrevocable, the government does not lose the right to revoke or amend the entitlement as it sees fit.<sup>112</sup> If the enabling Act expressly allows the government

105 Ibid 1333.

106 572 F 3d 502 (8<sup>th</sup> Cir, 2009).

107 Ibid 508–9.

108 Ibid 509.

109 Ibid 507 n 4, the court distinguished *Boonstra v City of Chicago*, 574 NE 2d 689 (Ill Ct App, 1991), in which abrogation of the right to transfer existing taxicab licences was held to be a taking of a compensable property interest. The Court said that in the case before it, licences remained assignable.

110 In *Minneapolis Taxi Owners Coalition Inc v City of Minneapolis*, 572 F 3d 502, 509 n 4 (8<sup>th</sup> Cir, 2009), the Court distinguished *Boonstra v City of Chicago*, 574 NE 2d 689 (Ill Ct App, 1991) ('*Boonstra*'), in which taxicab licences were implicitly accepted as compensable property interests under Illinois law. *Boonstra* has been criticised for importing the broader meaning of property in the due process clause in the Fourteenth Amendment: *Berst v Snohomish County*, 57 P 3d 273, 280 (Wash Ct App, 2002). *Boonstra* is inconsistent with the weight of authority on the status of licences under the Takings Clause: Steve Oxenhandler, 'Taxicab Licenses: In Search of a Fifth Amendment, Compensable Property Interest' (2000) 27 *Transport Law Journal* 113, 134.

111 *Peanut Quota Holders*, 421 F 3d 1323, 1334–5 (Fed Cir, 2005); *Kafka*, 201 P 3d 8, 21 [44]–[45], 23 [52] (Mont, 2008).

112 *Peanut Quota Holders*, 421 F 3d 1323, 1335 (Fed Cir, 2005); *Kafka*, 201 P 3d 8, 22 [50] (Mont, 2008).

to revoke, suspend or vary the entitlement, the Act is taken to create a revocable licence rather than a cognisable property right.<sup>113</sup>

## B Application to Emission Entitlements

Emissions trading schemes generally take the form of two broad models. The first is the cap-and-trade model. It involves a governmental body granting a number of permits to emit with the number of permits reflecting the emission reduction target. The second is the baseline-and-credit model. Schemes adopting this model involve an emitting party reducing their emissions below a set baseline to receive a tradeable credit equivalent to the emissions sequestered or reduced.<sup>114</sup> In both models, trade in the entitlements between market actors theoretically allows decentralised market mechanisms to achieve emission reductions at minimised costs.<sup>115</sup>

Based on the approach used by US courts, it is overall unlikely that emission entitlements will be capable of supporting proprietary interests. On the one hand, emission allowances grant a permit holder an exclusive right to emit a discrete quantity of greenhouse gases, which is somewhat analogous to a right to a quantified portion of the market, that is, the right to exclude under *Peanut Quota Holders* 'closed market' interpretation.<sup>116</sup>

On the other hand, emission entitlements differ from the kind of entitlement considered in *Peanut Quota Holders*. While the holder's proportion of permissible emissions may be fixed, the value of the share is not protected from diminution through a decision of the regulator to allocate more allowances.<sup>117</sup> Nor is the right to emit a discrete amount linked to value to the same extent as a right to a particular portion of the market. In addition, emissions trading schemes rely on a functioning market, and so other actors who do not receive an allocation from the regulator may be able to acquire entitlements through market exchange. Emissions markets, therefore, are likely to be more open than closed in order to fulfil policy objectives.

Under a cap-and-trade emissions trading scheme, a regulator could increase the cap on emissions, which would reduce the value of emission allowances, as emitters would not need to purchase as many entitlements to be under the cap.

113 *Conti v United States*, 291 F 3d 1334 (Fed Cir, 2002); *Peanut Quota Holders*, 421 F 3d 1323 (Fed Cir, 2005); *Dennis Melancon Inc v City of New Orleans*, 703 F 3d 262 (5th Cir, 2012); *American Pelagic Fishing Co LP v United States*, 379 F 3d 1363, 1374 (Fed Cir, 2004).

114 Emissions trading schemes typically take one of two forms, but as new schemes are developed the distinction between the different types of schemes has increasingly been blurred. For instance, Australia had a hybrid scheme for a short period of time. See, eg, David J Crossley, 'Tradeable Energy Efficiency Certificates in Australia' (2008) 1 *Energy Efficiency* 267; Arnaud Brohé, Nick Eyre and Nicholas Howarth, *Carbon Markets: An International Business Guide* (Earthscan, 2009) 53.

115 For instance, part of the costs saved are the administrative and compliance costs that governments incur where enforcing a command-and-control regulatory approach.

116 Mark Fina and Tyson Kade, 'Legal and Policy Implications of the Perception of Property Rights in Catch Shares' (2012) 2 *Washington Journal of Environmental Law & Policy* 283, 291, 315–17.

117 *Ibid*, citing 16 USC §§ 1802(23), 1802(26) (Supp V 2006).

The design of this common model for emissions trading would weigh against a finding that the entitlements conferred support proprietary interests. The US Court of Appeals rejected a claim by taxicab licensees in *Dennis Melancon Inc v City of New Orleans*<sup>118</sup> that the lifting of a regulatory cap on the number of licences effected a regulatory taking insofar as it reduced the market value of their licences. The Court said that the licensees had entered a heavily regulated market and had ‘no more than a unilateral expectation that the City’s regulation would not disrupt the secondary market value’ of the licences.<sup>119</sup> Similar observations could be made about cap-and-trade schemes where the market is more heavily regulated and where a general expectation exists that the regulator will be adjusting the cap in line with emission reduction goals.

Regardless of the effect of the ‘closed market’ interpretation of the right to exclude, US emission entitlement schemes to date have expressly stated that emission entitlements are not property. This is important as courts in the US, unlike the other jurisdictions that we are examining, tend to interpret statutory provisions that describe the entitlement as a revocable licence or as ‘not subject to property rights’ to be reserving the government’s right to revoke or vary the interests conferred by the entitlement.<sup>120</sup>

Emissions trading in the US has been developed by states, in particular California and Washington, as well as the *Regional Greenhouse Gas Initiative 2013*, which is an agreement establishing an emissions trading scheme between nine other US states.<sup>121</sup> All US emissions trading schemes to date have expressly declared entitlements issued under the relevant scheme to not be capable of supporting proprietary interests. For instance, the Californian scheme uses the term ‘compliance instrument’ to refer to emission allowances and offsets issued by the relevant regulator.<sup>122</sup> It states that such ‘compliance instruments’ do not ‘constitute property or a property right’.<sup>123</sup> Similarly, the model agreement for the *Regional Greenhouse Gas Initiative 2013* provides that emission entitlements are ‘[a] limited authorization by the [regulatory agency] ... to emit up to one ton of CO<sub>2</sub>’ and do not ‘constitute a property right’.<sup>124</sup> Such provisions seem at odds with the aim of using market mechanisms to efficiently reduce greenhouse gas emissions.

118 703 F 3d 262 (5<sup>th</sup> Cir, 2012).

119 Ibid 274.

120 *Peanut Quota Holders*, 421 F 3d 1323, 1335 (Fed Cir, 2005).

121 *Clean Air Rule*, 173-442 WAC (2016) (Washington); *California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms*, 17 CA ADC div 3 ch 1 § 95802 (2013); *Regional Greenhouse Gas Initiative 2013* (Model Rule, CO<sub>2</sub> Budget Trading Program) <<https://www.rggi.org/documents>>. The *Regional Greenhouse Gas Initiative 2013* was an agreement reached between Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Vermont.

122 *California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms*, 17 CA ADC div 3 ch 1 § 95802 (2013).

123 Ibid § 95820.

124 *Regional Greenhouse Gas Initiative 2013* (Model Rule, CO<sub>2</sub> Budget Trading Program) 1.2(s), 1.5(c)(9).

## IV AUSTRALIA

### A Approach to Property Analysis

The above discussion of the US approach throws into sharper relief the contrasting Australian approach to entitlements. In Australia, property analyses have tended to be conducted in relation to the land rights of First Nations Peoples. In the 1970s, Blackburn J of the Supreme Court of the Northern Territory adopted an essentialist approach similar to the US in *Milirrpum v Nabalco* by limiting his analysis to the following indicia of property: the right to use and enjoy, the right to exclude others and the right to alienate.<sup>125</sup>

During the 1990s, a marked shift in approaches occurred that was in part due to changing conceptions of property and the increasing recognition, albeit still limited, of colonial dispossession and Indigenous land rights. Subsequently, the essentialist approach adopted in *Milirrpum v Nabalco* was widely considered inappropriate as a basis for determining the existence of Indigenous Australians' land rights.<sup>126</sup> These developments had an effect more broadly on Australian conceptions of property and led to the adoption of a more flexible and less conceptualist approach to property analyses.

Now, property analyses in Australia tend to involve closely examining the statutory context, considering analogies between the novel form of property and recognised common law forms of property and giving weight to the existence or absence of different rights commonly associated with property.<sup>127</sup> We have grouped the various approaches into two based on their core methodology, but some Australian cases employ both of these approaches.<sup>128</sup>

The first method entails drawing an analogy between the statutory entitlement and a novel form of property. For instance, Australian courts have relied on an analogy between a *profit à prendre* and a statutory entitlement that grants the holder a right to take and harvest a natural resource.<sup>129</sup> In *Harper v Minister for*

125 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 272. However, this judgement has since been critiqued for reasons such as that it failed to consider First Nation Peoples' conception of land and property. On this point, see, eg, Paul Patton, 'Mabo, Freedom and the Politics of Difference' (1995) 30 *Australian Journal of Political Science* 108; Aaron Corn and Neparra Gumbula, "'Now Balanda Say We Lost Our Land in 1788": Challenges to the Recognition of Yolnu Law in Contemporary Australia' in Marcia Langton et al (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 101. The decision was subsequently disapproved by the High Court in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 101. This disapproval related to the approach taken by Blackburn J in relation to colonial constitutional law.

126 Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2<sup>nd</sup> ed, 2009).

127 See, eg, *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210, 230–1 [44]; *Smith v ANL Ltd* (2000) 204 CLR 493, 504–5, 556–7; *Australian Capital Territory v Pinter* (2002) 121 FCR 509, 529; *Frank v Australian Capital Territory* (2001) 146 ACTR 15, 19–20 [20], 20 [25], 21 [27].

128 *Yanner v Eaton* (1999) 201 CLR 351, 367–8.

129 See, eg, *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151, 160; *Alcock v Commonwealth* (2013) 210 FCR 454, 467–8 [44]; *Fitti v Minister for Primary Industries and Energy* (1993) 40 FCR 286, 292; *Saulnier* [2008] 3 SCR 166, 184–5 [31]–[33].

*Sea Fisheries* the High Court of Australia held that a fee paid to a fishery regulator for a fishing licence was not a tax but a payment for the grant of a privilege.<sup>130</sup> Brennan J said it was ‘a privilege analogous to a profit à prendre in or over the property of another’.<sup>131</sup> Mason CJ, Deane and Gaudron JJ said that the ‘privilege can be compared to profit à prendre. In truth, however, it is an entitlement of a new kind’.<sup>132</sup> Yet, such analogies will not always be effective or appropriate.

Hepburn has provided a compelling critique of states declaring carbon sequestration rights to constitute *profit à prendre* interests in legislative instruments.<sup>133</sup> She argues, inter alia, that carbon sequestration rights grant the holder the right to benefit from the sequestration process, but a *profit à prendre* concerns a right to take a particular resource. Accordingly, Hepburn explains: ‘Framing carbon rights within the confines of a common law servitude, whose origins are derivative of feudal England and the law of the commons, is a retrograde act. The process distorts the core characteristics of the sequestration interest.’<sup>134</sup> The same argument can be made in relation to other tradeable emission entitlements, which exhibit characteristics of both private property and administrative concessions. Nevertheless, a *profit à prendre* analogy may be useful for other forms of statutory entitlements, such as the fishing licence, where actors are removing a benefit.

The second main approach to property analysis adopted by Australian courts is to consider ‘the totality of the legal rights conferred by the statute’,<sup>135</sup> and examine in particular whether the statutory entitlement has the indicia of property identified by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*.<sup>136</sup> In this case, Lord Wilberforce declared: ‘Before a right or an interest 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.’<sup>137</sup> Even though *Ainsworth* did not concern a statutory entitlement, and instead concerned the equity of a ‘deserted wife’, Australian courts have relied on the *Ainsworth* criteria in property analysis for statutory entitlements since *R v Toohey; Ex parte Meneling Station Pty Ltd* (*Meneling Station*),<sup>138</sup> and sometimes without express references

130 (1982) 168 CLR 314.

131 Ibid 335.

132 Ibid 325.

133 Samantha Hepburn, ‘Carbon Rights as New Property: The Benefits of Statutory Verification’ (2009) 31 *Sydney Law Review* 239.

134 Ibid 245.

135 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 352 (Wilson J).

136 [1965] AC 1175 (*Ainsworth*).

137 Ibid 1247–8.

138 (1982) 158 CLR 327.



to *Ainsworth*.<sup>139</sup> Perhaps as a reflection of the fact that *Ainsworth* was decided in a different context, statutory entitlements tend to easily display the first two indicia of property from *Ainsworth*. Because statutory entitlements are expressed in a statute, they are inherently definable and identifiable by third parties. Australian courts, consequently, have focused on whether an entitlement is ‘capable in its nature of assumption by third parties’ and the ‘permanence or stability’ of an entitlement.

The requirement that the entitlement ‘be capable in its nature of assumption by third parties’ appears to be a highly extended version of the right to transfer. Australian case law considers the right to transfer as only conceptual in nature, and so the right can be established regardless of whether something is actually or legally transferable. According to the majority in *Australian Capital Territory v Pinter*, the criterion can be satisfied even if the statute prohibits transfer, so long as the entitlement is *in its nature* capable of assumption by third parties, that is, actually or conceptually capable of being transferred.<sup>140</sup> An entitlement, therefore, can satisfy this criterion even where it cannot legally be sold or otherwise transferred. Similarly, restrictions on the ability to transfer an entitlement will not prevent a finding that the entitlement is ‘capable in its nature of assumption by third parties’.<sup>141</sup>

Nevertheless, Australian courts will place significant weight on the existence of an express right to transfer in the enabling Act. In *ICM Agriculture Pty Ltd v Commonwealth* (*ICM Agriculture*),<sup>142</sup> French CJ, Gummow and Crennan JJ deemed it significant that the licences were transferable, albeit subject to the Minister’s consent, and that they increased the value of land.<sup>143</sup> Their Honours said that provision in an enabling Act for transferability of rights ‘is an indication that for the general purposes of the law the rights may be classified as proprietary in nature’, and that the *Ainsworth* criteria is evidence of this.<sup>144</sup> In addition, Hayne, Kiefel and Bell JJ readily accepted that the bore licences were ‘a species of property’, which they took to be ‘amply demonstrate[d]’ by the fact that the rights to water under the licences could be traded or used as security.<sup>145</sup>

Circumstances that tend against an entitlement satisfying the transferability criterion from *Ainsworth* include where an enabling Act grants the regulator wide

139 See, eg, *Western Mining Corporation Ltd v Commonwealth* (1994) 50 FCR 305, 329, 335 (petroleum exploration permit held to be property acquired by the Commonwealth, set aside on appeal by a majority on the ground that while the permits were property, they had not been acquired by the Commonwealth: *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1); *Australian Rice Holdings Pty Ltd v Commissioner of State Revenue* [2002] ATC 4052 (statutory water rights dutiable as property); *TC Distributors (NT) Pty Ltd v Northern Territory* (2002) 11 NTLR 249 (omnibus licence); *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151,165; *Alcock v Commonwealth* (2013) 210 FCR 454, 471 [56].

140 *Australian Capital Territory v Pinter* (2002) 121 FCR 509, 529 [86]–[90] (Black CJ).

141 *Ibid*; see also *Meneling Station* (1982) 158 CLR 327, 342–3 (Mason J).

142 (2009) 240 CLR 140.

143 *Ibid* 178 [75].

144 *Ibid* 178 [76].

145 *Ibid* 201–2 [147]. This view was applied in *Lee v Commonwealth* (2014) 229 FCR 431, 462–3 [174], [177]; *Alcock v Commonwealth* (2013) 210 FCR 454, 469 [48].

discretion in either the allocation of a particular statutory entitlement or in the conditions that attach to an entitlement. These characteristics suggest a legislative intent to grant statutory entitlements to those determined and regulated by the relevant regulator and therefore tend against the finding that an entitlement is transferable in theory.<sup>146</sup> Similarly, if an entitlement is expressly non-transferable in both legal and equitable title under the enabling Act, then this will support a finding that the entitlement is not capable of being the subject of property rights.<sup>147</sup>

In relation to the second relevant criterion of the *Ainsworth* test, an entitlement is generally interpreted as ‘having some degree of permanence or stability’ if the relevant statute does not allow the regulator to cancel or vary an entitlement at any time other than for breach of condition,<sup>148</sup> or ‘in certain defined events only’.<sup>149</sup> In *Meneling Station*, Mason J, with whom Brennan J agreed,<sup>150</sup> expressly applied the *Ainsworth* criteria to a grazing licence. Mason J found the licence lacked permanence or stability because grazing licences cease to be valid after a year and the Minister had an unfettered discretion to cancel them on short notice or to refuse to renew them.<sup>151</sup> Contemporary statutes generally specify the circumstances in which the relevant Minister may revoke an entitlement.<sup>152</sup> This increases the likelihood that a statutory entitlement will satisfy this criterion.

The Australian approach to property analysis, therefore, is fundamentally different from that of US courts and from the more orthodox, essentialist understanding of property. Instead, Australian courts adopt a flexible, contextual, and less methodical approach that is more in line with instrumentalism. Specifically, Australian property analyses are most consistent with a ‘bundle-of-rights’ understanding of property even though Australian analyses may involve comparing an entitlement against the requisite criteria from *Ainsworth*. This is because the *Ainsworth* criteria has been broadly interpreted in Australia with the effect that it does not place a strong emphasis on the existence of specific rights. In fact, Wilson J in *Meneling Station* observed that the right to exclude was not necessary to support a finding that the licences conferred a proprietary interest.<sup>153</sup>

At the same time, the Australian courts have generally placed emphasis on the ability of a holder to transfer an entitlement when conducting a property analysis. This emphasis, which is often linked with references to the commercial value of an entitlement, evidences support for the commercial realities approach where

146 *Meneling Station* (1982) 158 CLR 327, 343 (Mason J).

147 See, eg, *Sorna Pty Ltd v Flint* (2000) 21 WAR 563.

148 *Meneling Station* (1982) 158 CLR 327, 342 (Mason J), 353–4 (Wilson J); *O’Keefe v Williams* (1910) 11 CLR 171; *TC Distributors (NT) Pty Ltd v Northern Territory* (2002) 11 NTLR 249, 254 [12].

149 *O’Keefe v Williams* (1910) 11 CLR 171, 191 (Griffith CJ), cited with approval in *Meneling Station* (1982) 158 CLR 327, 353; *ICM Agriculture* (2009) 240 CLR 140, 220–3 [205]–[209] (Heydon J).

150 *Meneling Station* (1982) 158 CLR 327, 364. Wilson J (with whom Murphy J agreed) reached the same conclusion via different reasoning. Gibbs CJ (at 332) expressed agreement with the reasons of both Wilson and Murphy JJ.

151 *Ibid* 332, 342, 345, 353, 364.

152 For instance, the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) s 80 provides that a regulator can cancel an authority to prospect only if the holder does not comply with particular requirements, and cancellation does not take effect until the holder is given notice.

153 *Meneling Station* (1982) 158 CLR 327, 353.

value and transferability are key considerations. The High Court of Australia in *ICM Agriculture*, where the plurality observed the value and transferability of the bore licences in unison, exemplifies the influence of commercial expectations.<sup>154</sup> Similarly, in *Pennington v McGovern*, the Full Court of the Supreme Court of South Australia upheld a plaintiff's beneficial title in an abalone fishing licence after focusing on the transferability and value of the entitlement.<sup>155</sup> King CJ explained:

It [the abalone fishing licence] is a transferable right which is contemplated as having value. ... The system of competitive tenders clearly contemplates that the licence will have value. The valuable nature of the right is confirmed by its transferability and by its being linked in both the Act and the regulations with the registration of boat and equipment and to the transfer thereof.<sup>156</sup>

Notably though, the existence of commercial value alone would not be sufficient to determine the existence of property rights in Australia — unlike, for instance, in Canada, where a more observable adoption of the commercial realities approach exists. Instead, commercial value is an indicator to Australian courts that legislatures may have intended for a statutory entitlement to be subject to proprietary rights and that the entitlement is transferable.

Given that statutory entitlements are unique with their combination of public and private dimensions, Australia's flexible approach to property analysis may be more suitable than the US's essentialist approach focused on intrinsic attributes and standard property rights. In other words, Australian courts exhibit a property analysis approach that is more adaptable to the novel nature of statutory entitlements and to the private and public interests that they are designed to satisfy. However, this does not mean that the Australian approach should be adopted in the US, where the constitutional context significantly differs. Arguably, a narrow property analysis suits the constitutional context in the US, where regulators are more likely to be liable where modifying or cancelling an entitlement, regardless of the public interest in such administrative decision-making.

Furthermore, conceptualists would not prefer the approach adopted in Australia to property analyses, despite its ability to deal with novel property. Instead, conceptualists are likely to position the Australian approach as counter to the long-term functioning of property law, as the approach adopted by Australian courts moves away from traditional notions of property, which may in turn increase legal uncertainty and transaction costs.

154 (2009) 240 CLR 140. While discussing the character of the entitlement at 178 [75], French CJ, Gummow and Crennan JJ stated: 'Section 117J provided for the transfer (permanently or for a period) of the whole or part of the water allocations for a licence, whether or not the transferee held another licence. In New South Wales, the assessment of the value of irrigable land takes into account rights to take water. Bore licences attached to irrigable land enhanced its market value and were commonly taken into account by lenders when assessing the value of security to be provided' (citations omitted).

155 (1987) 45 SASR 27.

156 *Ibid* 31.

## B Application to Emission Entitlements

Australian courts are far more likely to find that such entitlements are capable of supporting proprietary interests than US courts, and this is especially due to their emphasis on transferability. In fact, the legislation establishing Australia's emissions trading scheme, which is now withdrawn, designated carbon units as 'personal property'.<sup>157</sup> This had the effect of fostering market and legal certainty, as all statutes that regulated property interests, such as insolvency and personal property security laws, automatically applied to dealings with statutory entitlements.

However, a blanket provision that an entitlement is 'personal property' may subordinate the public interests being progressed through emissions trading schemes. Such an approach to characterising entitlements, for instance, may not adequately outline the circumstances in which the rights granted may be restricted to pursue public policy goals. For instance, regulators may want to restrict the property rights of holders to create and bundle derivative financial products from entitlements to help maintain some regulatory oversight of this derivative market.<sup>158</sup>

French CJ of the High Court of Australia discussed the importance of considering how the public interest shapes the scope of statutorily granted rights in *JT International SA v Commonwealth*.<sup>159</sup> In this case, a tobacco company sought to declare plain-packaging laws as unconstitutional because the laws interfered with the company's intellectual property rights in the appearance of their tobacco products. French CJ stated:

Intellectual property laws create property rights. They are also instrumental in character. As Peter Drahos wrote in 1996, their proper interpretation does not depend upon 'diffuse moral notions about the need to protect pre-legal expectations based on the exercise of labour and the creation of value'. The statutory purpose, reflected in the character of such rights and in the conditions informing their creation, may be relevant to the question whether and in what circumstances restriction or regulation of their enjoyment by a law of the Commonwealth amounts to acquisition of property for the purposes of s 51(xxxi) of the *Constitution*.<sup>160</sup>

Intellectual property rights then, like emission entitlements, have a mixture of private and public policy goals, and are statutorily created. Furthermore, both intellectual property rights and emission entitlements rely on transferability and value to achieve broader policy objectives. Consequently, there are some strong

157 *Clean Energy Act 2011* (Cth) s 103. This Act was repealed on 17 July 2014 by the *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth).

158 Inadequate and fragmented regulation of financial derivatives was a significant factor in the Global Financial Crisis. See, eg, Guido Ferrarini and Filippo Chiodini, 'Nationally Fragmented Supervision over Multinational Banks as a Source of Global Systemic Risk: A Critical Analysis of Recent EU Reforms' in Eddy Wymeersch, Klaus J Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision: A Post-Crisis Analysis* (Oxford University Press, 2012) 193.

159 (2012) 250 CLR 1.

160 *Ibid* 28 [30] (citations omitted).

similarities between the rights conferred through intellectual property and the rights conferred through other forms of statutory entitlements.

Accordingly, French CJ's observations about the innately instrumental nature of intellectual property rights adds weight to a broader argument, that is, statutory entitlements should confer rights and obligations that are scoped in accordance with the public policy goals which they are designed to achieve. In line with social-obligation norm conceptions and the observations by French CJ, the rights and duties of private parties, as well as regulators, in relation to emission entitlements should account for the ultimate statutory purpose of cost-effective emission reductions.

Scoping the rights and obligations conferred by emission entitlements in line with the goals of emissions trading may result in, for instance, a qualified 'right to exclude' to allow for both regulator discretion and market confidence. It may also clarify the corresponding obligations owed by the holder of emission entitlements, which may include an obligation to undertake due diligence in relation to the entitlements they hold, including checking whether their emission entitlements are based on properly verified emission reductions or sequestration projects.

## V UNITED KINGDOM

### A Approach to Property Analysis

The commercial realities approach to property analysis is prevalent in the UK, as advanced by Morritt LJ in *Re Celtic Extraction Ltd (in liq)*.<sup>161</sup> This approach, as discussed, effectively reduces property analyses to just two indicators: transferability and value. Consequently, the UK conception of property and its indicia falls towards the instrumental end of approaches where property is a means to an end.

The issue before the Court of Appeal in *Re Celtic Extraction* was whether a waste management licence was 'property' within the meaning of s 436 of the *Insolvency Act 1986* (UK). The Act broadly defined 'property' to include 'money, goods, things in action, land and every description of property wherever situated'.<sup>162</sup> After reviewing various authorities, Morritt LJ identified a threefold test:

It appears to me that these cases indicate the salient features which are likely to be found if there is to be conferred on an exemption from some wider statutory prohibition the status of property. First, there must be a statutory framework conferring an entitlement on one who satisfies certain conditions even though there is some element of discretion exercisable within that framework. ... Second,

161 [2001] Ch 475 ('*Re Celtic Extraction*'). Note, however, that Morritt LJ relied on the *Ainsworth* criteria when establishing the threefold test in *Re Celtic Extraction*.

162 *Insolvency Act 1986* (UK) c 45, s 436.

the exemption must be transferable. ... Third, the exemption or licence will have value.<sup>163</sup>

As identified by Morritt LJ, this threefold test is informed by the *Ainsworth* criteria.<sup>164</sup> Accordingly, the test developed in *Re Celtic Extraction* is adapted from the *Ainsworth* criteria to suit statutory entitlements. Despite their similarities, the *Re Celtic Extraction* test places more emphasis on value than the *Ainsworth* criteria.

Statutory entitlements easily satisfy the first test from *Re Celtic Extraction* as such entitlements are, by nature, created and conferred through statutory frameworks. Turning to the second test, not all statutory entitlements are transferable and sometimes statutory schemes will place limitations on their transferability. However, the extent of the transferability required for an entitlement to satisfy this test was narrowly interpreted by Morritt LJ. His Lordship found that the waste management licence was transferable even though a holder had to surrender the entitlement to the regulator before it could be re-issued to the nominated transferee.

In relation to the last test from *Re Celtic Extraction*, some statutory entitlements, particularly those that are not transferable, would have limited commercial value because there is less likely to be an established market for the statutory entitlements.<sup>165</sup> However, value for the purposes of this test is not determined by the existence of a legally valid market. In *Re Celtic Extraction*, the waste management licence did not have a market. Nonetheless, Morritt LJ observed industry practice and commented ‘money does change hands as between transferor and transferee’.<sup>166</sup> Another factor considered when determining value was the fees the holders had to pay to the agency, which Morritt LJ considered to be ‘a good indication of the substantial value a waste management licence possesses for the owners’.<sup>167</sup> Presumably, this is because a waste management licence holder would not start or continue paying such fees unless the licence had value.

The broad criteria proposed by Morritt LJ are clearly aligned with the commercial realities approach where it necessarily follows that if an asset is valuable and transferable then it is capable of supporting proprietary interests. This is illustrated by the fact that the two most onerous qualifiers in his Honour’s formulation are transferability and value. As a result, the decision of the Court of Appeal overlooked the fact that, by allowing an insolvent company to disclaim its waste management licence, the company could avoid the obligations it carries

163 *Re Celtic Extraction* [2001] Ch 475, 489 (Morritt LJ).

164 *Ibid* 487–9.

165 For instance, licences permitting a person to carry out an extreme sport or a more hazardous recreational activity are generally non-transferable.

166 *Re Celtic Extraction* [2001] Ch 475, 489.

167 *Ibid*.

to rehabilitate and regulate long-term waste disposal sites.<sup>168</sup> This raises issues regarding the appropriateness of the commercial realities approach when dealing with statutory entitlements designed to serve public interests.

Similar to *Re Celtic Extraction*, subsequent cases have placed little weight on statutory limitations to transfer and the commercial value of the entitlement has been the predominant consideration. For instance, in *Swift v Dairywise Farms Ltd*,<sup>169</sup> the court found that a milk quota was capable of supporting proprietary interests, despite having significant restrictions on who the quota could be transferred to.<sup>170</sup> Jacob J stated that the: ‘Quota has commercial value and a legal effect. Merely because there are limitations on how it may be held or conveyed is not a reason for equity to refuse to impose a trust where conscience so requires.’<sup>171</sup> A significant factor leading to his Honour’s conclusion was that the quota was still transferable once particular conditions were met. In terms of reasoning then, *Swift v Dairywise Farms Ltd* differs fairly significantly from the *US Peanut Quota* case, which focused on whether an entitlement grants access to an otherwise closed market while *Swift v Dairywise Farms Ltd* focused on the commercial value of a licence not on the exclusivity of the milk quota. Yet, the US approach is not that distinct: if a statutory entitlement grants access to a closed market then it is likely to have a higher commercial value. Both approaches then are tied to commercial value to varying extents.

## **B Application to Emission Entitlements**

The UK participates in the European Union’s (‘EU’) emissions trading scheme, which is silent as to the legal character of its emission allowances. The closest the scheme has come to specifying the nature of the emission allowances is through its definition of an emission allowance as a ‘fungible, dematerialised instrument that is tradable on the market’.<sup>172</sup> However, this is a list of objective features not legal or proprietary characteristics.

The European Union’s silence as to the legal nature of emission entitlements has been criticised by stakeholders. For instance, the Financial Markets Law Committee of the Bank of England commented:

The central area of difficulty is that nothing in the EU-ETS provides any indication of the legal nature of emission allowances. ... [I]t is understood that different conclusions as to their legal classification may already have been, or

168 Blanca Mamutse and Valerie Fogleman, ‘Environmental Claims and Insolvent Companies: The Contrasting Approaches of the United Kingdom and the United States’ (2013) 2 *British Journal of American Legal Studies* 579.

169 [2000] 1 All ER 321.

170 Affirmed in *Swift v Dairywise Farms Ltd* [2003] 2 All ER 304.

171 *Swift v Dairywise Farms Ltd* [2000] 1 All ER 321, 326.

172 *Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1193/2011* [2013] OJ L 122/1, art 40(1).

are in the course of being, reached in a number of Member States. The potential ramifications of alternate legal classifications are far reaching.<sup>173</sup>

The Committee points out that the legal nature of emission entitlements determines the laws that regulate how such entitlements are allocated, transferred, cancelled or altered and whether an entitlement can support security interests.

Despite the lack of legal specificity, it seems likely that UK courts would characterise emission entitlements as property based on the commercial realities approach, as these entitlements are generally designed to be transferable and have commercial value. The decision by Stephen Morris QC, sitting as Deputy High Court Judge, in *Armstrong DLW GmbH v Winnington Networks Ltd* (*Armstrong v Winnington*) affirms this, and provides the first judgment that considers the legal character of emission entitlements.<sup>174</sup>

*Armstrong v Winnington* involved a third party fraudulently obtaining Armstrong's login details for the UK emission allowances registry. The third party sold Armstrong's entitlements to Winnington. Armstrong sought compensation from Winnington, who was unaware of the fraudulent activity at the time. Accordingly, the question in *Armstrong v Winnington* was whether the emission allowances issued under the European Union's emissions trading scheme were the type of property that equity or common law protected.

Morris QC noted the distinctive nature of emission allowances,<sup>175</sup> and considered that such entitlements do not give the holder a 'right' to emit a greenhouse gas so much as permission to emit and an exemption from a fine.<sup>176</sup> In determining the scope and nature of entitlements, he relied upon the decision from *In Re Celtic*.<sup>177</sup> After applying the threefold test from *Re Celtic Extraction*, he concluded that an emission allowance is best characterised as 'some ... other intangible property'.<sup>178</sup> Morris QC stated:

First, there is, here, a statutory framework which confers an entitlement on the holder of an [EU allowance] to exemption from a fine. Secondly, the [EU allowance] is an exemption which is transferable, and expressly so, under the statutory framework. Thirdly the [EU allowance] is an exemption which has value ...<sup>179</sup>

173 Financial Markets Law Committee, above n 12, 5.

174 [2013] Ch 156.

175 Ibid 166 [17].

176 Ibid 172 [48].

177 Ibid 173 [50], 176–7 [58]–[61]. Note that he also applied, as an initial test, the *Ainsworth* criteria, which he considered to be easily satisfied by the emission allowances. In particular, the allowances were considered 'identifiable by third parties' due to their unique reference numbers and did have 'the permanency or stability' required as they are capable of existing from year to year in the registry until transferred.

178 Ibid 176–7 [58]–[61].

179 Ibid 176 [58].



In relation to value, emission entitlements were considered to have commercial value because they could be used to avoid a fine for exceeding allowable emissions and could be traded through the market.<sup>180</sup>

Ultimately, the Court concluded that Armstrong had retained equitable title in the emission allowances, and that the fraudulent party had obtained legal title by possession. Thus, Armstrong's claim for unconscionable receipt of trust property in equity was upheld, while the alternative claim, which was a claim proprietary restitution claim at common law, was unsuccessful. To establish a claim in proprietary restitution, Armstrong would need to have retained legal and equitable title.

Although the Court determined that Armstrong was entitled to a money judgement to the value and proceeds of the emission allowances, this judgement was based on a number of broad assumptions that could form contentious issues in a following dispute. For instance, both parties conceded before the trial that an emission allowance 'is a property right of some sort' and that 'one way or another, Armstrong does, in principle, have a legal basis for the claim for recovery'.<sup>181</sup>

In a similar vein, different disputes and factual contexts will raise other issues connected to the unclear nature of emission entitlements. For instance, *Armstrong v Winnington* did not entail a detailed analysis of the type of legal rights and correlative obligations that exist in relation to 'other' forms of intangible property. The absence of such consideration left it unclear how legal title in emission allowances passes. Morris QC ultimately decided that equitable title had remained with Armstrong, while the fraudster had obtained legal title based on possession.<sup>182</sup> In reaching this decision, he stated:

I have not found this issue easy. The intangible nature and electronic form of the [EU allowances] coupled with the speed with which it appears that the [EU allowances] were taken out of one account and transferred to another account make it difficult to compare the situation with the thief who steals physical property or a bag of money and passes it on to a third party.<sup>183</sup>

However, he noted that if he was wrong about how property has passed, and instead both equitable and legal title had remained with Armstrong, it would not affect the outcome.<sup>184</sup> Armstrong would still have a successful claim in common law, as *Winnington's* defence of bona fide purchase failed.<sup>185</sup>

In sum, *Armstrong v Winnington* illustrates the application of *Re Celtic Extraction Ltd* to emission entitlements. Yet the case also exemplifies the legal difficulties courts must resolve where the nature of emission entitlements is left unclear. The paucity of the authorities in the UK as well as other common law countries, and

180 Ibid 172 [49].

181 Ibid 168 [31].

182 Ibid 192–3 [127]–[128].

183 Ibid 221 [275].

184 Ibid 223 [287].

185 Ibid 223 [288].

the limited scope of considerations in *Armstrong v Winnington*, necessarily leaves unexplored other legal issues that may arise in relation to emission entitlements.<sup>186</sup>

## VI CANADA

### A Approach to Property Analysis

Unlike Australia and the US, but similar to the UK, property analyses in Canada have arisen more frequently within the context of private law issues than in decisions concerning government expropriation of statutory entitlements.<sup>187</sup> Furthermore, property analyses of statutory entitlements are considerably more unsettled in Canada than the other jurisdictions. Prior to the decision of the Canadian Supreme Court in *Saulnier*,<sup>188</sup> Canadian courts were using either an essentialist or a commercial realities approach to property analyses in statutory entitlement cases.<sup>189</sup> Since *Saulnier*, Canadian courts have tended towards a ‘bundle-of-rights’ conception, but application has not been consistent.<sup>190</sup> In this section, we will briefly outline the divergent approaches.

The Ontario Court of Appeal in *Re National Trust Company and Bouckhuys* is a key case illustrating an essentialist approach to property analyses in the context of a tobacco quota.<sup>191</sup> The Court characterised the quota as permission to produce tobacco, which production would otherwise be illegal.<sup>192</sup> Even though the quota was traded for value, the court deemed it most significant that the regulator had to approve transfers, and had the discretion to allocate or cancel tobacco quotas.<sup>193</sup> Consequently, the Court held that the quota was ‘by its nature subject to such discretionary control and is so transitory and ephemeral in its nature that it cannot, in my view, be considered to be property’.<sup>194</sup>

186 Low and Lin, above n 16, 385.

187 Much of the Canadian case law deals with private transactions concerning fishery licences. See, eg, *British Columbia Packers Ltd v Sparrow* (1989) 35 BCLR (2d) 334.

188 [2008] 3 SCR 166.

189 See, eg, *Saskatoon Auction Mart Ltd v Finesse Holsteins* (1992) 104 Sask R 154; *G Slocombe & Associates Inc v Gold River Lodges Ltd* [2001] BCSC 840 (12 June 2001) [8]. Note, scholars and courts have categorised the lines of cases into those that take the ‘traditional property approach’ with a focus on exclusion, ‘the regulatory approach’ that emphasises permanency of an entitlement, and the ‘commercial realities approach’. We consider both the ‘regulatory approach’ and the ‘traditional approach’ to be focused on exclusivity in a way more in line with essentialism. See, Barton, above n 64, 86–7.

190 See, eg, *Taylor v Dairy Farmers of Nova Scotia* (2010) 298 NSR (2d) 116, [55]–[59].

191 *Re National Trust Co and Bouckhuys* (1987) 61 OR (2d) 640 (‘*Bouckhuys*’).

192 *Ibid* 648 (Cory JA, giving the judgment of the Court).

193 *Ibid* 647–8.

194 *Ibid* 648.

The decision in *Bouckhuys* has been followed in other Canadian cases in which the transfer of quotas is subject to comprehensive regulatory control.<sup>195</sup> These decisions demonstrate an approach similar to the US and an essentialist understanding of property where the exclusionary aspects of the particular legal relationship with an entitlement form the basis of the property analyses. In particular, the right to exclude in relation to statutory entitlements seems to exist where the holder can exclude the regulator from making decisions that significantly affect the existence of an entitlement.

In contrast, the commercial realities approach was being adopted in other judgements. For instance, *Saskatoon Auction Mart Ltd v Finesse Holsteins* concerned a milk quota that was deemed to be property of the milk board according to the relevant legislation.<sup>196</sup> Matheson J, however, focused on the value of the quota, and stated:

Merely because it is stated that all milk and cream quotas are the property of the Board does not necessitate a conclusion that there is no property interest in the quota allotted to a producer. The quota, as distinct from the proceeds generated from the use thereof by the sale of milk and cream, has a significant value, evidenced, in this instance, by the sale of 392 kilograms per day of milk quota for more than \$100,000.<sup>197</sup>

Ultimately, his Honour concluded that the licence may have started as a ‘mere licence’ but additional rights were impliedly granted including, in this case, the right to produce and market the milk.<sup>198</sup> This decision exemplifies how the commercial realities approach tends to be more focused on the way in which a statutory entitlement has been used and valued by the market than by statutory context.

The Supreme Court of Canada in *Saulnier* eventually considered the divergence of approaches to property analyses.<sup>199</sup> Referring to the analysis in *Re Celtic Extraction Ltd* and *Swift v Dairywise Farms Ltd*, Binnie J (for the court) observed that the commercial realities approach is not aligned with the way in which property functions. His Honour observed ‘many things that have commercial value do not constitute property, while the value of some property may be minimal’.<sup>200</sup> He concluded:

There is no necessary connection between proprietary status and commercial value. ... ‘[C]ommercial realities’ cannot legitimate wishful thinking about the notion of ‘property’ in [statutes], although commercial realities provide an appropriate context in which to interpret the statutory provisions.<sup>201</sup>

195 *Taylor v Dairy Farmers of Nova Scotia* 298 NSR (2d) 116 [53]; *Sanders v British Columbia (Milk Board)* (1990) 43 BCLR (2d) 324, [63], affirmed in (1991) 53 BCLR (2d) 167. See further cases cited in *Saulnier* [2008] 3 SCR 166, 186 [36].

196 (1992) 104 Sask R 154.

197 *Ibid* 159 [33].

198 *Ibid* 160 [36].

199 [2008] 3 SCR 166.

200 *Ibid* 189 [42].

201 *Ibid* 189 [41]–[42] (giving the judgment of the Court).

In other words, property analyses that focus on the economic function of property undermine or distract from determining whether the entitlement has intrinsic attributes that tend towards a finding of property as a distinct legal institution. Instead, commercial considerations form part of interpreting the necessary statutory provisions and determining legislatures' intentions; but, commercial value cannot be *prima facie* evidence of a proprietary interest. Overall then, the judgment rejected the commercial realities approach as too instrumentalist to be appropriate for determining whether something is capable of supporting a proprietary interest.

The question before the Supreme Court in *Saulnier* was whether the rights conferred by commercial fishing licences were capable of qualifying as 'property' in accordance with the definition of 'property' in the *Bankruptcy and Insolvency Act*,<sup>202</sup> and the *Personal Property Security Act*.<sup>203</sup> The Court, therefore, was not concerned with whether the fishing licences conferred the kinds of rights necessary to qualify as property at common law. Instead, the Court focused on whether the rights transferred under the fishing licence may be sufficient to find that the licence is 'property' as defined in, and for the purposes of, the relevant statutes.

To determine this, the Court indicated a preference for drawing analogies between the entitlement in question and recognised forms of common law property interests. Specifically, the Court drew an analogy between the fishing licences and the common law *profit à prendre*, which is a non-possessory land interest recognised in common law that grants the interest holder the right to extract a resource on another's land coupled with a proprietary interest in the resource extracted.<sup>204</sup>

On the basis of this analogy, the fishing licences were sufficient to be considered property for the purposes of the *Bankruptcy and Insolvency Act*, and the *Personal Property Security Act*. Two key factors made the fishing licence analogous to a *profit à prendre*. First, the fishing licences conferred permission to participate in fisheries. Second, the licences granted a proprietary interest in all fish caught in accordance with the licence. Binnie J explained:

My point is simply that the subject matter of the licence (i.e. the right to participate in a fishery that is exclusive to licence holders) coupled with a proprietary interest in the fish caught pursuant to its terms, bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature.<sup>205</sup>

The fact that the fishing licences in question granted 'the right to engage in an exclusive fishery' weighed into the analogy with a *profit à prendre*, as the *profit à prendre* generally confers the right to prevent others from extracting the same

202 RSC 1985, c B-3.

203 SNS 1995-96, c 13.

204 *Saulnier* [2008] 3 SCR 166, 183 [28].

205 *Ibid* 185 [34].

resource.<sup>206</sup> This interpretation seems to have similarities with the ‘closed market’ exception in the US. Both analyses place emphasis on whether an entitlement grants exclusive access to a benefit.

Although the Court acknowledged that the statutory entitlement might reasonably be encompassed by the definitions of ‘property’ according to the relevant statutes, it noted that the entitlement does not have the elements required to be characterised as property at common law. Binnie J observed that the right to participate in a fishery and the right to the fish caught pursuant to the right would not ‘wholly correspond to the full range of rights necessary to characterize something as “property” at common law’ though were ‘sufficient to qualify the “bundle of rights” [conferred on Saulnier] ... as property’ for the purposes of the relevant statutes.<sup>207</sup> Arguably then, for a statutory entitlement to qualify as property in common law it would need to create interests of the kind that are traditionally recognised in common law.<sup>208</sup>

Canadian decisions subsequent to the Supreme Court’s decision in *Saulnier* have avoided the commercial realities approach. Instead, the courts have adopted a bundles-of-rights approach in which the various rights conferred are considered with more weight given to exclusionary factors, the duration and permanence of the entitlement and its transferability.<sup>209</sup> For instance, in *Tuscows.com Co v Lojas Renner SA*,<sup>210</sup> the Ontario Court of Appeal held a domain name to be personal property because it gave an exclusive right to access a website, and had a degree of permanence. Similarly, in *Haché v Canada*,<sup>211</sup> the Federal Court of Appeal held that a fishing licence was property for purposes of a capital gains tax provision. The Court found that the fishery was exclusive, and the licences had an element of permanence as the regulator’s practice was to renew them annually.

To a certain extent, the line of reasoning illustrated in these cases is consistent with *Saulnier*. However, the emphasis on duration and permanence was not an attribute that the *Saulnier* decision relied upon nor is it an attribute strictly or expressly associated with property according to essentialist interpretations. In fact, Binnie J in *Saulnier* cast doubt on the relevance of the ‘transitory or ephemeral’ nature of

206 Ibid 190 [43]. Whether such a right exists will depend on the subject matter. In Herman H Hahner, ‘An Analysis of Profits a Prendre’ (1946) 25 *Oregon Law Review* 217, 220 the author explained: ‘When [wild] birds or animals come upon the owner’s land, his right of exclusive occupation of the land enables him to prevent an appropriation or to claim the benefit of an illegal appropriation by others. This interest, consisting of a right to prevent an appropriation, when surrendered to another, becomes a profit’.

207 *Saulnier* [2008] 3 SCR 166, 190 [43].

208 In other words, interests that are permitted to be property interests in line with the *numerus clausus* principle.

209 *Tuscows.com Co v Lojas Renner SA* (2011) 106 OR (3d) 561, 581–3 [58]–[65] (considered exclusivity and permanence in holding a domain name to be personal property); *Haché v Canada* [2011] FCA 104 (17 March 2011) (considered same factors in holding a fishing licence was property for purposes of capital gains tax); *Taylor v Dairy Farmers of Nova Scotia* (2010) 298 NSR (2d) 116 (applied *Bouckhuys* to find that milk quota was not property for purposes of expropriation as it lacked stability and transferability).

210 (2011) 106 OR (3d) 561, 581–3 [58]–[65].

211 [2011] FCA 104 (17 March 2011).

licences renewable at the regulator's discretion.<sup>212</sup> His Honour observed that: 'A lease of land for one day or one hour is undeniably a property interest, as is a lease terminable at pleasure'.<sup>213</sup> The inclusion of permanence or stability as an attribute that tends towards an interest being proprietary in nature is more in line with the Australian approach to property analyses. This emphasis on stability reflects how the features that make up the 'bundle-of-rights' will differ, and that the approach is far from static or determinative. While this flexibility may present an issue for legal and market certainty, it is an approach more adaptable to the various and unique bundles-of-rights conferred by statutory entitlements.

## **B Application to Emission Entitlements**

In Canada, similar to in the US, states are leading the development of emissions trading with Quebec, Manitoba, Ontario, Alberta and British Columbia establishing such schemes. Instead of expressly declaring that emission entitlements are not capable of constituting property, Canadian schemes tend to prevent holders of such entitlements from dividing their interests.

For instance, the legislation establishing Ontario's emissions trading schemes states that '[n]o registered participant shall hold in the participant's cap and trade accounts an emission allowance or credit that is owned, directly or indirectly, by another person'.<sup>214</sup> Quebec took a similar approach by stating that '[a]n emitter or a participant may only hold emission allowances for their own use and not on behalf of another person having an interest in or control [of] the emission allowances'.<sup>215</sup> Meanwhile, Alberta adopted a more direct approach to characterisation by declaring its emissions entitlements to be 'revocable licences'.<sup>216</sup>

Regardless of how each regime characterised the entitlements, all Canadian emissions trading schemes are designed to involve the sale and transfer of entitlements. These restrictions on the ability to divide up the bundle-of-rights conferred by an entitlement could lead to situations where, for instance, a trust in relation to an entitlement is illegal or a transfer of the use rights under an entitlement is void.

Canadian decisions, similar to Australia and the UK, have tended to find an entitlement to be capable of supporting proprietary interests despite legislative statements to the contrary. Canadian courts have commonly upheld beneficial ownership in statutory entitlements to give effect to commercial arrangements that were not originally contemplated by the legislature and which were developed

212 *Saulnier* [2008] 3 SCR 166, 187 [37]–[38], citing *Re National Trust Co v Bouckhuys* (1987) 61 OR (2d) 640, 648 (Cory JA).

213 *Saulnier* [2008] 3 SCR 166, 187 [37].

214 *Climate Change Mitigation and Low-Carbon Economy Act*, SO 2016, c 7, s 28(2).

215 *Regulation Respecting a Cap-and-Trade System for Greenhouse Gas Emission Allowances*, OC 1297-2011, 16 December 2011, GOQ 2011.II.50B, s 24.

216 *Specified Gas Emitters Regulation*, Alta Reg 139/2007, s 10(1).

outside of the statutory framework.<sup>217</sup> For instance, courts have interpreted provisions requiring the regulator's approval for transfer as being limited to transfers in legal rather than equitable title.<sup>218</sup> The rights that make up a particular statutory entitlement may be found to be divisible even where the relevant statute prohibits transfer.<sup>219</sup>

It is unclear whether the legislative prohibitions in Canadian emission trading schemes on dividing interests in emissions entitlements will be effective. On the one hand, restrictions on divisibility of interests could suggest that an emission entitlement does not confer sufficient rights to make up a bundle-of-rights in property. A contract that transfers some of the use rights under an entitlement to another could be void and unenforceable.

Alternatively, the provisions may prevent courts from enforcing trusts in respect of entitlements.<sup>220</sup> Given that one of the policy objectives underpinning emissions trading schemes is to create a functioning market, it seems likely that courts will be disinclined to void transfers where informed parties enter into the transaction. The design and policy objectives of the emissions trading scheme may speak to the legislature's intentions regarding how the entitlements should move through the markets more than the prohibition on dividing interests. However, Canadian courts have moved away from the commercial realities approach, which suggests that they are less likely to uphold a transaction in light of an express statutory prohibition on dividing interests.

Adding to this uncertainty is the approach taken in *Saulnier*. This decision placed reliance on an analogy between a common law property interest and a statutorily created entitlement, which analogy is not as appropriate or applicable in the context of emission entitlements. An emission entitlement is not analogous to a *profit à prendre* in the same way as a fishing licence, as an emission entitlement does not involve a right to extract something, and it does not result in a proprietary interest in the thing extracted.<sup>221</sup> Instead, emission entitlements are either a tradeable allowance to emit a certain amount (the opposite of extracting a resource) or a right to benefit from sequestering carbon through offset programs. The unconventional nature of emission entitlements suggests that the pre-existing categories of common law property interests are not a suitable approach to characterising new legal relationships.

217 See, eg, *Gaudet v Dugas* [2015] NBQB 59 (27 February 2015), [116]–[118]; *Loder v Citifinancial Canada Inc* (2007) 290 DLR (4th) 155, 159–60 [16], [17], 162 [21]; *Goulden v Smith* [2003] NSSC 215 (3 November 2003), [2]; *R Baker Fisheries Ltd v Widrig* [1998] NSJ No 158 (22 April 1998), [9].

218 *British Columbia Packers Ltd v Sparrow* (1988) 22 BCLR (2d) 302; *British Columbia Packers Ltd v Sparrow* (1989) 35 BCLR (2d) 334.

219 *Theriault v Corkum* (1993) 121 NSR (2d) 99.

220 Anthony Duggan, 'In the Wake of the Bingo Queen: Are Licences Property?' (2009) 47 *Canadian Business Law Journal* 225, 237.

221 Hepburn, 'Carbon Rights as New Property', above n 133.

## V IMPLICATIONS FOR EMISSIONS TRADING SCHEMES

Across the jurisdictions examined, clear differences in approaches to property analyses exist, and the potential effects of these differences are demonstrated in the context of emission entitlements. The UK has already recognised emission entitlements as property, and Australia is likely to recognise such entitlements as property. Both jurisdictions, however, have not developed an operational definition or sought to scope the rights and liabilities granted by such an entitlement taking into consideration the public interest dimension. In contrast, it is unlikely that the US will recognise emission entitlements. Meanwhile, the likely outcome in Canada is unclear, but express provisions restricting the ability of a holder to divide their interests could suggest that the rights in relation to the entitlement are not proprietary in nature.

For entitlements like fishing permits, it is not necessarily significant that different jurisdictions will deem such permits to be property while others will not. However, linking different domestic emissions trading schemes is promoted by international climate change agreements,<sup>222</sup> inter-governmental bodies,<sup>223</sup> and scholars.<sup>224</sup> Theoretically, inter-linking schemes improves and expands the functioning of markets leading to a more cost-efficient reduction of emissions than unilateral emissions trading.<sup>225</sup>

To inter-link emissions trading schemes, a regulator must accept the use of an emission allowance originating from another jurisdiction.<sup>226</sup> As Hawkins and Jegou explained:

Linkage ... requires a certain degree of harmonization between some scheme elements ... The differences in the design of [schemes] largely affect the compromises that linkage would involve. ... [T]he decision whether or not to link is a trade-off between the merits and demerits of linkage ... in light of a government's priorities.<sup>227</sup>

222 See, eg, *Adoption of the Paris Agreement*, 21<sup>st</sup> sess, Agenda Item 4(b), UN Doc FCCC/CP/2015/L.9/Rev.1 (12 December 2015) annex ('*Paris Agreement*') art 6, which promotes market-based mechanisms and allows parties to use and transfer 'mitigation outcomes' to meet their emission reduction targets. It also seems to be setting up an international emissions trading scheme termed the 'sustainable development mechanism', though the rules, modalities and procedures are yet to be set.

223 Sonja Hawkins and Ingrid Jegou, 'Linking Emissions Trading Schemes: Considerations and Recommendations for a Joint EU-Korean Carbon Market' (Issue Paper No 4, International Centre for Trade and Sustainable Development, March 2014) 4–5 <<http://www.ictsd.org/sites/default/files/research/linking-emissions-trading-schemes-considerations-and-recommendations-for-a-joint-eu-korean-carbon-market.pdf>>.

224 See, eg, Andreas Tuerk et al, 'Linking Carbon Markets: Concepts, Case Studies and Pathways' (2009) 9 *Climate Policy* 341. See also Flachsland, Marschinski and Edenhofer, above n 19, where it is concluded that while global emissions trading is preferable because it expands the market the most, bottom-up inter-linking presents a way to move towards a global emissions trading scheme.

225 See, eg, Michael Grubb, 'Linking Emissions Trading Schemes' (2009) 9 *Climate Policy* 339.

226 Anita Talberg and Kai Swoboda, 'Emissions Trading Schemes around the World' (Background Note, Parliamentary Library, Parliament of Australia, 6 June 2013) 3 <[http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2501441/upload\\_binary/2501441.pdf;fileType=application/pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2501441/upload_binary/2501441.pdf;fileType=application/pdf)>.

227 Hawkins and Jegou, above n 223, 4.



Though the jurisdictions examined here are similar culturally and legally, the different approaches to property analysis and the subsequent characterisations of emission entitlements are likely to present a barrier to inter-linking schemes.<sup>228</sup> For instance, the US may want to continue recognising entitlements as revocable licences to limit their government's liability, while potential partners such as the UK or Australia may prefer to continue characterising entitlements as property. Thus, policy makers will have to consider, and perhaps compromise on, the legal characterisation of emission entitlements when considering inter-linking two schemes.

In addition to hindering the inter-linking of schemes, schemes inter-linked without first harmonising the legal character of emission entitlements could have significant consequences for private actors and for the outcomes of emissions trading. For example, if Alberta (Canada) and Australia linked their emissions trading schemes, then an entitlement holder in Alberta could contractually agree to sell its entitlements to a buyer in Australia. If the entitlement holder decides to sell to someone else instead, an Australian buyer would only be able to sue for a breach of contract in Alberta, whereas the buyer could assert an equitable interest in the entitlement in Australia, which would ensure that the buyer had rights to the monetary benefits of the emission entitlements.<sup>229</sup> Thus, the choice of forum can have a critical role in the outcome of related cases.

More generally than inter-linking, the viability of emissions markets depends on market confidence and legal certainty similar to trade in commodities.<sup>230</sup> Manea explained: 'The outcomes of a viable emissions market and minimal impact on economic development require certainty as to the scope of the entitlements'.<sup>231</sup> Manea explored a range of situations where 'loopholes and tensions' between the EU emissions trading scheme and domestic regulatory frameworks were a result of, or have been aggravated by, the absence of a clear definition of emissions entitlements'.<sup>232</sup>

The inadequate specification of emission entitlements makes rights a holder has in relation to the entitlements, the duties such as tax and accounting requirements, as well as the modes of transferring these rights, highly uncertain.<sup>233</sup> Further legal uncertainties include whether entitlements can be the subject of property crimes

228 A similar suggestion was made in Sanja Bogojevic, *Emissions Trading Schemes: Markets, States and Law* (Bloomsbury Publishing, 2013) 113–16 in reference to EU's emissions trading schemes and the different characterisations of entitlements within the EU.

229 See Regina Betz and Ashley Stafford, 'The Policy Issues Arising with the Linking of International Emissions Trading Schemes' (2008) 27 *Australian Resources and Energy Law Journal* 86, 96.

230 Sabina Manea, 'Defining Emissions Entitlements in the Constitution of the EU Emissions Trading System' (2012) 1 *Transnational Environmental Law* 303.

231 *Ibid* 309.

232 *Ibid* 322.

233 See, eg, Manea, above n 230; M J Mace, 'The Legal Nature of Emission Reductions and EU Allowances: Issues Addressed in an International Workshop' (2005) 2 *Journal for European Environmental & Planning Law* 123; Margherita Colangelo, *Creating Property Rights: Law and Regulation of Secondary Trading in the European Union* (Martinus Nijhoff Publishers, 2012) ch 5; Financial Markets Law Committee, above n 12.

like fraud and theft, the role of different regulators, the application of international investment agreements and the effect of insolvency and succession laws.

A final issue connected to the lack of a clear or unified approach to characterising entitlements concerns derivative products (forwards, options, futures, swaps) that are formed on the basis of an entitlement. In the EU, which has the largest and most established emissions trading scheme, trade in derivative products from emission entitlements has been much greater than trade in the underlying emission entitlement.<sup>234</sup> The issue is that derivative markets are based on emission entitlements that are uncertain in legal nature. This, combined with the difficulties of verifying that emissions have been reduced or sequestered, has led commentators to draw analogies between financial derivative products from emission entitlements and the sub-prime mortgage bundles that led to the Global Financial Crisis.<sup>235</sup>

## VII CONCLUSION

Through an examination of property concepts and analyses, this article has provided a comparative survey of the distinctions between jurisdictions in relation to the legal nature of statutory entitlements. Using emission entitlements as the case study, we were able to explore the real consequences that could emerge from different legal characterisations of entitlements. Along with illustrating the impact of different approaches to property and therefore the legal character of entitlements, this discussion highlighted the importance of institutional cooperation at this still relatively early stage in the development of emissions trading to ensure the compatibility of such schemes.

Where disputes arise, courts are often burdened with determining the scope of the rights and liabilities granted under an entitlement and how the entitlement interacts with the existing domestic legal framework. Generally, courts seem to be able to determine whether an entitlement is property or otherwise, but they do not go further in scoping the rights and liabilities or exploring the limitations on the rights of the holder. Such scoping is necessary given the legal uncertainty that surrounds statutory entitlements, and the often complex public and private aspects of entitlements. The limitations on courts may prevent an adequate characterisation of statutory entitlements from emerging, and raises the question of whether legislatures are better positioned to deal with the policy complexities and precision required to legally characterise statutory entitlements.<sup>236</sup>

234 Commission to the European Parliament and the Council, *Report on the Functioning of the European Carbon Market*, COM (2015) 576, annex 1 (18 November 2015) 23 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0576>>.

235 See, eg, Michelle Chan, 'Lessons Learned from the Financial Crisis: Designing Carbon Markets for Environmental Effectiveness and Financial Stability' (2009) 3 *Carbon & Climate Law Review* 152; Larry Lohmann, 'Regulatory Challenges for Financial and Carbon Markets' (2009) 3 *Carbon & Climate Law Review* 161.

236 Legislative specification was promoted by Hepburn, 'Carbon Rights as New Property', above n 133 for similar reasons.