NOT ENOUGH OIL ON TROUBLED WATERS: COMPENSATION LITIGATION IN THE "ZONE OF CO-OPERATION"*

INTRODUCTION

EARLY AUSTRALIAN EXPLORATION PERMITS IN THE TIMOR GAP

Exploration of the offshore region known as the Timor Gap in the early 1970s was conducted under Australian permits issued under the *Petroleum (Submerged Lands) Act* 1967 (PSLA),[1] following Australia's 1953 proclamation of continental shelf rights in the region.[2]

THE "ZONE OF CO-OPERATION" TREATY

On 11 December 1989, without abandoning competing sovereign rights claims to the continental shelf,[3] Australia and Indonesia signed a treaty for joint control of Timor Gap petroleum operations.[4] The treaty entered into force on 9 February 1991.[5]

The Zone of Co-operation (ZOC) created by the treaty is an area of approximately 60,000 square kilometres[6] between the west coast of Australia's Northern Territory and the island of Timor. Article 2, which establishes the ZOC, provides for its administration as three separate areas. The central Area A is subject to "joint control by the Contracting States of the exploration for and exploitation of petroleum resources, aimed at achieving optimum commercial utilization thereof and equal sharing . . . of the benefits of the exploitation of petroleum resources".[7] Areas B (closest to Australia) and C (closest to Indonesia) are subject respectively to Australian and Indonesian control; revenue-sharing arrangements apply.[8]

The contracting States exchanged "side letters" pertaining to the rights of existing Australian permit holders.[9]

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1. See G. Moloney, "Australian-Indonesian Timor Gap Zone of Co-operation Treaty: A New Offshore Petroleum Regime" (1990) *Journal of Energy and Natural Resources Law* 128 at 130.
2. R. D. Lumb, "The Delimitation of Maritime Boundaries in the Timor Sea", *Australian Year Book of International Law* Vol. 8, No. 2, p. 72; W. Martin and D. Pickersgill, "The Timor Gap Treaty" (1991) 32 *Harvard International Law Journal* 566.
3. Article 2(3) of the treaty.
4. See text schedule to *Petroleum (Australia-Indonesia Zone of Co-operation) Act* 1990.
5. The treaty is challenged before the International Court of Justice by a third state. Portugal claims Australia's participation in it contravenes international law in that it violates both Portugal's rights and duties as United Nations-recognised administering power of the Territory of East Timor, and the rights of self-determination and permanent sovereignty over natural resources of the East Timorese people. The claim appears to rely in part on the argument that the Timor Gap continental shelf forms a natural prolongation of the land territory of the former colony of East Timor. See J. P. Fonteyne, "The Portugese Timor Gap Litigation Before the International Court of Justice" (1991) 45 *Australian Journal of International Affairs* 170 at 172; K. Livesley, "The Timor Gap Treaty — An Update" (1991) 10(4) *AMPLA Bulletin* 213 at 251.
6. Moloney, op cit. at 129.
7. Article 2(2).
8. Article 2(2)(b) and (c).
9. Letters between Senator Peter Cook, Minister for Resources, and Ir Drs Gindadjar Kartasasmita, Minister for Mines and Energy, 11 December 1989.

Australian law implementing the treaty is under challenge. In the Federal Court,[10] Western Mining Corp. Ltd, an interest holder in one of seven pre-existing Australian permits affected by the treaty, claims compensation for extinguishment of permit rights over offshore acreage now located in Area A of the ZOC.

The following description of the case is based on the parties' written submissions before Ryan J.

BACKGROUND TO THE LITIGATION

WA-74-P

Western Mining Corporation (WMC) has, since 1983, held a 16.25 per cent interest in exploration permit WA-74-P. The original permit, covering 253 graticular blocks in what are now Areas A and B of the ZOC, was issued on 25 June 1977 to Pelsart Oil.[11] The Commonwealth claims "the only consideration for the grant of the permit was compliance with an exploration programme".[12] Mesa Petroleum, which in October 1983 became a fully owned subsidiary of WMC, obtained a 16.25 per cent interest in the permit in 1979.[13] WMC paid valuable consideration for its interest: at least $100,000[14] or more.[15]

In 1979 and subsequently, competing sovereign rights claims over the area and negotiations between Australia and Indonesia to resolve them created uncertainty as to the future of WA-74-P. In 1979 and again in 1982, at the permittees' request, the Joint Authority varied the work programme,[16] in 1982 by providing that "no wells were to be drilled unless the seabed boundary dispute is resolved".[17] It is not clear from the submissions whether any exploration was carried out before the 1979 variation, but it appears none was carried out subsequently.[18] On 22 June 1983, two days before the permit was due to expire[19] and five months before WMC acquired an interest in it, the Joint Authority suspended the permit "in the national interest" and extended it for a period of five years.[20] Suspension and extension allowed the permittees to avoid the 50 per cent acreage relinquishment requirements then imposed on them by s. 31.[21] A further period of suspension and extension was effected on 20 June 1988.[22]

10. Victorian Registry, General Division, Ryan J., No. VG 137 of 1991.
11. WMC submissions before Ryan J., para. 17 and p. 58.
12. Commonwealth submissions before Ryan J., para. 35.
13. WMC submissions, para. 14.
14. Commonwealth submissions, para. 68.
15. WMC reply before Ryan J., para. 34.
16. Under s. 103(1) of the PSLA.
17. WMC submissions, para. 59.
18. See side letter Australian Minister of Resources to Indonesian Minister for Mines and Energy, 11 December 1989 which states, in part, that Australian permit holders "have, at the request of the Australian government, refrained from exploration activity since 1979 and acted responsibly during talks between Australia and the Republic of Indonesia on delimitation of the continental shelf of the area concerned".
19. See PSLA, s. 29.
20. Under PSLA, s. 103A; see WMC submissions, para. 59.
21. Section 30A(5) of the PSLA, inserted in 1991, provides that relinquishment of acreage requirements do not apply to renewal of permits reduced in size by excision of blocks now part of Area A of the ZOC.
22. WMC submissions, p. 60.

At 17 February 1991, the day before Australian legislation implementing the ZOC treaty commenced, the effect of the two suspension periods was that the permittees had extended by eight years rights over an area four times larger than they otherwise would have held had they renewed the permit twice.[23] The permittees appear to have conducted no exploration during this prolonged period. On WMC's submissions, they froze exploration at the Commonwealth's request pending the outcome of the Australia-Indonesia negotiations.[24] On the Commonwealth's submissions, as the original work programme was never complied with, the permittees obtained for nil consideration and held the whole of WA-74-P from 25 June 1977 to 17 February 1991.

AUSTRALIAN LEGISLATION IMPLEMENTING THE ZOC TREATY

On 18 February 1991, the Commonwealth's *Petroleum (Australia-Indonesia Zone of Co-operation) Act* 1990 ("the ZOC Act") and *Petroleum (Australia-Indonesia Zone of Co-operation) (Consequential Provisions) Act* 1990 ("the Consequential Provisions Act") commenced.

Under the ZOC Act, Australian rights and responsibilities in Area A are exercised by an Australian-Indonesian Joint Authority and Ministerial Council;[25] the Act prohibits petroleum prospecting[26] and petroleum operations[27] in Area A except with Joint Authority approval or, in the case of petroleum operations, under a production-sharing contract. Part 8 of the Consequential Provisions Act amends the PSLA. Section 22 redefines the "adjacent areas" in respect of the Northern Territory and Western Australia to exclude Area A of the ZOC (a new s. 5A in the PSLA). Section 23 inserts a new s. 30A:

> "(1) . . .
>
> (2) Where, as a result of the amendments of section 5A made by the [Consequential Provisions Act (which removed Area A from the adjacent areas)] and of the operation of subsection 17(2):
>
> (a) a block specified in the permit has ceased to exist; or
>
> (b) the boundaries of a block specified in the permit have changed;
>
> the permit is taken not to specify any block referred to in paragraph (a), to specify each block referred to in paragraph (b) as that block exists immediately after the commencement of the amendments, and to specify each block unaffected by the amendments.
>
> (3) . . .
>
> (4) Where, immediately before the commencement of this section, there was in force under section 103A an instrument of suspension in respect of a permit, then, on the commencement of this section:
>
> (a) the instrument is by force of this section revoked; and
>
> (b) the permittee is taken to have made an application under section 30 for the renewal by the Joint Authority of the permit in respect of the blocks which, as a result of the operation of subsection (2), constitute the permit area.
>
> (5) [Provides that s. 31, requiring 50 per cent relinquishment of acreage on renewal of a permit, does not apply to renewals under subs. (4).]"

23. Section 29 of the PSLA provides that the term of a permit shall be six years, or five years in the case of a renewal. Section 31 requires applications for renewal to be in respect of a reduced area. Section 32 provides that the Joint Authority must grant a permit renewal where the permit conditions and the Act have been complied with.
24. WMC submissions, para. 19; see also side letters to the treaty, above, n. 18.
25. Section 4.
26. Section 7.
27. Section 8.

ASHTON GOLD (W.A.) LTD v. WESTERN MINING CORP. LTD
(Perth Warden's Court, 8 January 1993)

The matter concerned the meaning of the words "at the same time" in s. 105A of the Mining Act.

Ashton Gold (W.A.) Ltd (the applicant) lodged its Form 21 application for an exploration licence at least 28 seconds before Western Mining Corp. Ltd (the objector) lodged its application form.

The applicant contended that although there was only a short period of time between the lodgment of the two applications, they were not lodged at the same time within the meaning of s. 105A(3) and hence this was not a case where the Warden should order a ballot.

The objector submitted that the words "at the same time" means substantially at the same time and that fine distinctions of a matter of seconds were not contemplated by the legislation.

The Warden held that "although very close or fine differences in time between competing applications may render any distinction between them impossible" this was not such a case. The Warden found that as there was a clear distinction of 28 seconds between the lodgment of the competing applications, this established a clear priority for the purpose of s. 105A. The application by the applicant was therefore recommended for approval.

The Warden followed previous Warden's Court decisions in *Dalrymple Resources NL v. Forrestania Gold NL* and *Emlen Pty Ltd v. Saladar.*

SMITH v. QUEK
(Kalgoorlie Warden's Court, 5 March 1993)

The matter concerned plaints for forfeiture of prospecting licences on the basis of breach of s. 45(2)(b) of the Mining Act.

Section 45(2)(b) prevents a person who had an interest in a former prospecting licence from applying for a prospecting licence in respect of the ground the subject of the former licence within three months of the surrender, forfeiture or expiry of the original licence.

In this matter the licences had already been granted so the opportunity to oppose their grant on the basis of a breach of s. 45(2)(b) had passed.

The Warden was of the view that a post-grant breach of s. 45(2)(b) had to be pursued as a complaint in petty sessions under s. 133 of the Act and could not proceed as a plaint in the Warden's Court. Smith (the plaintiff) argued that as it intended to issue complaints in due course, the plaints should be adjourned pending the outcome of the complaints.

The Warden rejected the plaintiff's submission. The plaints were issued without jurisdiction in the wrong court and hence were dismissed.

SMITH v. YIM MING DANNY CHAN
(Kalgoorlie Warden's Court, 5 March 1993)

This case concerned an application pursuant to s. 50 of the Mining Act for the forfeiture of the defendant's prospecting licences on the ground that the defendant had failed to comply with expenditure conditions.

The Warden commented on the insufficiency of evidence supporting the defendant's claims of expenditure, and held that the expenditure conditions had

not been complied with. The necessary moneys were not spent on the tenements and the amounts claimed to have been spent included amounts which are not allowable because they consisted of unauthorised use of an excavator (permission not having been sought or granted by the Department of Minerals and Energy).

The non-compliance was of sufficient gravity to justify forfeiture for each of the prospecting licences.

AMTE PTY LTD v. IMDEX TALC PTY LTD and *IMDEX TALC PTY LTD v. HENDERSON*
(Perth Warden's Court, 9 February 1993)

This case concerned an application by Imdex Talc Pty Ltd for Exploration Licence 70/1235, an objection against it by Amte, an application for Exploration Licence 70/1241 by Henderson and an objection by Imdex over the same ground.

Private landowners, holding the land subject to the tenement application, had refused consent to Imdex's application and had entered into compensation agreements with the objector (Amte). This effectively precluded them from giving consent to Imdex.

Amte objected on the basis of s. 57(3) claiming Imdex was not able effectively to explore the land. Amte alleged that Imdex did not have the financial or technical ability to sustain a work programme. This claim was rejected by the Warden after hearing evidence from a stockbroker and a geologist.

Next Amte alleged that restricted access would prevent Imdex from drilling and exploration. In light of the compensation agreements entered into with the private landowners which guaranteed access, Amte would be able to explore the land more effectively than Imdex. It was shown, however, that Imdex could effectively explore the land by virtue of a drilling programme based on access from the road reserves.

In considering the application, the Warden held that what is relevant is whether the applicant was first in time, and whether it had satisfied the Warden that it is able to effectively explore the land. It is not a question of considering the competing merits or equities between the two rival applicants.

RESOLUTE RESOURCES LTD v. MARYMIA EXPLORATION NL
(Perth Warden's Court, 12 February 1993)

The portion of an exploration licence to be surrendered under s. 65 was on two public plans. In Perth both plans were correctly endorsed but only one plan was endorsed in the Meekatharra registry.

The Warden held that the surrender did not comply with s. 65 and reg. 23 and thus the release was invalid. A subsequent application was accordingly recommended for refusal.

BACKMAN v. MINERALOGY PTY LTD
(Carnarvon Warden's Court, 20 November 1992)

A pastoralist's objections to a lease application were held to be frivolous and vexatious. Both parties consented to the Warden fixing the costs, rather than having them taxed. The pastoralist was ordered to pay costs of $1200. In addition, he was ordered to pay the cost ($1850) of a charter aircraft to transport counsel from Perth to the court.

MAITLAND MINING NL v. THISTLE PTY LTD
(Kununurra Warden's Court, 5 February 1993)

The mining registrar failed to comply with reg. 55 requiring at least 21 days for objections prior to the hearing date of an exemption application. In addition, the Perth registry had not entered details of the exemption applications in the register there, which is arguably required by reg. 106.

The Warden held that these were directory not mandatory provisions and he refused to grant relief to an objector to the application.

HOMESTAKE GOLD LTD v. MOWANA HOLDINGS PTY LTD
(Kalgoorlie Warden's Court, 5 March 1993)

The Warden declined to order costs against a prospecting licence applicant which withdrew its application at the hearing. The facts appear to indicate the applicant was waiting for senior counsel's opinion which was received only just prior to the hearing.

THOMAS' APPLICATIONS
(Perth Warden's Court, 31 December 1992)

The Warden rejected objections on environmental grounds lodged by persons who were not the owners or occupiers. She also refused to hear evidence on which she could recommend appropriate conditions.

SOLE RISK OPERATIONS IN PETROLEUM JOINT VENTURES*

BACKGROUND AND RATIONALE

Most petroleum joint ventures will contain provisions permitting one or more of the parties to engage in independent operations. These operations may take the form of a sole risk programme, or a decision not to participate (non-consent) in what is otherwise an approved joint venture programme.

The presence of these provisions demonstrates the inherent flexibility of the unincorporated joint venture structure to accommodate the wish of one or more participants in the joint venture to take action not otherwise within the scope of the joint venture programme. Whether such flexibility will always be desirable will depend on individual circumstances. Certainly, there would appear to be less support for a non-consent provision, which permits a minority to opt out of a majority approved joint venture programme, as distinct from a sole risk provision, which does not permit a minority to embark at its own cost on a project not otherwise supported by the majority of participants and therefore not forming part of the joint venture programme.

Whilst a duty of good faith between the participants of an unincorporated joint venture will normally be expressed or implied, the usual petroleum joint venture agreement (often referred to as a joint operating agreement, "JOA") will contemplate that some of the participants are able to take certain decisions in their own interests, or adversely to the interests of an individual participant, as may be the case in sole risk or non-consent situations.[1] Where "the parties have recognisable and distinct interests of their own which the joint venture agreement does not prevent them from pursuing,"[2] they are entitled to pursue self-interest.

A contractual duty to act in good faith will not necessarily establish a fiduciary relationship between the participants. In fact Professor Finn has stated that the Australian courts are reluctant, with negotiated contracts in commercial settings, to supplement contractual obligations with fiduciary ones unless these are consistent with and conform to the terms of the relevant contract.[3] Accordingly, a petroleum joint venture will not attract fiduciary concepts where its terms allow the participants to act in their own self-interest. This does not, however, mean that an unincorporated joint venture does not at least represent a relationship based to some extent on mutual trust and confidence. The ultimate end of a joint venture is to promote the several interests of each participant, the means to which require common endeavour, the pooling of resources, co-operation and mutual dependence.[4] In seeking to utilise sole risk or non-consent opportunities, a party to the JOA will therefore need to bear these principles in mind so as not to divert to itself, at least without proper disclosure and the opportunity for common participation, projects which might otherwise go towards fulfilling the principal objectives of the petroleum joint venture.

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1. P. Finn, "Joint Ventures — Good Faith, Unconscionability and Fiduciary Duties", Graham & Trotman and International Bar Association, 103 at 113.
2. *Noranda Australia Ltd v. Lachlan Resources NL* (1988) 14 N.S.W.L.R. 1 at 14.
3. Finn, op. cit., p. 116.
4. Ibid., p. 118.

Clauses dealing with independent operations require careful drafting to take into account all likely commercial and technical issues. As it is difficult to cover all situations, particularly over a long period of time, the provisions will work best where the drafting is clear and precise, and the joint venture participants can have recourse to the provisions in the context of a good working relationship. The clause will most likely lay out the basic structure for the proposed independent operations; it will become unworkable if one of the participants seeks to apply the clause in a more technical way than might have been intended. On the other hand, the presence of the clause should assist in promoting a more harmonious relationship between the joint venture participants by recognising some scope for individual action and decision-making.

These types of clauses are primarily for the benefit of a minority party in giving it the opportunity to take action which differs from the majority position. Whilst recourse to these provisions is somewhat infrequent, a factor which may support the strength of the common purpose behind the joint venture, clauses permitting independent operations do nevertheless provide the participants with a framework in which to take independent action, as well as a statement of the benefits or penalties, as the case may be, for so acting.

Moroney[5] has identified three competing factors contributing to the presence of these clauses:

(a) to preserve the opportunity for any joint venturer to go sole risk should it wish to do so;
(b) to permit a joint venturer to allocate its resources as it sees fit, although a decision to sole risk a project may mean that the participant no longer has the same flexibility to spread its risk and allocate its resources over a number of wells in view of the higher financial commitment with the sole risk project; and
(c) the fear of acting independently in the sense of either being left out of a drilling programme approved by a majority or going ahead on a sole risk project not supported by the majority.

Most joint ventures prefer to spread their risks and work within majority-approved programmes, which no doubt partly explains why access to clauses permitting independent operations is relatively infrequent. Saville[6] sees the purpose of such clauses as being nothing more than a pre-agreed mode of joint venture dispute resolution, although it is questionable whether they can really be classified as "deadlock breakers" when the majority position has clearly resolved the issue within the context of the joint venture operations.

Perhaps the reasons for the presence of these provisions in petroleum joint ventures has as much to do with the reasons for their comparative absence from mineral joint ventures, which Saville[7] identifies as:

(a) historical, with the separate development, until recently, of the two industries;
(b) practical, based on the different methods of exploration, proving up and development of the two resources, with the presence of petroleum in discrete pools or reservoirs making it usually much quicker to identify and determine

5. D. F. Moroney, "Sole Risk in Mining and Petroleum Ventures: An International Perspective" (1986) *AMPLA Yearbook* 164.
6. K. R. Saville, "Comment on Sole Risk in Mining and Petroleum Ventures" (1986) *AMPLA Yearbook* 225.
7. Ibid. at 230.

the extent of the discovery, the feasibility of the development, and then to enable production to proceed; and

(c) psychological, based on the more entrepreneurial and risk-oriented nature of petroleum exploration, producing commensurately higher rewards, as compared to the more gradual and conservative strategy of minerals exploration.

A popular view is that the object of a good sole risk clause is that no one should ever go sole risk.[8] Saville[9] believes that the clause, in simple terms, should provide a mechanism for what will happen if the parties fail to agree, whilst also being an inducement for the parties to agree on some other means of resolving their differences so that they continue to participate within the scope of the joint venture programme, and, in so doing, spread their risk and allocate their resources over a wider field of opportunity.

DISTINCTION BETWEEN SOLE RISK AND NON-CONSENT OPERATIONS

A sole risk provision in a JOA enables one or more participants to conduct an activity on the joint venture area at their own risk and cost, which has otherwise failed to win majority support as part of the joint venture operation. The activity will usually be at the early stages of a petroleum operation, most likely in exploration work, although activities in more advanced stages can in certain cases be covered by such provisions.

If the exploration or other work is successful, the non-participating parties have the opportunity to join in the project, but only on payment of a premium or penalty in recognition of the work and risks undertaken by the sole risk participants. No such payment applies where the project is unsuccessful, with the loss lying where it falls.

The sole risk clause therefore provides a participant with the flexibility to embark upon its own exploration or other work, even though it is not supported by the majority participants. On the other hand, a non-consent clause essentially works in the reverse scenario, in permitting one or more participants who form a minority position to elect not to participate in a programme that has been proposed by the operator of the joint venture as a joint venture activity and has received a majority (but not unanimous) vote to qualify as a joint venture operation within the terms of the JOA.

A non-consent clause is less common in Australian petroleum joint ventures than a sole risk clause. This largely reflects the desire and expectation for all participants to support joint venture approved programmes, whilst providing the flexibility for one or more participants to conduct their own project if not otherwise approved as part of the joint venture operation.

Whilst the legal principles applicable to both provisions are similar, both terms are typically given a different emphasis depending on the commercial negotiations between the parties, for example, by stipulating a lower buy-back premium for non-participants in a sole risk project, and also a more limited range of work, as compared to a non-consent project. Saville[10] questions whether a non-consent project should necessarily attract a higher buy-back premium, if the

8. Moroney, op. cit. at 165.
9. Saville, op. cit. at 226.
10. Ibid. at 227.

premium is otherwise calculated by reference to the risks and rewards attached to the relevant operation. He points to the growing international trend to merge the two concepts, which gives less reason for any premium differentiation between sole risk and non-consent projects.[11] He further argues that a sole risk project has just as much potential to disrupt ordinary joint venture operations. It does however seem that the bias should be in favour of promoting joint venture operations, not only in the development stage, but also in geophysical work and in exploratory drilling activity, with high premiums for non-consent projects encouraging participants to abide by the majority decision and further the objects of the joint venture within the decision-making parameters set out in the JOA.

On the other hand, a concisely drafted sole risk clause could continue to permit individual initiative and risk-taking which did not impinge on the joint venture operations, and which provided a reasonably priced buy-back premium that was not so high as to encourage less activity within the scope of the joint venture approved operations.

The extent and type of the independent operations provisions in the JOA will ultimately depend on the outcome of the commercial negotiations between the participants, which in turn will be affected by each participant's individual position in the joint venture, its participating interest and its financial capacity. Nevertheless, the level of participating interests and the financial capacity of each participant can change during the course of a joint venture, thus promoting in the end a provision which seeks to be fair and reasonable, and takes into account the position of all participants.[12]

TYPES OF OPERATIONS

Sole risk clauses will invariably be inapplicable to work which is obligatory under the terms of the relevant permit. Sole risk activity therefore only applies in respect of work that is additional to these minimum requirements, the rationale no doubt being that a joint venture participant must at the very least have agreed to support and pay for its share of the minimum work programme required to maintain the permit in good standing.

However, the sole risk prohibition on obligatory operations is only valid where the nature of such obligations is clearly stated, something which is not a regular occurrence in the conditions accompanying the grant of the relevant permits. Indeed, Nicholls[13] lists four definitions of an obligatory well which highlights the risk of cancellation of the permit if the wrong interpretation is chosen, and perhaps encourages activity being conducted only through majority decisions as prescribed in the JOA, with any failure being regulated by the default provisions in that agreement.

Moroney[14] surmises that the reasons for a prohibition on independent operations in respect of obligatory conditions may be to preserve the joint venture's best locations for joint venture activity, and to prevent undue acceleration of the work programme. He does, however, question the need for any such prohibition, particularly where the obligatory operations are not clearly stated.

11. Ibid. at 228; see also Moroney, op. cit. at 166.
12. Moroney, op. cit. at 170.
13. R. C. Nicholls, "Some Practical Problems of Joint Venture Agreements — Independent Operations (Including Some Tax Aspects)" (1981) 3 *AMPLJ* 41 at 44.
14. Moroney, op. cit. at 171.

The type of well to which the sole risk activity should apply is also important. Generally, work at an earlier stage is more favoured for sole risk activity. Hence the most common sole risk activity is the drilling of exploratory wells. The JOA does, however, need to contain a clear definition of an exploratory well, which is usually determined by reference to the latest data and information at the time of spudding the well, so that it is a well "not drilled into a geologic feature or stratigraphic trap into which a well has previously been drilled and tested [sic] oil at the surface".[15] It can be a matter of some difficulty to determine if it is an exploratory well, having regard to the means available to identify the extent of the reservoir, and whether any previous drilling in a different location may have identified the same reservoir so that it was no longer an exploratory well.

The definitional issue is therefore important. The sole risk project may be limited to exploratory wells, or the buy-back premium may be differently calculated depending on the type of well, with a higher premium rewarding the riskier exploration activity.

Sole risk projects can frequently also extend to appraisal wells, which are drilled to determine the extent of the discovery. It is, however, relatively uncommon in development well drilling, with this activity being the domain of the joint venture operation. In this regard, each joint venture participant will need to abide by the majority position, with the only freedom being to elect in or out of the overall development at the outset, after which there is usually no scope for withdrawal, at least until the capital investment is completed.[16] In this way, the joint venture participants can, in the absence of default, finalise their respective budgets and plan the performance of their obligations in the knowledge that no unforeseen expenditure caused by a withdrawing party at such a critical stage should occur.

Saville[17] gives only two situations where sole risk development operations should be permitted:

(a) if a proposed development has not been approved by the majority of participants, a party should be permitted to sole risk the whole development, provided it is able to do so without disrupting the joint operations; and
(b) if a party has sole risked an exploration or appraisal well, it should be permitted to proceed with the development, whether or not it is approved by the majority. A proper feasibility and development proposal should still be prepared and presented to all participants, any of whom may elect to join in, should they wish to do so. In this situation, Waite[18] suggests that the development decision should in any event be based on an independently prepared feasibility study, in the absence of unanimous agreement to proceed, and not upon a majority vote which may prevent or delay the sole risk minority from reaping the rewards of its discovery.

The competing interests of those who may have participated in earlier work on a particular well, or in a field in which the well is located, highlight the difficulties of permitting sole risk activity beyond the exploration stage. Whilst the petroleum from the well or the field discovered by the sole risk operations would in the normal course be the source of the premium or reward for the

15. Ibid. at 172-173.
16. Ibid.
17. Saville, op. cit. at 235.
18. J. H. Waite, "Sole Risk in Mining and Petroleum Ventures: The Australian Position" (1986) *AMPLA Yearbook* 185 at 217.

sole risk party, any such location is more complex with more advanced sole risk activity, for example, a premium being extracted from petroleum from a field for sole risk appraisal well drilling, as against those that participated in exploratory, appraisal and development well drilling in that field as part of the joint operations.

The challenge for the drafter is therefore to be able to identify the particular benefits flowing from a successful sole risk operation, and to rationalise the competing entitlements to petroleum from the one field as between the various joint venture participants, including those who have participated in any non-consent or sole operations.[19]

Independent operations do not normally feature in other aspects of petroleum ventures, although it is possible for some ancillary services to development operations to be conducted on a sole risk basis, for example, transportation and treatment facilities. At the other end of the operation, in geophysical and general survey work, there is little scope for either form of independent operations, primarily because of the perceived inability of constructing a penalty when it is difficult to determine whether such work has contributed to a discovery, and, if so, to what extent. However, Moroney[20] questions why sole risk geophysical surveys should not be permitted, even if the construction of a penalty is difficult, if such operations are otherwise voluntarily undertaken in the interests of further exploration.

RELEVANCE TO JOINT VENTURE OPERATIONS

Sole risk operations are conducted within the overall context of a petroleum joint venture. The conduct and results of such activities will interact with the respective rights and obligations of all participants in the petroleum joint venture. There are a number of issues that will be relevant, which are discussed below.

NON-INTERFERENCE WITH JOINT OPERATIONS

The JOA should not permit a sole risk programme to be carried out if it may interfere with present or proposed joint venture operations. This may be particularly relevant where the area of the tenement is small and does not easily accommodate operations that are not part of the majority approved work programme.

On the other hand, a sole risk clause may be of assistance where the area is large, or where there is only a short period of the permit remaining, so as to allow greater diversity and acceleration of exploration operations.

Where sole risk operations are permitted, some JOAs specify a minimum distance between the sole risk well and a well that comes within the scope of the joint operations.[21]

ROLE OF OPERATOR

The JOA will usually permit the operator of the joint venture to decide whether it wishes to act as operator of the sole risk project. The operator will usually so act where it is also a participant in the sole risk programme. If it chooses

19. G. L. J. Ryan, "Sole Risk and Non-Consent for Oil and Gas Exploration" (1983) *AMPLA Yearbook* 272 at 274.
20. Moroney, op. cit. at 174.
21. Ryan, op. cit. at 275.

not to so act, the sole risk participants need to choose another, who should in any event be made a party to the JOA so at least there is contractual recourse for all parties. In particular, as the terms of the JOA will provide that the operator of the sole risk project cannot look to the non-participants for contribution (even where there is a default under the sole risk programme) the operator under the JOA may be reluctant to undertake this responsibility where it is not also a participant in the sole risk programme. No doubt its decision will take into account the financial capacity of the proposed sole risk participants and its own assessment of the particular sole risk project.

The operator of the joint operations will also need to assess carefully its commitments under the JOA before undertaking additional responsibilities. It will therefore be relevant as to whether the sole risk project is the single drilling of an exploratory or appraisal well, or a full scale development. If the operator is not a participant and the sole risk participants need to appoint one of their number as operator, difficulties may also be encountered in being able to select someone with the necessary skill and background to fulfil that position.[22] In any event, the sole risk operator, whoever it may be, will need to keep separate books and records from those of the joint operations.[23]

INDEMNITY TO NON-PARTICIPANTS

As the sole risk party is to conduct the operations at its sole risk and expense, it follows that non-participants who are otherwise party to the JOA should receive the benefit of an indemnity from the sole risk participant in respect of all liabilities referable to the sole risk programme. This is because claims against non-participants may be possible where a tort is committed, or in contract where it is entered into by the operator beyond the scope of its authority, or for a breach of the statute or the terms of the relevant exploration permit.

Complex questions will also arise where a party defaults in respect of the sole risk project, but not the joint operations. The JOA will need to cater for such situations in providing for the consequences of such default and to what extent it may impact on the sole risk participant's interest in the joint venture. Any failure to meet an indemnity to the non-participant should expose the sole risk participant to a diminution of its interest in the joint venture.

SHARING OF INFORMATION

As previously mentioned, difficulties associated with the calculation of a suitable penalty are usually put forward as the main reason for not permitting independent operations in seismic or other forms of survey work.

Saville[24] suggests that such work should be a permissible sole risk activity, but without any entitlement to cost reimbursement or premium. However, there would hardly seem to be any point in committing to the sole risk programme unless the party which obtains the information could sell it to parties who decide to participate in a development based on that information. There are also difficulties in putting a value on the information, or maintaining that value where it may need to be disclosed in order to enable a participant to decide whether it wishes to be a participant in the relevant drilling programme.

22. Saville, op. cit. at 236.
23. Ryan, op. cit. at 276.
24. Saville, op. cit. at 235.

It is, in fact, more common for the JOA to provide that all parties should be kept informed of such work and the results so that they can decide whether to participate in future joint venture work arising out of the sole risk programme. In this situation, it is submitted that the information should remain the property of the sole risk party, and that if it is integral to the subsequent successful development of the well, some compensation formula should be agreed at the time of doing the work to reward the sole risk participant.[25]

JOINT VENTURE INTERESTS

As will be discussed later, the form of penalty or premium associated with sole risk or non-consent activity should not be such as to change the legal or equitable ownership of joint venture property. This is because petroleum legislation, both onshore and offshore, contains provisions which restrict the free alienability of such interests, in some cases only in relation to the entirety of the tenement, and in others without the consent of the relevant Minister, in the absence of which the creation of the relevant interest, and in some States even the instrument purporting to create such interest, will be of no force or effect.[26] Accordingly, although the participating interests of the parties in the joint venture are not varied by the performance of a sole risk programme, those interests do become subject to certain rights and obligations in the form of penalties referable to any successful sole risk programme.

Where those penalties take the form of production in kind, it becomes a matter of construction as to whether the rights and obligations are contractual only, or become part of the proprietary rights attaching to the joint venture interests so as to pass to successors and assigns, unless otherwise affected by the abovementioned statutory restrictions.

The effect of a successful sole risk programme on the joint venture property raises a number of issues relating to the types of penalties and the method by which a successful programme is determined, which are discussed below.

PENALTY CONSIDERATIONS

The penalty in the sole risk operation is in the nature of a premium over the costs incurred by the sole risk participants in conducting a successful sole risk programme. Whilst the size of the penalty is typically a reflection of the level of risk and costs involved in the sole risk programme, with, for example, offshore wildcat drilling attracting a higher multiple than onshore appraisal work, the penalty is enforceable because it is not a payment made as a result of a breach of contract, which might otherwise present a comparison as to whether the amount represented a genuine pre-estimate of the costs involved in the sole risk project.

Rather, the penalty is payable in order to enable non-participating parties to join the further drilling or development of the well located by the sole risk programme. Most JOAs will give such parties the option to participate in future production. In some cases, it may not be worthwhile if the level of the penalty or premium is such that they might only acquire an entitlement to petroleum towards the end of the life of the reservoir, and yet be left to share in abandonment and plugging costs.

25. See also Waite, op. cit. at 207.
26. *Swan Resources Limited v. Southern Pacific Hotel Corp.* (1983) W.A.R. 39.

As the sole risk programme was never part of the approved joint operations, an election to participate seems to be more appropriate and of greater flexibility than a provision which requires mandatory contributions after the sole risk participants have extracted their reward premium.

Sole risk penalties generally take the form of production, cash or acreage penalties. Whilst the production penalty is the preferred method in Australia of rewarding the risk-taking parties, the structure can be quite complicated, particularly when the penalty is to be calculated by reference to operations more advanced than exploration.

The penalty is typically recoverable, in the form of petroleum, from the reservoir discovered, appraised or developed, as the case may be, not just from one particular well. The more advanced the programme, the more difficult it becomes to distinguish the contribution made by the sole risk participants over that of the joint venture participants through their approved programmes under the terms of the JOA. For these and other reasons, sole risk programmes are less favoured, and are often not permitted, beyond the exploration stage.

The second form of penalty is the cash penalty, but it has less attraction than the production penalty, partly for tax reasons and also because it typically contemplates an up-front payment by the non-participants, as compared to the production penalty which is satisfied by the extraction of petroleum from the relevant reservoir.

The third form of penalty is the acreage penalty, whereby the non-participating party loses or relinquishes part of the joint venture tenement area in favour of the participating parties. This can create complications of having a joint venture within a joint venture. As mentioned earlier, there are also legislative provisions covering both the onshore and offshore regimes which create difficulties in seeking to deal in this way with the title to such tenements, and which therefore lessen the attractiveness of this type of penalty.[27]

A number of other general points are relevant to the structure of the appropriate penalty provision:

1. The JOA will need to define carefully on what basis it can be claimed that the sole risk programme has been successful. Only at that stage can the issue arise as to whether or not non-participants are to contribute to the costs of the sole risk programme, and on what basis. Whilst this may be clear in the case of an exploratory well which discovers petroleum, other activities may require more precise language to trigger the application of the penalty provisions.
2. The sole risk participant must also participate in the subsequent development in order to gain the benefit of any buy-back penalty or premium.
3. The penalty provision in the JOA needs to take into account a number of other technical issues, such as the ownership of petroleum under a production penalty vesting automatically in the sole risk participants, and not by way of assignment.[28] The provision also needs to recognise that changes in the composition of the joint venture will occur over time, so the rights and obligations attaching to the production penalty need to take into account the interests of successors and assigns and provide guidance as to whether they

27. See, for example *Petroleum (Submerged Lands) Act* 1967 (Cth), s. 78; *Petroleum Act* 1923 (Qld), s. 41; M. Forsyth, "Physical Sub-division of Petroleum Titles" (1985) *AMPLA Yearbook* 286.
28. Waite, op. cit. at 219.

form part of the proprietary rights attaching to the respective joint venture interests, or are enforceable only by way of contract.[29]

4. The JOA needs to specify some order of priority for the payment of the penalty, with most likely a bias towards the early recoupment of costs for more advanced works so as to encourage continuing development of a discovery.[30]

On this basis, reimbursement of development and production costs will precede drilling costs for exploratory and appraisal wells, which will in turn precede the amount representing the multiple of any of the foregoing costs. Saville however favours reimbursement of costs and premium attaching to the most recent step in the drilling programme, in priority to the costs and premium respectively of each earlier step, again to provide a greater incentive for participants to precede with the next stage of the relevant project.

CONCLUSION

Provisions dealing with independent operations in petroleum joint ventures will inevitably not cover all conceivable factual developments. The foregoing analysis has highlighted a number of the complexities and conceptual difficulties that can arise. In addition, there are taxation issues to be considered, which are beyond the scope of this paper.

Perhaps it is true that the underlying philosophy should be to promote collective effort and participation through the structure of the unincorporated joint venture. Whilst provisions dealing with independent operations reflect the inherent flexibility of this joint venture structure and the freedom of any party to take individual positions in certain cases, it may be a testament to the success of the joint venture and the compatibility of its participants that resort to these provisions becomes more the exception than the rule.

29. Ibid. at 221.
30. Saville, op. cit. at 236; Waite, op. cit. at 222.

NOT ENOUGH OIL ON TROUBLED WATERS: COMPENSATION LITIGATION IN THE "ZONE OF CO-OPERATION"*

INTRODUCTION

EARLY AUSTRALIAN EXPLORATION PERMITS IN THE TIMOR GAP

Exploration of the offshore region known as the Timor Gap in the early 1970s was conducted under Australian permits issued under the *Petroleum (Submerged Lands) Act* 1967 (PSLA),[1] following Australia's 1953 proclamation of continental shelf rights in the region.[2]

THE "ZONE OF CO-OPERATION" TREATY

On 11 December 1989, without abandoning competing sovereign rights claims to the continental shelf,[3] Australia and Indonesia signed a treaty for joint control of Timor Gap petroleum operations.[4] The treaty entered into force on 9 February 1991.[5]

The Zone of Co-operation (ZOC) created by the treaty is an area of approximately 60,000 square kilometres[6] between the west coast of Australia's Northern Territory and the island of Timor. Article 2, which establishes the ZOC, provides for its administration as three separate areas. The central Area A is subject to "joint control by the Contracting States of the exploration for and exploitation of petroleum resources, aimed at achieving optimum commercial utilization thereof and equal sharing . . . of the benefits of the exploitation of petroleum resources".[7] Areas B (closest to Australia) and C (closest to Indonesia) are subject respectively to Australian and Indonesian control; revenue-sharing arrangements apply.[8]

The contracting States exchanged "side letters" pertaining to the rights of existing Australian permit holders.[9]

* Jennifer Clarke, Solicitor, Darwin.

1. See G. Moloney, "Australian-Indonesian Timor Gap Zone of Co-operation Treaty: A New Offshore Petroleum Regime" (1990) *Journal of Energy and Natural Resources Law* 128 at 130.
2. R. D. Lumb, "The Delimitation of Maritime Boundaries in the Timor Sea", *Australian Year Book of International Law* Vol. 8, No. 2, p. 72; W. Martin and D. Pickersgill, "The Timor Gap Treaty" (1991) 32 *Harvard International Law Journal* 566.
3. Article 2(3) of the treaty.
4. See text schedule to *Petroleum (Australia-Indonesia Zone of Co-operation) Act* 1990.
5. The treaty is challenged before the International Court of Justice by a third state. Portugal claims Australia's participation in it contravenes international law in that it violates both Portugal's rights and duties as United Nations-recognised administering power of the Territory of East Timor, and the rights of self-determination and permanent sovereignty over natural resources of the East Timorese people. The claim appears to rely in part on the argument that the Timor Gap continental shelf forms a natural prolongation of the land territory of the former colony of East Timor. See J. P. Fonteyne, "The Portugese Timor Gap Litigation Before the International Court of Justice" (1991) 45 *Australian Journal of International Affairs* 170 at 172; K. Livesley, "The Timor Gap Treaty — An Update" (1991) 10(4) *AMPLA Bulletin* 213 at 251.
6. Moloney, op cit. at 129.
7. Article 2(2).
8. Article 2(2)(b) and (c).
9. Letters between Senator Peter Cook, Minister for Resources, and Ir Drs Gindadjar Kartasasmita, Minister for Mines and Energy, 11 December 1989.

LITIGATION: WESTERN MINING CORP. LTD v. COMMONWEALTH

Australian law implementing the treaty is under challenge. In the Federal Court,[10] Western Mining Corp. Ltd, an interest holder in one of seven pre-existing Australian permits affected by the treaty, claims compensation for extinguishment of permit rights over offshore acreage now located in Area A of the ZOC.

The following description of the case is based on the parties' written submissions before Ryan J.

BACKGROUND TO THE LITIGATION

WA-74-P

Western Mining Corporation (WMC) has, since 1983, held a 16.25 per cent interest in exploration permit WA-74-P. The original permit, covering 253 graticular blocks in what are now Areas A and B of the ZOC, was issued on 25 June 1977 to Pelsart Oil.[11] The Commonwealth claims "the only consideration for the grant of the permit was compliance with an exploration programme".[12] Mesa Petroleum, which in October 1983 became a fully owned subsidiary of WMC, obtained a 16.25 per cent interest in the permit in 1979.[13] WMC paid valuable consideration for its interest: at least $100,000[14] or more.[15]

In 1979 and subsequently, competing sovereign rights claims over the area and negotiations between Australia and Indonesia to resolve them created uncertainty as to the future of WA-74-P. In 1979 and again in 1982, at the permittees' request, the Joint Authority varied the work programme,[16] in 1982 by providing that "no wells were to be drilled unless the seabed boundary dispute is resolved".[17] It is not clear from the submissions whether any exploration was carried out before the 1979 variation, but it appears none was carried out subsequently.[18] On 22 June 1983, two days before the permit was due to expire[19] and five months before WMC acquired an interest in it, the Joint Authority suspended the permit "in the national interest" and extended it for a period of five years.[20] Suspension and extension allowed the permittees to avoid the 50 per cent acreage relinquishment requirements then imposed on them by s. 31.[21] A further period of suspension and extension was effected on 20 June 1988.[22]

10. Victorian Registry, General Division, Ryan J., No. VG 137 of 1991.
11. WMC submissions before Ryan J., para. 17 and p. 58.
12. Commonwealth submissions before Ryan J., para. 35.
13. WMC submissions, para. 14.
14. Commonwealth submissions, para. 68.
15. WMC reply before Ryan J., para. 34.
16. Under s. 103(1) of the PSLA.
17. WMC submissions, para. 59.
18. See side letter Australian Minister of Resources to Indonesian Minister for Mines and Energy, 11 December 1989 which states, in part, that Australian permit holders "have, at the request of the Australian government, refrained from exploration activity since 1979 and acted responsibly during talks between Australia and the Republic of Indonesia on delimitation of the continental shelf of the area concerned".
19. See PSLA, s. 29.
20. Under PSLA, s. 103A; see WMC submissions, para. 59.
21. Section 30A(5) of the PSLA, inserted in 1991, provides that relinquishment of acreage requirements do not apply to renewal of permits reduced in size by excision of blocks now part of Area A of the ZOC.
22. WMC submissions, p. 60.

At 17 February 1991, the day before Australian legislation implementing the ZOC treaty commenced, the effect of the two suspension periods was that the permittees had extended by eight years rights over an area four times larger than they otherwise would have held had they renewed the permit twice.[23] The permittees appear to have conducted no exploration during this prolonged period. On WMC's submissions, they froze exploration at the Commonwealth's request pending the outcome of the Australia-Indonesia negotiations.[24] On the Commonwealth's submissions, as the original work programme was never complied with, the permittees obtained for nil consideration and held the whole of WA-74-P from 25 June 1977 to 17 February 1991.

AUSTRALIAN LEGISLATION IMPLEMENTING THE ZOC TREATY

On 18 February 1991, the Commonwealth's *Petroleum (Australia-Indonesia Zone of Co-operation) Act* 1990 ("the ZOC Act") and *Petroleum (Australia-Indonesia Zone of Co-operation) (Consequential Provisions) Act* 1990 ("the Consequential Provisions Act") commenced.

Under the ZOC Act, Australian rights and responsibilities in Area A are exercised by an Australian-Indonesian Joint Authority and Ministerial Council;[25] the Act prohibits petroleum prospecting[26] and petroleum operations[27] in Area A except with Joint Authority approval or, in the case of petroleum operations, under a production-sharing contract. Part 8 of the Consequential Provisions Act amends the PSLA. Section 22 redefines the "adjacent areas" in respect of the Northern Territory and Western Australia to exclude Area A of the ZOC (a new s. 5A in the PSLA). Section 23 inserts a new s. 30A:

> "(1) . . .
>
> (2) Where, as a result of the amendments of section 5A made by the [Consequential Provisions Act (which removed Area A from the adjacent areas)] and of the operation of subsection 17(2):
>
> (a) a block specified in the permit has ceased to exist; or
>
> (b) the boundaries of a block specified in the permit have changed;
>
> the permit is taken not to specify any block referred to in paragraph (a), to specify each block referred to in paragraph (b) as that block exists immediately after the commencement of the amendments, and to specify each block unaffected by the amendments.
>
> (3) . . .
>
> (4) Where, immediately before the commencement of this section, there was in force under section 103A an instrument of suspension in respect of a permit, then, on the commencement of this section:
>
> (a) the instrument is by force of this section revoked; and
>
> (b) the permittee is taken to have made an application under section 30 for the renewal by the Joint Authority of the permit in respect of the blocks which, as a result of the operation of subsection (2), constitute the permit area.
>
> (5) [Provides that s. 31, requiring 50 per cent relinquishment of acreage on renewal of a permit, does not apply to renewals under subs. (4).]"

23. Section 29 of the PSLA provides that the term of a permit shall be six years, or five years in the case of a renewal. Section 31 requires applications for renewal to be in respect of a reduced area. Section 32 provides that the Joint Authority must grant a permit renewal where the permit conditions and the Act have been complied with.
24. WMC submissions, para. 19; see also side letters to the treaty, above, n. 18.
25. Section 4.
26. Section 7.
27. Section 8.

no loss as a result of commencement of the Consequential Provisions Act.[204] Failure to take into account the total treaty arrangements will result in WMC being paid compensation which is unreasonable.[205] The most reliable evidence of value of a permit is the price paid or offered for shares in the permit. In 1983, WMC paid $100,000 for a 16.25 per cent interest; the total value was therefore $615,385.[206] In 1991, an intending farminee offered an amount which values the total rights in ZOCA 91-12 at $8,640,000.[207] In 1992, another intending farminee offered an amount which suggests ZOCA 91-12 was worth $20,961,500.[208] Thus the value of WMC's rights increased greatly as a result of implementation of the treaty. WMC suffered a loss relating to ZOCA 91-12 because it disposed of ZOCA 91-12 in a transaction not conducted at arm's length.[209]

WMC says it suffered a loss due to excision of blocks from WA-74-P and its "re-purchase" of similar blocks as ZOCA 91-12.[210] It says (without setting out an alternative calculation) the Commonwealth's valuation of WA-74-P is too low and does not take into account significant expenditure obligations imposed on WMC. The farm-in offers on ZOCA 91-12 either did not eventuate or were unsatisfactory. The eventual disposal of ZOCA 91-12 for no value was at arm's length[211] and the overall effect of implementation of the treaty was a loss to WMC.

DISCUSSION

Compensation will be calculable according to established principles relating to the value of the property to its owner at the time of acquisition. One such principle is that the quantum of compensation will represent what a willing buyer would pay for the property rather than fail to obtain it. Thus the value to WMC of its rights in WA-74-P will be the value it could have obtained were it to offer those rights on an open market, not its percentage share of the original value of the permit at the time of issue, which was nil.

Another such principle is that the value to the owner must be calculated by reference to a market which is not affected by price fluctuations caused by the scheme of acquisition itself. In this case, the Consequential Provisions Act can be likened to a "scheme of acquisition". It seems logical that market anticipation of the commencement of this Act would have led to a drop in the market value of rights in WA-74-P. That drop in value is not to be taken into account in calculating WMC's loss.[212]

For reasons discussed above, I do not accept the proposition that the "right to match" offered to the WA-74-P joint venturers and subsequent production-sharing contract signed by them are relevant to the calculation of compensation in respect of rights lost over the WA-74-P permit area. Thus the proper comparison for compensation purposes is between the value of the permit rights, unaffected by anticipation of their likely termination, before commencement of

204. Ibid., para. 53.
205. Ibid., para. 57.
206. Ibid., para. 68.
207. Ibid., para. 70.
208. Ibid., para. 69.
209. Ibid., para. 71.
210. WMC reply, para. 27.
211. Ibid., para. 24.
212. See, generally, A. A. Hyam, *The Law Affecting the Valuation of Land in Australia* (The Law Book Co. Ltd, Sydney, 1983), Ch. 8.

the Consequential Provisions Act and the value of those rights at 18 February 1991.

It appears that the price paid by WMC for its share in the permit is indeed the most reliable indicator of the former value of the permit. If total permit rights over 253 blocks in 1983 were worth $615,385, and no exploration was carried out on WA-74-P, it seems reasonable to postulate that at 18 February 1991, the date on which "property" was acquired, all permit blocks were of equal value.[213] The value of the rights over 112 blocks at that time would have been $272,423; the loss of rights over 141 blocks would have been a loss in the order of $342,962. WMC's 16.25 per cent share of the loss amounted to $55,731. This figure would require adjustment for inflation to 18 February 1991. While compensation ordinarily does not include interest, judgment interest should also be added.

CONCLUSION

"Property" within s. 51(xxxi) has been interpreted broadly. However, if the court in *WMC v. Commonwealth* defines petroleum exploration permit rights by analogy with common law rights, it is likely to find that a permit confers rights in the nature of a bare licence, the termination of which does not amount to an "acquisition of property" within s. 51(xxxi). If the court defines "property" as including "practically all valuable rights", permit rights fall within s. 51(xxxi). Alternatively, the court could adopt the *R v. Toohey* test of property: irrevocability or permanence of rights is essential and assignability is important. A permit satisfies these criteria, and on this test would also fall within s. 51(xxxi).

If the permit rights are property, there has been an "acquisition" by the Commonwealth within the meaning of s. 51(xxxi) and of s. 24 of the Consequential Provisions Act, not a mere regulation affecting property. That acquisition has been effected otherwise than on just terms, and the Commonwealth is liable to pay "compensation of a reasonable amount" to the WA-74-P joint venturers under s. 24. The amount of compensation payable is to be calculated without reference to other legislation or political events. On the parties' submissions, it appears the quantum of compensation payable to WMC is in the vicinity of $100,000. It is difficult to understand WMC's motivation for commencing proceedings in relation to such an amount.

213. This assumption, however, may be at odds with the evidence. There appears to be a large body of expert evidence before Ryan J. regarding the hypothetical value of the oil in the ground (see, for example, Commonwealth submissions, para. 61 and WMC reply, para. 33). The submissions suggest that the permit holders were more interested in the northern portion of WA-74-P, although of course the pre-treaty "sovereign risk" would have been much greater in relation to these blocks than for the southern portion. As the Commonwealth points out (submissions, para. 62), a fundamental flaw in WMC's attempt to value hypothetical oil in the ground is that this is not an accurate measure of the rights of the permit holders.