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The offshore petroleum regulatory frameworks of Australia and Norway

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Oil, Gas & Energy Law Intelligence

The Offshore Petroleum Regulatory Frameworks of Australia and Norway by T. Hunter

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The Offshore Petroleum Regulatory Frameworks of Australia and Norway

Tina Hunter¹

Introduction

When examining and comparing Norwegian and Australian petroleum legislation and regulation, parallels exist between petroleum regulation in both jurisdictions, since each have common internalised functions. In particular, this includes a petroleum legislative framework that comprises acts, regulations, and administrative guidelines in each jurisdiction.²

Both countries award petroleum licences to participants, and may also stipulate conditions for the award of petroleum licences. Although Norway uses the North Sea model, and Australia the North American model, both jurisdictions use the award of petroleum licences in formal licensing rounds to establish and maintain a relationship between the State and the oil companies during the exploitation of petroleum resources. In addition, there are administrative provisions in each jurisdiction for the allocation of petroleum licences outside of these formal licensing rounds.

This paper provides a descriptive overview of the regulation of petroleum activities in Australia and Norway, covering the legal framework, joint venture arrangements, and the decommissioning of petroleum structures.

Australia

Overview of Australian Licencing and Concession System in Australia

Australia's legal framework for the petroleum licensing system is a rule based legislative system. It is a combination of painstaking detail and grand scale delegation, attributable to a need to secure offshore petroleum development without addressing the ongoing dispute between the Commonwealth and state over

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² For both jurisdictions, these administrative guidelines provide applicants and participants with a wide range of guidelines relating to petroleum activities, including applying for exploration and production licences, field development plans, and decommissioning of structures. These can be found at www.ret.gov.au (last visited Aug. 26, 2010) (Australia), and www.npd.no (last visited Aug. 26, 2010) (Norway).

jurisdiction in offshore areas.³ This is accomplished by granting states the legislative capacity to grant dual titles to oil companies under State authority and Delegated Authority from the Commonwealth.⁴ Consequently, there are eight petroleum jurisdictions in Australia. The Commonwealth is responsible for all mineral resources on Commonwealth land, and all resources in the seabed seaward from 3 nautical miles. These legislative competency arrangements created the need for detailed legislative provisions.⁵

All mineral and petroleum resources in Australia are owned by the State (at either federal or state level) and exploited by the State on behalf of the community, with the government administering these rights on behalf of the community. The Australian governments assign property rights to the private sector for petroleum exploration, development and production activities.

Australia's legislative framework for offshore petroleum activities is the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPAGGSA). Australia's initial petroleum legislation, the *Petroleum Submerged Lands Act 1967* (Cth) (the PLSA) was 'a combination of painstaking detail and grand-scale delegation'⁶ that remains today in the OPAGGSA as a coherent, but highly unusual system of offshore petroleum regulation, articulated by administrative rules and powers within the Principal Act.⁷

As a result of the changes to petroleum licensing and activities in Australia, the detailed PLSA has required over 1000 amendments from 1965-2005, resulting in over thirty separate compilations of the Act.⁸ A rewrite of the PLSA, the *Offshore Petroleum Act 2006* (Cth) (OPA), was enacted in 2006, and touted as a plain English rewrite of the PLSA.⁹ Industry and government alike had identified the PLSA as cumbersome, unwieldy and complex as the result of numerous amendments and updates.¹⁰ The OPA contained only changes to the structure and style of the legislation, implementing only a few minor policy changes from the framework set out in the PLSA.¹¹

³ Terrence Daintith, *Discretion in the Administration of Offshore Oil and Gas* 13 (2005).

⁴ Terrence Daintith, *Discretion in the Administration of Offshore Oil and Gas* 13 (2005).

⁵ Terrence Daintith, *Discretion in the Administration of Offshore Oil and Gas* 13 (2005).

⁶ Terrence Daintith, *Discretion in the Administration of Offshore Oil and Gas* 13 (2005). It is important to note that there has been a history of legislative name changes to the Australian offshore petroleum legislation. The initial legislation was the *Petroleum Submerged Lands Act 1967* (Cth). This Act was rewritten and renamed the *Offshore Petroleum Act 2006* (Cth), and entered into force on 1 July 2008. The name of Offshore Petroleum Act was changed to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) and entered into force on 22 November 2008. For a history of OPAGGSA see <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/B852B89FDB82AECACA25758D001909BD>.

⁷ Terrence Daintith, *A Critical Evaluation of the Petroleum (Submerged Lands) Act as a Regulatory Regime* AMPLA Yearbook 2000 91, 91 (2000).

⁸ The full legislative history of the *Petroleum (Submerged Lands) Act 1967* (Cth) can be found at www.comlaw.gov.au.

⁹ *Explanatory Memorandum*, Offshore Petroleum Bill, 2005 (Cth) 2 (2005).

¹⁰ *Explanatory Memorandum*, Offshore Petroleum Bill 2006 (Cth) 2 (2005).

¹¹ *Explanatory Memorandum*, Offshore Petroleum Bill 2006 (Cth) 2 (2005).

Where the previous petroleum legislation (the PSLA) had been 391 pages, the rewrite was over 630 pages. However, it would appear that the new legislation (the OPA) was no better than its predecessor the PSLA, which was described by Professor Daintith as ‘old, fat and ugly, and not likely to score highly in a legislative beauty contest.’¹² Furthermore, Daintith expressed concern over its replacement (the OPA), noting in 2004 that ‘replacing an Act...[] by one which is even fatter would be a profoundly disappointing result.’¹³ Unfortunately, this concern has been realised, with the rewrite of the PSLA being fatter and uglier, a 650 page prescriptive tome¹⁴ that required over one hundred amendments prior to its commencement in July 2008. The OPA has since become even fatter and uglier in its new incarnation as the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPAGGSA) as a result of the addition of offshore greenhouse gas storage provisions.¹⁵

The current offshore petroleum legislation, the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPAGGSA), is rule based, demonstrated by the length and level of detail of the legislation.¹⁶ It operates by prohibiting the activities it covers (for example extracting petroleum), and then granting companies an administrative authorisation to conduct the activity (this is known as a ‘command and control’ scheme of authorisation).¹⁷ This is demonstrated by section 97 (1) of the OPAGGSA, where ‘a person commits an offence if that person explores for petroleum; and the exploration occurs in an offshore area,¹⁸ then excuses the taking of petroleum under section 97 (1) where the taking of petroleum is ‘authorised by a petroleum exploration permit, or otherwise required by or under this Act’.¹⁹ This differs to principle based legislation such as Norway, where the State merely stipulates the requirement for a licence in order to recover petroleum from an area, such as the right to recover petroleum,²⁰ rather than making it illegal to recover petroleum then creating conditions to make it legal, such as under section 97 of the OPAGGSA.

At over 830 pages, the OPAGGSA addresses in minutiae the award and management of licences and titles, safety arrangements for offshore petroleum activities and the jurisdiction of the Joint and Designated Authorities.²¹ Such minutia can be illustrated

¹² Terence Daintith, *A Critical Evaluation of the Petroleum (Submerged Lands) Act as a Regulatory Regime* AMPLA Yearbook 2000 91, 92 (2000).

¹³ Terence Daintith, *Administering the Petroleum (Submerged Lands) Act: Too Much Discretion or Too Little?* AMPLA Yearbook 2004 1, 43 (2004).

¹⁴ In its first incarnation as the *Offshore Petroleum Act 2006* (Cth).

¹⁵ The OPA was amended to incorporate Greenhouse Gas Storage legislative provisions and renamed the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPAGGSA) on 1 November 2008.

¹⁶ The *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPAGGSA) found its first incarnation as the *Offshore Petroleum Act 2006* (Cth) (OPA) in 2006. Although enacted in 2006, the OPA did not enter into Force until 1 July 2008 after all relevant jurisdictions had enacted ‘mirror’ legislation. In November 2008 the OPA was renamed the OPAGGSA, and the greenhouse gas storage provisions were incorporated by the *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008*.

¹⁷ Terence Daintith, *Discretion in the Administration of Offshore Oil and Gas: A Comparative Study* 175 (2005).

¹⁸ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §97 (1).

¹⁹ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §97 (2).

²⁰ The right for the state to regulate petroleum activities is granted under §1-2 of the *Petroleum Activities Act 1996* (Norway), and the right to recover petroleum is conferred under §3-2 of the *Petroleum Activities Act 1996* (Norway)

²¹ *Offshore Petroleum and Greenhouse Gas Storage Act* (Cth).

by the requirements for a simplified outline to explain the general ideas contained in the legislation. For example, legislation relating to the award of petroleum exploration licences spans twenty one sections and forty pages.²² A simplified outline of what these sections and pages contain is included in section 96 of OPAGGSA:

It is an offence to explore for petroleum in an offshore area except:

- (a) under a petroleum exploration permit; or
- (b) as otherwise authorised or required by or under this Act.

- This Part provides for the grant of petroleum exploration permits over blocks in an offshore area.
- A petroleum exploration permit authorises the permittee²³ to explore for petroleum in the permit area.
- There are 3 types of petroleum exploration permits:
 - (a) a petroleum exploration permit granted on the basis of work program bidding (a *work-bid petroleum exploration permit*);
 - (b) a petroleum exploration permit granted on the basis of cash bidding (a *cash-bid petroleum exploration permit*);
 - (c) a petroleum exploration permit granted over a surrendered block or certain other blocks (a *special petroleum exploration permit*).

If a petroleum pool is identified in a petroleum exploration permit area, the Joint Authority may declare a location over the blocks to which the petroleum pool extends.

This detailed legislative framework is accompanied by brief regulations, the *Offshore Petroleum and Greenhouse Gas Storage Regulations* (OPAGGSR),²⁴ just 15 pages long. These petroleum regulations are confined to particulars relating to a petroleum discovery, survey of wells, and current rates for fees.

²² The award of a petroleum licence is covered in §97 to §117 of the *Offshore Petroleum and Greenhouse Gas Storage Act* (Cth).

²³ Note that permittee and licensee are equivalent, and mean the legal entity which has the proprietary rights to explore for and produce petroleum. In Australia, an exploration licence is also called an exploration permit, even though it confers proprietary rights.

²⁴ *Offshore Petroleum and Greenhouse Gas Storage Regulations 1985* (Cth). These regulations began life as the *Petroleum (Submerged Land) Regulations 1985* (Cth), with a name change on 1 July 2008.

This is an unusual regime, since most petroleum regulatory frameworks place the regulatory details in the regulations rather than in the primary legislation.²⁵ Furthermore, since both the Act and the Regulations are parliamentary instruments, they can only be altered by parliamentary process. This has been suggested by the World Bank as an ineffective way of managing the change that is required in petroleum regulation.²⁶ Indeed, the World Bank sees the role of regulations as subsidiary instruments to the petroleum legislation, not intended for legislative enactment, since this maintains maximum flexibility to respond to current petroleum developments which require changes in the regulation of petroleum operations.²⁷

Offshore Petroleum Regulatory Structure

Initial arrangements for the exploration and production of offshore petroleum were created between the Commonwealth and States under the 1967 *Agreement Relating to the Exploration for and the Exploitation of, the Petroleum Resources, and Certain Other Resources, of the Continental Shelf of Australia and of Certain Territories of the Commonwealth and of Certain Other Submerged Land signed October 16, 1967* (the Petroleum Agreement).

The Petroleum Agreement did not intend to create legal relationships enforceable in a court of law. Rather, it noted that petroleum activities would be encouraged by uniform legislative measures on the continental shelf beyond territorial limits, with State and Commonwealth governments cooperating to ensure effectiveness of authorities over petroleum resources.²⁸

The legal status of the Petroleum Agreement enunciated in clause 26 of the Agreement –

‘the Governments acknowledge that this Agreement is not intended to create legal relationships justiciable [sic] in a Court of Law but declare that the Agreement shall be construed and given effect to by the parties in all respects according to the true meaning and spirit thereof’²⁹

To achieve constitutional legitimacy, each State and Territory government legislated ‘with respect to’ offshore petroleum operations, in identical terms to the Commonwealth petroleum legislation (known as ‘mirror’ legislation). In addition, all

²⁵ Terence Daintith, *A Critical Evaluation of the Petroleum (Submerged Lands) Act as a Regulatory Regime* AMPLA Yearbook 2000 91, 93 (2000).

²⁶ William T Onorato, *Legislative Frameworks Used to Foster Petroleum Development* World Bank Policy Research Working Paper WPS 1420, 4 (1995).

²⁷ William T Onorato, *Legislative Frameworks Used to Foster Petroleum Development* World Bank Policy Research Working Paper WPS 1420, 27-28 (1995).

²⁸ Constance D Hunt, *The Offshore Petroleum Regimes of Canada and Australia* 63 (1989).

²⁹ See Michael Crommelin, ‘The Legal Character of Petroleum Production Licences in Australia’ in Terrence Daintith, *The Legal Character of Petroleum Licences: A Comparative Study* 62 (1981).

governments agreed not to make, amend or repeal regulations under the legislation except under a prior agreement to do so.³⁰

The *Petroleum (Submerged Lands) Act 1967* (CTH) (PSLA) was conceived as a legal mechanism to give effect to the Petroleum Agreement,³¹ securing offshore petroleum development without having to resolve the jurisdictional issues between the Commonwealth and the States.³² This legislation arose as a result of the constitutional conflict that existed between the Commonwealth and States at the time. This PSLA addressed this conflict by enacting a comprehensive legislative ‘code,’ creating joint Commonwealth-State administration of petroleum titles.³³ Much of the details ordinarily contained in regulations are contained in the PSLA, since if administrative delegation occurred, there was a risk of variation or conflict between the Commonwealth and States.³⁴ To reduce the capacity for States to go their own way, the provisions of the petroleum legislation were necessarily detailed,³⁵ granting each State or territory the legislative capacity to grant dual titles to oil companies under State Authority and Delegated Authority from the Commonwealth.³⁶ Consequently, there currently are eight petroleum jurisdictions in Australia.³⁷

The relationship between the States and Commonwealth altered in 1973 when the Commonwealth claimed the offshore maritime zones in the *Sea and Submerged Lands Act 1973* (Cth). The NSW government immediately challenged the constitutional validity of this legislation in the High Court.³⁸ NSW contended that they held rights in the territorial waters from the baseline seaward three nautical miles, the same as those rights for fishing held in *Bonser v La Macchia*.³⁹ The High Court in *NSW v Commonwealth*⁴⁰ held that sovereign rights in relation to the Continental Shelf outside the territorial waters were vested in the Commonwealth. Consequently, the States were denied property rights in the seabed and subsea terrain of the territorial waters, since their territory ended at low-water mark.⁴¹ This decision had a major impact on the States’ jurisdiction over, and income from the offshore petroleum, and prompted negotiations between petroleum-producing States and territories and the Commonwealth.

³⁰ Michael Crommelin, ‘The Legal Character of Petroleum Production Licences in Australia’ in Terrence Daintith, *The Legal Character of Petroleum Licences: A Comparative Study* 62 (1981).

³¹ Constance D Hunt, *The Offshore Petroleum Regimes of Canada and Australia* 64 (1989).

³² Terrence Daintith, *Discretion in the Administration of Offshore Oil and Gas* 13 (2005).

³³ Terrence Daintith, *A Critical Evaluation of the Petroleum (Submerged Lands) Act as a Regulatory Regime* AMPLA Yearbook 2000 91, 93 (2000). This joint management required the establishment of two Authorities that regulate petroleum activities: The Joint Authority, which comprises the relevant Commonwealth Minister and the responsible State Minister, and the Designated Authority, comprising the responsible State or territory Minister.

³⁴ Terrence Daintith, *Discretion in the Administration of Offshore Oil and Gas* 13 (2005).

³⁵ Terrence Daintith, *Discretion in the Administration of Offshore Oil and Gas* 13 (2005).

³⁶ Terrence Daintith, *Discretion in the Administration of Offshore Oil and Gas* 13 (2005).

³⁷ Commonwealth Offshore, New South Wales (NSW), Western Australia (WA), Tasmania, Victoria, Northern Territory (NT), South Australia (SA) and Queensland (Qld).

³⁸ *NSW v. Commonwealth* 8 ALR 1 (1975).

³⁹ *Bonser v. La Macchia* 122 CLR 177 (1969).

⁴⁰ *NSW*, 8 ALR 1.

⁴¹ Pat Brazil, *Offshore Constitutional Settlement 1980: A Case Study in Federalism* 2 (2001).

A permanent solution to these constitutional issues was reached in the *Offshore Constitutional Settlement* in 1980, and enacted at State and Commonwealth level through mirror legislation (Commonwealth and State *Petroleum (Submerged Lands) Acts*).⁴² In addition, a plethora of other required legislation was enacted to enable the implementation of the *Offshore Constitutional Settlement*.⁴³ The offshore jurisdiction of the States/territories is defined in section 5 of the *OPAGGSA* as agreed to by the States and Commonwealth in the *Offshore Constitutional Agreement*, which remain in force today:

- Commonwealth offshore petroleum legislation is limited to the area outside the State waters of the States and the Northern Territory;⁴⁴
- For this purpose, the outer limits of the State and Northern Territory coastal waters should start 3nm from the baseline of the territorial sea;⁴⁵
- The States and the Northern Territory should, in the manner provided by the *OPGGSA*, administer Commonwealth offshore petroleum legislation;⁴⁶
- State and Northern Territory offshore petroleum legislation should apply to State and Northern Territory coastal waters;⁴⁷ and
- The Commonwealth, States and the Northern Territory should try to maintain, as far as practicable, common principles, rules and practices in regulating and controlling the exploration for, and exploitation of offshore petroleum beyond the baseline of Australia's territorial seas.⁴⁸

Joint Authorities and Designated Authorities

As the control of petroleum resources in Australia is shared between state governments and the Commonwealth, a Joint Authority (JA) for each state or territory has been established under Part 1.3 of *OPAGGSA*.⁴⁹

The responsibility for the administration of the exploration and production of offshore petroleum is divided between:

⁴² Petroleum (Submerged Lands) Act 1967 (Cth), Petroleum (Submerged Lands) Registration Fees Act 1990 (WA), Petroleum (Submerged Lands) Act 1982 (Vic), Petroleum (Submerged Lands) Act 1982 (Qld), Petroleum (Submerged Lands) Act 1982 (SA), Petroleum (Submerged Lands) Act 1982 (Tas), Petroleum (Submerged Lands) Act 1982 (NSW), and Petroleum (Submerged Lands) Taxation Act 1967 (NSW), as outlined in Michael Crommelin, 'The Legal Character of Petroleum Production Licences in Australia' in Terrence Daintith, *The Legal Character of Petroleum Licences: A Comparative Study* 63 (1981).

⁴³ Required Acts include *Coastal Waters (State Powers) Act 1980*; *Coastal Waters (Northern Territory Powers) Act 1980*; *Coastal Waters (State Title) Act 1980*; *Coastal Waters (Northern Territory Title) Act*; and *Offshore Minerals Act 1984* (Cth).

⁴⁴ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §5(2)a

⁴⁵ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §5(2)b

⁴⁶ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §5(2)c

⁴⁷ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §5(2)d

⁴⁸ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §5(2)e.

⁴⁹ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) Part 1.3.

- a. The Joint Authority (JA) for the State or Territory (the Joint Authority is constituted by the responsible State/Territory Minister and the responsible Commonwealth Minister), and
- b. The Designated Authority (DA) of the State or Territory (responsible to the State/Territory Minister).⁵⁰

In the event of a disagreement in the Joint Authority, the Commonwealth's view prevails.⁵¹

After the *Offshore Constitutional Settlement*, a number of other Commonwealth Acts have been enacted to facilitate the Offshore Constitutional Settlement, and the development of petroleum resources in Australia. These include the:

- *Coastal Waters (State Powers) Act 1980* (Cth) which allowed the states to make certain laws that would operate offshore in the States' agreed territory;
- *Coastal Waters (Northern Territory Powers) Act 1980* (Cth) making similar provisions as the *Coastal Waters (State Powers) Act 1980* for the Northern Territory;
- *Coastal Waters (State Title) Act 1980* (Cth) vesting in each State certain property rights in the sea bed beneath the coastal waters of the State;
- *Coastal Waters (Northern Territory Title) Act 1980* (Cth), making similar provisions to the *Coastal Waters (State Title) Act 1980* for the Northern Territory;
- *Offshore Minerals Act 1984* (Cth) making provision, based on the *Offshore Constitutional Settlement* for the licensing regime that applies to the exploration for, and recovery of, minerals (other than petroleum) in offshore areas.⁵²

Whilst OPAGGSA covers petroleum licensing, regulation and safety, it does not regulate the environmental or native title aspects of petroleum exploitation in Australia.⁵³ As such there is a raft of additional and separate Commonwealth environmental protection legislation, including, but not confined to:

- *Native Title Act 1993* (Cth);
- *Environment Protection (Impact of Proposals) Act 1974*;
- *Australian Heritage Commission Act 1975*;
- *National Parks and Wildlife Conservation Act 1975*
- *Endangered Species Protection Act 1992*
- *Environment Protection and Biodiversity Conservation Act 1999*

⁵⁰ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), s4.

⁵¹ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), s59 (2).

⁵² See *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), s5.

⁵³ With the exception of the requirements for the restoration of the environment after petroleum operations, outlined in §585 – 590 *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).

Of these statutes, it is the *Environment Protection and Biodiversity Conservation Act 1999* that is of most relevance to offshore petroleum activities.

Given the constitutional division between state and Commonwealth jurisdictions regarding petroleum regulation, state legislation controls the onshore regulation in Australia, which is a ‘mirror’ of the old Commonwealth *Petroleum (Submerged Lands) Act 1967*, (and now replaced by OPAGGSA). State legislation includes:

- *Petroleum (Submerged Lands) Act 1982* (Qld)
- *Petroleum (Submerged Lands) Act 1982* (Vic)
- *Petroleum (Submerged Lands) Act 1982* (NSW)
- *Petroleum (Submerged Lands) Act 1982* (WA)
- *Petroleum (Submerged Lands) Act 1982* (SA)
- *Petroleum (Submerged Lands) Act 1982* (NT)
- *Petroleum (Submerged Lands) Act 1982* (Tas)

Since the focus of this article is offshore exploration and production of petroleum, onshore petroleum legislation will not be considered.

Offshore Petroleum Legislative Framework

All activities relating to offshore petroleum are regulated by the OPA which grants the following titles:

1. *Exploration Title*, authorising the permittee to explore for petroleum in the permit area;⁵⁴
2. *Retention Lease*. An application for a retention lease occurs after petroleum has been found in a licence area, and is granted if the recovery of petroleum is not currently commercially viable, but likely to do so within 15 years;⁵⁵

⁵⁴ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), part 2.2.

⁵⁵ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), part 2.3.

3. A *Production Licence*, which authorises the licensee to carry out petroleum recovery operations in the licence area;⁵⁶
4. An *Infrastructure Licence*, authorising the licensee to construct and operate an infrastructure facility in the licence area;⁵⁷
5. A *Pipeline Licence*, which authorises the licensee to construct and operate a pipeline;⁵⁸
6. A *Special Prospecting Authority*, which authorises the holder to carry on petroleum exploration operations in the authority area (but not to make a well);⁵⁹
7. An *Access Authority*, which authorises the holder to carry on petroleum exploration operations. And certain petroleum exploration operations, and certain operations relating to the recovery of petroleum in the authority area (but not make a well);⁶⁰

Exploration Titles

All petroleum exploration must be accompanied by an exploration permit, as it is an offence to explore for petroleum in an offshore area without either a permit or other authorisation as required.⁶¹ An exploration permit authorises the permit holder to explore for petroleum in the permit area, for a period of six years initially, which may be followed by a five year renewal.⁶²

There are three types of exploration permits that are awarded by the Australian government in the annual acreage releases

- *Work-bid exploration permit*, an exploration permit granted on the basis of work program bidding;
- *Cash-bid exploration permit*, an exploration permit granted on the basis of cash bidding;
- *Special exploration Permit*, an exploration permit granted over a surrendered block or certain blocks.

Retention Titles

Under Part 2.3 of the OPGGSA, retention titles are granted over blocks in offshore areas where the block contains petroleum, and the recovery of petroleum is not currently viable, but is likely to become commercially viable within 15 years.⁶³ A retention lease authorises the lessee to explore for petroleum and recover petroleum

⁵⁶ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), part 2.4.

⁵⁷ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), part 2.5.

⁵⁸ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), part 2.6.

⁵⁹ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), part 2.7

⁶⁰ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), part 2.8.

⁶¹ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), § 99-§104.

⁶² *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §102.

⁶³ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §139.

for appraisal purposes in the lease area and can be granted to an exploration permit holder or the holder of a life-of-field production licence over the block.

Retention leases remain in force for 5 years,⁶⁴ and upon the granting of a retention lease, an exploration permit ceases to be in force to the extent to which it relates to the blocks.⁶⁵

Production Licences

Production licences are required in order for petroleum to be removed from the acreage for commercial sale.⁶⁶ Part 2.4 of the OPGGSA provides for the grant of production licences over blocks in an offshore area. A production licence is only granted subject to general conditions, requiring the licensee to explore the licence area with a view to determining the additional recoverability of petroleum in the licence area, and recover the petroleum if it is commercially viable to do so.⁶⁷

There may also be specific conditions attached to the granting of a production licence, as deemed necessary by the Joint Authority.⁶⁸

There are three ways in which a production licence can be granted. Firstly, a production licence can be granted as a result of an application made by an exploration permit holder or a retention lessee. Secondly a production licence may be granted over a surrendered block or a similar block, and thirdly a production licence can be granted over an individual block in exchange for another licence that was in force over the same block.⁶⁹

Infrastructure Licences

An infrastructure licence is required to construct or operate infrastructure for the exploration or production of petroleum in the Commonwealth offshore zone in accordance with part 2.5 of the OPGGSA.⁷⁰ The infrastructure licence does not include pipelines, which require a separate licence.

An infrastructure licence is granted upon a written application through an offer document.⁷¹ Once granted, an infrastructure licence continues indefinitely,⁷² and confers rights to the licensee to construct and operate infrastructure facilities in the licence area.⁷³ The infrastructure licence is terminated if there has been no operation for five years.⁷⁴

⁶⁴ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §139.

⁶⁵ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §144-145.

⁶⁶ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §160.

⁶⁷ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §162(5).

⁶⁸ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §162(7).

⁶⁹ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §159.

⁷⁰ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), part 2.5.

⁷¹ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) §199.

⁷² *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §196 (1).

⁷³ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §196.

⁷⁴ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §197.

Pipeline Licences

A pipeline is often constructed to transport petroleum from the offshore platform to a suitable storage facility, onto shore, or for loading petroleum onto ships. Under Part 2.6 of the OPGGSA, a licence is required to construct or operate a pipeline in an offshore area.⁷⁵ The Joint Authority may direct a pipeline licensee to be a common carrier of petroleum in relation to a pipeline, and a pipeline licensee must not cease to operate the pipeline without the consent of the Joint Authority.⁷⁶

The application for a pipeline licence must be made to the Designated Authority for a grant by the Joint Authority,⁷⁷ with the application including detailed design and construction plans, pipeline size and capacity, financing of the construction and operation, and accompanied by appropriate plans.⁷⁸ If there has been no construction or use of the pipeline within 5 years from the grant of the licence, the pipeline licence will be terminated.⁷⁹ Otherwise, a pipeline licence remains in force indefinitely.⁸⁰

Special Prospecting Authority

A special prospecting licence confers on the holder the right to carry on petroleum exploration operations as specified by the authority, but does not extend to the making of a well.⁸¹ The Designated authority has wide scope and discretion in granting a special prospecting authority, granting the authority subject to whatever conditions the Designated Authority thinks appropriate.⁸² Under Part 2.7 of the OPGGSA, a special prospecting licence may be granted over a block, so long as no exploration, retention lease or production licence is in force over the block. This special licence authorises the holder to carry on non-intrusive petroleum exploration operations in the authority area such as geothermal imaging or seismic survey, but is unable to drill wells.⁸³

Access Authorities

An access authority authorises the holder of the authority to carry on certain petroleum operations, and certain operations relating to the recovery of petroleum, in the authority area (but not make a well),⁸⁴ for a period specified by the Designated Authority.⁸⁵

⁷⁵ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), part 2.6.

⁷⁶ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §209.

⁷⁷ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §217.

⁷⁸ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §217.

⁷⁹ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §215.

⁸⁰ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §214 (2).

⁸¹ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §230.

⁸² *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §231.

⁸³ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §229.

⁸⁴ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), s§239 (2).

⁸⁵ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §241 (2).

Safety Regulatory Framework

A new national approach to Australian Petroleum safety was endorsed in 2002 by the national Ministerial Council on Mineral and Petroleum Resources, which provided for a consistent national approach to petroleum safety. Amendments to the PSLA in 2004 established the *National Offshore Petroleum Safety Authority* (NOPSA), responsible directly to the Commonwealth Minister, overriding previous state and territory safety laws in relation to offshore areas.⁸⁶ The changes apply to all offshore facilities, and came into effect on 1 January 2005.

The objective of NOPSA is to secure the health, safety and welfare of all persons at or near offshore petroleum facilities. The Authority also imposes an Occupational Health and Safety duty of care on employers and employees to take all reasonably practicable steps to ensure the health and safety of those within the jurisdiction.⁸⁷

NOPSA was established with extensive authority, including the right to regulate all offshore petroleum operations, including diving, exploration, recovery, processing, storage, offloading or piped conveyance to a facility. It also covers vessels that are facilities such as FPSO's, construction and pipelaying vessels, as well as vessels such as offtake tankers and tugboats that are not facilities.⁸⁸ The jurisdiction of NOPSA includes all Commonwealth waters, state designated coastal waters, and may also include waters that are landward of the baseline if the state establishes NOPSA's jurisdiction in these waters. Under OPAGGSA, the functions of NOPSA include:

- to promote the occupational health and safety of persons engaged in offshore petroleum operations;
- to develop and implement effective monitoring and enforcement strategies to secure compliance
- To investigate accidents, occurrences and circumstances that affect, or have the potential to affect, the occupational health and safety of persons engaged in offshore petroleum operations;
- report, as appropriate, to the responsible Commonwealth Minister, and to State and Northern Territory Petroleum Ministers, on those investigations;
- to advise appropriate persons on occupational health and safety matters
- to cooperate with other Commonwealth agencies having functions relating to offshore petroleum operations and State and Northern Territory agencies having functions relating to offshore petroleum operations including the Designated Authorities of the states and the Northern Territory.⁸⁹

⁸⁶ That had previously been covered by the *Navigation Act 1912 (Cth)* and the *Occupational Health and Safety (Maritime Industry) Act 199*. See the Department of Industry, Science and Resources, *Future Arrangements for the Regulation of Offshore Petroleum Safety* 8 (2001).

⁸⁷ NOPSA, *Vision, Mission and Objectives* (2010) <http://www.nopsa.gov.au/overview.asp> (last visited Aug. 12, 2010).

⁸⁸ *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)*, §646.

⁸⁹ *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)*, §646.

In addition, NOPSAs has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions, including (but not confined to) the power to acquire, hold and dispose of real and personal property, enter into contracts, occupy or use any land or building, conduct research and development projects, and apply for and hold patents.⁹⁰

The implementation of NOPSAs represents a major change in offshore safety in Australia. Prior to the establishment of NOPSAs, individual states territories were responsible for the day to day petroleum safety regulation using a combination of state and Commonwealth law. This law was prescriptive until the Piper Alpha disaster in the North Sea, after which the safety case approach was introduced into Australia.⁹¹ The difficulty of this approach to offshore safety was that although the regulatory requirements were altered to accommodate the safety case approach, the administrative arrangements to implement this approach were not. Consequently, the Commonwealth had the legal and political accountability for safety, but not the authority to determine how the laws were applied on a daily basis.⁹²

Today the regulation of offshore health and safety continues to be administered by NOPSAs, with the legislative framework integrated into OPAGSAs.⁹³ However, in light of the Montara oil spill off the northwest coast of Western Australia in 2009, it is likely that the structure and functions of NOPSAs is likely to be altered.⁹⁴

Contractual Framework

The Commonwealth Government is responsible for all oil and gas resources that are positioned offshore outside the three mile territorial sea limit and allocates exploration and production property rights through two main mechanisms:

- *work program bidding*, where resource rights are assigned according to which applicant is deemed to be most likely to develop the resource to its full potential and optimise development of the surrounding area;⁹⁵ and,
- *cash bonus bidding*, where resource rights are granted to the applicant with the highest cash bid.⁹⁶

Cash bonus bidding is theoretically the most efficient approach, whereby the government allocating the rights receives a rent payment and benefits from an efficient allocation system (as the most efficient miner can afford to bid the highest). Cash bonus bidding has been used in relation to exploration permits that were

⁹⁰ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §648.

⁹¹ Peter Wilkinson, *Creating a New Offshore Petroleum Safety Regulator* (2003) Conference Paper presented at the APPEA Conference, 25 March 2003, 4

⁹² Peter Wilkinson, *Creating a New Offshore Petroleum Safety Regulator* Conference Paper presented at the APPEA Conference, 25 March 2003 12 (2003).

⁹³ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §645.

⁹⁴ This will be dependant upon the Commonwealth. At the time of publication, Australia had a hung parliament, with the probable result being new elections.

⁹⁵ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §104.

⁹⁶ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §110.

assigned in several Australian highly prospective petroleum areas between 1985 and 1992, with values of winning cash bids ranging from A\$1 million to A\$20 million.⁹⁷

Today, most Australian acreage is allocated using the work program bidding system, with subsequent exploration permits awarded for an initial term of six years.⁹⁸ When bidding the bidder must include the minimum guaranteed exploration work to be accomplished within the first three years of the licence, as well as a secondary work program for years 4-6, especially substantial operational activities that will significantly advance the exploration of the area.⁹⁹ Upon lifting, title to the petroleum impliedly passes to the oil company.¹⁰⁰

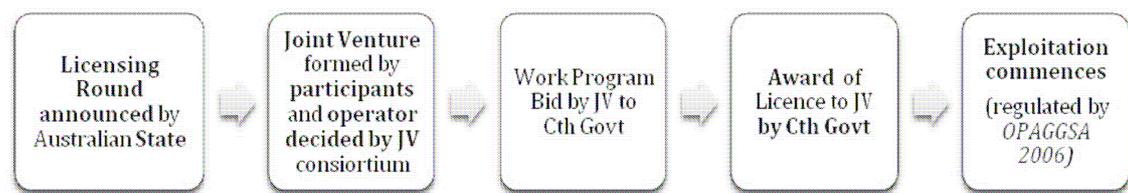


Figure 1: granting of licences for petroleum exploitation under the Australian Licensing and Concession System

There is no express contractual arrangement between the government and the petroleum licensee in the exploitation of petroleum resources in Australia. All contractual arrangements are formed between the participating parties. The contractual arrangements for the exploitation of Australian petroleum resources are governed by the Joint Venture agreement. A joint venture is established so the venturers can share in the produce of the venture. It is the discretion of the participants of a joint venture agreement as to what conditions they require and stipulate within their JV agreement. The award of a licence usually occurs in licensing rounds which are announced annually at the annual industry conference, the *Australian Petroleum Production and Exploration Association (APPEA) Conference*.

Once a joint venture has been established for a particular acreage area, an Operator is appointed and the JV applies for a licence for that acreage. The licence is then awarded to the successful joint venture bid. Once the licence is awarded, it is the responsibility of the Operator to ensure that the petroleum resources are exploited according to the legislative framework in place under OPAGGSA.

Generally, all Australian joint venture agreements in the petroleum industry are unincorporated joint ventures. In this commercial arrangement, the members of the joint venture associate themselves for the particular acreage exploration or production venture and share the production from the venture, rather than the profits from the

⁹⁷ Trudi Rodgers and Stewart Webster, *Resource Rent Mechanisms in Australian Primary Industries: Some Observations and Issues* Paper presented at the 51st annual Conference of the Australian Agricultural and Resource Economics Society Conference 2007, Sydney (2007).

⁹⁸ Department of Resources, Energy and Tourism, *Guidance Notes for Applicants 3* (2010).

⁹⁹ Department of Resources, Energy and Tourism, *Guidance Notes for Applicants 3* (2010).

¹⁰⁰ This is implied under the rights conferred by a petroleum production lease under s161, *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).

company.¹⁰¹ In this legal relationship, the participants enter into a contractual relationship to pursue the particular venture, without forming a separate legal entity.¹⁰²

The key feature of the Australian unincorporated joint venture is the participating interest, which defines what the participant owns. The Participating Interest in a joint venture confers both property and contractual rights on the participants, and comprises:

- an obligation to contribute a specified proportion of joint venture capital and operating costs;
- the right as tenant in common to take a specified proportion of joint venture production, separately and for its own account;
- beneficial ownership as tenant in common in a specified share of each item of joint venture property; and
- other rights benefits and obligations arising under the joint venture agreement.

The structure of the unincorporated joint venture and the relationship between the participants means that there are a number of critical issues that must be addressed when forming a JV for the exploitation of petroleum resources. These issues include:

- the scope purpose and duration of the joint venture;
- the obligations and rights of the participants;
- the structure of the JV for the operation, management and control of the JV, each participant is entitled to representation on the Operation Committee, and votes on work programs, budgets and authorizations;
- identification of assets committed to the joint venture , including the taking of security over a joint venture participant's interests;
- participating interests of the participants, which sets out the proportionate shares or interests of the JV held by each participant;
- the assignment of the separate participating interests of the participant in a JV, transferring the real property interests to a third party;
- default by participants; and
- inter-participant relations and the external liability of participants.

Government control of Joint Ventures

The JV in Australia is a wholly private agreement between the JV parties. As such the joint venturers are able to put as many or as few provisions into the contracts as they require. There is no government regulation of the JVA, however, they do have to gain government statutory approval for the project being conducted by the JVA, and are

¹⁰¹ J Merralls, *Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts* 1 Aust Mining and Petroleum L. J. 1, 2-3 (1980)

¹⁰² Allens Arthur Robinson, *Unincorporated Joint Ventures* (2003) available at http://www.aar.com.au/pubs/bt/14oct03/bio02.htm#4_Un (last visited Aug. 12, 2010).

subject to of statutory obligations outside of the JVA, including the *Trade Practices Act 1974* (Cth) and OPAGGSA.

There are however, provisions for government ratification of contracts at the state through the non-compulsory State Agreements.¹⁰³ These agreements are for significant development projects in Western Australia, and are negotiated between the Government and the developer.¹⁰⁴ These agreements are ratified by parliament, and set down the obligations of both of the parties for the life of the project.¹⁰⁵ They are essentially contracts between the Government of Western Australia for major resources projects, and are ratified by an Act of the State Parliament.¹⁰⁶

The State Agreements differ from other primary approvals in the petroleum production process in that they are only a facilitating mechanism for development of specific long-term projects through a negotiated agreement to ensure long term certainty, land tenure and complex approvals. It must be noted that these agreements are only applied through statute, and are not compulsory. However, once ratified, these agreements can only be altered through mutual consent, thereby providing greater certainty to the project, security of tenure, and reducing sovereign risk for investors.¹⁰⁷

These State Agreements specify:

‘the rights, obligations, terms and conditions for development of the project, and establish a framework for ongoing relations and cooperation between of the State and project proponent.’¹⁰⁸

When entering into a State Agreement, the broad objectives of the state are to:

- Facilitate the efficient and effective development of the State’s natural resources;
- Manage the development by ensuring it is consistent with State policies on issues such as land use, conservation, competition, infrastructure sharing, secondary processing development and maximising local content; and
- Ensure that development provides economic and social benefits for the Western Australian community.¹⁰⁹

State Agreements have not generally been entered into for a specific term, but have been designed to operate throughout the life of the project. To this end, provisions are included in Agreement Acts dealing with matters such as assignment, variation and force majeure. Provision has also been included in recent State Agreements for the

¹⁰³ Western Australia Department of Industry and Resources, *State Agreements* (2007) available at http://www.doir.wa.gov.au/documents/investment/State_Agreements_text_v2.pdf 1 (last visited Mar. 30 2008).

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¹⁰⁵ Western Australia Department of Industry and Resources, *State Agreements* (2007) available at http://www.doir.wa.gov.au/documents/investment/State_Agreements_text_v2.pdf 1 (last visited Mar. 30 2008).

¹⁰⁶ Western Australia Department of Industry and Resources, *State Agreements* (2007) available at http://www.doir.wa.gov.au/documents/investment/State_Agreements_text_v2.pdf 1 (last visited Mar. 30 2008).

¹⁰⁷ Western Australia Department of Industry and Resources, *State Agreements* (2007) available at http://www.doir.wa.gov.au/documents/investment/State_Agreements_text_v2.pdf 1 (last visited Mar. 30 2008).

¹⁰⁸ Western Australia Department of Industry and Resources, *State Agreements* (2007) available at http://www.doir.wa.gov.au/documents/investment/State_Agreements_text_v2.pdf 1 (last visited Mar. 30 2008).

¹⁰⁹ Western Australia Department of Industry and Resources, *State Agreements* (2007) available at http://www.doir.wa.gov.au/documents/investment/State_Agreements_text_v2.pdf 1 (last visited Mar. 30 2008).

submission of additional proposals under the proposals mechanism if the developer wishes to modify, expand or vary

Decommissioning of Petroleum Structures

Guidelines for the decommissioning of offshore Petroleum Facilities in Australia were drafted in 2002 by the Commonwealth Department of Industry, Tourism and Resources on behalf of the JA.¹¹⁰ These guidelines stipulate the process for the decommissioning of petroleum facilities, including the relevant international conventions, domestic legislation. Offshore decommissioning activities are primarily subject to the following legislative provisions and conventions:

- *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), and its Regulations;
- the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), and its Regulations;
- the *Environment Protection (Sea Dumping) Act 1981* (Cth), and its Regulations;
- the UN Convention on the Law of the Sea (UNCLOS); and
- the *Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matters* (MARPOL).

The decommissioning process of oil facilities in Australia is primarily regulated by Part 6.4 of OPAGGSA,¹¹¹ subject to article 210 of UNCLOS, which requires a state to adopt laws and regulations to prevent, reduce and control pollution of the marine environment.¹¹² In addition, a60 (3) of UNCLOS states that any disused or abandoned installations or structures on the continental Shelf shall be removed as necessary to ensure safety of navigation. Such removal of structures will have due regard to fishing, protection of the environment and rights and duties of other States.¹¹³

The titleholder must remove all structures from the title area that will not be used in connection with the operations which the titleholder is or will be engaged in and are authorised by the permit, lease or licence.¹¹⁴ The Designated Authority has the right to give remedial directions to former or current titleholders regarding the removal of property, the plugging or closing off of wells, the conservation and protection of natural resources; or remediation of damaged seabed or sub-sea areas.¹¹⁵ If there is a breach of a remediation direction, the Designated Authority may do anything required to effect the direction.¹¹⁶

¹¹⁰ Department of Industry, Tourism and Resources, *Guideline for the Decommissioning of Petroleum Facilities* (2002) available at [www.ret.gov.au/.../Upstream%20Petroleum/Guidelines for Offshore Pipeline Facilities Draft.pdf](http://www.ret.gov.au/.../Upstream%20Petroleum/Guidelines%20for%20Offshore%20Pipeline%20Facilities%20Draft.pdf) (last visited Aug. 12, 2010).

¹¹¹ Primarily §586 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).

¹¹² UNCLOS a60 (3).

¹¹³ UNCLOS a60 (3).

¹¹⁴ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §586.

¹¹⁵ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §586 (2)

¹¹⁶ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), §587.

Under s23 of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), (EPBC Act), the titleholder must not take an action that has, or is likely to have, significant impact on the environment, without the approval of the Minister or delegate under Part 9 of the EPBC Act.¹¹⁷ In addition, the *Sea Dumping Act 1981* (Cth) requires the titleholder who proposes to dispose of an offshore platform or vessel in situ or in Australian waters to apply for a grant of permit from the Environment Minister, which will be considered within the context of ss18-19 of the *Sea Dumping Act 1981* (Cth).¹¹⁸

Standards and guidelines for the removal of offshore installations were adopted by the International Maritime Organisation (IMO) in 1989, to ensure safety of navigation. These guidelines state that disposal needs to take into account a number of safety, environmental and cost-risk factors, including the commissioning of the structures for other uses.¹¹⁹

Norway

Overview

Petroleum exploitation in Norway is also based on the licensing and concession system which assumes that the operating oil companies obtain a licence or a concession from the State, subject to certain terms and conditions, most of which are fixed by legislation and some of which are negotiated case by case between the state and the relevant oil companies.

The Norwegian licensing system is also a discretionary licensing system, controlled by the Norwegian Petroleum Directorate (NPD) under the direction of the Ministry of Petroleum and Energy (MPE). The licensing framework is based upon predictability and transparency.¹²⁰ The division of roles and responsibilities within the MPE for the regulation of petroleum operations is organized to ensure that important social considerations are safeguarded and the value created by petroleum benefits the Norwegian society as a whole.¹²¹

Since the commencement of petroleum activities in Norway, the State has played a significant role in the Norwegian petroleum sector,¹²² being involved in all aspects of the management and development of petroleum resources and associated industries.

¹¹⁷ *Environmental Protection Biodiversity Conservation Act 1999* (Cth) part 9.

¹¹⁸ Department of Industry, Tourism and Resources, *Guideline for the Decommissioning of Petroleum Facilities* 7-8 (2002).

¹¹⁹ Department of Industry, Tourism and Resources, *Guideline for the Decommissioning of Petroleum Facilities* 9 (2002).

¹²⁰ Ministry of Petroleum and Energy, Norwegian Petroleum Directorate, *Facts 2006: The Norwegian Petroleum Sector* 17 (2006).

¹²¹ Ministry of Petroleum and Energy, Norwegian Petroleum Directorate, *Facts 2006: The Norwegian Petroleum Sector* 17 (2006).

¹²² INTSOK, *Government Role* (2004) available at <http://www.intsok.no/PHP/index.php?id=79> (last visited Dec. 22, 2008).

Norwegian oil and gas resources are seen as part of the country's national wealth, and as such there has been a general consensus that the Norwegian society as a whole should benefit from the depletion of these resources.¹²³ It is regulated by State policy and legislative framework, as the oil and gas resources are seen as part of the country's national wealth:¹²⁴

... 'Norway's oil and gas resources belong to the whole Norwegian society and must be managed to the best advantage of present and future generations.'¹²⁵

There are a number of key principles of the Norwegian Petroleum Licensing and Concession system:

- A stable, predictable, framework where the conditions of exploitation establish acceptable commercial incentives. The Norwegian State is aware of the fact that investors in the oil and gas business face prospectivity uncertainty (geology, price of petroleum in the world market. and technology). Uncertainty about terms and contractual stability should be minimized, whilst still maintaining a framework that is flexible and responsive to change;
- Incentive-based management that is facilitated and not hampered by administrative decisions. The basic philosophy is "letting a responsible industry do what they do best" for mutual benefit of both the State and the industry
 - The State sees transparent and predictable processes and decisions as the heart of petroleum policy, as transparency plays a key role in the working relationship between the government and the industry;
- Clarity and transparency concerning the roles of the State. This is a fundamental element of the Norwegian petroleum policy, since the Norwegian government sees that it is only through clarity of roles that efficient and effective resource management can occur;
- Through the licensing policy and contractual framework ,the Norwegian State aims to pool resources, capital, competence, research, plurality of ideas and internal checks and balances between the licencees and their relationship with the State;
- The State as resource owner acts as the administrative governmental body establishing policies, framework conditions and decisions relating to petroleum activities; and
- As the resource owner the State participates directly in petroleum activities through Statoil (state oil company); State Direct Financial Investment in major fields and plays.¹²⁶

¹²³ INTSOK <http://www.intsok.no/PHP/index.php?id=79> at 22 December 2006.

¹²⁴ INTSOK <http://www.intsok.no/PHP/index.php?id=79> at 22 December 2006.

¹²⁵ Bjorg Sandal, *Norwegian Oil and Gas Policies – Changes and Challenges: Speech given by Minister of Petroleum and Energy at Norwegian-American Chamber of Commerce 1 May 2001*, available at http://www.odin.no/odinarkiv/english/stoltenberg_1/oed/026031-090018/dok-bn.html (last visited Dec. 22, 2006).

¹²⁶ A discussion of Norwegian Petroleum resource policy principles and objectives comes from Gunnar Gjerde, *The Norwegian Model and the Working Relationship Between the Authorities and the Industry: As Seen from the*

Legislative Framework

The legal basis and regulatory framework for petroleum activities in Norway is conferred by the *Petroleum Activities Act 1996* and the associated *Petroleum Activities Regulations 1997*. The Norwegian State controls petroleum activities, and no activity is permitted without the licences, approvals and consents required pursuant to the *Petroleum Activities Act 1996*.

The award of licences for petroleum exploration and production is undertaken in discrete licensing rounds, however they all follow the same process as outlined in figure 2 below.

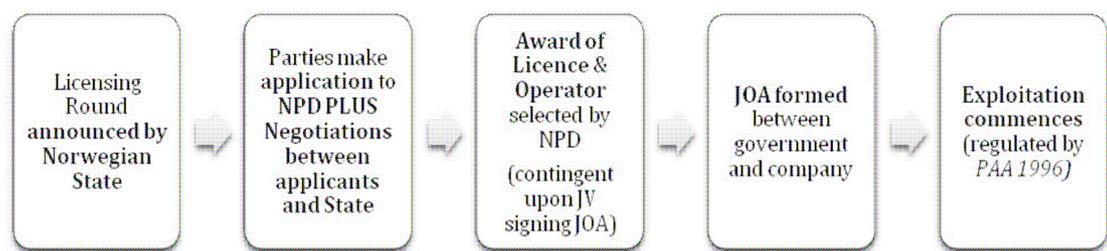


Figure 2: Granting of licences for petroleum exploitation under the Norwegian Licensing and Concession System

Exploration Licences

Exploration licences are conferred to either a legal person or a natural person domiciled within an EEA/EU State,¹²⁷ upon payment of an annual fee.¹²⁸ They are granted for an initial period of three years, unless otherwise stipulated.¹²⁹ The Exploration Licence authorises geological, geophysical, geochemical and geotechnical activities, but excludes the drilling of well.¹³⁰ The results of exploration activities are required to be submitted to the relevant government body.¹³¹

Exploration licences are regulated under chapter 2 of the *Petroleum Activities Act 1996* (Norway). Under this act, the MPE grants a licence for exploration of the seabed and subsoil.¹³² The exploration licence, like the rest of the Norwegian petroleum legislative framework, also confers a discretionary right upon the King to issue

Authorities' Point of View (2005) available at http://www.regjeringen.no/Upload/OED/Vedlegg/Norwegian%20model/Norwegian_model_program_Gunnar_Gjerdde.pdf, 2-5 last visited Aug. 12, 2008).

¹²⁷ *Petroleum Activities Act 1996* (Norway), §2-1.

¹²⁸ The annual exploration licence fee for 2006 was set at 60,000 NOK. *Petroleum Activities Regulations 1997* (Norway), §5.

¹²⁹ *Petroleum Activities Act 1996* (Norway), §2-1.

¹³⁰ *Petroleum Activities Regulations 1997* (Norway), §4.

¹³¹ *Petroleum Activities Regulations 1997* (Norway), §§4-§6.

¹³² *Petroleum Activities Act 1996* (Norway), §2-1.

regulations relating to the contents of a licence application, the scope of such licences, further conditions of the licence, and fees to be paid for the licence.¹³³

Production Licence

The grant of an exploration licence does not automatically confer the right for a production licence for the exploration area.¹³⁴ Rather, an application for a production licence may be lodged to the Norwegian government upon the release of acreage in a licensing round,¹³⁵ which must be suitably advertised in the *Norwegian Gazette* and the *Official Journal of the European Communities*, in order to comply with EU Directive requirements.¹³⁶

Upon granting a production licence, a non-recurring fee (cash bonus) may be levied, and a production bonus fee may also be levied, calculated on the basis of production volume.¹³⁷ The licensee pays an annual fee for the production licence, calculated on a per kilometre basis (area fee), and on the quantity and value of the petroleum produced at the shipment point of the production (production fee).¹³⁸

Prior to the award of a production licence, the area under application must have been opened for exploration through a licensing round.¹³⁹ This usually occurs after the environmental, economic and social impact of such operations on other industries and adjacent regions has been assessed. Production licences are normally awarded only through licensing rounds, where the Norwegian State invites applications for a certain number of blocks (acreage).¹⁴⁰ When acreage is announced and released in licensing rounds, companies can apply individually or in groups. The announcement specifies the terms and criteria which will determine the award of a licence.

After the close of the licensing round, the State assesses the applications received and the Ministry of Petroleum and Energy (MPE) shortlists a group of companies based on the criteria for selection.¹⁴¹ The licences are then awarded, based on the non-discriminatory, objective, published criteria, and announced publicly.¹⁴² Where there is cooperation agreements entered into for application for a production licence, these agreements are submitted to the MPE for veto and approval, with the Minister reserving the right to alter the agreement if required.¹⁴³ The Operator of the licence is selected or approved by the MPE,¹⁴⁴ and is responsible for the daily conduct of petroleum operations in accordance with the terms of the licence.

¹³³ *Petroleum Activities Regulations 1997* (Norway).

¹³⁴ *Petroleum Activities Act 1996* (Norway), §2-1.

¹³⁵ *Petroleum Activities Act 1996* (Norway), §3-5

¹³⁶ EU Directive 94/22/EC re hydrocarbons.

¹³⁷ *Petroleum Activities Act 1996* (Norway), §4-10

¹³⁸ *Petroleum Activities Act 1996* (Norway), §4-10.

¹³⁹ *Petroleum Activities Act 1996* (Norway) §3-1

¹⁴⁰ *Petroleum Activities Act 1996* (Norway) §3-5.

¹⁴¹ *Petroleum Activities Regulations 1997* (Norway), §10.

¹⁴² *Petroleum Activities Act 1996* (Norway), §3-5.

¹⁴³ *Petroleum Activities Act 1996* (Norway), §3-4.

¹⁴⁴ In accordance with *Petroleum Activities Act 1996* (Norway) §3-7.

Petroleum licences are usually awarded for a period of ten years,¹⁴⁵ with the ability to extend up to thirty years if work commitments have been fulfilled.¹⁴⁶ There is Ministerial discretion to extend the production licence in excess of the extension period where the request is submitted five years or more prior to the expected elapse of the licence.¹⁴⁷ Production licences can be surrendered, either in its entirety within the first three months of the grant of the production licence, or at the end of the calendar year, with three months notice,¹⁴⁸

An important component of the award of a production licence is the exploitation of other natural resources. Whilst a production licence confers exclusive rights to petroleum resources, it does not confer exclusivity in regard to other natural resources.¹⁴⁹ Where there is a clash between the exploitation of the two resources, the State has the discretion to decide which of the activities will be postponed, taking into account the investment, stage of the project, economic and social impact and the nature of the discovery.¹⁵⁰

Discretion in the Award of Petroleum Licences.

The production licence is granted on condition by the State, which has the discretion to stipulate conditions for the granting of production licences.¹⁵¹ The State is not obliged to grant a licence based on the criteria stipulated,¹⁵² and may grant licences without announcement. In addition the State is able to regulate matters relating to a production licensee, including the content of an application for production, and application fees.¹⁵³ In addition, the State has the discretion to determine if, and at what level, the Norwegian State will participate in petroleum activities.¹⁵⁴ It is also possible for the Ministry to grant exploration rights in part of a production area, at the discretion of the Ministry.¹⁵⁵

Control over Petroleum Production

Petroleum production must be conducted in accordance with prudent production technologies and sound economic principles, to ensure that petroleum resources are not wasted,¹⁵⁶ and the production is for the benefit of the Norwegian people. To that end, the licensee must submit a plan for development to the Ministry for approval prior to the production of petroleum in the licence area. This plan must contain an

¹⁴⁵ *Petroleum Activities Act 1996* (Norway), §3-9

¹⁴⁶ *Petroleum Activities Act 1996* (Norway), §3-9.

¹⁴⁷ *Petroleum Activities Act 1996* (Norway), §3-9.

¹⁴⁸ Within three months of the grant of the production licence – see *Petroleum Activities Act 1996* (Norway), §3-15.

¹⁴⁹ *Petroleum Activities Act 1996* (Norway), §3-13.

¹⁵⁰ *Petroleum Activities Act 1996* (Norway), §3-13

¹⁵¹ *Petroleum Activities Act 1996* (Norway), §3-3.

¹⁵² *Petroleum Activities Act 1996* (Norway), §3-5.

¹⁵³ *Petroleum Activities Act 1996* (Norway), §3-5.

¹⁵⁴ *Petroleum Activities Act 1996* (Norway), §3-6.

¹⁵⁵ *Petroleum Activities Act 1996* (Norway), §3-9.

¹⁵⁶ *Petroleum Activities Act 1996* (Norway), §4-1.

account of the economic, resource, technical, commercial and environmental aspects of the production, as well as decommissioning and disposal of the installation once production has ceased.¹⁵⁷ Where production is planned in two or more stages, the plan must, as far as possible, comprise a total development plan rather than a stage development plan.¹⁵⁸ Production cannot commence until the plan has been approved by the Minister,¹⁵⁹ and where there has been significant deviation from the original production plan, the Ministry may require a new or amended plan to be submitted and approved.¹⁶⁰

The Ministry also has to approve the expected production schedule, which is only able to be altered if warranted by resource management or other significant social considerations.¹⁶¹ The Ministry may stipulate, for periods of time, the quantity of petroleum which may be produced, injected or cold vented at any time, and stipulates that burning of petroleum is not allowed without Ministry approval.¹⁶² On all other production matters, the Ministry has discretion regarding preparation, commencement, and continuation of production,¹⁶³ and the use of production facilities by others, where deemed necessary for efficient operation or for the benefit of society.¹⁶⁴

The State has the discretion to requisition petroleum for national requirements, deciding to whom the petroleum shall be delivered to, with the price calculated in accordance with the formula used to calculate the production fee, plus transportation cost.¹⁶⁵ In the event of war, or such threat, the State may nominate that a licensee place their production at the disposal of Norwegian authorities, at a price determined and fixed by the State.¹⁶⁶

Joint Operating Agreements

Section 3-3 of the *Petroleum Activities Act 1996* (Norway) makes the award of the production licence conditional upon the parties concluding a Joint Operating Agreement (JOA).¹⁶⁷ The JOA regulates the relationship between the partners of the JOA, and the partners' relationship with the Norwegian State, as well as providing details of the organisation of the Operation.

The JOA is a contract between the Norwegian State and the participants in a licence, and is mandatory. Without the JOA, petroleum exploitation cannot commence. The

¹⁵⁷ *Petroleum Activities Act 1996* (Norway), §4-2.

¹⁵⁸ *Petroleum Activities Act 1996* (Norway), §4-2.

¹⁵⁹ *Petroleum Activities Act 1996* (Norway), §4-2.

¹⁶⁰ *Petroleum Activities Act 1996* (Norway), §4-2.

¹⁶¹ *Petroleum Activities Act 1996* (Norway), §4-4.

¹⁶² *Petroleum Activities Act 1996* (Norway), §4-4.

¹⁶³ *Petroleum Activities Act 1996* (Norway), §4-6.

¹⁶⁴ *Petroleum Activities Act 1996* (Norway), §4-8.

¹⁶⁵ *Petroleum Activities Act 1996* (Norway), §4-13.

¹⁶⁶ *Petroleum Activities Act 1996* (Norway), §4-10.

¹⁶⁷ *Petroleum Activities Act 1996* (Norway), §3-3.

JOA forms the core regulatory document for petroleum production under the licence. The JOA regulates:

- The structure and arrangement of the JOA, including parties, the State appointed Operator, voting rules and allocations, and how to change the Operator should the need arise;¹⁶⁸
- Financial arrangements, including how joint assets are arranged, liabilities and payments, accounting procedures, and process where default occurs;¹⁶⁹
- Actual work activities, especially work programs, budget of the project, rules relating to purchasing, and insurance coverage for participants;¹⁷⁰
- Field development proposal;¹⁷¹
- Procedure and information relating to sole risk operations;¹⁷²
- The disposal and distribution of petroleum produced, including ownership of resources¹⁷³
- Issues relating to assignment of participating interest, cessation of operations, especially duties and obligations relating to cessation, and abandonment of facilities (planning and actual).¹⁷⁴

Essentially, the JOA forms the basis for the day to day operations of the licence, as well as the allocation of earnings.

Management

The Norwegian JOA requires the establishment of a management committee to manage the petroleum operation. It is the supreme body and decision-making body in a Joint Venture. Each participant in the Joint Venture has one member and one deputy on the Management Committee, which is chaired by the Operator or his deputy.¹⁷⁵ The Operator is the participant who is in charge of ‘developing’ the licence, and is accountable to the Norwegian government for the licence area.

The JOA designates meeting periods, and the conduct of the joint venture, and stipulates the reporting arrangements.¹⁷⁶ The voting rules for the management committee are governed by the participating interest (percentage) each party has, and decisions are ratified when a certain percent of members agree. These areas of the JOA are negotiated between the parties prior to the ratification of the JOA, and are

¹⁶⁸ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Articles 1-6

¹⁶⁹ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Articles 7-11

¹⁷⁰ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Articles 12-15

¹⁷¹ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Articles 16-17

¹⁷² *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Articles 19-20

¹⁷³ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Articles 21-22

¹⁷⁴ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Articles 24-33.

¹⁷⁵ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 1-2 – 1-3

¹⁷⁶ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 3.

clearly set out in the agreement.¹⁷⁷ The JOA also regulates the duties and obligations of the Operator on behalf of the group

Finance

As a part of the arrangements under the JOA, each party owns a share of the capital assets, including any rights that have been acquired with them, including any petroleum that has not been disposed of. The size of the share is equal; to the participants' participating interest.¹⁷⁸ Each of the parties are liable, on a pro-rata basis, secondarily and jointly liable for all financial obligations resulting from the JV's activities, irrespective of the liability of the parties, but excluding taxes.¹⁷⁹ All of the parties are expected to contribute financially to all costs and expenses related to the JV activities, with payments calculated according to the participating interest at the time the payment is made.¹⁸⁰

If a party does not or is unable to comply with the payment obligations, the amount required will be forwarded by the non-defaulting parties, and recovered from the defaulting party upon notice, or by acquiring his share of petroleum produced.¹⁸¹ Where the default is longer than three months after notification to the management committee, the non-defaulting parties can demand that the defaulting party reassign his interest to them, and this right of assignment has priority over assignment rights in section seven of the JOA, unless the default is the fault of the Norwegian government.¹⁸²

The Operator is required to keep accounts in Norway for all activities in the JOA, in accordance with Norwegian laws, regulations and accounting practices.¹⁸³ Accompanying the JOA is an accounting agreement, which forms part of the regulatory framework for petroleum operations. This agreement details the provisions for the financial aspects of the JOA, including cash notification requirements, statements and billings, charges to the joint account, reimbursement to the Operator, and taxes, duties and fees.¹⁸⁴

Corporate Governance

Under the JOA, the Operator is required to establish and maintain processes for integrated corporate governance to ensure highest possible added value for health, safety, and the environment. The corporate governance will be based on the corporate governance system of the Operator, and shall integrate strategic development, goal

¹⁷⁷ Defined in the voting rules of the JOA: *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 2.

¹⁷⁸ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 6

¹⁷⁹ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 7.

¹⁸⁰ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 8.

¹⁸¹ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 9.

¹⁸² *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 9.

¹⁸³ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 10.

¹⁸⁴ *Accounting Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Articles 1-5.

oriented management, long term planning, process for significant procurements, risk management, and reporting.¹⁸⁵

All JOA's must submit a work plan and budget which specifies the main activities and the economic framework for the coming year, and include preliminary estimates, goals, deliverables and deadlines. The draft budget needs to include an operating budget and an investment budget, which will allocate monies for fixed and contingent costs, but not exploration costs.¹⁸⁶

The Operator can incur expenses and financial obligations on behalf of the JV within the limits of the authorisations for expenditure as approved by the management committee as approved for exploration operation and investment budgets, and can exceed a budget item by up to 10%. The Operator can also incur liability on behalf of the JV to a specified aggregate amount, and for expenses incurred to protect life, health or property, or to limit pollution, where the Operator sees fit and has not had time to seek approval from the management committee.¹⁸⁷

The JV requires a procurement and contract strategy for significant purchases in the various phases of the petroleum activities. Where purchases are over 5 million NOK, a proposal needs to be made to the management committee for a decision concerning the purchase strategy, including a bidding list and approval of the supplier. A decision on the purchase should be made within five working days from submission by the Operator to the Management Committee.¹⁸⁸ These thresholds can be altered by unanimous decision by all parties.

The Operator is required to take out and maintain insurance on behalf of the JV, although an individual party is also able to take out his own insurance if desired.¹⁸⁹

The Operator must also ensure that all suppliers of goods and services to the joint venture have required insurances under Norwegian laws, and endeavour to secure waivers of recourse actions against the parties where applicable or appropriate. The Operator is required to provide a copy of insurance policies to all of the parties, and provide the necessary information to the parties regarding claims.

Field Development

An important part of the Norwegian JOA framework is the requirement of the Operator, on behalf of the parties to submit a field plan to the MPE for the development and operation of the licence area, prior to the commencement of production. This is to ensure that the planned production meets with strict environmental, social and other conditions. The plan will include goals on

¹⁸⁵ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 11.

¹⁸⁶ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 12.

¹⁸⁷ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 12.

¹⁸⁸ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 13.

¹⁸⁹ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 14.

profitability, health and safety and the environment, design basis resource basis and production strategy, cost estimates and planned studies.¹⁹⁰

Sole Risk Operations

A party of the JOA is able to propose that a project which is not adopted by the management committee can be carried out solo by the Operator as a sole risk operation.¹⁹¹ The JOA outlines the procedure should a participant decide to enter into solo operations for part of the operations,¹⁹² including the requirement for separate accounts, separate management committee and finances. Sole risk developments also require the submission of a Plan for Development and Operations (PDO).¹⁹³

Disposal of Petroleum

Each party has the right and obligation to take and dispose of their share of the produced oil, and the share is equivalent to the participating interest of the party.¹⁹⁴ The property right to the produced oil, as well as the risk, is transferred to each party at the point of delivery, which is determined by the management committee prior to the commencement of production.¹⁹⁵ Similarly, each party has the right and obligation to dispose of any natural gas produced, equivalent to their participating interest.¹⁹⁶

Where petroleum production exceeds the aggregate demands of the participants, the excess quantities shall be apportioned amongst the participants in accordance with their participating interest. Once oil is lifted, there is no obligation to return oil.¹⁹⁷ Lifting capacity and amounts is calculated on an annual basis, and under or over lifting is dealt with by the management committee.¹⁹⁸

Assignment of Interests

A party has the ability to assign its interest or part thereof, with the permission of the management committee and notification to the Ministry.¹⁹⁹ Similarly a party has the capacity to resign from the JV once the obligatory work obligation described in the production licence has been carried out and upon four months notice to the management committee.²⁰⁰ Should all of the parties decide and agree, the JV may dissolve the Agreement and surrender the production licence to the Norwegian

¹⁹⁰ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 15.

¹⁹¹ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 18.

¹⁹² *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Articles 19-20.

¹⁹³ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 19.

¹⁹⁴ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 20.

¹⁹⁵ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 21.

¹⁹⁶ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 22.

¹⁹⁷ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 20.

¹⁹⁸ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 20.

¹⁹⁹ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 20.

²⁰⁰ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 24.

government.²⁰¹ All parties are still liable to meet their obligations which have arisen as a consequence of the JV activity, even where the JV has been dissolved. If produced petroleum has been sold at the time of dissolution, the Operator shall execute the sale.²⁰²

Decommissioning Framework

Decommissioning in Norway is governed by both International and Domestic Law. As signatory to both OPSAR and MARPOL, Norway has international obligations when decommissioning old and disused petroleum structures. These obligations have been incorporated into domestic legislation.²⁰³

The licensee is required to submit a decommissioning plan to the NPD at least five years prior to the decommissioning of a structure, which must include proposals for alternative use, complete or partial removal, or abandonment in situ, and reasons for the proposal.²⁰⁴ The final decision related to the decommissioning of a structure is solely the responsibility of the Ministry.

In addition the licensee is liable for all wilful or negligent damage or inconvenience caused in connection with the disposal of a petroleum structure.²⁰⁵ Should the structure be abandoned, the licensee is responsible for any damage or inconvenience caused by the abandoned structure, unless the MPD decides to assume responsibility and liability for the structure.²⁰⁶ If the State requires the removal of the facility or acquires the facility, then all liens, charges and encumbrances are deemed to have lapsed upon acquisition.²⁰⁷

The Norwegian State also has the legislative right to assume ownership of a licensee's facility where a licence expires, has been surrendered or revoked, or if the use of the facility has been permanently terminated.²⁰⁸ If any compensation is to be paid to the licensee, the State shall determine the amount of compensation.²⁰⁹

Where cessation of activities is to occur, the Operator of a licence must submit a proposal to the management committee to prepare an abandonment plan in accordance with the Petroleum Act.²¹⁰ This plan shall specify proposals for continued use of the facilities, shutdown and disposal of the facilities including removal.²¹¹ It is deemed to have been adopted by the management committee unless discussed within

²⁰¹ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 25.

²⁰² *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 25.

²⁰³ The requirements for cessation of petroleum production have been incorporated into chapter 5 of the *Petroleum Activities Act 1996* (Norway).

²⁰⁴ *Petroleum Activities Act 1996* (Norway), §5.1.

²⁰⁵ *Petroleum Activities Act 1996* (Norway), §5.4.

²⁰⁶ *Petroleum Activities Act 1996* (Norway), §5-4.

²⁰⁷ *Petroleum Activities Act 1996* (Norway), §5-5.

²⁰⁸ *Petroleum Activities Act 1996* (Norway), §5-6.

²⁰⁹ *Petroleum Activities Act 1996* (Norway), §5-6.

²¹⁰ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 30.

²¹¹ *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 31.

three months of the proposal of the plan by the Operator.²¹² The plan requires approval from the Ministry.

Regulation of Petroleum Activities and the State: A comparison of Australia and Norway

The similarities and differences in the regulation of offshore petroleum are illustrated by the approaches the Australian and Norwegian States take in structure of the regulatory bodies that regulate petroleum activities, and the structure and function of the petroleum contract

Administration of Petroleum Activities

The administration of Australian offshore petroleum resources is a product of its Federalist heritage. Current offshore petroleum legislation (OPAGGSA) establishes two authorities for the management of petroleum resources.²¹³ The regulation of offshore petroleum resources is the responsibility of the Commonwealth and the state/territory governments, resulting from the *Offshore Constitutional Settlement*. As a result, there are three distinct offshore zones. The State regulates the onshore and coastal waters (effectively the first three nautical miles from the coastline).²¹⁴

Beyond the coastal waters (seaward of the first three nautical miles of the Territorial Sea) to the outer limits of Australia's continental shelf, the management of offshore petroleum is divided between the JA and the DA,²¹⁵ with the state and territory governments act as the DA, and are responsible for the day-to-day decision making in respect of the area of the Continental Shelf off the coast of the relevant state.

In Norway a single administrative authority, the Norwegian Petroleum Directorate (NPD), was established by the Ministry of Petroleum and Energy (MPE) in the early 1970s, with a mandate to manage Norwegian oil and gas resources on the Norwegian Continental Shelf.²¹⁶ The NPD provides an effective administrative authority for the management of petroleum resources, since it is a single body with extensive expertise in petroleum exploitation, responsible for administering and regulating petroleum activities within a coordinated legal regime.²¹⁷

²¹² *Joint Operating Agreement Concerning Petroleum Activities: 18th Licencing Round* (2005) Article 32.

²¹³ *Offshore Petroleum and Greenhouse Gas Storage Act* (Cth), Part 1.3, Division 1.

²¹⁴ Department of Tourism Industry and Resources, *Offshore Acreage Release 2006: Roles and Responsibilities of Government* (2006) www.industry.gov.au/acreage_releases/2006/HTML/Overview/contents_8.HTML at 7 April 2007.

²¹⁵ *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), s56.

²¹⁶ Norwegian Petroleum Directorate, *History* (2005) <http://www.npd.no/en/About-us/Organisation/History/> at 12 October 2008.

²¹⁷ See Norwegian Petroleum Directorate, *The Norwegian Petroleum Directorate* (2009) <http://www.npd.no/en/About-us/> at 27 November 2009.

This Australian regulatory authority structure differs substantially to that of the Norwegian State, which emphasises clarity, transparency, and predictable processes in the working relationship between the government and the industry. Consequently, the Norwegian State established the Norwegian Petroleum Directorate (NPD) as a single regulatory authority, ensuring clarity, certainty and transparency in the regulation of all aspects of petroleum exploitation.²¹⁸ The NPD, as a specialist administrative body for petroleum activities, has as its prime objective ‘contributing to creating the greatest possible values for society from the oil and gas activities by means of prudent resource management’.²¹⁹ To attain its objective, the NPD performs a number of roles, including regulatory, planning and advisory, and information storage and management.

The NPD performs a regulatory role by setting frameworks, stipulating regulations and making administrative decisions in areas where it has delegated authority.²²⁰ It also performs an advisory role, directing the Ministry for Petroleum and Energy (MPE) on matters regarding petroleum development. In particular, the NPD emphasises cooperation, long-term solutions, and joint operations to ensure the development of petroleum resources, particularly time critical resources in mature areas, to ensure it meets its national petroleum objectives. The NPD also has a responsibility for all petroleum data from the Norwegian Continental Shelf (NCS), maintaining a comprehensive petroleum database that contains seismic and well data, as well as a core repository.²²¹ It is important to note that from 1st January 2004, the regulatory responsibility for safety, emergency preparedness and the working environment in the petroleum sector was taken over by a special body, the Norwegian Petroleum Safety Authority (PSA), a Subordinate to the Ministry of Labour. The responsibility was taken over from the Norwegian Petroleum Directorate, who now has only the regulatory responsibility for petroleum activities.²²²

The State and petroleum contracts

The Joint Venture Agreement (JVA) in Australia serves no regulatory role for the State in the regulation of petroleum development, since the State does not participate in petroleum activities. Rather, they are a wholly private agreement between the joint venture (JV) parties. As such the joint venturers are able to put as many or as few provisions into the JVA as the parties require. There is no government regulation of the formation of a JVA. However, the JVA requires statutory approval for the project

²¹⁸ See Norwegian Petroleum Directorate, *The Norwegian Petroleum Directorate* (2009) <http://www.npd.no/en/About-us/> at 27 November 2009.

²¹⁹ See Norwegian Petroleum Directorate, *The Norwegian Petroleum Directorate* (2009) <http://www.npd.no/en/About-us/> at 27 November 2009.

²²⁰ See Norwegian Petroleum Directorate, *The Norwegian Petroleum Directorate* (2009) <http://www.npd.no/en/About-us/> at 27 November 2009.

²²¹ See Norwegian Petroleum Directorate, *The Norwegian Petroleum Directorate* (2009) <http://www.npd.no/en/About-us/> at 27 November 2009.

²²² See Norwegian Petroleum Safety Authority at www.psa.no.

being conducted by the JVA, and is subject to the statutory obligations outside of the JVA, including the *Trade Practices Act 1974* (Cth), OPAGGSA, and common law fiduciary duties. Once a JV is formed and approved by the relevant authority,²²³ the JVA regulates the relationship between the participants in a JV and the development of petroleum resources.

Generally, all Australian commercial JVAs in the petroleum industry are unincorporated joint ventures (UJV). In this commercial arrangement, the members of the JV associate themselves for the particular acreage exploration or production venture and share the production from the venture, rather than the profits from the company, and then apply for a petroleum exploration licence. In this legal relationship, the participants enter into a contractual relationship for a particular licence area, without forming a separate legal entity. These individual JV agreements fall under commercial-in-confidence, and are unavailable to anyone but participants, or those parties with access to the petroleum register.²²⁴

The structure of the UJV and the relationship between the participants means that there are a number of critical issues that must be addressed when forming a JVA in Australia for the exploitation of petroleum resources. These issues include the scope purpose and duration of the JV, the obligations and rights of the participants, and the structure of the JV for the operation, management and control of the JV. Other vital issues include an identification of assets committed to the joint venture, including the taking of security over a JV participant's interests. Participating interests of the participants are detailed in the JVA, setting out the proportionate shares or interests of the JV held by each participant. It also creates legal rights between the parties as tenants-in-common to take a specified proportion of JV production, separately and for its own account.²²⁵

It is important to note that there is no uniform commercial JVA in Australia. The Association of International Petroleum Negotiators (AIPN) has developed a Model Form Joint Operating Agreement (MFJOA) to encourage greater harmonisation of JVAs in the oil and gas industry.²²⁶ This MFJOA seeks to be flexible, accommodating the preferences of all parties and legal regimes.²²⁷ The existence of such an international model JVA supports the World Bank view of the essential nature of a model contract between the parties.²²⁸ There appears to be some use of this model

²²³The relevant authority will depend on which jurisdiction the petroleum development falls into. If it is an offshore development that falls under the auspices of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), then the JV will be approved by the JA in that state/territory.

²²⁴ For example see Western Australia Department of Mines and Petroleum, *Title Search Request* (2009) <http://www.dmp.wa.gov.au/5776.aspx> at 27 November 2009.

²²⁵ Mallesons Stephen Jaques, *Joint Ventures* (2005) <http://www.mallesons.com/publications/2005/Dec/8222123W.htm> at 12 July 2009.

²²⁶ Catia Malaquias Miles, 'AIPN 2002 Model Joint Operating Agreement in Oil and Gas Joint Ventures' (2003) 22 *Australian Resources and Energy Law Journal* 153, 154.

²²⁷ Catia Malaquias Miles, 'AIPN 2002 Model Joint Operating Agreement in Oil and Gas Joint Ventures' (2003) 22 *Australian Resources and Energy Law Journal* 153, 153.

²²⁸ William T Onorato, *Legislative Frameworks Used to Foster Petroleum Development* (1995) World Bank Policy Research Working Paper WPS 1420, 45.

agreement in Australia, although there still remains a preference for individually negotiated JV agreements.²²⁹

There are provisions for government ratification of JVAs for offshore petroleum activities in Western Australia through non-compulsory State Agreements.²³⁰ State Agreements are contracts between the Government of Western Australia and proponents of major resource projects (both mining and petroleum, onshore and offshore). They are ratified by an Act of the State Parliament.²³¹ They specify the rights, obligations, terms and conditions for development of the project and establish a framework for ongoing relations and cooperation between the State and the companies developing the petroleum.²³² Rather than a regulatory tool for resource development, State Agreements are a facilitating mechanism, ensuring development of specific long-term projects through a negotiated agreement to ensure long-term certainty, land tenure and complex approvals. They are utilised to provide greater certainty to the project, security of tenure, and reduce sovereign risk for investors.²³³

When entering into a State Agreement, the Western Australian government seeks to satisfy several objectives. Primarily, the objective is to facilitate the efficient and effective development of Western Australia's petroleum resources.²³⁴ This includes managing the development by ensuring it is consistent with state policies on issues such as land use, conservation, competition, and infrastructure.²³⁵ However, the government also seeks to ensure that the resource development provides economic and social benefits for the Western Australian community.²³⁶

The Western Australian State Agreements generally operate throughout the life of the project. To this end, there are provisions in the State Agreements that deal with matters such as assignment, variation of contractual provisions, and *force majeure*. Provisions are also included for the submission of additional proposals if the joint venturers wish to modify, expand or vary the project. It is important to note that only the JV parties can alter the terms of the project, since the State Agreement does not give the Western Australian government the right to alter the project proposal once it has been approved by the parliament.

²²⁹ Catia Malaquias Miles, 'AIPN 2002 Model Joint Operating Agreement in Oil and Gas Joint Ventures' (2003) 22 *Australian Resources and Energy Law Journal* 153, 154.

²³⁰ Western Australia Department of Industry and Resources, *State Agreements* (2007) http://www.doir.wa.gov.au/documents/investment/State_Agreements_text_v2.pdf at 30 March 2008, 1.

²³¹ Western Australia Department of Industry and Resources, *State Agreements* (2007) http://www.doir.wa.gov.au/documents/investment/State_Agreements_text_v2.pdf at 30 March 2008, 1.

²³² Western Australia Department of Industry and Resources, *State Agreements* (2009) <http://www.dsd.wa.gov.au/6641.aspx#6666> at 3 September 2009, 1.

²³³ Western Australia Department of Industry and Resources, *State Agreements* (2007) http://www.doir.wa.gov.au/documents/investment/State_Agreements_text_v2.pdf at 30 March 2008, 1.

²³⁴ Western Australia Department of Industry and Resources, *State Agreements* (2007) http://www.doir.wa.gov.au/documents/investment/State_Agreements_text_v2.pdf at 30 March 2008, 1.

²³⁵ Western Australia Department of Industry and Resources, *State Agreements* (2007) http://www.doir.wa.gov.au/documents/investment/State_Agreements_text_v2.pdf at 30 March 2008, 1.

²³⁶ Western Australia Department of Industry and Resources, *State Agreements* (2009) <http://www.dsd.wa.gov.au/6641.aspx#6666> at 3 September 2009, 1.

Although not compulsory, there is some indication that the Australian resources industry approves of State Agreements, particularly for large projects. This is indicated by the take-up rate of Western Australian State Agreements, which have been used for the last 40 years. Currently, state agreements are utilised in over 70% of all major development projects in Western Australia, accounting for over \$4 billion in processed minerals and energy production in Western Australia.²³⁷

The State Agreements reduce a large amount of regulatory burden for oil companies, since project approvals at state and federal level are fast tracked, as well as brought together under a single umbrella.²³⁸ Once a State Agreement has been ratified by the Western Australian parliament, it is the only regulatory compliance document required for project development. This considerably reduces compliance burden and costs for oil companies, thus contributing to the economic development of offshore petroleum resources. To date, State Agreements have been used in all major resources projects in Western Australia, including the North West Shelf Gas Project and the Barrow Island Gas Project, and include several international oil companies.²³⁹

In Norway the joint petroleum activities between participants is regulated the JOA. Unlike the optional, private JVA in Australia, section 3-3 of the *Petroleum Activities Act 1996* (Norway) enables the State to stipulate the requirement of a JOA as a condition for the granting of a production licence, with the state forcing the licencees to enter into agreements comprising specific contents with one another.²⁴⁰ Without a JOA, petroleum exploitation cannot commence.²⁴¹ Therefore, together with the PAA and the PR, the mandatory JOA forms part of a regulatory trinity that enables the State to regulate all aspects of petroleum development and production.²⁴² This differs substantially to Australia, where the regulation of petroleum activities is largely left to the companies, who are required to comply with the regulatory requirements stipulated in the detailed OPAGGSA.

An important regulatory aspect of the Norwegian JOA is that the participants of a petroleum licence are selected by the NPD, and the joint venture is formed by the Norwegian State.²⁴³ This differs to Australia, where the joint venture participants are selected by the companies themselves (including the Operator), and the JV is entered into prior to the JV applying for a licence area. In Norway, the State appoints the

²³⁷ Chamber of Minerals and Energy, *State Agreements* (2004), 1.

²³⁸ Western Australia Department of Industry and Resources, *State Agreements* (2009) <http://www.dsd.wa.gov.au/6641.aspx#6666> at 3 September 2009, 1.

²³⁹ This includes agreements concluded under the *Anglo-Persian Oil Company Limited's (Private) Act 1919*, *British Imperial Oil Company, Limited (Private) Act 1925*, *Commonwealth Oil Refineries Limited (Private) Act 1940* and *Texas Company (Australasia) Limited (Private) Act 1928*.

²⁴⁰ For example, see Norwegian Petroleum Directorate, *Invitation to Apply for Petroleum Production Licence* (2008), s 4.

²⁴¹ *Petroleum Activities Act 1996*, (Norway), s 3-3.

²⁴² Finn Arnesen, 'The Relationship Between the Authorities and the Licencees' in Nordisk Institutt for Sjørett, *Petroleum Law Compendium, Volume 1* (2007) 25, 28.

²⁴³ The legislative capacity for the state to select the participants of a licence are found in section 3-4 and 3-5 of the *Petroleum Activities Act 1996* (Norway).

Operator for the joint venture. By establishing the requirement of a universal JOA, and then selecting the companies that will be party to that JOA, the State is able to exert control over the development of a field. This enables the government to direct petroleum operations, since the JOA stipulates all conditions concerning petroleum activities, including management of the JV, petroleum activities, liability, sole risk field development, and financial arrangements.²⁴⁴ The Norwegian JOA also enables the NPD to consider environmental and socio-economic factors in the exploitation of petroleum resources.²⁴⁵ Thus the JOA, as part of a regulatory trinity, enables the Norwegian State to regulate petroleum activities in a manner that encourages the exploitation of petroleum resources in abidance of Norway's petroleum policy.²⁴⁶

The Norwegian State uses the contractual arrangements contained in the JOA as a tool to regulate petroleum operations activities as well as regulating the relationship between those participating in petroleum activities on the NCS,²⁴⁷ including the regulation of the activities of the management committee.²⁴⁸ It also forces the participants to comply with the resource management policy of the Norwegian government through the regulation of field development under Articles 15-17 of the JOA. By controlling the activities of the participants through the JOA, the Norwegian State is able to assert greater direct control of the petroleum operations than is possible through licensing alone.

The Norwegian approach is a contrast the Australian approach, where the company generally drives petroleum development and controls operations. The commercial nature of Australian JV contracts reflects the interests of the joint venturers. Once a JVA is concluded and a licence is awarded to the joint venturers, the consortium has the right to develop the field according to its goals, objectives and resources. Unlike Norway, from the commencement of petroleum activities in Australia during the 1960s, the Commonwealth and state governments of Australia decided not to participate in petroleum activities or engage in commercial petroleum exploration and development.²⁴⁹ Rather, petroleum exploitation is undertaken wholly by the private sector, which initiates exploration and development, in a manner similar to the United States. The Australian government regulates petroleum activities and the petroleum sector through the regulatory legislative framework and its administrative bodies. The participation of the Australian government in petroleum activities in Australia has not been seriously considered since the early 1980s, when the federal opposition indicated

²⁴⁴ *Norwegian Petroleum Directorate, Joint Operating Agreement (Norway)*.

²⁴⁵ Finn Arnesen, 'The Relationship Between the Authorities and the Licencees' in Nordisk Institutt for Sjørett, *Petroleum Law Compendium, Volume 1* (2007) 25, 29.

²⁴⁶ This is stipulated in Art 15-17 of the *Norwegian Petroleum Directorate, Joint Operating Agreement (Norway)*.

²⁴⁷ This is particularly possible through the field development requirements of Art. 15-17 of the *Joint Operating Agreement (Norway)*. See also Norwegian Petroleum Directorate, *Petroleum Facts 2001* (2001), 60.

²⁴⁸ Art. 1-5, *Joint Operating Agreement (Norway)*.

²⁴⁹ Department of Resources, Energy and Tourism, *An Overview for Applicants 2009* (2009) http://www.ret.gov.au/resources/Documents/acreage_releases/2009/OverviewForApplicants.pdf at 25 August 2009, 10.

its intention to create a national oil company and participate in offshore petroleum activities.²⁵⁰ This was publicly rejected by the petroleum industry in 1985. In their petroleum policy statement, the Australian Petroleum Exploration Association (APEA, which would later become APPEA) concluded that it could not support the establishment of an Australian hydrocarbon corporation.²⁵¹ The view of APEA was that no federal government should create a body to compete with private enterprise for skills, equipment and capital in an already tight market that exists for all three.²⁵² In contrast, Norway's experience with the state-owned oil company Statoil demonstrates that the establishment of a State oil company does not compete for skills, equipment and capital, as outlined by APEA. Rather, it encourages sustainable development of petroleum resources by enabling the State to regulate the activities of the participants through the management committee of the JOA.

Conclusion

This article has provided some insight to the regulation of petroleum activities in Australia and Norway through legislative instruments and the use of Joint Venture Agreements. It is not an exhaustive list. Rather, it seeks to outline some of the main legal structures, detailing how legal regulation under the licensing and concession system is similar in common law and civil law legal traditions. These similarities exist since there are a number of unique features of petroleum regulation in general, and the Norwegian and Australian licensing and concession systems in particular, that mitigate the usual difficulties associated with comparative law. Different countries have developed different strategies and legal models for managing their petroleum resources and dividing the risks between the State and the oil companies. The regulation of petroleum interests is based on two internationally recognised natural resources licensing models that incorporate both national and international law. These are classified into two distinct systems: the licensing and concession system and the production sharing contract system. Since Norway and Australia both use the licensing and concession system, it is possible to make direct comparisons between the two countries, even though they are respectively civil law and common law systems.

Whilst statutory dominance is expected in a civil law jurisdiction such as Norway, it is unusual in common law jurisdictions. However, in order to address constitutional and policy issues, a detailed statutory framework has been established for the regulation of petroleum in the Australian jurisdiction. When examining and comparing Norwegian and Australian petroleum legislation and regulation, parallels exist between petroleum

²⁵⁰ Paul Keating, 'The Labor Approach to Petroleum Exploration Development and Pricing' (1980) 20 *APPEA Journal* 16.

²⁵¹ Australian Petroleum Exploration Association, *Petroleum Policy in Australia: The Exploration Industry's Perspective* (1985), 5.

²⁵² Australian Petroleum Exploration Association, *Petroleum Policy in Australia: The Exploration Industry's Perspective* (1985), 5.

activities regulation in each jurisdiction, since each have common internalised functions. In particular, this includes a petroleum legislative framework that comprises acts, regulations, and administrative guidelines in each jurisdiction. In addition, both countries utilise joint venture agreements, although in Norway these are a standard form, whilst in Australia these are individual agreements, tailored for the use of each joint venture agreement. In addition, Australia also uses State Agreements, whilst Norway only uses the JOA.

Whilst each country awards licences in order for petroleum activities to occur, there are several types of licences in Australia that do not occur in Norway. Most importantly, the retention title is unique in Australia, enabling companies to retain a title even though they are neither exploring in the title area of producing oil from the area. Similarly, the access authority is unique to Australia, with no counterpart in the Norwegian framework.

Both countries award petroleum licences to participants, and may also stipulate conditions for the award of petroleum licences. Although Norway uses discretion in the award of a licence, and Australia uses the work program bid method in the allocation of licences, both jurisdictions use the award of petroleum licences in formal licensing rounds to establish and maintain a relationship between the State and the oil companies during the exploitation of petroleum resources in the concession area. In addition, there are administrative provisions in each jurisdiction for the allocation of petroleum licences outside of these formal licensing rounds. In each jurisdiction there is also a requirement for the decommissioning of petroleum structures when petroleum production has ceased.

These commonalities in regulatory functions under the licensing and concession system enable direct comparisons to be made between the regulatory frameworks of these two jurisdictions of different legal traditions.