6

Titles

Rights

6.1 In Australia, almost all earth resources are Crown-owned.[1] The statutory rights to onshore resources and resources in coastal waters to the three nautical mile limit fall within the jurisdiction of the host state. The Commonwealth Government controls the resources beneath the territorial sea which extends beyond the three nautical mile limit[2] and out to twelve nautical miles. Resources on the continental shelf beyond the twelve nautical mile limit and out to the limits of the Exclusive Economic Zone (EEZ), plus areas that can be claimed under "Law of the Sea", are controlled by the Commonwealth but may be subject to international treaties. Some historic remnant land titles with attaching sub-surface resources ownership still exist in some states, but the areas involved are insignificant in the context of the present inquiry.

6.2 The rights to explore Crown resources in a specified area ("tenement") are documented in a lease or license ("title") issued by a regulatory agency. Resources title confers on the holder certain responsibilities including reporting requirements, performance outcome thresholds and environmental standards and conditions.[3]

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1 e.g. Northern Territory Government, *Minerals (Acquisition) Act (1984)*, s. 3; South Australian Government, *Mining Act (1971)*, s. 16; Government of Western Australia, *Mining Act (1978)*, s. 9.

2 Northern Territory Government, *Transcript, 9 October 2003*, p. 10.

3 e.g. Northern Territory Government, *Mining Act (2003)*, Part IV; South Australian Government, *Mining Act (1971)*, Part 5; Government of Western Australia, *Mining Act (1978)*, s. 57.

6.3 The establishment and allocation of petroleum and mineral rights is a key role for regulatory agencies.[4]

Applications

6.4 All Australian states have a suite of exploration titles, each designed for a particular purpose and each with a standard range of qualifying criteria and operating conditions. However, the exploration title styles and conditions vary in detail quite significantly from state to state.

6.5 Companies wishing to explore for earth resources must first make application to the state government regulatory agency for an appropriate exploration title. In general, two types of application filtering process are used:

- program bidding; and
- priority of lodgement.

6.6 Petroleum tenements are usually allocated through a bidding process and minerals tenements employ the priority of lodgement approach.

6.7 The lack of consistency in title styles, tenure, and conditions placed on titles between the states creates much uncertainty with regard to regulatory compliance. This in turn has led to increased regulatory costs on private explorers. Gross overregulation and inefficiencies in processing exploration tenement applications and attendant delays in approvals processes leading to the grant of title may deter exploration investment.[5] Discussion on delays in the issue of tenements relating to Native Title matters is covered in Chapter 7, and if linked to environmental matters, in Chapter 8.

Minerals Titles

Process

6.8 Under the priority of lodgement system, titles are issued on the basis of priority of receipt by the issuing authority, of valid applications over vacant ground. In almost all cases this is the method used to determine the allocation of minerals licenses.

6.9 Some states offer *ad hoc* rights relating to "boutique" or artisan-scale resources exploration, but still within the overall priority system.

4 South Australian Government, *Submission No. 70,* p. 964.

5 Japan Australia LNG (MIMI) Pty Ltd, *Submission No. 7,* p. 34; Victorian Minerals and Energy Council, *Submission No. 63,* p. 866.

6.10 The Amalgamated Prospectors and Leaseholders Association of Western Australia, for example, pointed out that there is a non-conflicting arrangement in Western Australia whereby prospectors can apply for permits over areas within existing exploration licenses held by other parties to metal detect for gold nuggets. There is a requirement attaching to the permit for the prospector to report back on the amount and location of any gold nuggets detected on the permit area. [6] The Committee is impressed by the degree of co-operation between two groups with demonstrably complementary exploratory interests, and understands that the arrangement is working well.

6.11 Similarly, the Lightning Ridge Miners Association submitted that, in partnership with the regulatory agency, its industry had developed a title system to suit the evolving needs of the [opal] industry, with local and immediate needs administered in a positive manner.[7] Notwithstanding, industry structure and marketing were identified as the opal producers' major challenges.

Problems with Title Applications

6.12 Explorers experience problems relating to agencies' management of their title applications, leading to preventable costs and delays caused by:

- **difficult and lengthy documentation:** "The form that you put in for an exploration tenement can be anything up to 30 pages long. … It is an involved process that is very difficult";[8]
- **procedural excesses:** "…I notice huge changes in the time requirements for fringe issues not directly associated with exploration which come directly from government… Solution is to get government departments to be flexible…";[9]
- **over regulation:** "The State Government is… applying statutory measures for such forefront issues as safety performance. … extended shifts and drug and alcohol testing present challenges for exploration in remote locations.";[10]
- **high expenditure requirements:** "…minimum expenditure requirements should be lowered for the first 2 years…";[11] and

6 Amalgamate Prospectors and Leaseholders Association of Western Australia, *Transcript, 31 October 2003,* p. 226.

7 Lightning Ridge Miners Association Ltd, *Submission No. 15,* p. 121.

8 Ken Harvey, *Transcript, 7 March 2003,* p. 380.

9 David Watkins, *Submission No. 2,* p. 2.

10 John Anderson, *Submission No. 31,* pp 417-8.

11 Fergus O'Brien, *Submission No. 3,* p. 7

- **lack of transparency in title conditions**: leverage being applied to waive conditions (royalty holidays) for special one off deals as governments try to attract exploration[12].

Applications and Lodgements: An Assessment

6.13 The Committee recognises the need for resources title criteria to be simple, transparent and consistent nationally, as a significant step towards assisting investors, especially foreign companies, become involved in Australian resources exploration. Delays and costs of title issue to applicants, should, as a result, be reduced.

6.14 The Committee notes that state agencies are now offering electronic lodgement of title applications. This was seen as a sound step towards achieving simplicity and saving process time.

6.15 The Committee agrees that it is necessary for states to offer a range of title styles to fit the varied requirements of the exploration companies and individuals. However, the Committee feels that there is considerable scope for the various regulatory agencies to harmonise titles' criteria, conditions and currency across the states and recommends accordingly.

Recommendation 13

6.16 **The Minister for Industry, Tourism and Resources, through the Ministerial Council on Minerals and Petroleum Resources, collaborate to establish and implement nationally consistent resources exploration title management processes. Attention should be directed towards exploration title type, conditions, tenure, charges, reporting requirements and administration, with the view to having a nationally harmonised regime.**

Inter-Jurisdictional Delays: Offshore Minerals Exploration

6.17 Sydney Marine Sand (SMS) submitted that it had experienced a problem in relation to its application for minerals title over near offshore marine aggregate deposits.[13] Applications to explore for offshore minerals (as distinct from offshore petroleum) are jointly administered by the Commonwealth and the relevant state – in this case New South Wales – under the auspices of the Commonwealth's *Offshore Minerals Act 1994.* This Act deals with two related matters:

12 Department of Industry, Tourism and Resources, *Transcript, 20 March 2003,* p. 15.

13 Sydney Marine Sand Pty Ltd, *Submission No. 117,* p. 1650.

- setting up a licensing system for mining and exploration in particular offshore areas; and
- the application of state laws to those offshore areas so far as those laws concern mining and exploration activities.

6.18 The Act establishes a Designated Authority which is constituted by the State Minister responsible for the coastline off which an offshore mineral exploration licence is lodged (in this case, the New South Wales Department of Mineral Resources). The Act also establishes a Joint Authority which is constituted by the responsible state minister and the Commonwealth Minister for Industry, Tourism and Resources. For Sydney Marine Sand's application, the Joint Authority was the Department of Industry Tourism and Resources (DITR) and the NSW Department of Mineral Resources. Offshore mining applications are lodged with the Designated Authority and then approved by the Joint Authority.

6.19 SMS claims that it took the Joint Authority "nearly 2 years to process the application and refer the [Mineral Exploration Licence] to the respective ministers" and that:

> Neither department appears to have good working knowledge of the Act. Neither demonstrates a good understanding of their obligations with regards to determining the application…. We have not encountered one member of staff empowered to oversee the application process to ensure that both departments did what was required within a reasonable timeframe. … SMS has witnessed much inter-departmental blaming (of the other) for the prolonged delays.[14]

6.20 The Committee is of the view that both DITR and state agencies need to ensure that harmonised and efficient procedures exist for licence applications made under the Offshore Minerals Act and recommends accordingly.

Recommendation 14

6.21 **The Minister for Industry, Tourism and Resources, through the Ministerial Council on Minerals and Petroleum Resources, work with the Northern Territory and state ministers to establish harmonised and efficient procedures for processing applications for offshore mining and exploration licences under the *Offshore Minerals Act 1994*.**

14 Sydney Marine Sand Pty Ltd, *Submission No. 117,* pp 1650-1.

Acreage bidding in the Petroleum Sector

Process

6.22 Offshore petroleum acreage release and work program bidding campaigns are managed by the Commonwealth Government. The acreage release process involves four steps:

- acreage that is going to be released is chosen by DITR, focussing on areas of genuine interest to junior, mid-tier and major companies;[15]
- data packs are assembled by DITR to accompany the release areas;
- companies have 6-18 months to assess the acreage;
- DITR assesses the bids and decides on successful bidders.[16]

6.23 Onshore petroleum acreage release and work program bidding programs basically follow the same process, but are managed by the respective state government agency.

6.24 Cash bidding, last used by the Commonwealth Government in 1993, is an alternative bidding process to allocate acreage. Current policy is not to use cash bidding because the work program bidding system is believed to encourage exploration by ensuring dollars are not diverted away from exploration budgets.[17]

Problems with Acreage Bidding

6.25 APPEA is concerned that certain components of the approvals process for offshore petroleum tenements amount to an investment disincentive, especially:

- the costs associated with the complexity and duplication of approvals processes; and
- the uncertainty resulting from policy risk in approvals processes.[18]

6.26 Agip Australia was scathing about the awarding of Commonwealth acreage, saying that "[t]he time taken to offer exploration acreage in Australia following bid submission is nothing short of Worlds worst practice".[19]

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15 Department of Industry, Tourism and Resources, *Submission No. 112,* p. 1603.

16 Australian Petroleum Production and Exploration Association Inc, *Submission No. 39,* p. 497.

17 Department of Industry, Tourism and Resources, *Submission No. 112,* p. 1606.

18 Australian Petroleum Production and Exploration Association Inc, *Submission No. 39,* p. 495.

19 Agip Australia Limited, *Submission No. 28,* p. 243.

6.27 APPEA advised that, at present there are three pieces of legislation relevant to the approvals process.

> …there is the *Petroleum (Submerged Lands) Act* [1967], which covers licensing, approvals and conditions both for exploration and operations. Separate to that, located in a different department and with a different minister, is the *Environment Protection and Biodiversity Conservation Act* [1999]. One of the six triggers under that act is the marine environment. Ninety percent of Australia's petroleum production takes place in the marine environment. … Separate to that… is the *Native Title Act* [1994] which rests in another government agency.[20]

6.28 APPEA conceded, however, that it would not be possible for the three pieces of legislation to be administered by one agency. In APPEA's view:

> The shorter you make that process, the more consistency you have in it, the more transparency you have in it, the faster you will get to the stage where action starts to happen. That makes it easier to get investment funds into the industry.[21]

6.29 However, with the approvals process running in sequence, it may take three to five years before there is any cash flow, by which time investors may direct funds elsewhere.

6.30 APPEA also identified the compilation of government data packs to accompany acreage releases could also generate significant delays in the process.[22] Woodside Energy observed that the release cycle could take two years, and over that long time the exploration momentum and priorities may have moved elsewhere.[23]

6.31 Woodside Energy further advised that authorised work program rigidity applying to offshore acreage prevented work commitments being moved to other permit years or to other permits as technical understanding matures or operational conditions change.[24]

Acreage Bidding: An Assessment

6.32 APPEA suggested that acreage release approvals processes should operate in a coordinated and timely fashion:

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20 Australian Petroleum Production and Exploration Association Inc, *Transcript, 21 October 2002*, p. 62.

21 Australian Petroleum Production and Exploration Association Inc, *Transcript, 21 October 2002*, p. 63.

22 Australian Petroleum Production and Exploration Association Inc, *Submission No. 39*, p. 497

23 Woodside Energy Ltd, *Submission No. 44*, p. 541.

24 Woodside Energy Ltd, *Submission No. 44*, p. 541.

- processes need to run in parallel, be consistent between jurisdictions, and standard activities need to be extracted from approvals processes if they meet pre-determined criteria;
- processes need to minimise risk of unforeseen factors; and
- decision-making needs to be transparent and capricious decision-making needs to be minimised.[25]

6.33 APPEA advised that new acreage bidding information packages need to be more comprehensive and expanded to include all available data on environmental values and management processes, all available data on proven and claimed Native Title and approval processes (and applicable negotiation methods for onshore acreage) and proven or claimed Cultural Heritage sites.[26]

6.34 APPEA also stressed the need for consistency and streamlining in approvals processes between state and Commonwealth jurisdictions.[27] Agip Australia considered that state agencies should not be involved in any review of bids.[28] ChevronTexaco saw merit in post-award approvals processes involving agencies and stakeholders mapping out schedules, time lines and decision points that would cut delay.[29]

6.35 The Committee concludes that the process of offshore petroleum permit issue was un-coordinated. Rectification of the problem can be achieved through closer liaison between DITR; Environment Australia and, where appropriate, state government and Native Title agencies. The Committee recommends accordingly.

Recommendation 15

6.36 **The Minister for Industry, Tourism and Resources establish a function in the Department of Industry, Tourism and Resources to take the lead role in coordinating and expediting the Commonwealth, Northern Territory and state (as appropriate) processes for the approval of onshore and particularly offshore petroleum exploration permits.**

6.37 The Committee also encourages endeavours by DITR to ensure that acreage release documentation includes information on all environmental and cultural liens over areas to be released.

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25 Australian Petroleum Production and Exploration Association Inc, *Submission No. 39*, p. 495.

26 Australian Petroleum Production and Exploration Association Inc, *Submission No. 39*, p. 498.

27 Australian Petroleum Production and Exploration Association Inc, *Submission No. 39*, p. 503.

28 Agip Australia Limited, *Submission No. 28*, p. 243.

29 ChevronTexaco Australia Pty Ltd, *Submission No. 36*, p. 458.

Tenement Turnover

6.38 Several witnesses referred to the need to ensure tenement turnover regularly takes place. The South Australian Government commented that:

> Access to land for both petroleum and mineral exploration can be negatively impacted by companies holding large, long term tenements, possibly not doing much exploratory work, and preventing access to new players with new ideas and money.[30]

6.39 Many resources discoveries are made by explorers who apply new ideas and add to existing data generated by earlier companies who have worked the area. Frequently it is not until after a succession of seven or eight explorers have surveyed a particular area unsuccessfully and often repetitively, that a discovery is made. [31] It is important, therefore, that prospective areas are not held on to by companies doing very little or nothing at all, but are relinquished for others to look at.

6.40 The South Australian Government advised that it is necessary for regulatory agencies to have an effective regulatory framework in place that facilitates open and fair competition for petroleum and mineral rights and for providing security of title to such rights.[32] In line with this approach the South Australian *Petroleum Act 2000* is considered leading edge in land access philosophy especially regarding acreage availability and acreage management. Title currency and area have been reduced, bidding made mandatory and penalties specified. Measures to encourage minerals tenement turnover include increasing expenditure requirements in the latter years of a license.[33]

6.41 The Minerals Council of Australia, (MCA) on the other hand, saw the compulsory relinquishment of exploration tenures over the life of a lease is seen as an unnecessary restriction to the effective operation of exploration projects. The MCA considered that:

> Any legislative requirement for compulsory relinquishment of exploration tenements should incorporate necessary flexibility for exploration operations, even if there is a deferral to the minister for a judgement. [34]

30 South Australian Government, *Submission No. 70,* p. 964.

31 Eduard Eshuys, *Submission No. 32*, p. 433; Eduard Eshuys, *Transcript, 12 May 2003*, pp 472-3.

32 South Australian Government, *Submission No. 70,* p. 964.

33 South Australian Government, *Submission No. 70,* p. 964.

34 Minerals Council of Australia, *Transcripts, 3 March 2003,* p. 272.

Tenement Warehousing

6.42 The Minerals Council of Australia stated that there is also an insidious side to the broader issue of tenement turnover, amounting to uncompetitive behaviour called warehousing.[35]

6.43 Warehousing refers to a practice whereby companies may apply for areas far in excess of what they can handle and then they exploit cheaply the application stage of a tenement granting process to hold the areas, to the exclusion of others who may be interested in making application. Companies involved in warehousing exploit the hold-ups relating to Native Title, by locking-up areas under application preventing other potential interested parties applying. The warehousing ruse may also extend to companies holding granted licenses without working them.

6.44 One minerals explorer stated that:

> I think warehousing is a problem because what has happened with Native Title and the access issues is that ground has become valuable and not ideas. People have been pegging knowing that they can sit on it. It is a game that is played by everybody. It is an impediment to exploration because if you have a good idea about an area, you will go and negotiate the access, but if is stagnant under applications then nothing is going to move.[36]

6.45 The Northern Territory Minerals Council stated that most companies had a need to turn land over, but that does not mean that land can be turned over quickly in the current situation. Only when the license is granted does the tenement life clock start to tick.[37]

6.46 The Northern Territory Government is monitoring tenement turnover and seeking to devise policies to encourage greater land turnover.

6.47 The MCA supports legislation intended to avoid warehousing and the locking up of exploration land.[38]

6.48 The Committee concludes that the issue of companies "hanging on to titles or applications" had probably always existed for a number of valid precautionary reasons including enhancing joint-venturing opportunities. However warehousing had escalated as a market response to the added layer of Native Title negotiations on top of the approvals process, and was detrimental to collective regional exploration activity.

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35 Minerals Council of Australia, *Submission No. 81,* p. 1185.

36 John Anderson, *Transcript, 7 March 2003,* p. 390.

37 Northern Territory Minerals Council (Inc), *Transcripts, 9 October 2002,* p. 22.

38 Minerals Council of Australia, *Transcripts, 3 March 2003,* p. 272.

Disjunctive and Conjunctive Titles

6.49 Resources titles may be "disjunctive" or "conjunctive". A disjunctive title means that that an exploration license confers no automatic right to a production title in the event that resources development goes ahead. Conjunctive titles incorporate exploration and production approvals in the same agreement.

6.50 There are advantages and disadvantages with the two types of titles. Conjunctive titles confer certainty that successful exploration can proceed to production without renegotiation.[39] On the other hand, if the conditions of the exploration license at the time of issue have to accommodate a potential automatic production approval, then the process of issue of the exploration title is slowed in almost all instances unnecessarily, because very few exploration titles generate a production proposal.

6.51 However, there is a lack of consistency between the states over whether resources exploration and production titles are conjunctive or disjunctive.

6.52 Issues such as title application and approval inefficiencies; lax tenement turnover policies; and warehousing cumulatively amount to unnecessary disincentives that may deter investors from pursuing major investment in Australian resources exploration. There needs to be a co-ordinated response by all governments to design a consistent set of modern national title policies that meet the needs of the current resources exploration climate. The Committee concurs with the South Australian Government's view that the optimal position should be a sensitive balance between enabling fair competition for rights whilst providing security of title, and recommends accordingly.

Recommendation 16

6.53 **The Minister for Industry, Tourism and Resources, through the Ministerial Council on Minerals and Petroleum Resources, work with the Northern Territory and state ministers to investigate the feasibility of introducing to all Australian jurisdictions, optional conjunctive exploration/production titles combined with uniform mandatory relinquishment requirements.**

Legacy Data

6.54 Regulatory compliance monitoring is undertaken by states to ensure that exploration licence conditions are met, especially those relating to

39 Ian McDonald, *Submission No. 4*, pp 16-7; Northern Territory Government, *Submission No. 89*, p. 1410.

lodgement of technical data and adherence to environment conditions. Technical data collected throughout an exploration program by private companies are required to be lodged periodically with the license issuing agency. These data are stored by the government agency and made available in the public domain where they are known as legacy data.

6.55 There is now a huge volume of legacy data collected by both private companies exploring and by governments doing pre-competitive work. This information can lead to breakthroughs in deposit geology because it enhances the ability of geologists to identify and delineate areas for exploration drilling, accurately and can reduce the time and cost of exploration for smaller companies. The availability of legacy data can also increase the value of Australia as a target for exploration investment.

6.56 According to a resource industry representative, state agencies are struggling to keep legacy data up to date.[40] Others point out that data lodged with state agencies are generally only available from the respective state, prompting comments for the information to be held under a federal mantle.[41]

6.57 The Committee's view is that there should be a national repository for all geoscientific data that are in the public domain, to enable efficient retrieval and interrogation by exploration companies for geoscientific exploration research and program planning purposes. All historic data should be available to exploration companies in digital format stored nationally. A consistent digital form of lodgement across all states and the Commonwealth should be devised and implemented for the lodgement of all future data.

6.58 The Committee sees good sense in this proposition and, accordingly, makes the following recommendation.

Recommendation 17

6.59 **The Minister for Industry, Tourism and Resources, through the Ministerial Council on Minerals and Petroleum Resources, work with the Northern Territory and state ministers to store all public domain geoscientific data (legacy and pre-competitive) in digital form in a national data repository.**

40 John Anderson, *Transcript, 7 March 2003*, p. 385.

41 Dr Ian Gould, *Transcripts, 12 May 2003*, p. 439.