RECENT CASES — THEIR PRACTICAL SIGNIFICANCE
Harper v. Minister for Sea Fisheries

By William R. Ash*

GENERAL OUTLINE

Harper v. Minister for Sea Fisheries[1] concerned an abalone fisherman challenging the validity of a Tasmanian licensing scheme for abalone fishing, arguing that the licence fee imposed a duty of excise contrary to Section 90 of the Constitution.

The subject Regulation[2] prevented any person from taking abalone in State fishing waters unless he or she was the holder of a subsisting commercial abalone licence or a non-commercial diving licence. The basis of calculating the licence fee changed in each of the three relevant years but this change was not material to the Court's decision. In contrast to the *Pipelines Fee* case[3], a marked increase in the fee in the second of the three years was not the subject of direct comment by the Court.

The Court concluded that the fee was not a tax so it did not have to consider the further question of whether, being a tax, the fee imposed a duty of excise. By its decision the Court raised some interesting questions relevant to general mining law, some of which were addressed in the 1984 AMPLA Conference[4] and which will be commented upon in this paper.

The leading judgment was delivered by Brennan J. The other Justices divided into two groups (Mason CJ, Deane and Gaudron JJ in one group and Dawson, Toohey and McHugh JJ in the other), each group agreeing with Brennan J, but with slight qualifications.

To reach his conclusion, Brennan J wove a tangled, if not intriguing, web to determine the basis for the grant of the licence and the nature of the licence and the licence fee. Accordingly, before examining whether the licence fee is a tax in the nature of a duty of excise, we must first address issues of the public right to fish and of ownership and jurisdiction to make the relevant laws. These issues not only remind us of the ancient legacy of the Magna Carta of John, but also the more recent legacy of the *Seas and Submerged Lands* case[5] and its progeny, including in particular in the present context, the Coastal Waters (State Powers) Act 1980 (Cth) and the Coastal Waters (State Title) Act 1980 (Cth).

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1 (1989) 63 ALJR 687. This case has been the subject of a casenote by G. Moloney in (1989) 8 *AMPLA Bulletin* 155.

2 Sea Fisheries Regulations 1962, reg. 17A.

3 *Hematite Petroleum Pty Ltd v. Victoria* (1983) 151 CLR 599.

4 See K.H. Parker, 'Implications of Pipelines Tax Case for State Resource Revenue' [1984] *AMPLA Yearbook* 1 and the Commentaries by C. Saunders in [1984] *AMPLA Yearbook* 22 and N.R. Carson in [1984] *AMPLA Yearbook* 29.

5 *New South Wales v. Commonwealth* (1975) 135 CLR 337.

BACKGROUND ISSUES

Public Right to Fish

Brennan J assumed that the fishing was taking place in 'tidal waters' and the Crown's (whether in right of the Commonwealth or of the State) ownership of the seabed was subject to the paramount public right of fishing preserved by Magna Carta. These rights could only be taken away by a competent legislature. In this case, the Tasmanian legislature purported to abrogate a general public right of fishing for abalone in tidal waters and conferred on certain persons private statutory rights to take abalone in limited quantities.

Ownership of the Seabed

Brennan J assumed that the tidal waters encompassed both the 'coastal waters' (being, for purposes of this paper, those waters within three nautical miles of the coast) and waters adjacent to the coastal waters and that proprietary rights in respect of the former lay with the State and in respect of the latter lay with the Commonwealth.[6]

Ownership of the Abalone

Does the owner of the seabed own the abalone? Brennan J tells us that '[i]n the mature state, abalone remain in contact with the seabed, normally attached by suction to rock surfaces' and 'are able to move in snail-like fashion by means of their single muscular foot . . . They are taken by divers diving to the seabed and individually prising the abalone free from rocks by means of a knife or other similar instrument'.[7]

Brennan J did not settle this question, quoting from one case that states that shellfish 'are not part of the soil or freehold'[8] and referring to another case that states that mussels are part of the river bed (the Court questions whether the ratio of the latter case 'was that mussels in the mussel scalps were part of the soil').[9]

Jurisdiction over the Tidal Waters[10]

Brennan J emphasised the distinction between proprietary rights and legislative jurisdiction. That is, 'the competence of a State legislature to make laws regulating a right of fishing in [tidal] waters is not dependent upon the State's possession of a proprietary right in the [seabed]'.[11] Accordingly, notwithstanding who had title to the seabed, the State had the relevant jurisdiction over all the tidal waters.

1. As a general proposition, in the absence of special legislation, State law relating to fisheries may extend beyond the coastal waters pro-

6 Coastal Waters (State Title) Act 1980 (Cth).
7 (1989) 63 ALJR 687, 688.
8 Ibid. 691, quoting from *Goodman v. Mayor of Saltash* (1882) 7 App. Cas. 633, 646 per Lord Selborne LC.
9 Ibid. 692, discussing *Parker v. Lord Advocate* [1904] AC 364.
10 See generally *Port MacDonnell Professional Fishermen's Association Inc. v. South Australia* (1989) 63 ALJR 671, noted by J. Waugh in (1990) 9 *AMPLA Bulletin* 68.
11 (1989) 63 ALJR 687, 690.

vided there is sufficient connection with the peace, order and good government of the State and provided further that the laws are not inconsistent with Commonwealth law.

2. Section 5 of the Coastal Waters (State Powers) Act extends the legislative powers of the State over the coastal waters to the making of all laws as could be made if those waters were within the limits of the State and beyond those waters with respect to fisheries which under an agreement with the Commonwealth are to be managed in accordance with State laws.
3. In 1987, the Commonwealth and the State entered into an arrangement for the management in accordance with the laws of Tasmania of the abalone fishing in those waters beyond the coastal waters.[12]

It followed that the State had the relevant jurisdiction over all of the tidal waters relevant for purposes of the case but, as noted above, did not necessarily have title to all the seabed (nor all the abalone even if it were part of the seabed) associated with those waters.

Purpose of Scheme — Fishery Management

Each judgment emphasised the fact that abalone is a finite but renewable resource and, if not managed, could be depleted. As such the licensing scheme was concerned with conservation and management of a resource which, as noted and emphasised below, is a public resource.

NATURE OF THE LICENCE AND LICENCE FEE

General Description — Statutory Right/Compensation

Brennan J noted that the public right of fishing for abalone in the tidal waters was abrogated and replaced by a private statutory right to take limited quantities. For the loss of this right, the public derived by way of compensation ('if compensation it be'[13]) the amounts of the licence fee. This notion of compensation was not expressly developed (though was adopted by Mason CJ, Deane and Gaudron JJ in their reference to a 'price exacted'), but certainly sets the tone, preparing the reader for the inevitable conclusion.

Grantor with Proprietary Rights — Royalty/Fee

The defendants argued that the licence fee was a royalty 'in the sense of a payment made to the owner of land for the right to take away things which are part of or naturally attached to the soil'[14] and a royalty is not a tax and hence not an excise. Alternatively, the fee is paid for a profit a prendre, being a right to take abalone from the seabed rather than as a fee or royalty for the abalone taken. By stating their case in the alternative, the defendants presumably would not have had to have the Court decide whether the abalone formed part of the seabed.

12 Ibid. 691.
13 Ibid.
14 Ibid. 692.

In response, Brennan J pointed out that the tidal waters included seabed in waters adjacent to the coastal waters, over which the State clearly had no proprietary rights. However, he did not have to decide this issue because he preferred an argument based not upon proprietary rights in the seabed, but upon the State's jurisdiction over tidal waters.

Grantor with Jurisdiction — Analogous to a Common of Piscary

Brennan J compared the licence with the common of piscary describing it as 'a right of fishing in another's waters to the exclusion of the public. Such a common law right is a profit a prendre . . . but at common law it is not available in tidal waters.'[15]

Being concerned, of course, with tidal waters, Brennan J then found that the right was 'analogous to a profit a prendre in or over the property of another',[16] the property being a limited natural resource which was public property 'whether or not the Crown has the radical or freehold title to the resource'.[17] Analysed in this way the right was more than a mere right to do something that was prohibited (for example, a right to sell liquor) where there was no resource to which a right of access was being granted by licence.

Brennan J was thus able to sidestep neatly the issue of whether the State needed title to support the granting of the licence. However, if title was needed to support the grant to fish for abalone then with respect to the adjacent waters, the Crown in right of the Commonwealth had consented to the creation of those rights. This consent was relevant to the question of the extent to which the licensing scheme, as it applied to waters adjacent to the coastal waters, affected the proprietary rights of the owner of the seabed (that is the Commonwealth) and the extent to which the State sought to create proprietary rights in an area over which it had no title. As the consent was present, these issues did not have to be resolved. Furthermore, this consent no doubt meant that whether or not the abalone was part of the seabed, as between the State and the plaintiff, the State had the relevant rights in respect of that abalone, with those rights being founded in jurisdiction and not title.

Analysed in this manner, the licence fee was described as being of 'the same character as a charge for the acquisition of property.'[18]

A Right Sui Generis

Mason CJ, Deane and Gaudron JJ, while noting that the right could be compared with a profit a prendre, opined that it was '[i]n truth . . . an entitlement of a new kind created as part of a system for preserving a limited public natural resource . . .'.[19] Accordingly,

> the commercial licence fee is properly to be seen as the *price exacted* by the public, through its laws, for the appropriation of a limited public natural resource to the com-

15 Ibid.
16 Ibid. 693.
17 Ibid.
18 Ibid.
19 Ibid. 688.

> mercial exploitation of those who, *by their own choice*, acquire or retain commercial licences. So seen, the fee is a quid pro quo for the property which may lawfully be taken pursuant to the statutory right or privilege which a commercial licence confers upon its holder.[20]

On this reasoning it mattered not who had title to the seabed. Arguably nor did it matter that the grantor of the statutory right may not have had 'radical or freehold title'[21] to that property (that is, the abalone). It was enough that the abalone was a 'limited public natural resource and the State has general jurisdiction over that resource'.[22]

Is the Fee a 'Tax'?

Brennan J quoted from *Air Caledonie International*[23] where the High Court had described what is generally referred to as the positive and negative attributes which will indicate whether some payment constitutes a 'tax'. The Court had, in that case, listed the positive attributes as the payment being compulsory, for a public purpose and enforceable by law. The negative attributes included, but were not necessarily limited to, the payment not being for services rendered, not being a charge for the acquisition or use of property or a fee for a privilege, or a fine or penalty imposed for criminal conduct or breach of statutory obligation. However, the circumstances of each case had to be closely examined.[24]

Clearly, the licence fee exhibited the positive attributes, but it was enough for Brennan J that the fee was 'of the same character as a charge for the acquisition of property'[25] to clothe the fee with a negative attribute that was overriding and therefore, characterised the fee as not being a tax.

Similarly, as noted above, Mason CJ, Deane and Gaudron JJ concluded it was not a tax because 'the fee is the quid pro quo for the property which may lawfully be taken pursuant to the statutory right or privilege which a commercial licence confers upon its holder'.[26] However, perhaps more fundamentally if not conclusively, earlier in their judgment, they characterised the scheme as 'not a mere device for tax collecting. Its basis lies in environmental and conservational considerations'.[27]

Dawson, Toohey and McHugh JJ, agreed with the leading judgment but qualified it by emphasising that the conclusion that the fee is not a tax 'flows from all the circumstances of the case'.[28] In particular, their judgment found significant 'that abalone constitute a finite but renewable resource which cannot be subjected to unrestricted commercial exploitation without endangering its continued existence'[29] and 'that it is possible to discern a relationship between the amount paid and the value of the

20 Ibid. (emphasis added).
21 Ibid.
22 Ibid.
23 *Air Caledonie International v. Commonwealth* (1988) 165 CLR 462.
24 Ibid. 467.
25 (1989) 63 ALJR 687, 693.
26 Ibid. 688.
27 Ibid.
28 Ibid. 693.
29 Ibid.

privilege conferred by the licence'.[30] They qualified their judgment by adding that there were other ways of protecting a natural resource and '[c]learly the line between a price paid for the right to appropriate a public natural resource and a tax upon the activity of appropriating it may often be difficult to draw. But what is otherwise a tax is not converted into something else merely because it serves the purpose of conserving a natural public resource'.[31]

Is the Licence Fee an Excise?

A duty of excise must first bear the character of a 'tax' and the Court, therefore, spared itself from having to discuss the nature of an excise.

The plaintiff did try to find an analogy with *M. G. Kailis*,[32] where the High Court had rather ingenuously (having regard to precedents) found a fee exacted for a licence to process fish was an excise. The High Court avoided having to revisit *M. G. Kailis* by stressing, perhaps again ingenuously (but for different reasons), what should always be the first question in the analysis of these cases, namely, is the subject fee a tax? This aspect is commented upon below.

COMMENTS

Harper[33] is worth of study for several reasons.

Offshore Regime

Harper reminds us of the complex offshore regime of title and jurisdiction settled after the *Seas and Submerged Lands* case.[34]

Is a Royalty a Tax?

Harper raises the issue of whether a royalty will always be a tax. This issue was addressed in detail at the 1984 AMPLA Conference in the context of the *Pipeline Fees* case.[35] However, *Harper* arguably takes the matter further.

First, *Harper* may shed some light on Carson's comment that a State which imposes a royalty, payable into consolidated revenue, on minerals that it does not own, 'must come perilously close to Section 90 [w]hich is no doubt why the New South Wales government now owns all the coal in that State'.[36] *Harper* may be support for the view that the State need not own the minerals in respect of which it imposes a royalty, so long as the State has jurisdiction to impose that royalty.

Secondly, *Harper* again stresses that there should be a link between the amount of royalty and the value of the right conferred in return for

30 Ibid.
31 Ibid.
32 *M.G. Kailis (1962) Pty Ltd v. Western Australia* (1974) 130 CLR 245.
33 (1989) 63 ALJR 687.
34 (1975) 135 CLR 337.
35 Parker, op. cit. 10–17 and Carson, op. cit. 34–35.
36 Carson, op. cit. 35.

payment of the royalty. Interestingly *Harper* discussed this link in the context of deciding whether the fee was a tax, and not in deciding whether a fee, being a tax, was an excise.

Another Source of Revenue? An Environmental/Conservation Levy?

Assuming that the State owns the minerals, then it is not difficult to conclude that the royalty is 'the price for acquiring ownership of the extracted minerals'. However, are not minerals *also* a 'limited public natural resource'? In addition to paying a royalty as 'the price for acquiring ownership' is not the public entitled to exact a *further* price from those who 'by their own choice' acquire the right to mine that public resource? This price should not depend on strict legal title. Nor is it a 'mere device for tax collecting'. So long as 'it is possible to discern a relationship between the amount paid and the value of the privilege' then arguably *Harper* supports the exaction of the fee.

On this reasoning, the price of the right to mine a particular mineral could have two components, first, a component that is related solely to acquiring property in a valuable asset (this component may, but not necessarily, depend on ownership of that asset by the State) and second, a component that is related solely to extracting a finite, non-renewable public resource (this component would not depend on ownership by the State). Each component should be considered separately, including the 'relationship between the amount paid and the value of the privilege'. It is interesting to ponder the value that should be placed on the second component, especially as we move into the 1990s, which are increasingly drawing us into hitherto uncharted waters related to conservation of resources and protection of the environment.

Of course, if the State owns the subject mineral then, arguably, to increase its revenue, the State need merely increase the level of royalty. However, this may not be possible or may not be palatable for two reasons. First, there may be some limit on the level of royalty if there needs to be a relationship between the amount paid and the value of the right to acquire ownership of the mineral. Second, it may be more palatable politically not to increase the level of royalty but to clothe the increased fee as an environmental levy.

What is an Excise?

As already noted, the High Court cleverly sidestepped this issue, preferring to decide simply that the fee was not a tax. In doing so, the leading judgment stressed, as did the High Court in *Air Caledonie*[37], the negative attributes which, if present, may preclude a fee from being a tax, notwithstanding the presence of the three positive attributes. Some members of the Court also discussed the quantum in the context of whether a fee is a tax, instead of confining this issue to the context of whether a tax constitutes an excise.[38] To one who is not an expert in this area (though mindful of the extreme difficulties, if not straight out inconsistencies, of

37 Contrast Parker, op. cit. 14.
38 (1988) 165 CLR 462.

analysis that the High Court has inflicted upon itself over the years) this emphasis on the negative attributes and quantum seems a clever means of ignoring troublesome precedents that relate their discussion more to deciding the attributes of an excise.

For Whom the Bell Tolls!

More fundamentally, though, the Court was able to distinguish earlier excise cases by looking at the substance of the fee — it was not a mere tax collection device. It was a fee exacted by the public from a person who by his or her own choice wished to take ownership of, and benefit from, a finite public resource. While certain analogies can be made with other licence fees (such as tobacco and liquor licence fees), the Court was no doubt correct in articulating a substantive distinction, a distinction which could well swing the pendulum in favour of the States in their efforts to exact further fees in respect of the mining of the minerals over which they have jurisdiction. Perhaps the States only real hurdle in this area will be to articulate a meaningful link between the right granted and the price for that right and in doing so take heed of the warning of Dawson, Toohey and McHugh JJ, that 'what is otherwise a tax is not converted into something else merely because it serves the purpose of conserving a natural public resource'.[39] However, if the fee can be divided into the two components, discussed above, then the State may be able to extract more fees in total than had it only relied on, for example, the royalty component.

39 (1989) 63 ALJR 687, 688.