

# STATUTORY PROPERTY: IS IT A THING?

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*Over the last several decades there has been a proliferation of property-type rights created by statute, particularly in the environmental management context. A key question has been how to approach these rights on a principled basis, particularly where Parliament has been silent about their precise nature. One response has been to put a gloss on these rights by classifying them as a new category of "statutory property". However, this article suggests that we should recognise that these types of rights are private property. This argument is based on the premise that private property serves a variety of social goals and not only individualistic ones. As a result, the institution of property is flexible enough to cater for the main concern driving this legislative vagueness, which flows from the risk that recognising rights as private property may serve to undermine the purpose for which property is being employed. This article develops this point with reference to legislation setting up individual transferable quota for fish and emissions units for greenhouse gases in New Zealand. It argues that the rights used by these schemes, although not explicitly articulated as private property, should be treated as such. It suggests that, providing the contours of the right have been structured carefully and the boundaries of the right clearly demarcated, it is desirable that the law of property fill in any resulting gaps not addressed by the legislation.*

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## **I INTRODUCTION**

The last several decades have seen a number of property-type rights created by statute, particularly in the environmental management context. A key question has been how to approach these rights on a principled basis, particularly where Parliament has been silent about the precise nature of the right. This is especially pertinent where the right in question has many, or all, of the characteristics of private property. In many cases the rights are specifically designed so that the holder has the ability to possess, use and transfer them, and the benefits that flow from these powers are a prime motivating factor in adopting such a right in the first instance.<sup>1</sup> One response has been to

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<sup>1</sup> There are at least six characteristics of private property: exclusivity, duration, flexibility, quality (or security) of title, transferability and divisibility; see Anthony Scott *The Evolution of Resource Property Rights* (Oxford University Press, Oxford, 2008) at 6. However, in property law theory the "liberal triad"

put a gloss on these rights by classifying them as a new category of property such as "statutory property" subject solely to the provisions of the relevant legislation. However, this article suggests that such an approach is problematic. The concerns are twofold. First, labelling something as "property" but then confining its operation to the text of a particular piece of legislation is likely to result in negative outcomes. Where Parliament has been ambiguous, or silent, on a particular issue, the courts would have limited recourse to the general law and, in particular, property tools and concepts that we recognise as non-controversial and essential to resolving issues regarding the ownership, control and use of resources. Essentially, the risk is that in grouping these rights under a classification of statutory property we mischaracterise them as something less than what they really are. Words have power, and by erroneously restricting their definition to a certain (and impliedly lesser) species of property, we run the risk of creating unnecessary complexity in the law, both normatively and practically. Calling something statutory property contains an implicit assumption that these are somehow not "proper" property, and therefore, less legitimate. This is likely to lead to uncertainty and increased costs, but may also result in unintended consequences. Secondly, the uncertainties attendant on statutory property and the ambiguity of this type of right more generally are likely to have a flow on effect for their security, their attractiveness and value, the extent of engagement with the schemes which rely on them and the success of the schemes overall.

In response, this article argues that it should simply be recognised that these types of rights are private property. This argument is based on the premise that private property serves a variety of social goals and not only individualistic ones. As a result, the institution of property is flexible enough to cater for the main concern driving the legislative vagueness, which flows from the risk that recognising rights as private property may serve to undermine the purpose for which property is being employed. This is important because recognition that these rights are proprietary would not only increase both certainty and efficiency, but would also allow the state the flexibility to closely design property regimes which harness the positive benefits that flow from private property while also providing for broader social considerations.

This article begins by discussing *Armstrong DLW GMBH v Winnington Networks Ltd*,<sup>2</sup> which not only illustrates the sorts of issues that can arise in this context, but also that ambiguity in the characterisation of a particular right can be time-consuming, unnecessarily complex and expensive. It then observes that Parliament can, and often does, play an important role in the creation of private property before using emissions units under the New Zealand Emissions Trading Scheme (NZ ETS) and individual transferable quota under the New Zealand quota management system for fish to demonstrate that these property-type rights are indeed private property.

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powers of possession, use and disposition are often used as a useful shorthand for the key features of private property: see Jeremy Waldron *The Rule of Law and the Measure of Property* (Cambridge University Press, Cambridge, 2012) at 66.

2 *Armstrong DLW GMBH v Winnington Networks Ltd* [2012] EWHC 10, [2013] Ch 156 (Ch).

Finally, the article explores the reasons legislatures are often vague regarding the legal nature of these rights. It identifies that the drivers of this ambiguity are anxieties regarding the perceived consequences of recognising something as private property. However, a counter-tradition within theories of private property, known as the "social obligation norm" provides a principled response to these concerns. This idea of private property recognises that property serves social ends and that owners are subject to limitations and obligations. In turn, this supports this article's ultimate argument, which is that these property-type tools should be explicitly recognised as private property and treated as such. Providing careful attention is paid to the structure of the right in the first instance, it is totally appropriate that the general law of property fill any gaps.

## **II LOSS IN A CASE OF FRAUD: ARMSTRONG V WINNINGTON**

In late January 2010, 250,000 emissions allowances under the European Union emissions trading scheme were fraudulently acquired as a result of a phishing attack by six companies in Germany. Among the victims was Armstrong DLW GMBH, a company involved in the production of linoleum and PVC. Using a fraudulent email, the fraudsters had obtained the username and password for Armstrong's account in the German Greenhouse Gas Emissions Trading Registry. The fraudsters then approached another company, Winnington Networks Ltd (which was based in England and dealt in technology products), and sold the emissions allowances to it, duly transferring the allowances into Winnington's account at the UK Greenhouse Gas Emissions Trading Registry. Winnington, which it was accepted was not a party to the fraud, traded them on to another party on the same day.<sup>3</sup> The value of the stolen emissions allowances was over €250,000.

The resulting case centred on which of the two parties (Armstrong or Winnington) should bear the loss of the fraud perpetrated by the third party. Resolution of this issue centred on the legal nature of the emission allowances in question. This issue was far from clear-cut. Formally known as European Union Allowances, the allowances in this case were a creature of the EU Emissions Trading Scheme. By art 3 of the relevant Directive, an "Allowance" means an allowance to emit one tonne of carbon dioxide during a specified period.<sup>4</sup> Although allowances are freely transferable in accordance with the terms of the Directive and recorded in a register which facilitates trade, the scheme is otherwise silent as to the fundamental legal nature of these rights. It followed that the judge had to start from first principles in resolving the dispute. He began by noting that the legal question at the heart of this dispute was:<sup>5</sup>

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3 At [22].

4 Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community [2003] OJ L275/32.

5 *Armstrong*, above n 2, at [28].

If B steals A's property and sells it to C, does A have a claim against C for the property or its value, and if so, what is the legal basis of A's claim and what defences, if any, does C have to such a claim?

What this suggests is that, notwithstanding the legislative silence about the precise nature of an emissions allowance, the law of property would play a decisive role in the dispute. It was ultimately accepted by all parties, and the judge, that the relevant emissions allowances were private property.<sup>6</sup> However, if statutory property is accepted as a distinct class of rights it would not have assisted resolution of the matter given the governing legislation, in this case an EU Directive, was effectively silent on the legal nature and characteristics of these allowances. In fact, it may have made it more difficult to resolve because the judge may have felt unable to resort to orthodox property law tools to decide the matter.

Fortunately, this was not the case as, despite all parties concluding (correctly in my view) that the rights were private property, they did not agree about their precise nature and characterisation. Winnington argued that, while the emissions allowances were property, they were not a type of property that the "common law protects by a relevant cause of action".<sup>7</sup> In particular, Winnington suggested that there was no common law proprietary claim for property of the sort represented by an emissions allowance; such claims being restricted to receipt of land, goods, money and some documentary choses in action, but not other forms of intangible property, such as emissions allowances.<sup>8</sup>

Eventually, the judge decided that the allowances could not be characterised as a chose in action in a narrow sense (as they could not be claimed or enforced by action), but, to the extent the concept of the chose in action encompasses wider matters of property, they could be described as such. Ultimately, the judge concluded that it did not matter whether an emissions allowance was a chose in action or merely some other form of intangible property.<sup>9</sup> This conclusion opened the door to a discussion of both the law of restitution and the law of trusts, and enabled the judge to conclude the case in Armstrong's favour by holding that either:

- (1) the fraudster had become a constructive trustee of the emissions allowances in question, and that Winnington's degree of knowledge (in particular as a result of deficient behaviour in assessing client due diligence information) was enough to make its receipt of the allowances unconscionable; or

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<sup>6</sup> At [31].

<sup>7</sup> At [40].

<sup>8</sup> At [35]–[40].

<sup>9</sup> At [61].

- (2) if beneficial and legal title to the allowances had not been separated, Winnington was sufficiently on notice of potential fraud so as to be liable for a claim for proprietary restitution.<sup>10</sup>

Without deciding which of these two approaches actually provided the appropriate legal basis for compensation, the judge concluded that Armstrong was entitled in principle to a money judgment in an appropriate sum.<sup>11</sup> Clearly, this is a deeply unsatisfactory result from the point of view of the law of obligations and legal principle. However, the case also has wider implications for the law of property.

### **III PARLIAMENT AND PROPERTY CREATION**

*Armstrong* demonstrates that where property-type tools, such as emissions allowances, are employed, the clarity of the legislation creating the right will be of crucial importance and can have a profound effect on the outcome for private parties. Beyond the simple cost of the litigation involved in *Armstrong* which took on an "unduly convoluted complexion"<sup>12</sup> (and would have only increased if statutory property was to become a distinct and recognised category on its own) legislative ambiguity also has consequences for the security of these rights generally. In particular, it is likely to impact on their attractiveness and value, the function of the market created by these rights, the expense of engaging with these schemes and their overall success.<sup>13</sup>

The emissions allowances in *Armstrong* are not unique. Since the 1970s there has been a proliferation of property-type rights created by statute, particularly in the environmental management context. There is nothing unusual or inappropriate about Parliament creating property. Indeed, Parliament's role in this sphere is often overlooked. At one end of the scale are legislative creations that are clearly proprietary. For example, s 14 of the Copyright Act 1994 succinctly states that, "[c]opyright is a property right that exists, in accordance with this Act, in original works". Similarly, s 17 of the Patents Act 2013 helpfully states that "[a] patent is personal property" and conveniently confirms that "[e]quities in respect of a patent may be enforced in the same way as equities in respect of any other personal property". Moreover, the concept of the fee simple owes its existence to a piece of legislation called *Quia Emptores*.<sup>14</sup> This legislation prevented tenants from

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10 At [273]–[289].

11 At [290].

12 Kelvin FK Low and Jolene Lin "Carbon Credits as EU Like It: Property, Immunity, TragiCO2medy?" (2015) 27 JEL 377 at 377.

13 At 377.

14 *Quia Emptores* 1289 (Eng) 18 Edw I c 1.

passing their land by subinfeudation, and required all tenants who wished to alienate their land to do so by way of substitution. It remained part of New Zealand's law until 2007.<sup>15</sup>

At the other end of the spectrum are instances where Parliament expressly disclaims property (although it sometimes does so while conferring some property-like functions on the right involved). Perhaps the most infamous example of this is the Resource Management Act 1991 which states in s 122(1) that resource consents are "neither real nor personal property." While there has been a great deal of debate about what this means (and whether it actually means what it says),<sup>16</sup> a 2015 Court of Appeal case clarified that resource consents do not confer a property right.<sup>17</sup> At least as far as water permits are concerned, they simply confer the right to carry out the activity under the Act; the right to take and use water.

Between these two extremes are a range of other entitlements, like the emissions allowances in *Armstrong*, where the legislature is unspecific about the nature, extent and limitations of the right. These sorts of entitlements cover a range of different activities, extending from environmental management tools to address the tragedy of the commons (such as individual transferable quota for fishing, transferable water rights or emissions units for managing greenhouse gas emissions) to rights to engage in an economic activity such as the production, import or export of a particular commodity.<sup>18</sup>

A recurring question about these rights is how to approach them on a principled basis. As *Armstrong* demonstrates, the legal classification of the right will have real implications for the owner. For example, in the absence of statutory guidance, the simple question of whether the right is tangible or intangible property will have an impact in relation to the property torts, the law of equity, securities law, insolvency law, governmental confiscation, regulatory adjustment and the rules

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15 Although aspects of the rule continue: see the Property Law Act 2007, s 57(3).

16 Barry Barton "Property Rights Created under Statute in Common Law Legal Systems" in Aileen McHarg and others (eds) *Property and the Law in Energy and Natural Resources* (Oxford University Press, Oxford, 2010) 80; Laura Fraser "Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Management Act 1991" (2008) 12 NZJEL 145; and David Grinlinton "Evolution, Adaptation, and Invention: Property Rights in Natural Resources in a Changing World" in David Grinlinton and Prue Taylor (eds) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Publishers, Leiden and Boston, 2011) 273.

17 *Hampton v Canterbury Regional Council (Environment Canterbury)* [2015] NZCA 509, (2015) 18 ELRNZ 825.

18 Examples include liquor licences or equivalent, but also tools such as the United Kingdom's former "dairy produce quota" which aimed to cap the amount of milk a farmer could sell each year without having to pay a levy or pay for a "waste disposal licence" such as that in issue in *Re Celtic Extraction Ltd* [2001] Ch 475 (CA).

regarding liability, not to mention taxation and accounting treatment.<sup>19</sup> *Armstrong* is not the only case where judges have had to grapple with these issues.<sup>20</sup>

#### ***IV PROPERTY-TYPE RIGHTS ARE ... PRIVATE PROPERTY***

How to approach these "intermediate" rights on a principled basis is the key question confronting this area of the law. Rather than categorising them as statutory property the simple solution is to recognise that they are actually private property and be explicit about this when drafting the relevant legislation. This approach is supported by the fact that close examination of these rights suggests that they are proprietary but that the legislative ambiguity is largely driven by concerns regarding the perceived operation of private property, and in particular the degree of privilege with which it is associated. However, these concerns are alleviated when it is recognised that private property serves social purposes beyond catering to the self-interest of individuals. Indeed, modern accounts of private property which justify it on the basis of the social purpose it serves help to support the argument both that these rights are private property, but also that legislatures should be much more explicit about this.

#### ***A A New Zealand Illustration: Emissions Units and Individual Transferable Quota***

Two practical examples help to illustrate the argument that these property-type rights are in fact property. These examples also demonstrate that treating these rights as property will not result in a range of anticipated and undesirable outcomes, as Parliament has already proscribed the rights in a way that avoids these concerns.

##### ***1 The exclusivity of emissions units and individual transferable quota***

It is useful to begin by considering the extent to which emissions units (under the NZ ETS) and individual transferable quota under the New Zealand quota management system confer exclusive rights on their holders. Focusing on exclusivity is helpful because it is often seen as the key characteristic of private property and provides a preliminary test regarding the legal nature of these tools.

The NZ ETS creates and recognises various types of "emissions units". Participants in the scheme must surrender to the Crown one unit for each tonne of emissions they have made over the

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19 Markus W Gehring and Charlotte Streck "Emissions Trading: Lessons From SO<sub>x</sub> and NO<sub>x</sub> Emissions Allowance and Credit Systems Legal Nature, Title, Transfer, and Taxation of Emissions Allowances and Credits" (2005) 35 *Env't L Rep* 10219.

20 For example, if not addressed by statute, the simple question of whether or not the entitlement is held in joint or common tenancy could have very important consequences for the holders of the right: see *Armstrong v Public Trust* [2007] 2 NZ L Rev 859 (HC). The operation of equity and the ability to sever the legal and beneficial title is also another question that may need to be determined judicially: see *British Columbia Packers Ltd v Sparrow* (1989) 35 BCLR (2d) 334 (CA).

relevant compliance period.<sup>21</sup> This obligation underpins the market that has been created and gives emissions units both purpose and value. However, the Climate Change Response Act 2002 is almost entirely silent as to the legal nature of these units. Although the different types of units are identified in the interpretation section (s 4), the Act does not further define their nature.<sup>22</sup> However, the effect of ss 18C and 7(2) of the Act is to indicate that, with a few narrow exceptions, only account holders are able to transfer or otherwise deal with emissions units.<sup>23</sup> Thus, the Act appears to confer an exclusive right to deal with the units held in the holder's account. Account holders may surrender, cancel, retire, transfer and (to a certain extent) use their units as security. Only the holders of the units can engage in these activities, which suggests that emissions units are private property because they confer on their holder an exclusive right to deal with the units as they see fit.

Similar observations are true of individual transferable quota under the Fisheries Act 1996. The operation of the quota management system is driven by the annual decision of the Minister of Fisheries regarding the total allowable catch and the total allowable commercial catch for each species of fish managed by the scheme.<sup>24</sup> In order to ensure sustainability, the Minister can adjust the allowable catch up or down, and he or she may set it at zero.<sup>25</sup> As with emissions units, although the Fisheries Act 1996 does not explicitly deal with the nature of quota,<sup>26</sup> it is clear that quota is private property.<sup>27</sup> Quota itself is specifically designed to be like other forms of private property<sup>28</sup>

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21 Climate Change Response Act 2002, s 63.

22 With one exception, the Act uses the term "holder" of an emissions unit and avoids the word "ownership". Section 29, however, indicates that a printed search result, or a copy of a printed search result, is receivable as evidence of "ownership" of units. It follows that while the Act eschews the language of ownership we can accept that a degree of "ownership" is envisaged by the Act. See also: Alastair Cameron "New Zealand Emissions Trading Scheme" in Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis NZ, Wellington, 2011) 239 at 269.

23 At 269.

24 Fisheries Act 1996, ss 13 and 20.

25 Section 20(2).

26 Section 2 of the Fisheries Act 1996, which deals with interpretation, states that individual transferable quota is, inter alia, individual transferable quota allocated under ss 44, 47, or 49, or quota that was allocated under the Fisheries Act 1983 but that has been converted into quota shares via the operation of s 343.

27 A point reinforced by *New Zealand Federation of Commercial Fishermen v Minister of Fisheries* CA82/97, 22 July 1997 at 16 (see below).

28 James L Anderson "Property Rights, Fisheries, Aquaculture, and the Future" in Donald R Leal (ed) *Evolving Property Rights in Marine Fisheries* (Rowman & Littlefield Publishers, Oxford, 2005) 239; Donald R Leal "Prologue" in Donald R Leal (ed) *Evolving Property Rights in Marine Fisheries* (Rowman & Littlefield Publishers, Oxford, 2005) ix; Donald R Leal "Fencing the Fishery: A Primer on Rights-Based Fishing" in Donald R Leal (ed) *Evolving Property Rights in Marine Fisheries* (Rowman & Littlefield Publishers, Oxford, 2005) 1; and Rognvaldur Hannesson "The Privatization of the Oceans" in Donald R Leal (ed) *Evolving Property Rights in Marine Fisheries* (Rowman & Littlefield Publishers, Oxford, 2005) 25.

and can be bought, sold, mortgaged and transferred. There is even the ability to place a caveat on the quota register.<sup>29</sup> While quota does not confer a right to catch a certain number of fish, but rather represents the right to a percentage of a total allowable commercial catch,<sup>30</sup> it is exclusive in the sense that a quota holder's percentage of the catch need not be shared with anybody else.

## 2 *Private property theory*

The conclusion that emissions units and quota are private property is also supported by broader aspects of property law theory. While there is an ongoing debate in property law theory about what actually makes property "property",<sup>31</sup> taking the robust sort of approach laid down by Lord Wilberforce in *Ainsworth*, it is clear that these rights are "... definable, identifiable by third parties, capable in [their] nature of assumption by third parties, and ... have some degree of permanence or stability".<sup>32</sup> In theoretical terms, this approach is echoed by scholars such as Waldron who suggests that if a right entitles its holder to possession, use and transfer of a "thing" (to a greater or lesser degree) it will amount to a private property right.<sup>33</sup> This is certainly true of emissions units and quota. It follows that, at least in relation to the triad powers of possession, use and disposition, emissions units and quota are private property. Holders of these rights have possession, can use the rights, and are able to alienate them.

## 3 *Judicial opinion*

Further support for the argument that rights such as emissions units and quota are property stems from the fact that courts, across a range of jurisdictions, accept that these rights are private property, albeit subject to some restrictions and qualifications.<sup>34</sup> Two cases serve to demonstrate the point.

Clearly, *Armstrong* is a useful example. Essentially, it involved a question regarding liability for loss suffered as a result of a trade involving stolen carbon credits. As noted, there was no dispute between the parties that the emissions units in question were capable of constituting, and did in fact constitute, property as a matter of law. The judge did not object to this position noting that "[w]hat is in issue, however, is their precise nature and characterisation as property".<sup>35</sup> As noted above,

29 Fisheries Act 1996, pt 8.

30 Quota is expressed as shares and one share is worth one-hundred-millionth of the total allowable commercial catch: Fisheries Act 1996, s 42.

31 For an excellent review see Jonnette Watson Hamilton and Nigel Banks "Different Views of the Cathedral: The Literature on Property Law Theory" in Aileen McHarg and others (eds) *Property and the Law in Energy and Natural Resources* (Oxford University Press, Oxford, 2010) 19.

32 *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) at 1248.

33 Waldron, above n 1, at 66.

34 For a further example see *IMC Agriculture Pty Ltd v Commonwealth* [2009] HCA 51, [2009] 240 CLR 140.

35 *Armstrong*, above n 2, at [40].

answering that question was crucial to determining the appropriate basis for liability; something the judgment actually leaves clouded.

A New Zealand example also serves as an excellent illustration of the courts' general approach to these types of rights. *New Zealand Federation of Commercial Fishermen v Minister of Fisheries* involved a judicial review of a Ministerial decision to reduce the catch of snapper in a quota management area at the top of the North Island by about 39 per cent. Among the heads of review was a claim that in doing so the Minister had failed to take into account a legislative intention to create "strong property rights" in the quota in question. One of the preliminary arguments in the High Court and Court of Appeal was whether or not individual transferable quota is, in fact, property.

In the High Court McGechan J accepted without difficulty that individual transferable quota constituted a very important and valuable form of private property right.<sup>36</sup> However, contrary to the applicants' submission, he held that the property right had qualifications that indicated it was subservient to the Minister's powers. The quota holder holds it, his Honour suggested, on the basis that he or she must take the rough along with the smooth. Moreover, he stressed that while "[s]anctity of property has its place in law and society ... much depends on the terms of which the property is held".<sup>37</sup>

In the Court of Appeal Tipping J was even more explicit. His Honour held that it was necessary to have regard to the legislation creating the right, and moreover:<sup>38</sup>

While quota are undoubtedly a species of property and a valuable one at that, the rights inherent in that property are not absolute ... There is no doctrine of which we are aware which says you can have the benefit of the advantages inherent in a species of property but do not have to accept the disadvantages similarly inherent.

Each of these cases serves as a useful demonstration that courts accept these entitlements are a form of property right, albeit that they may have some peculiarities. Importantly, none of these courts had to work very hard to come to this conclusion.

#### 4 *Scholarly opinion*

Completing the argument that these rights are private property is the fact that private property is absolutely central to the theory underpinning the use of emissions units and quota. According to this theory, market failures, such as over-fishing or climate change, occur as a result of inadequately

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<sup>36</sup> *New Zealand Federation of Commercial Fishermen v Minister of Fisheries* HC Wellington CP237/95, 24 April 1997 at 90.

<sup>37</sup> At 92.

<sup>38</sup> *New Zealand Federation of Commercial Fishermen*, above n 27, at 16.

specified private property rights.<sup>39</sup> It follows that completely specifying property rights in a resource should result in environmental problems being solved.<sup>40</sup> Structuring an environmental management scheme around private property should lead to the "best" or "most efficient" use of natural resources and do so in a way that rationally secures long-term sustainability.<sup>41</sup> Individual transferable quota schemes and emissions trading are the poster children of this movement and clearly demonstrate the practical application of the theory. The key thing to note about these tools is that they essentially involve privatising the former commons and this entails giving some form of ownership interest to those using the resource.<sup>42</sup> The aim is to establish a market, which is completely reliant on private property.

It follows that the literature also starts from the premise that these rights, employed to solve the tragedy of the commons,<sup>43</sup> are proprietary in nature.<sup>44</sup> As Carol Rose has observed, property has always been seen as a solution to the tragedy of the commons, and attempts to employ this idea in the context of air pollution and greenhouse gases reflect the standard idea that property rights can encourage conservation. As she points out "all these schemes reflect a standard idea in property: that is, property rights can encourage careful resource management and conservation".<sup>45</sup> It is the "property-like" characteristics of these rights that are "at the heart of their attractiveness".<sup>46</sup> She describes these rights as a form of "hybrid-property" and in doing so her goal seems to be to recognise that these tools owe their existence to the state, although she is quick to point out that this is also true for a large amount of otherwise uncontroversial property such as intellectual property and corporate securities. However, in using the term "hybrid-property" Rose is not denying that

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- 39 See the origin of this view in Garrett Hardin "The Tragedy of the Commons" (1968) 162 *Science* 1243. Similar points can be made in relation to instruments such as import or production licences, but they are beyond the scope of this article.
- 40 Paul Martin and Miriam Verbeek "Property Rights and Property Responsibility" in Catherine Mobbs and Ken Moore (eds) *Property: Rights and Responsibilities Current Australian Thinking* (Land & Water Australia, Canberra, 2002) 1 at 2.
- 41 Gerd Winter "The Climate is No Commodity: Taking Stock of the Emissions Trading System" (2010) 22 *JEL* 1 at 16.
- 42 John Hasnas "Two Theories of Environmental Regulation" (2009) 26(2) *Social Philosophy and Policy* 95 at 98.
- 43 Hardin, above n 39.
- 44 See for example Terry L Anderson and Donald R Leal *Free Market Environmentalism* (Westview Press, Boulder (Colorado), 1991) at 3.
- 45 Carol M Rose "The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems" (1998) 83 *Minn L Rev* 129 at 166.
- 46 Carol M Rose "Common Property, Regulatory Property, and Environmental Protection: Comparing Community-Based Management to Tradable Environmental Allowances" in Elinor Ostrom and others (eds) *The Drama of the Commons* (National Academy Press, Washington DC, 2002) 233 at 235.

these tools are a form of private property. Rather she is simply attempting to identify the role of the state in their creation. Moreover, as she later observes, a number of concerns about using the language of private property in relation to these tools stems from the "rhetoric and mentality of entitlement"<sup>47</sup> that often accompanies it, which can drive an unwillingness to specifically acknowledge the rights are private property simpliciter and instead characterise them as something that implicitly indicates that they are a lesser, and more confined, species of right.

## V **LEGISLATIVE AMBIGUITY; DRIVEN BY ANXIETY**

This final point is crucial. Assuming that these rights are private property as it is commonly understood (a position which is supported by theory, judicial authority and academic comment), what explains the fact that their legal nature is not addressed in the legislation that creates them? There is clearly no problem with creating private property through legislation as this happens frequently. What is unclear, however, is what makes these rights different. The answer lies in Rose's observation that the concerns about using the language of private property in relation to these tools stems from the associated notion of entitlement. Barton has also noted this, observing that ideas of property have "dangerous strength in environmental and natural resources law".<sup>48</sup>

There is a range of relevant concerns. Many, if not all, stem from the perception that once something is called or recognised as property, a range of consequences will follow. In particular, the concerns are driven by the dominant account of private property within the Western tradition which celebrates individual autonomy and functions to elevate individual self-interest over the needs of the community. The fear is that calling something "property" will engage this perception, which may lead to a range of unintended consequences.

Two brief examples help to illustrate this point. First, it is likely that policymakers are well aware that if an entitlement is seen as proprietary, if it is changed in some way or "taken away" by the state, then there is an expectation that compensation will be paid.<sup>49</sup> Clearly, keeping the contours of a right vague will make this sort of argument more difficult to run. The problem with this, however, is that it can become very difficult to determine what, if any, attributes of property attach to an entitlement in any given set of circumstances.<sup>50</sup> The potentially unintended consequence of this, is that by attempting to avoid the financial risks associated with compensation it becomes difficult for the law to evolve in a way that minimises complexity. This will inevitably increase costs for all of those involved, as well as impacting on the potential success of the regimes overall.

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47 Rose, above n 45, at 172.

48 Barton, above n 16, at 99.

49 See Geoffrey Palmer "*Westco Lagan v AG*" [2001] NZLJ 163 at 168.

50 Barton, above n 16.

A second and related concern can be described as the risk of "path-dependency" in the sense that adaptation and flexibility in response to changing information can become very difficult because of prior institutional choice. In theory, using private property to manage natural resources requires restricting the use of a resource to a level that is compatible with the sustainability of the whole complex network or ecosystem in which the resource is embedded. To achieve the goals of resource conservation, it will also require a large degree of flexibility in order to adjust to changing information and policy priorities. If these rights are expressly seen as private property there is a perceived risk that the operation of private property and its focus on insulating the desires of the individual from the needs of the community and ecosystem may limit the degree of flexibility available. Keeping the nature of the right ambiguous ostensibly allows decision makers a degree of leeway which might be impeded if such rights were explicitly property. One response in this area has been to suggest that these entitlements should be categorised as a new form of "statutory property".<sup>51</sup> This species of property would be solely governed by the rules contained in the statute that created it and not subject to the general rules and statutes dealing with real or personal property. In this way, the concerns surrounding the privileged conceptions of property can be addressed and flexibility maintained, while also recognising that these entitlements are, at the very least, a form of hybrid property.

## **VI SOCIAL OBLIGATION ADDRESSES THE CONCERNS**

The difficulty with this approach, however, is that in this sphere the perception is not matched by the reality, and these concerns and responses rely on an idea of property which, although dominant, does not tell the full story. Close examination of the Western property law tradition indicates that there has never been a time where the interests of the individual were invariably able to trump those of the community. A counter-tradition within property law makes it clear that in reality, private property is a social institution that serves an intrinsically social function. This counter-tradition helps to explain why emissions units and quota can be private property while also avoiding some of the traditional concerns associated with its use.

Although this counter-tradition is evident in analysis of private property dating back to ancient times, its modern articulation is relatively recent.<sup>52</sup> There is a range of different names for this idea, however, the one that is generally accepted is the "social obligation norm" of property.<sup>53</sup> In essence, it suggests that society expects a private property regime to fulfil primarily social goals, not

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51 Grinlinton, above n 16, at 296.

52 Carol M Rose *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press, Boulder (Colorado), 1994); and Gregory S Alexander *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776–1970* (The University of Chicago Press, Chicago, 1997).

53 Gregory S Alexander "The Social-Obligation Norm in American Property Law" (2009) 94 Cornell L Rev 745.

individual ones. It recognises that humans are social creatures whose individual autonomy is enabled by their social nature and the communities in which they live. On this approach, the core purpose of private property is to secure sufficient property to individuals in order to allow them to flourish. Only if the individual can flourish, can autonomous participation in a well-functioning society be enabled.<sup>54</sup> This fact tempers the scope of the individual's ability to use his or her property solely as he or she wishes and recognises that sometimes individuals owe obligations to the community in relation to the resources they control.<sup>55</sup>

The crucial aspect of these observations is that the norm is inherent in what it means to own property.<sup>56</sup> Consequently, restrictions or limitations on the ways in which property can be used, or on the contours of the right, are not the imposition of external duties on an owner. Rather, they are simply the identification of a restriction that is already extant within the property right itself. The mechanism may be normative, judicial or legislative, but in any case a change or constraint in how the right may be deployed is the concrete expression of a central feature of the private property right itself. It follows that the social obligation norm of property provides a principled explanation for the fact that owners of property have obligations to the community generally.<sup>57</sup>

The presence of the social obligation norm within the idea of property not only provides a principled basis on which to account for the structure of emissions units and quota, but also demonstrates that the institution of property is flexible enough to cater for the main concerns driving the legislative vagueness in relation to these property type rights. It follows that it is not necessary to articulate these rights as unique; as a species of "statutory property" limited to the words of the legislation. Instead, we can simply accept that they are private property and be clear about that. It is not a given that use of property will lead to the negative consequences feared by many as it is possible to structure private property regimes to achieve a range of predictable and desired ends.

Evidence of the social obligation norm in operation is provided by both the NZ ETS and the quota management system for fish. For example, although predicated on the idea that creating a private property in a resource will provide an incentive to look after it, the NZ ETS does not actually do this. Rather, it creates a property right that can be used to discharge a liability; the right does not

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54 Alexander, above n 53; Gregory S Alexander "The Complex Core of Property" (2009) 94 Cornell L Rev 106; Gregory S Alexander and Eduardo M Peñalver "Properties of Community" (2009) 10 Theo Inq L 127; Gregory S Alexander "Pluralism and Property" (2011) 80 Fordham L Rev 1017; Sheila R Foster and Daniel Bonilla "Symposium: The Social Function of Property: A Comparative Law Perspective: Introduction" (2011) 80 Fordham L Rev 1003; and Colin Crawford "The Social Function of Property and the Human Capacity to Flourish" (2012) 80 Fordham L Rev 1089.

55 Alexander and Peñalver, above n 54.

56 Gregory S Alexander "Ownership and Obligations: The Human Flourishing Theory of Property" (2013) 43 HKLJ 451 at 453.

57 At 453.

actually grant its holder an interest in either greenhouse gases or the atmosphere. If a participant does emit a tonne of carbon dioxide they are liable to surrender one emissions unit.<sup>58</sup> Failure to do so can lead to criminal sanctions and a financial penalty of \$30 for each unit that ought to have been surrendered.<sup>59</sup> Consequently, it is not possible to even roughly equate the ownership of an emissions unit with ownership of the atmosphere or the actual carbon or other greenhouse gases. The fact that the primary use of an emission unit is to escape a liability severs any relationship between the property right and the resource.<sup>60</sup> This is important because it suggests that the framers have managed to use private property in a way that mitigates the concerns surrounding its use. This structure insulates the Crown from criticism if it changes the regulations surrounding emitting activities because unit holders cannot argue that rule changes will illegitimately interfere with their private property rights. Their rights are limited and do not represent an interest in a resource that can be "taken away" by regulation. This avoids both the risk of path-dependency, but also the concern that any changes to the scheme may need to be accompanied by compensation.

It is difficult to see that the position would be any different if emissions units were specifically articulated as private property. The Crown's powers and protections would not be diminished. However, in the case of fraud under the NZ ETS, clearly articulating emissions units as property would have the happy effect of avoiding the problems that arose in *Armstrong* by eliminating the need to have a preliminary argument regarding the legal nature of emissions units. There is nothing in the Climate Change Response Act 2002 which addresses the situation that arose in *Armstrong*. In the case of fraud, there will be questions regarding who should bear the loss. Unless Parliament was minded to address this question, or provide a scheme of compensation similar to that under the Land Transfer Act 1952, resolution of such an issue would have to be addressed by the common law or equity. While specific recognition of an emission unit as private property would not mean that the answer in any particular case would necessarily become clear-cut, it does help to provide some certainty regarding the area of law which will govern the outcome. Not only would this increase the certainty needed for investment and a successfully functioning scheme, but it can also be important in assessing, and advising on, the available remedies if the matter is brought to court. While completely avoiding the types of arguments presented in *Armstrong* (for example, whether emissions allowances were a chose in action or something else) would require detailed legislative drafting, generally speaking, recognising these rights as private property would help to reduce the complexity and cost of any litigation and would not expose the Crown to any actions which would interfere with the function of the scheme.

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58 Climate Change Response Act 2002, s 63.

59 Sections 132 and 134.

60 For a full analysis see Ben France-Hudson "No Property Rights in the Atmosphere" in Paul Martin and others (eds) *In Search of Environmental Justice* (Edward Elgar Publishing, Cheltenham, 2015) 105.

Similar observations are true in relation to individual transferable quota. Although it is private property, quota does not provide a strong or unattenuated property right in a particular resource. While quota provides an exclusive right, it is not in the fish themselves, but rather in co-ownership with the other holders. Quota holders are still in competition with each other for the actual fish and there are no guarantees that they will land them. Thus, the scheme of the Fisheries Act 1996 and in particular the fact the Minister has the power to set and adjust the total allowable catch, reflects the community's interest in having a sustainably managed fishery; but none of this would be different if quota were articulated as private property. The structure of quota insulates the Crown from claims for compensation or objections regarding regulatory taking, in the same way as for emissions units. Thus, concerns about path-dependency and compensation are overstated. While the Fisheries Act 1996 specifically addresses the problem that arose in *Armstrong*<sup>61</sup> the legislation does not appear to cater for every eventuality. For example, it does not specify whether quota held by more than one person is held jointly or in common. This may be important where one party dies, particularly for a right that can commonly be held by families.<sup>62</sup> While specifically stating that quota are property will not resolve all of these issues, it will make them simpler to assess in the first instance and provide some certainty to right holders about the nature of their entitlements.

It is clear that the concerns surrounding the legislative vagueness regarding emissions units and quota are adequately addressed by the fundamental structure of each right. Emissions units provide the ability to discharge a liability that occurs as a result of engaging in emitting activities. Recognition of this right as property will not impede the Crown's ability to govern and regulate the regime itself. Nor will any changes in the number of emissions units in circulation (a drop in the cap) result in any claim for compensation. Likewise, quota reflect a share of a total catch, not an interest in fish. The key environmental decisions, and in particular the requirement to achieve sustainability<sup>63</sup> are engaged in the decisions regarding the appropriate level of catch. As the catch can go up and down, there is no risk that recognising quota as specifically proprietary will result in an inability to achieve this aim and there is also no risk that a reduction in catch will result in a successful claim for compensation.<sup>64</sup>

It follows that the architects of these rights have done a good job of balancing the tension between utility of private property in this area and some of the associated concerns. The reason for this success lies in the fact that, contrary to popular belief, private property is not solely about individual preference satisfaction, the protection of individuals from illegitimate governmental

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61 Quota differs from emissions units in that it is backed by a Crown guarantee of title, which is drafted in similar terms to that found in the Land Transfer Act 1952. See the Fisheries Act 1996, ss 168–173.

62 Other issues might concern equity and the law of trusts, temporal assignment and rules on forfeiture.

63 Fisheries Act 1996, s 8.

64 As illustrated by *New Zealand Federation of Commercial Fishermen*, above n 27.

interference and an increase in aggregate social wealth. The reality is that these rights demonstrate that the tradition of private property is actually plural and that a "thing" can be proprietary while still carving out room within its contours for the needs of the community.

## **VII CONCLUSION**

*Armstrong* was heard at the Royal Courts of Justice over five full days. The reported judgment is 293 paragraphs and 64 pages long. "Unduly convoluted"<sup>65</sup> is perhaps a polite way of describing what should have been a relatively straight-forward dispute determining who should bear the loss in a case of fraud. This complexity stems from the failure of the relevant legislation to define the legal nature of the emissions allowances in question. The same ambiguity can be seen in relation to the NZ ETS and the New Zealand quota management scheme.

However, this legislative ambiguity is unnecessary and does the rights, and us, a disservice, as does the suggestion that they should be treated as a distinct class of statutory property. We are employing these tools because we want to utilise the really beneficial aspects of private property and the investment and ingenuity it encourages. These tools are designed to look like property, they behave like property and judges and academics accept that they are property. The concerns that lead to the vague articulation of these rights are driven by an idea of property centred on the satisfaction of individual preferences and the protection of the individual from illegitimate governmental interference. There is a risk that, taken to its logical conclusion, this idea of private property could result in adverse path-dependency and the risk of expensive claims for compensation. However, these concerns overlook the fact that this idea of property is not the only one at work. Recognising that private property actually serves social ends and that owners are subject to limitations and obligations regarding what they own provides a principled basis by which to explain the structure of these rights, but also addresses the concerns underpinning the poor articulation of these rights in the legislation.

It follows that we should be upfront and both recognise that these property-type tools are private property and be much clearer about this when drafting legislation. This is preferable to trying to classify these rights as "statutory property" and confining their operation solely to the text of the legislation creating them. Such an approach is unworkable. It is impossible for the legislature to think of everything, and relying solely on a single statute with no recourse to the general law results in the real risk that the law of unintended consequences will make an appearance. This could not only increase uncertainty and costs in relation to the practical operation of a particular right, but also make it extremely difficult to reconcile the operation of private property as a legal concept across similar rights occurring in dissimilar situations. The idea of property should be consistent and based on a cogent set of principles that allow for disputes to be settled in a consistent manner.

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65 Low and Lin, above n 12, at 377.

Statutory property should not be seen as a thing, but rather, providing the contours of the right have been structured carefully and the boundaries of the right clearly demarcated, it is completely desirable that the law of property fill in gaps not addressed by the legislation. Not only will this increase the certainty and efficacy of these new regimes, but it will also allow for the state to clearly provide the incentives necessary to engage the benefits of private property while defining the contours of these rights in light of social interdependence and the obligations this imposes.