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TINA HUNTER*

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Introduction

As the production from Australia's petroleum resources continues to decline, there has been a focus on, and criticism of,[1] Australia's petroleum regulatory framework.[2]

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1 A study by the Australian Productivity Commission has been commissioned to examine the upstream regulatory framework in Australia, to assist the Australian government to formulate better policies and a regulatory framework. See http://www.pc.gov.au/__data/assets/pdf_file/0018/82026/upstream-petroleum-issues.pdf.

2 Australia's petroleum regulatory framework is that of the licensing and concession system. Within the context of this paper, the petroleum regulatory framework refers to suite of legislative and policy tools that a State utilises to regulation petroleum exploration and production. Specifically, the regulatory framework encompasses petroleum policy, petroleum legislation, the award of exploration and production licenses, the conditions for the award of petroleum licenses, and the government management of the extraction of petroleum. The offshore regulation in Australia is complex, divided between State and

It is generally agreed that the petroleum regulatory framework of Australia is outdated,[3] fraught with regulatory burden,[4] and fails to meet Australia's petroleum policy. One method of assessing Australia's petroleum regulatory framework to address these concerns is by comparatively analysing the petroleum framework against another, similar regulatory framework. The Australian petroleum framework is assessed against the Norwegian petroleum regulatory framework, since both jurisdictions utilise the licensing and concession system (LCS) as the regulatory framework for petroleum activities. By comparing these two systems, it is possible to identify similarities and differences between the two regulatory frameworks, examining the Norwegian regulatory framework for ways in which petroleum regulation has been streamlined and assess whether it provides any answers to the regulatory concerns that Australia is currently addressing.

One of the concerns with comparing the petroleum systems of Australia and Norway are the inherent problems when comparing civil and common law jurisdictions. This paper argues that these concerns do not apply equally to all areas of law. It identifies that there are some areas of law, such as petroleum law, that transcend domestic legal systems, making them areas of 'transnational law'.[5] As such, it seeks to demonstrate that there is commonality in the regulation of petroleum activities using the LCS that mitigate the usual difficulties associated with comparisons of civil and common law jurisdictions.

This paper compares a number of areas petroleum law, including national petroleum policy, legislative framework, and the award of licenses, highlighting similarities and differences between the two jurisdictions in the regulation of petroleum resources. By examining these areas of petroleum regulation in these two jurisdictions, it demonstrates that it is possible to compare elements of petroleum law in order to seek solutions to the legal problems in a jurisdiction.

Commonwealth Jurisdictions. The State has jurisdiction from the baseline (low water mark) to three nautical miles seaward, as defined in the *Offshore Constitutional Settlement* (1982).

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

4 See Australian Productivity Commission, *Review of Regulatory Burden on the Upstream (Petroleum and Gas) Sector – Research Report* (2009) http://www.pc.gov.au/projects/study/upstreampetroleum/report at 6 May 2009.

5 Transnational law is defined by Phillip Jessop as 'all law which regulates actions or events that transcends national frontiers'. See Phillip C Jessop, *Transnational Law* (1950), 2.

Why compare petroleum regulatory framework?

Offshore petroleum activities in Australia were, until 1 July 2008, regulated by the *Petroleum (Submerged Lands) Act 1967 (the PSLA)*.[6] The PSLA was an 'odd combination of painstaking detail and grand-scale delegation,[7] created to enable offshore petroleum development without resolving the constitutional dispute between the Commonwealth and state[8] governments over which government had the rights to petroleum in the seabed. The disagreement was resolved through the *Offshore Constitutional Settlement*,[9] although the statutory regulatory regime remains today.[10] Thus the relationship that was established between the State and the participating companies, which continues today, is one of statutory administration, rather than contractual in nature. A new petroleum Act, the *Offshore Petroleum Act 2006* (Cth) (OPA) entered into force in July 2008,[11] regulating the award of petroleum licenses, petroleum titles, petroleum safety, and data management and regulation. This legislation is a rewritten and renamed version of the PSLA. It has 'conspicuous changes in structure and style of the legislation, but implements only a modest number of minor policy changes'.[12] The purpose of the rewrite of the PSLA was is to provide a more user friendly enactment of the PSLA, reducing compliance costs for the upstream energy industry and the governments that administer it.[13]

The new OPA continues to attract the same criticism as the *PSLA,* which was described as a piece of legislation that 'would not score highly in any legislative beauty contest. It is old, fat and ugly'.[14] The rewrite of the PSLA into the fatter although less ugly OPA is seen by some academics as a profoundly disappointing lost opportunity for principled reform,[15] since it fails to address many of the

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6 Australian Parliament House, Explanatory Memorandum, Offshore Petroleum Bill, 2005, 2.

7 Terence Daintith, 'Administering the Petroleum (Submerged Lands) Act: Too Much Discretion or Too Little?' (2004) *AMPLA Yearbook 2004* 1, 6.

8 'State' has two meanings within the confines of this paper. The word *S*tate refers to a nation or country. The use of the word '*s*tate' refers to an Australian state as a jurisdiction.

9 Attorney-General's Department, Offshore Constitutional Settlement: A Milestone in Co-Operative Federalism (1980)

10 Terence Daintith, 'A Critical Evaluation of the *Petroleum (Submerged Lands*) *Act* as a Regulatory Regime' (2004) *AMPLA Yearbook 2004* 91, 93.

11 *Offshore Petroleum Act 2006* (Cth).

12 Australian Parliament House, Explanatory Memorandum, Offshore Petroleum Bill, 2005, 2.

13 Australian Parliament House, Explanatory Memorandum, Offshore Petroleum Bill, 2005, 2.

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

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

regulatory burdens inherent within the system of joint regulation between the States and Commonwealth developed in the PSLA.[16]

This current joint regulation of petroleum activities between the states and Commonwealth, as outlined in Part 1.3 of the OPA causes major delays in the petroleum approvals process.[17] These delays are attributable to the lengthy and costly approval process and onerous reporting requirements.[18] Improved legislative arrangements have the capacity to reduce regulatory costs, offsetting Australia's natural disadvantages of low oil prospectivity and geographic remoteness.[19]

A possible solution to the legislative problems inherent in the Australian petroleum regulatory framework may lie in an analysis of the Norwegian system of regulation of petroleum. The aim of this paper is not to determine whether the regulatory framework of Norway is able to provide some possible solutions to the regulatory impediments and address the criticisms directed to the Australian petroleum legislation. Rather it serves to illustrate that not only is the comparison of petroleum regulation in a common law and civil law jurisdiction possible, but is also useful, providing possible solutions to regulatory issues that impede the extraction of petroleum in a jurisdiction.

Comparative law methodology and functional analysis

Upstream offshore petroleum[20] regulation is based on internationally recognised natural resources licencing systems, both of which incorporate both national and international law.[21] When comparing Australian and Norwegian petroleum laws

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

17 Australian Productivity Commission, *Review of Regulatory Burden on the Upstream (Petroleum and Gas) Sector – Research Report* (2009) http://www.pc.gov.au/projects/study/upstreampetroleum/report at 6 May 2009, 73.

18 Australian Productivity Commission, *Review of Regulatory Burden on the Upstream (Petroleum and Gas) Sector – Research Report* (2009) http://www.pc.gov.au/projects/study/upstreampetroleum/report at 6 May 2009, 197.

19 Australian Productivity Commission, *Review of Regulatory Burden on the Upstream (Petroleum and Gas) Sector – Research Report* (2009) http://www.pc.gov.au/projects/study/upstreampetroleum/report at 6 May 2009, 197.

20 Upstream Petroleum is defined as all of the petroleum activities that occur up to the point of transfer of the petroleum for the transport, sale and refining of the product. It includes exploration and production activities. See http://www.offshore-technology.com/glossary/upstream.html at 17 January 2009.

21 The two systems are Production Sharing Agreements (PSAs), and the Licencing and Concession System (LCS). The Licensing and Concession System is defined as a system of

there is a substantial traversing of the differences normally inherent in comparing legal systems and traditions, and parallels can be drawn between the petroleum regulation in each jurisdiction. It is possible to extrapolate common internationalised functions within the two jurisdictions, particularly the property rights (both inherent rights, and rights conferred by the award of a petroleum licence) legislative framework, the award of license, and conditions associated with petroleum production. It is these parallels which enable the regulatory frameworks of two jurisdictions of different legal traditions to be compared.

The use of comparative analysis as a legal methodology in law is well established.[22] It is premised on the historical methodological and scientific assumption that only similar things could be compared.[23] Arguably, a fundamental tool for comparative analysis is functional analysis, since 'incomparables cannot usefully be compared, and in law the only things that are comparable are those which fulfil the same function'.[24] This paper utilises the functional approach in comparative analysis, drawing together similarities between functions of the Norwegian and Australian petroleum regulatory systems, as well as the differences.

The Norwegian petroleum regulation framework has been selected for comparison to the Australian petroleum regulatory framework for a number of reasons. Both States utilise the licensing and concession system for petroleum exploration and production, with Australia using the North American model of licensing,[25] and

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regulation petroleum operations where a 'license' is granted over a 'concession' or area. That license grants proprietary rights to the license holder, which are generally also imbued as contractual rights between the participating parties. Unlike the production sharing contract, the concession system assumes that the operating oil companies obtain a license from the State at certain terms and conditions, most of which are fixed by legislation and some of which are negotiated case by case between the state and the relevant oil companies. An important characteristic of the concession systems is that since legislative power is a State prerogative, the State remains at considerable liberty to modify at any time those terms and conditions that are not negotiated but fixed by legislation. See Guiditta Cordero Moss, 'Contract or License? Regulation of Petroleum Investment In Russia and the Role of Foreign Legal Advice' (1998) 3-11 *CEPMLP Internet Journal* http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=28136 at 12 January 2008.

22 The first International Congress of Comparative Law was held in Paris in 1900, assembling experts from Europe to consider this area of legal methodology.

23 A Essin Orucu, 'Methodology of Comparative Law' in J M Smits (ed), *Elgar Encyclopaedia of Comparative Law* (1998), 442.

24 Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (1998), 34.

25 In this system, the State awards petroleum licences, and enforces the laws and regulations protecting workers and the environment. The company is left to exert control over field

Norway developing and implementing the North Sea model of petroleum development.[26] Also, each State has some form of special taxation on petroleum production, although the amount, type and return to the State differ.

There are also temporal similarities. Both Australia and Norway have produced petroleum for the last forty years, with the first major petroleum discoveries in the 1960's, requiring the development of appropriate policies and legal frameworks for the development of these newly discovered resources. In developing these resources, both States have addressed similar issues in developing their petroleum sector.

Finally, both nations have small populations and large land masses and adjoining sea areas. In addition, both Australia and Norway are geographically remote, with hostile environments which have the potential to make attracting exploration and production in these geographically remote and hostile regions difficult for both States.

Parties and petroleum regulation

Offshore petroleum resources are owned by the State, although the exploitation of these resources is rarely undertaken solely by the State. This is because the State lacks the competence and skill to develop the resources, and is reluctant to invest public capital into high risk exploration ventures.[27] Therefore the development of petroleum in any jurisdiction establishes a symbiotic relationship between a State and private international oil companies. Each party requires the other for petroleum exploitation to occur. The oil companies need the State, since the State is the owner of the resource the companies wish to exploit. The State requires the oil companies to contribute the financial strength and technology needed to explore the resources, and assume the exploration and production risk.

The international oil companies that form a relationship with a State are required to comply with the legal regime and regulatory framework of the country of activity, as well as the legal regime operational in the company's country of corporate

development, rates of depletion and other issues relating to production. See Jerome Davis, *Does One Size Fit All: Reflecting on Governance and North Sea Licensing Systems* (2004) Background Paper: BC Offshore: Potential and Problems a MASC Workshop for Lawyers, Dunismuir Lodge, Sidney BC, March 18-21, 2004, 2.

[26] The North Sea model refers to the regulatory model developed by Norway in particular for the exploitation of North Sea oil resources, which had its origins in the regulation of hydro resources in Norway since the early twentieth century. See Brent F Nelsen, *The State Offshore: Petroleum, Politics and State Intervention on the British and Norwegian Continental Shelves* (1991), 23.

[27] Oystein Noreng, *The Oil Industry and Government Strategy in the North Sea* (1980), 19.

registration. Different jurisdictions have developed various petroleum regulatory frameworks for managing their petroleum resources and dividing the risks between the State and the oil companies. However, all of these regulatory frameworks are based on either Production Sharing Arrangements or the LCS. As such, international oil companies are familiar with and an integral part of the LCS which is used in the Norwegian and Australian jurisdictions and operate within national laws in each of these jurisdictions.

Sovereignty over petroleum resources

Offshore mineral and petroleum resources in both Australia and Norway are owned by the State in accordance with sovereignty that is accorded under UN Resolutions 1803 (XVII) and 3281,[28] and exploited by the State on behalf of the community, with the government administering these rights. Both States assigns property rights to the private sector for exploration, development and production activities. [29] The sovereign right to the Continental Shelf for these two coastal States was established by the 1958 Convention on the Continental Shelf, and confirmed by the 1982 Convention on the Law of the Sea.

Both Australia and Norway acknowledge the principle of State sovereignty over mineral and petroleum resources in the offshore zone, and invokes this principle when asserting its right to the EEZ and Continental Shelf under Articles 74 and 77 of UNCLOS.

Common features of a petroleum regulatory regime

Legal regulation can be defined as 'a principle, rule or law designed to control or govern conduct'. [30] The regulatory framework for petroleum exploitation encompasses legal instruments such as primary legislation, subordinate legislation as well as administrative decisions made by public officials utilising policy guidelines.[31]

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[28] United Nations General Assembly Resolution 1803 (XVII) of 1962 *Permanent Sovereignty Over Natural Resources* (1962) and United Nations General Assembly Resolution 3281 (XXIX) *Charter of Economic Rights and Duties of States.*

[29] Abare, Australia's Petroleum Resource Rent Tax: An Economic Assessment of Fiscal Settings. (2003) Abare Report 03.1, 27.

[30] Australian Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector: Productivity Commission Issues Paper* (2008) http://www.pc.gov.au/__data/assets/pdf_file/0018/82026/upstream-petroleum-issues.pdf at 11 August 2008, 3.

[31] Australian Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector: Productivity Commission Issues Paper* (2008)

The regulatory framework designed by a government is the fundamental tool for the administration of petroleum activities in a State. When developing a petroleum regulatory framework, a State considers a number of common elements, including State sovereignty over mineral and petroleum resources,[32] the legislative framework, and common rules and procedures for the granting of concessions or contracts.[33]

Policy

The regulatory regime which governs the exploitation of Australian and Norwegian petroleum resources is similar. Both countries have implemented the Licencing and Concession System, and the policies reflect such a system. Similarly, both countries have implemented a policy framework which seeks to capture the economic rent attributable to petroleum exploitation. Additionally, both countries enjoy strong legal systems, demonstrated by an independent judiciary, separation of powers and an observance of the rule of law.

This section examines the petroleum policies of Norway and Australia. By understanding the policies and regulatory framework of Norway, it is possible to apply the Norwegian regulatory system to some of the issues confronting the Australian upstream petroleum industry as it sits at the crossroads of reform.

Offshore Petroleum production and exploration in Australia has occurred since the 1960's with the discovery of petroleum in Bass Strait in 1965.[34] At that time Australia was a developed nation in a strong economic position, with a high reliance on primary production, especially agricultural commodities.[35] Trade primarily occurred with the distant traditional markets of the United Kingdom and to a lesser extent the USA. This had an impact on Australia's petroleum policy. Since this time, petroleum policy has been influenced by the complex interaction of changes in government policy and oil strikes over the last 40 years. This has resulted in a shifting Australian approach to government control over the 'commanding heights' of the economy.

The Australian government's objective in early petroleum policies was to maximise the benefit to all Australian through *an efficient and competitive exploration industry*

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http://www.pc.gov.au/__data/assets/pdf_file/0018/82026/upstream-petroleum-issues.pdf at 11 August 2008, 6.

32 Michael Bunter, *The Promotion and Licensing of Petroleum Prospective Acreage* (2002), 10.

33 Michael Bunter, *The Promotion and Licensing of Petroleum Prospective Acreage* (2002), 10.

34 Esso/BHP, *Bass Strait Oil and Gas* (2002) http://www.exxonmobil.com/Australia-English/PA/Files/publication_2002_BassStrait.pdf at 2 august 2007, 3.

35 See www.abs.gov.au for yearly overview of the Australian economy and general economic trends.

which can fully assess Australia's petroleum resources.[36] These policy goals were addressed by an offshore petroleum strategy which implemented a comprehensive program for the release of offshore acreage areas for exploration, the provision of geological data from Australian government agencies, and provision and advertising of attractive offshore petroleum title and taxation arrangements.[37]

The policy relating to petroleum resources was outlined in the *Minerals and Petroleum Resources Policy Statement* released in 1998. This Policy Statement built on the petroleum policy of 1990, further delineating a framework for the development of Australian mining and petroleum industries. This policy statement cemented Australia's previous commitment to provide investors with a positive, strong, stable framework of government policies to ensure certainty for investors, minimise investment impediments and promote investment in the Australian petroleum industry.[38] As a consequence of the 1998 policy review, Australian petroleum policy aimed to encourage investment in the Australian offshore petroleum industry by providing a highly competitive environment within a transparent regulatory framework. It also seeks to support the petroleum industry's efforts to achieve sustained wealth generation for industry through growth, innovation and enhancement of value. To ensure this sustained wealth generation, the State assists industry to meet international challenges and seize international trade and investment opportunities.[39] Aside from encouraging economic activities, the Australian policy seems to promote world best practice in management of environment, health and safety and, in doing so, promote responsible stewardship of the environment and community interests**.**

A sector wide policy review of the Australian energy sector occurred in 2004.[40] This review was prompted by the leading role that the domestic energy sector has played in the sustained economic growth of Australia's economy.[41] The policy review sought to enhance the 1998 petroleum policy's aims of maximising the economic value of Australia's energy resources. It aims to provide Australians with a reliable supply of

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36 Department of Primary Industries, Offshore Strategy: Promoting Petroleum Exploration Offshore Australia (1990).

37 Department of Primary Industries, Offshore Strategy: Promoting Petroleum Exploration Offshore Australia (1990).

38 APEC GEMEED. *Australia's Mineral and Resources Industries: Recent Developments* (2002) http://www.gemeed.cl/medios/pdf/australiacountryreport.pdf at 2 March 2008, 2-3.

39 Department of Industry, Science and Resources, *Australian Offshore Petroleum Strategy* (1999).

40 Energy Task force, *Securing Australia's Energy Future* (2004), 51-3.

41 Energy Task force, *Securing Australia's Energy Future* (2004). 51-3.

competitively priced energy whilst at the same time ensure an appropriate return to the community for the depletion of these non-renewable resources, as well as meeting social and environmental objectives.[42]

The current Australian petroleum policy is based on the 1998 policy review, as well as integrating the 2004 sector-wide reforms. It focuses on the promotion of an efficient and competitive petroleum exploration and production industry.[43] To that end, the Government's goal is to maximise the contribution the petroleum industry makes to the well-being of Australia[44] accomplished by 'an efficient and competitive exploration industry which can fully assess Australia's petroleum resources'.[45]

The current policy framework primarily addresses exploration and commercial aspects of Australian offshore petroleum exploration and production, whilst meeting social and economic objectives. The petroleum policy seeks to ensure good stewardship of petroleum resources whilst encouraging commercial interests. However, the policy appears to favour commercial interests, and not always maximise economic and social benefits for Australian society. One major reason for this may be the abundance of other natural resources in Australia. Given the abundance of Australia's other natural resources, some of which is said to last at least 200 years,[46] it is understandable that the Australian Government sees little need to maximise wealth generated from petroleum exploitation. Unlike Norway, whose primary natural resource is petroleum, Australia has a plethora of natural resources, ranking within the top five globally for Coal, Iron Ore and Uranium reserves.[47] Conversely, Australia's petroleum reserves are relatively insignificant, both globally and nationally. Petroleum contributes 3% to the Australian GDP, compared to 25% of Norwegian GDP.[48] However, the natural resources of Australia, like Norway, are non-renewable. As such, the exploitation of these resources should occur within a framework that maximises the wealth from these resources and one that ensures economic sustainability after the resources are exhausted.

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42 Energy Task force, Securing Australia's Energy Future (2004), 51-3.

43 Department of Industry, Science and Resources, *Australian Offshore Petroleum Strategy* (1999), 1.

44 Department of Industry, Science and Resources, *Australian Offshore Petroleum Strategy* (1999), 1.

45 Department of Industry, Science and Resources, *Australian Offshore Petroleum Strategy* (1999), 1.

46 Geoscience Australia, Australia's Identified Mineral Resources 2005 (2005).

47 Geoscience Australia, Australia's Identified Mineral Resources 2005 (2005).

48 Ministry of Petroleum and Energy, *Facts 2007: The Norwegian Petroleum Sector* (2007) 14.

It appears that the current Australian government recognises the need for a change in the emphasis of Australia's petroleum policy. Two significant events occurred in 2008 which indicate a shifting policy emphasis. The first of these events was the commissioning of an issues paper by the Australian Productivity Commission regarding regulatory burden in the upstream oil and gas sector, and regulatory policy will be considered as part of the review.[49] Secondly, the Department of Resources, Energy and Tourism has publicly declared that:

> The Australian Government is committed to creating a policy framework to expand Australia's resource base, increase the international competitiveness of [the] resources sector and improve the regulatory regime, consistent with the principles of environmental responsibility and sustainable development.[50]

It is likely that Australia will formulate a new policy regarding petroleum exploration and production, one that considers sustainable development of the petroleum resources for future generations.

The petroleum policy implemented by Norway could serve as a reference for the Australian government of a policy framework that embraces sustainable development of petroleum. The overall petroleum policy objective in Norway is to secure a pattern of licensing which effectively promotes the best possible resource management of Norwegian petroleum resources, thereby laying the basis for creating the highest possible value and government revenues.[51]

The principles of Norwegian petroleum policy were laid out in 1971 in the 'ten oil commandments',[52] a set of goals and strategies to guide national involvement in the

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[49] Australian Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector: Productivity Commission Issues Paper* (2008) http://www.pc.gov.au/__data/assets/pdf_file/0018/82026/upstream-petroleum-issues.pdf at 11 August 2008, 4.

[50] Department of Industry, Science and Resources, *Australian Offshore Petroleum Strategy* (1999), 1.

[51] Ministry of Petroleum and Energy, *Facts 2003: The Norwegian Petroleum Sector* (2004) 63.

[52] The Norwegian ten oil commandments were approved by the Norwegian Storting on 14 June 1791, and comprised the following:
1. that national supervision and control must be ensured for all operations in the Norwegian continental shelf;
2. that petroleum discoveries are exploited in a way that makes Norway as independent as possible of others for its supplies of crude oil;
3. that new industry is developed on the basis of petroleum;
4. that the development of an oil industry must take necessary account of existing industrial activities and the protection of nature and the environment;

development of petroleum resources throughout the value chain, whilst focusing on the protection of the environment.[53] These commandments underpin Norwegian oil policy. The commandments dictated two essential policy elements that have remained central to Norwegian petroleum policy: sound macroeconomic policy and the creation of a fully state-owned oil company to participate in the exploitation of oil resources and develop domestic industry.[54]

Norwegian petroleum polices have been through a number of distinct phases. Initially, from the mid 1960's until the early 1980's, petroleum policy in the infant Norwegian petroleum industry was characterised by nationalist and protectionist policies. The objective of this nationalist strategy was to nurture and encourage Norwegian petroleum companies through information exchange, technology transfer and skilling, to build the capacity for Norwegian companies to develop the petroleum resources.[55] While these multinational firms were also intended to play an important long-term role, the goal of building up a Norwegian oil community was

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5. that flaring of exploitable gas on the Norwegian continental shelf must not be accepted, except during brief periods of testing;
6. that petroleum from the Norwegian continental shelf must as a main rule be landed in Norway, except in those cases where socio-political considerations dictate a different solution;
7. that the State becomes involved at all appropriate levels, and contributes to a coordination of Norwegian interests in Norway's petroleum industry as well as the creation of an integrated Norwegian oil community which sets its sights both nationally and internationally;
8. that a State oil company be established which can look after the government's commercial interests and pursue appropriate collaboration with domestic and foreign oil interests;
9. that a pattern of activities is selected north of the 62nd parallel which reflects the special socio-political conditions prevailing in that part of the country; and
10. that large Norwegian petroleum discoveries could present new tasks for Norway's foreign policy.

See Bjørn Vidar Leraøen, *Drops of Black Gold: Statoil 1972-2002* (2002), 46.

53 Willy H Olsen, *Petroleum Revenue Management- An Industry Perspective* (2002) Paper Presented at the Oil, Gas, Mining and chemicals Department of the WBG and ESMAPO Workshop on Petroleum Revenue Management, 2.

54 Richard Gordon and Thomas Stenvoll, *Statoil: A Study in Political Entrepreneurship* (2007)James A Baker III Institute for Public Policy, Rice University http://www.gordonenergysolutions.com/files/publications/Statoil_-_A_Study_in_Political_Entrepreneurship--Study.pdf at 12 December 2007.

55 Kenneth Dam, *Oil Resources: Who Gets What, How?* (1976).

defined in the early stages of petroleum policy.[56] Protectionist policies in the form of a favourable procurement regime existed to assist in the development of domestic industries.[57] This initial period of reliance was reduced as knowledge and technology strengthened the Norwegian national position during the early 1980s and the early 1990s, a period categorised by increased growth in domestic industries, but also marred by economic difficulties.

Today there is a policy of internationalisation, spearheaded by Statoil as operator and participant in international fields. The reasoning for this is was primarily to capitalise on Norwegian competence and technology. Other reasons included exploiting the potential of emerging markets, to even out fluctuations in the level of petroleum activity on the Norwegian Continental Shelf, and to acquire new technology and know-how.[58] This policy is pursued to ensure long-term value creation, continued industrial development and employment after the depletion of the Norwegian petroleum resources.

Today, there are two key elements in Norwegian petroleum policy.

First, Norwegian oil and gas resources are identified as part of the national wealth. Thus, the whole population (both current and future generations) should benefit from the depletion of these resources, implying that petroleum revenues must be managed with the view of improving the welfare of present and future citizens of Norway. In order to meet this first goal of Norwegian petroleum policy, the second element of Norwegian policy is to attract the best of international expertise and competence, and to promote co-operation between domestic and international players. This is viewed by the Norwegian government as essential for resource, since the combination of domestic and international knowledge and effort ensures that maximum the value of our petroleum resources. [59]

The policy position of the Norwegian Government is reflected in the principal regulatory tool, the *Petroleum Activities Act 1996*:

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56 Ministry of Petroleum and Energy, *Facts 2003: The Norwegian Petroleum Sector* (2004) 63.

57 Oystein Noreng, *The Oil Industry and Government Strategy in the North Sea* (1980), 19.

58 Odd Roger Enocksen, *Building a Sustainable Petroleum Industry: The Norwegian Experience* speech given at Mexico-Norway Meeting given on cooperation in the Energy Sector 22 March 2007 http://www.regjeringen.no/en/tidligere_statsraader/Minister-of-Petroleum-and-Energy/Speeches-and-articles/2007/Building-a-sustainable-petroleum-industr.html?id=460505 at 10 December 2007.

59 http://www.regjeringen.no/en/dep/oed/The-Ministey/Other-political-Staff/avskjedigete/State-Secretary--Anita-Utseth-/Speeches-and-articles/2006/The-Norwegian-organisation-of-the-petroleum-sector.html?id=420787.

> Resource management of petroleum resources shall be carried out in the long-term perspective for the benefit of Norwegian society as a whole. In this regard, the resource management shall provide revenues to the country and shall contribute to ensuring welfare, employment and an improved environment, as well as to the strengthening of Norwegian trade and industry and industrial development, and at the same time take due regard to regional and local policy considerations and activities.[60]

There are a number of common elements that exist in petroleum polices, allowing a direct comparison between petroleum policies of different States. Essentially, whilst all petroleum exploitation occurs as a result of the principle of State sovereignty, there are a number of commonalities: political policy, regulatory policy, fiscal policy, and other related policies. The policies in Australia and Norway are compared in figure 2 below, which highlights the similarities and differences in petroleum policies in both countries.

Factors	**Australia**	**Norway**
Political Policy		
• Controlled development of resource	×	✓
• Stated policy objective to maximise wealth for the benefit of present and future generations	×	✓
• Participation of the State in petroleum exploitation	×	✓
• Politically stable	✓	✓
• People as owners of the resource and beneficiaries	✓	✓
• Role of the state as manager and participant	×	✓
• Role of the state - minimalist	✓	×
Regulatory Policy		
• Strong Legal Institutions	✓	✓
• Licensing and Concession System (LCS)	✓	✓
• Discretionary system to assist state in times of change		
• Regulatory framework for capture of economic rent	×	✓
• Ability to control rate of depletion	✓	✓

[60] The discretion system is valuable for a Host State.

• JOA/ contractual framework	✓/×	✓
• Transparency and accountability	×	✓
Fiscal Policy		
• Appropriate level of economic rent	✓/×	✓
• Taxation Regime: high State income and attractive to oil companies	×	✓
• Taxation Regime: lower State income and attractive to oil companies	✓	×
• Regular review of policy to remain competitive	×	✓
• Economic diversification and favourable procurement to reduce dependency of petroleum revenue	×	✓
• Investment of petroleum revenue	×	✓
• Capital investment in infrastructure and investment in human capital	×	✓
Other policy areas		
• Active development of technology and R&D	×	✓
• Role of oil company controlled to ensure balanced return of income to both MOC and State	×	✓

Figure 2: comparison of Norwegian and Australian petroleum policies

Single administrative authority

A single competent authority with an exclusive mandate to implement government petroleum policy and negotiate and contract with international oil companies is important for the efficient and effective exploitation of resources.[61] A State should develop a competent authority, intergovernmental and inter-ministerial if need be, to license, contract and supervise petroleum operations: essentially a 'one-stop shop' for the development of petroleum resources.[62]

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61 William Onorato, 'World Petroleum Legislation: Frameworks that Foster Oil and Gas Development' (2001) 39 (1) *Alberta Oil Review* 70, 74.

62 William Onorato, 'World Petroleum Legislation: Frameworks that Foster Oil and Gas Development' (2001) 39 (1) *Alberta Oil Review* 70, 75-6.

In Norway, a single authority, the *Norwegian Petroleum Directorate (NPD)* was established by the Ministry of Petroleum and Energy in the early 1970s, with a mandate to manage Norwegian oil and gas resources on the Norwegian Continental Shelf.[63] This provides a highly effective framework for the management of petroleum resources, since there is a single body with extensive sectorial expertise that is responsible for the exploration and production of petroleum within a coordinated regime.

This differs substantially to the management of petroleum resources in Australia. At present, management of petroleum is divided between the commonwealth and State governments, through a Joint Authority and Designated Authority.[64] As such, there are at least two regulatory bodies that a oil company is required to liaise with in order to develop petroleum resources in Australia. This dual level of management at State and Commonwealth level, as well as the added jurisdictional layer of local government planning and approvals, has been identified as an impediment for investment in the exploitation of Australian petroleum resources.[65] Indeed the current regulatory regime has been identified as a regulatory environment that is burdensome for oil companies, since there are multiple jurisdictions and hundreds of regulatory approvals and decision points.[66] Each of these translates into hundreds of opportunities for regulatory failure, and regulatory burdens as a result of overlapping and inconsistent regulation has been identified in Australia.

The Council of Australian Governments (CoAG) recognise that although some attempts have been made to streamline upstream petroleum administration and harmonise local, state and commonwealth legislation, there is still scope for further improvement in the regulation of upstream petroleum in Australia.[67] Consequently, Australia has commissioned an inquiry into regulatory burdens and impediments

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63 Norwegian Petroleum Directorate, http://www.npd.no/English/Om+OD/ODs+organisasjon/Historikk/ at 12 October 2008.

64 See *Offshore Petroleum Act 2006*.

65 Australian Productivity Commission, *Review of Regulatory burden on the Upstream Petroleum (Oil and Gas) Sector: Productivity Commission Issues Paper* (2008) http://www.pc.gov.au/__data/assets/pdf_file/0018/82026/upstream-petroleum-issues.pdf at 11 August 2008, 5.

66 Australian Petroleum Production and Exploration Association, *Submission to the Productivity Commission Review of the Regulatory burden on the Upstream Petroleum (Oil and Gas*)Sector (2008) http://www.pc.gov.au/__data/assets/pdf_file/0019/83422/sub016.pdf at 17 October 2008, 7.

67 Council of Australian Governments, *CoAG: Meeting Outcomes: Reducing the Regulatory Burden* (2006) http://www.coag.gov.au/coag_meeting_outcomes/2006-07-14/index.cfm#reduce at 17 October 2007.

that hamper petroleum exploration and production in Australia at present.[68] This need for a single regulatory authority is supported by the oil and gas industry. Its peak body APPEA (Australian Petroleum Production and Exploration Association) has identified the problem of dual levels of administration, noting that dual levels of administration increases the amount of compliance costs.[69] A 'one-stop shop' arrangement model such as that in the South Australian jurisdiction has been highlighted as an effective way of regulating petroleum exploitation in a clear, effective and transparent manner.[70] Further, APPEA sees a single authority model as system capable of providing all necessary approvals, licences and permits for petroleum exploration and production, whilst at the same time encouraging investment in petroleum activities.[71]

As such, there is a duplication of regulatory framework in the current Australian regulatory system. Similar duplication occurred in the regulation of safety in offshore petroleum operations. This duplication of petroleum safety was alleviated by the creation of the National Offshore Petroleum Safety Authority (NOPSA) in 2002, at the agreement of the states, territories and Commonwealth. NOPSA only regulates offshore petroleum (from the 3nm limit as set out in the Offshore Constitutional Settlement).[72]

A single regulatory body is practical, since it removes a number of regulatory processes for participants in petroleum production, and would increase Australia's attractiveness as a province for petroleum production and exploration. It would ensure seamless regulation and removes regulatory burden since companies are only

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68 Australian Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector: Productivity Commission Issues Paper* (2008) http://www.pc.gov.au/__data/assets/pdf_file/0018/82026/upstream-petroleum-issues.pdf at 11 August 2008.

69 Australian Petroleum Production and Exploration Association, *Submission to the Productivity Commission Review of the Regulatory burden on the Upstream Petroleum (Oil and Gas) Sector* (2008) http://www.pc.gov.au/__data/assets/pdf_file/0019/83422/sub016.pdf at 17 October 2008, 7.

70 Australian Petroleum Production and Exploration Association, *Submission to the Productivity Commission Review of the Regulatory burden on the Upstream Petroleum (Oil and Gas) Sector* (2008) http://www.pc.gov.au/__data/assets/pdf_file/0019/83422/sub016.pdf at 17 October 2008, 49.

71 Australian Petroleum Production and Exploration Association, *Submission to the Productivity Commission Review of the Regulatory burden on the Upstream Petroleum (Oil and Gas) Sector* (2008) http://www.pc.gov.au/__data/assets/pdf_file/0019/83422/sub016.pdf at 17 October 2008, 49.

72 NOPSA, *History of NOPSA* (2008) http://www.nopsa.gov.au/history.asp at 10 August 2008.

dealing with a single organisation rather than the multiple regulatory authorities that are required in Australia at present.

A single regulatory body for offshore petroleum regulation is constitutionally possible in Australia. The Commonwealth could establish and maintain a single regulatory body by invoking the Corporations Power (ss51 (xx) of the Australian Constitution), or the Trade and Commerce Power (s51(i) of the Australian Constitution). Whilst there may be the constitutional capacity to establish a single regulatory body, there is also the issue of political will in establishing a single regulatory body. Whether a single Australian Petroleum Authority would attain consensus by relevant state, territory and commonwealth governments remains to be seen. The Australian Productivity Commission has recommended that a single offshore petroleum regulatory body be created in Australia to improve productivity and decrease regulatory burden in the Australian petroleum industry.[73]

Legislation

The World Bank has identified elements of petroleum legislative frameworks that foster the development of petroleum resources in many States.[74] The legislative framework for petroleum development provides the basic context and rules government petroleum activities in a State. It regulates the companies conducting the activities, whether they are foreign, international or domestic companies. It also defines the principal economic and fiscal guidelines for investment activity in the petroleum sector as a whole.[75] World Bank experience demonstrates that effective petroleum legislative framework should be broad, generic, short and thorough, but not overly detailed. This should be complemented by enabling regulations and a model contract. Together this framework gives both parties a clear legal and contractual context to develop petroleum resources.

The legal basis and legislative framework for petroleum activities in Norway is conferred by the *Petroleum Activities Act 1996* and the associated *Petroleum Regulations 1997*. No activity is permitted without the licenses, approvals and consents required pursuant to the *Petroleum Activities Act 1996*.

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73 Productivity Commission, *Review of Regulatory Burden on the Upstream (Petroleum and Gas) Sector – Research Report* (2009) http://www.pc.gov.au/projects/study/upstreampetroleum/report at 6 May 2009. XX.

74 William Onorato, 'World Petroleum Legislation: Frameworks that Foster Oil and Gas Development' (1995) *World Bank Policy Research Working Paper*, 2.

75 William Onorato, 'World Petroleum Legislation: Frameworks that Foster Oil and Gas Development' (1995) *World Bank Policy Research Working Paper*, 2.

Through the licensing policy and contractual framework, the Norwegian State aims to pool resources, capital, competence, research, plurality of ideas and internal checks and balances between the licensees and their relationship with the State.[76] The State as resource owner acts as the administrative body, establishing policies, framework conditions and decisions relating to petroleum activities.[77] In addition, the State also participates directly in petroleum activities through StatoilHydro and Petoro, particularly in major fields and plays.[78]

The legal basis and regulatory framework for petroleum activities in Norway is conferred by the *Petroleum Activities Act 1996* and the associated *Petroleum Activities Regulations 1997*. The Norwegian State controls all petroleum exploration and production through these two pieces of legislation, and no activity is permitted without the licenses, approvals and consents required pursuant to the *Petroleum Activities Act 1996*.

Exploration licenses are conferred to either a legal person or a natural person domiciled within an EEA/EU State,[79] upon payment of an annual fee.[80] They are granted for an initial period of three years, unless otherwise stipulated.[81] The Exploration License authorises geological, geophysical, geochemical and geotechnical activities,[82] the results of which may be required to be submitted to the relevant government body.[83]

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76 Gunnar Gjerde, The Norwegian Model and the Working Relationship Between the Authorities and the Industry: As Seen from the Authorities' Point of View (2007) http://www.regjeringen.no/Upload/OED/Vedlegg/Norwegian%20model/Norwegian_model_program_Gunnar_Gjerde.pdf at 12 March 2008, 2-5.

77 Gunnar Gjerde, The Norwegian Model and the Working Relationship Between the Authorities and the Industry: As Seen from the Authorities' Point of View (2007) http://www.regjeringen.no/Upload/OED/Vedlegg/Norwegian%20model/Norwegian_model_program_Gunnar_Gjerde.pdf at 12 March 2008, 2-5.

78 The framework of Norwegian Petroleum resource policy principles and objectives comes from Gunnar Gjerde, The Norwegian Model and the Working Relationship Between the Authorities and the Industry: As Seen from the Authorities' Point of View (200?) http://www.regjeringen.no/Upload/OED/Vedlegg/Norwegian%20model/Norwegian_model_program_Gunnar_Gjerde.pdf at 12 March 2008, 2-5.

79 *Petroleum Activities Act 1996* (Norway), s 2-1.

80 The annual exploration license fee for 2006 was set at 60,000 NOK. *Petroleum Activities Regulations 1997* (Norway), s 5.

81 *Petroleum Activities Act 1996* (Norway), s 2-1.

82 *Petroleum Activities Regulations 1997* (Norway), s 4.

83 *Petroleum Activities Regulations 1997* (Norway), s 4-6.

Exploration licenses are regulated under chapter 2 of the *Petroleum Activities Act 1996* (Norway). Under this Act, the MPE grants a licence for exploration of the seabed and subsoil.[84] The exploration license, like the rest of the Norwegian petroleum legislative framework, also confers a discretionary right upon the State to issue regulations relating to the contents of a license application, the scope of such licenses, further conditions of the licence, and fees to be paid for the licence.[85]

The grant of an exploration license does not automatically confer the right for a production license for the exploration area.[86] Rather, an application for a production license is submitted to the Norwegian government upon the release of acreage in a licencing round,[87] which must be suitably advertised in the Norwegian Gazette and the Official Journal of the European Communities, in order to comply with EU Directive requirements.[88]

Upon granting a production license, a non-recurring fee (cash bonus) may be levied, and a production bonus fee may also be levied, calculated on the basis of production volume.[89] The licensee pays an annual fee for the production license, calculated on a per kilometre basis, (area fee) and on the quantity and value of the petroleum produced at the shipment point of the production (production fee).[90]

Petroleum licences are usually awarded for a period of ten years,[91] with the ability to extend up to thirty years if work commitments have been fulfilled.[92] There is ministerial discretion to extend the production license in excess of the extension period where the request is submitted five years or more prior to the expected elapse of the license.[93] Production licences can be surrendered, either in its entirety within the first three months of the grant of the production licence, or at the end of the calendar year, with three months notice,[94]

An important component of the award of a production licence is the exploitation of other natural resources. Whilst a production licence confers exclusive rights to

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84 *Petroleum Activities Act 1996* (Norway), s 2-1.

85 *Petroleum Activities Regulations 1997* (Norway), see chapter 3.

86 *Petroleum Activities Act 1996* (Norway), s 2-1.

87 *Petroleum Activities Act 1996* (Norway), s 3-5.

88 EU Directive 94/22/EC re hydrocarbons.

89 *Petroleum Activities Act 1996* (Norway), s 4-10.

90 *Petroleum Activities Act 1996* (Norway), s 4-10.

91 *Petroleum Activities Act 1996* (Norway), s 3-9.

92 *Petroleum Activities Act 1996* (Norway), s 3-9.

93 *Petroleum Activities Act 1996* (Norway), s 3-9.

94 Within three months of the grant of the production license – see *Petroleum Activities Act 1996* (Norway), s 3-15.

petroleum resources, it does not confer exclusivity in regard to other natural resources.[95] Where there is a clash between the exploitation of the two resources, the State has the discretion to decide which of the activities will be postponed, taking into account the investment, stage of the project, economic and social impact and the nature of the discovery.[96]

Australian petroleum activities are also regulated by a petroleum Act, which confers several types of petroleum licences. The Commonwealth *Offshore Petroleum Act* establishes two authorities for the management of petroleum resources, with the responsibility for the administration of the exploration and production of offshore petroleum divided between the two.[97] The administration of petroleum is shared between the Commonwealth and state/territory governments. The state and territory governments act as the Designated Authority, responsible for the day to day decision making in respect of the area of the continental shelf off its coast. The relevant Commonwealth minister and his state counterpart form a Joint Authority for each area. The Joint Authority is responsible for the major decisions in commonwealth jurisdictions, including grant, renewal and cancellation of titles.[98] In the event of a disagreement in the Joint Authority, the Commonwealth view prevails.

Both the Commonwealth government and the state/territory governments have important roles affecting petroleum exploration and development. The Australian Government is responsible for broad economic policy and international matters, including personal and company income tax, interest rates, the overall level of government spending, foreign investment guidelines, trade and customs, commercial corporations and international agreements.[99] Onshore and coastal waters (effectively the first three nautical miles from the coastline), are the jurisdiction of the relevant states and territories who own and allocate petroleum rights, administer petroleum operations, including occupational health and safety, and collect royalties on

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95 *Petroleum Activities Act 1996* (Norway), s 3-13.

96 *Petroleum Activities Act 1996* (Norway), s 3-13.

97 *Offshore Petroleum Act 2006* (Cth), 38 (2).

98 Terrence Daintith, 'State-Company Relations in Offshore Oil Exploitation: Regulatory and Contractual Analysis' in Barry Barton, et al, (eds), *Regulating Energy and Natural Resources* (2006) 267, 277.

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

petroleum produced.[100] Beyond the coastal waters (seaward of the first three nautical miles of the territorial sea) to the outer limits of Australia's continental shelf, petroleum rights are held by the Australian Government, but day-to-day administration is carried out jointly with the relevant adjacent State or Territory.[101]

Titles to explore for and develop petroleum are issued and administered by the relevant Designated Authority following consultation with the Designated Authority's Department. A three-stage title system operates under which a permit is issued to cover all forms of exploration, followed by either a retention lease or a production licence if a discovery is made.[102]

The OPA provide for five main classes of petroleum licences. A special prospecting authority authorises the licencee to carry on petroleum exploration operations in the authority area, but not make a well.[103] This licence is similar to a Norwegian exploration licence. Both allow non-invasive exploration activities and do not confer exclusive rights.

Exploration licences confer exclusive rights on the licencee to explore for petroleum in the permit area, and includes seismic survey and test drilling.[104] This differs from a *Special Prosecuting Authority,* which authorises the holder to carry on petroleum exploration operations in the authority area (but not make a well).[105] The exploration licence confers similar exploration rights to the Norwegian production licence, including exclusive rights to exploration activities. These exploration activities include seismic activities and drilling of test wells.

The licencee can apply for a retention licences after the declaration of a location of block to the Joint Authority. It is granted if the recovery of petroleum is not currently commercially viable, but likely to do so within 15 years.[106] A retention lease authorises the lessee to explore for petroleum and recover petroleum for appraisal

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

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

102 Geoscience Australia, *Australian Petroleum Activity and Development Titles* (2006) http://www.ga.gov.au/oceans/pgga_titl_2004.jsp at 16 October 2008.

103 *Offshore Petroleum Act 2006* (Cth), s 75.

104 *Offshore Petroleum Act 2006* (Cth), s 77-8.

105 *Offshore Petroleum Act 2006* (Cth), s 194.

106 *Offshore Petroleum Act 2006* (Cth), s 117.

purposes in the lease area and can be granted to an exploration permit holder or the holder of a life-of-field production license over the block.[107]

Production Licenses authorise the licensee to carry out petroleum recovery operations in the license area.[108] These licences are conferred when an application for field development has been approved by the Joint Authority.[109]

There are two main operating licences in Australia. The infrastructure licence authorises the licensee to construct and operate the infrastructure facility in the license area.[110] The pipeline licence is required for the construction of an onshore or offshore pipeline, and authorises the licensee to construct and operate a pipeline.[111]

Whilst petroleum licencing, regulation and safety is covered by the OPA, it does not regulate the environmental aspects of petroleum exploitation in Australia. Instead there is a raft of additional and separate Commonwealth environmental protection legislation, including, but not confined to:

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

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

A new national legislation for Australian Petroleum safety was endorsed in 2002 by the national Ministerial Council on Mineral and Petroleum Resources, which provided for a consistent national approach to petroleum safety. This included a new legislative framework that is clear and enforceable, and that requires operators to be accountable for safety in all operations. Amendments to the *PSLA* in 2004 established the National Offshore Petroleum Safety Authority (NOPSA), responsible directly to the Commonwealth Minister, overriding previous state and territory safety laws in

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107 *Offshore Petroleum Act 2006* (Cth), s 117.
108 *Offshore Petroleum Act 2006* (Cth), s 135.
109 *Offshore Petroleum Act 2006* (Cth), s 142.
110 *Offshore Petroleum Act 2006* (Cth), s 75.
111 *Offshore Petroleum Act 2006* (Cth), s 75.

relation to offshore areas.[112] The changes apply to all offshore facilities, and came into effect on 1 January 2005.

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

Similarly, safety in the Norwegian jurisdiction is regulated by the Petroleum Act.[113] A single Norwegian petroleum safety authority was also created in 2004 to protect the safety of petroleum workers and ensure emergency preparedness of petroleum installations. Like NOPSA, the Norwegian Petroleum Authority exists to ensure the safety of the petroleum environment and its workers.

Contractual framework

Section 3-3 of the *Petroleum Activities Act 1996* (Norway) makes the award of the production license conditional upon the parties concluding a Joint Operating Agreement (JOA).[114] The JOA regulates the relationship between the partners of the JOA, and the partners' relationship with the Norwegian State, as well as providing details of the organisation of the Operation.[115]

The JOA is a mandatory contract between the Norwegian State and the participants in a licence. Without a JOA, petroleum exploitation cannot commence.[116] The JOA forms the core regulatory document for petroleum production under the licence. It regulates the structure and arrangement of the JOA, including parties, the State appointed operator, voting rules and allocations, and how to change the operator

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112 Thant had previously been covered by the *Navigation Act 1912* (Cth) and the *Occupational Health and Safety (Maritime Industry) Act 1993* Department of Industry, Science and Resources, Future Arrangements for the Regulation of Offshore Petroleum Safety (2001) 8.

113 *Petroleum Activities Act 2006* (Cth), chapter 9.

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

115 NPD, Petroleum Facts 2001 (2001), 60.

116 *Petroleum Activities Act 1996*, s 3-3.

should the need arise.[117] The financial arrangements, between the parties are also regulated by the JOA, including how joint assets are arranged, liabilities and payments, accounting procedures, and process where default occurs.[118] Similarly, work activities, especially work programs, budget of the project, rules relating to purchasing, and insurance coverage for participants are also regulated.[119] The JOA also establishes the guidelines for sole risk operations by any of the joint venture partners.[120]

There are two major reasons for the use of JOA's in Norway. The first relates to control of the development of a petroleum field. In Norway government control is maintained through the JOA, enabling the government to direct petroleum operations to ensure that resources are exploited in a proper manner for the benefit of Norwegian society. The second reason for JOA's in Norway is related to transparency. By utilising a standard JOA for all participants in petroleum production, there is transparency and certainty for all parties. This differs to Australia, where individual JV agreements fall under commercial in confidence, and are unavailable to anyone but participants, or those parties with access to the petroleum register.

There is no express contractual arrangement between the government and the petroleum licensee in the exploitation of petroleum resources in Australia. Rather, contractual arrangements are formed between the private participants who enter into a Joint Venture (JV) and are reflected in the Joint Venture Agreement (JVA) participating parties. A joint venture is established so the venturers can share in the produce of the venture. It is within the discretion of the participants of a joint venture agreement as to what conditions they require and stipulate within their JV agreement.

This unique system of regulation was created in response to the constitutional disagreement between the Commonwealth and Australian states over jurisdiction of offshore resources. The resulting legislation (*The Petroleum (Submerged Lands) Act 1967*) addresses the constitutional issues, establishing a statutory regulatory

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117 Joint Operating Agreement Concerning Petroleum Activities:18th Licensing Round (2005) Articles 1-6.

118 Joint Operating Agreement Concerning Petroleum Activities:18th Licensing Round (2005) Articles 7-11.

119 Joint Operating Agreement Concerning Petroleum Activities:18th Licensing Round (2005) Articles12-15.

120 Joint Operating Agreement Concerning Petroleum Activities:18th Licensing Round (2005) Articles 19-20.

framework unique among petroleum regimes.[121] The disagreement was resolved through the *Offshore Constitutional Settlement,*[122] although the statutory regulatory regime remains today.[123] Thus the relationship established between the State and the participating companies is one of statutory administration, rather than contractual in nature.

Generally, all Australian joint venture agreements in the petroleum industry are unincorporated joint ventures. In this commercial arrangement, the members of the joint venture associate themselves for the particular acreage exploration or production venture and share the production from the venture, rather than the profits from the company. In this legal relationship, the participants enter into a contractual relationship to pursue the particular venture, without forming a separate legal entity.

The key feature of the Australian unincorporated joint venture is the participating interest, which defines what the participant owns. The Participating Interest in a joint venture is similar to the standardised JOA in Norway, and creates a legal obligation to contribute a specified proportion of joint venture capital and operating costs. It also creates legal rights between the parties as tenants-in-common to take a specified proportion of joint venture production, separately and for its own account.

The structure of the unincorporated joint venture and the relationship between the participants means that there are a number of critical issues that must be addressed when forming a JV for the exploitation of petroleum resources. These issues include the scope purpose and duration of the joint venture, the obligations and rights of the participants, and the structure of the JV for the operation, management and control of the JV. Other vital issues include an identification of assets committed to the joint venture, including the taking of security over a joint venture participant's interests. Participating interests of the participants are detailed in the JV, setting out the proportionate shares or interests of the JV held by each participant.

The JV in Australia is a wholly private agreement between the JV parties. As such the joint venturers are able to put as many or as few provisions into the JVA as required. There is no government regulation of the JVA. However, the JV requires statutory approval for the project being conducted by the JVA, and are subject to statutory

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

122 Attorney-General's Department, Offshore Constitutional Settlement: A Milestone in Co-Operative Federalism (1980).

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

obligations outside of the JVA, including the *Trade Practices Act 1974* (Cth), *Offshore Petroleum Act 2006* (Cth), and fiduciary duties.

There are provisions for government ratification of contracts in some Australian states through non-compulsory State Agreements.[124] These agreements are for significant development projects in Western Australia, and are negotiated between the Government and the JVs. The agreements are ratified by parliament, setting down the obligations of both of the parties for the life of the project.[125]

The state agreements differ from the Norwegian JOA. They are a facilitating mechanism for development of specific long-term projects through a negotiated agreement to ensure long term certainty, land tenure and complex approvals. These agreements are a statutory agreement, and entry into this agreement is not compulsory. They provide greater certainty to the project, security of tenure, and reduce sovereign risk for investors.[126] In particular, they specify the rights, obligations, terms and conditions for development of the project, and establish a framework for ongoing relations and cooperation between of the State and project proponent.[127]

When entering into a state agreement, the state seeks to satisfy several objectives. Primarily the objective is to facilitate the efficient and effective development of the state's petroleum resources. This includes managing the development by ensuring it is consistent with state policies on issues such as land use, conservation, competition, infrastructure sharing, secondary processing development and maximising local content. The state also seeks to ensure that development provides economic and social benefits for the Western Australian community.[128]

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

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

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

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

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

State agreements are generally not entered into for a specific term. Rather they have been designed to operate throughout the life of the project. To this end, provisions are included in Agreement Acts dealing with matters such as assignment, variation of contractual provisions, and force majeure. Provision is also been included for the submission of additional proposals under the proposals mechanism if the JV wishes to modify, expand or vary the project. It is important to note that only the JV can alter the terms of the project. The State Agreement does not give the state the right to alter the project proposal once it has been approved by the parliament.

The key feature of both the Australian and the Norwegian JVA is the participating interest (PI), which defines what each participant owns. The PI in a joint venture confers both property and contractual rights on the participants. It establishes the rights of the parties as tenant in common to take a specified proportion of joint venture production, separately and for its own account. It also establishes a beneficial ownership as tenant in common in a specified share of each item of joint venture property. Furthermore, the participating interest comprises an obligation to contribute a specified proportion of joint venture capital and operating costs.[129]

Although there is no uniform contractual arrangement in Australia such as that which exists in Norway, there is some indication that a standard agreement is required for large projects in Australia. This is indicated by the take-up rate of Western Australian state agreements. Even though these agreements are not mandatory, they have been used for the last 40 years, and are currently utilised in over 70% of major development projects in Western Australia. Furthermore, these projects reduce a large amount of regulatory burden for oil companies, since project approvals at state and federal level are fast tracked, as well as brought together under a single umbrella. Furthermore, once a State Agreement has been ratified by parliament, it is the only regulatory compliance document required by the project. This considerably reduces compliance burden and costs for oil companies.

Initially the relationship between the participants in a license in Norway was regulated by a JV agreement seminal to that of Australian JVA, with no influence from the Norwegian Government.[130] Government drafted JOAs with mandatory requirements were implemented in Norway in 1973, and have since remained.[131] The Ministry of Petroleum and Energy stipulates the content of the JOA, and the Ministry is also a signatory to the JOA.[132] While there is there is no standard JV contract in

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129 Allens, Arthur Robinson, *Unincorporated Joint Ventures* (2003).

130 Peter Tronslin, 'The Norwegian Petroleum Regime' (1986) 115 *Marius*,1, 13.

131 Peter Tronslin, 'The Norwegian Petroleum Regime' (1986) 115 *Marius*, 1, 14.

132 Peter Tronslin, 'The Norwegian Petroleum Regime' (1986) 115 *Marius*, 1, 14.

Australia, the Association of International Petroleum Negotiators has a model *International Operating Agreement*, and Australian JVs can use these if required. The primary difference in these two regimes is that the Norwegian JOA is mandatory, without which petroleum production cannot commence or continue. In Australia, the State Agreement is optional, and generally only used for big projects in Western Australia. Furthermore, the Australia agreements are designed to provide an avenue for ease of regulatory approval rather than establish a contractual relationship between the State and the private company participants.

Grant of petroleum licences

The award of a petroleum license in the Australian and Norwegian jurisdictions is extremely similar. Although the method of selecting the winning applicants differs (work program bidding in Australia, and discretionary in Norway), the process is essentially the same, as illustrated in figure one below.

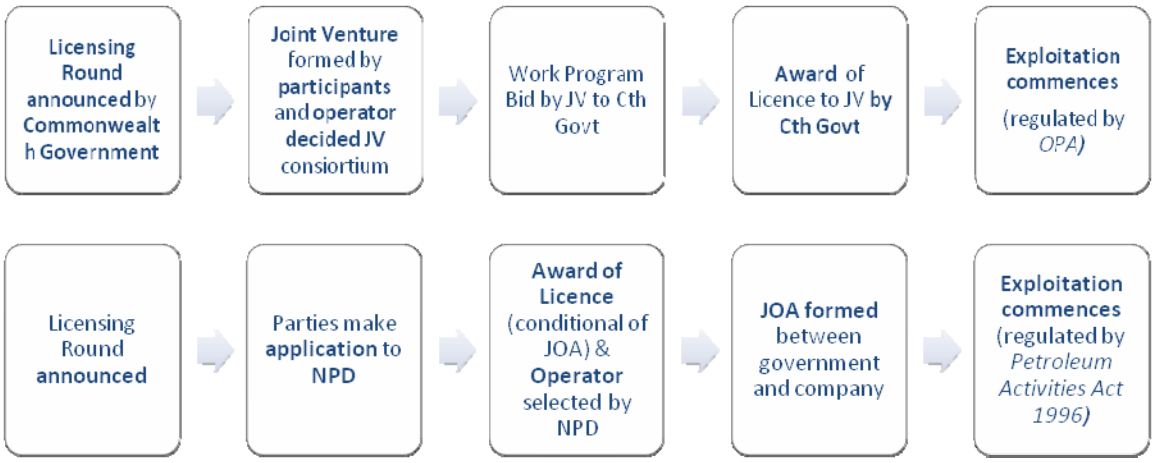

Figure X: Award of petroleum licenses in Australia (top) and Norway (bottom). Note that the process is very similar. In Australia the JV is formed by the individual companies who then apply for the licence. In Norway, the JOA is established between the State and the participating oil companies after the licence is awarded, and the participants are selected by the State.

The grant of a licence in Norway is based on the licensee fulfilling the conditions of the award of licence. When a licensing round is announced, the duties of the licensee

are outlined to prospective applicants, usually as a guide to applicant.[133] Duties are stipulated in the Norwegian *Invitation to Apply for Petroleum Production License,* and include the requirement for an applicant to be registered in Norway or the EEA, and that conditions of the award will be stipulated at the time of the licence.[134] The conditions of the grant of a licence are also outlined in section 11 of the *Norwegian Petroleum Regulations*. The grant of a petroleum licence is granted solely on the need to ensure that petroleum activities are carried out in a proper manner.[135] The conditions include the preservation of public health and safety, environmental protection, protection of biology and national treasures, and safety of employees and facilities. The grant of a licence also requires the systematic management of resources, including production rate, optimisation of production activities, and the need to ensure fiscal revenues.[136] In addition, the licensee is required to have an organisation 'which is capable of managing independently the petroleum activities from Norway'.[137] In practice this means that the Norwegian government has the right to specify requirements of the organisation and capital of the company, and the licensee may be ordered to use bases designated by the Norwegian government.[138]

Prior to the award of a production license, the area under application must have been opened for exploration through a licencing round.[139] This usually occurs after the environmental, economic and social impact of such operations on other industries and adjacent regions has been assessed.[140] Production licenses are normally awarded only through licensing rounds, where the Norwegian State invites applications for a certain number of blocks (acreage).[141] When the acreage is announced it specifies the terms and criteria which will determine the award of a license.

After the close of the licensing round, the State assesses the applications received and the Ministry of Petroleum and Energy (MPE) shortlists a group of companies based on the criteria for selection.[142] The licences are then awarded, based on the non-

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133 For example, the *Invitation to Apply for Petroleum Production License,* published by the Norwegian Petroleum Directorate and part of the package of information provided to applicants.

134 NPD, Invitation to Apply for Petroleum Production License, (2008), V.

135 Petroleum Regulations 1997 (Nor), s 11 para1.

136 Petroleum Regulations 1997 (Nor), s 11 para 2.

137 Section 10-2, *Petroleum Activities Act 1996* (Nor).

138 Section 10-2 para 2, *Petroleum Activities Act 1996* (Nor).

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

140 Ministry of Petroleum and Energy, *Facts 2001,* (2002) 59.

141 *Petroleum Activities Act 1996* (Norway) s 3-5.

142 Ministry of Petroleum and Energy, *Facts 2001,* (2002) 59.

discriminatory, objective, published criteria, and announced publicly.[143] Where there is cooperation agreements entered into for an application for a production licence, these agreements are submitted to the MPE for veto and approval, with the minister reserving the right to alter the agreement if required.[144] The operator of the licence is selected or approved by the MPE,[145] and is responsible for the daily conduct of petroleum operations in accordance with the terms of the licence.

The granting of a licence in Norway is done under the discretionary system implemented by the Norwegian government. It is done on the basis of factual and objective criteria,[146] and the State retains the right to not grant a licence based on the criteria stipulated.[147] As part of the award of licence, the State has the right determine if, and at what level, the Norwegian State will participate in petroleum activities.[148] There is also the right for the State to regulate matters relating to a production license. This regulation can include, but is not confined to, the imposition of a specific work program,[149] prudent production of petroleum resources,[150] and the approval and ongoing assessment of field development plans and operations.[151]

As part of the award of the discretionary award of licence in Norway, companies do not apply for acreage in a pre-arranged consortium. Rather, each company applies individually for the blocks on offer, indicating their preference for blocks.[152] The MPE, in consultation with the NPD and individual companies, selects a number of companies and assembles a consortium for each license area, as well as designating the operator for that acreage.[153] The MPE then stipulates as a condition of the grant of a licence that the licensees are to enter into agreements with specified contents with one another.[154] This consortium then enters into a contractual arrangement with the

143 *Petroleum Activities Act 1996* (Norway), s 3-5.
144 *Petroleum Activities Act 1996* (Norway), s 3-4.
145 In accordance with *Petroleum Activities Act 1996* (Norway) s 3-7.
146 *Petroleum Activities Act 1996* (Norway), s 3-5.
147 *Petroleum Activities Act 1996* (Norway), s 3-5.
148 *Petroleum Activities Act 1996* (Norway), s 3-6.
149 *Petroleum Activities Act 1996* (Norway), s 3-8
150 *Petroleum Activities Act 1996* (Norway), s 4-1 and 10-1.
151 *Petroleum Activities Act 1996* (Norway), s 4-2.
152 See Chapter 3 of *Petroleum Activities Act 1996* (Norway).
153 Brent F Nelsen, *The State Offshore: Petroleum, Politics and State Intervention on the British and Norwegian Continental Shelves* (1991), 94.
154 *Petroleum Activities Act 1996* (Norway), s 3-3.

Norwegian State and each other through the JOA.[155] As a part of the grant of licence, the Ministry appoints the operator of the joint venture it has created.

The reasoning for the allocation of consortia partners and selection of the operator by the Norwegian State is twofold. First, it allows the Norwegian government to assemble a consortia tailored to the unique qualities and nuances of that acreage, allowing the State to select the company with the best experience technology and skills for that particular acreage. Secondly, it enables the State, as owner of the petroleum resources, to retain control over who participates in the exploitation of acreage.

In Australia the Commonwealth Government is responsible for the allocation of licences of all petroleum resources that are positioned offshore outside the three mile territorial sea limit. Applicants for Australian licences under work program bidding are made according to a set of predefined conditions outlined in the *Guidance Notes to Applicants,*[156] and section 79 (5) of the *Offshore Petroleum Act 2006* (Cth). The primary condition for the award of license is the completion of the minimum guaranteed work program in the designated year,[157] and guarantee to spend the amount bid when carrying out the requisite work.[158]

Australian acreage is allocated using the work program bidding system, with subsequent exploration permits awarded for an initial term of six years.[159] Applicants for Australian licences under work program bidding are made according to a set of predefined conditions outlined in the *Guidance Notes to Applicants*,[160] and section 79 (5) of the *Offshore Petroleum Act 2006* (Cth). The primary condition for the award of licence is the completion of the minimum guaranteed work program in the

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155 The JOA is a mandatory part of the licensing framework, as defined under s 3-3. *Petroleum Activities Act 1996* (Norway). A company is not able to participate in the exploitation of petroleum resources on Norwegian Continental Shelf unless it enters into the JOA.

156 Department of Resources, Energy and Tourism, *Guidance Notes for Applicants: Release of Offshore Petroleum Exploration Areas Australia 2008* (2008).

157 *Offshore Petroleum Act 2006* (Cth), s 79 (5) a.

158 *Offshore Petroleum Act 2006* (Cth), s 79 (5) b.

159 Department of Tourism Industry and Resources, *Offshore Acreage Release 2006: Guide Notes for Applicants* (2006) www.industry .gov.au/acreagereleases/2006/HTML/Guidance/guidance_contents.html at 7 April 2007.

160 Department of Resources, Energy and Tourism, *Guidance Notes for Applicants: Release of Offshore Petroleum Exploration Areas Australia 2008* (2008).

designated year,[161] and guarantee to spend the amount bid when carrying out the requisite work.[162]

When bidding, the bidder must include the minimum guaranteed exploration work to be accomplished within the first three years of the license, as well as a secondary work program for a further three years. It must especially guarantee the substantial operational activities that will significantly advance the exploration of the area.[163]

Property rights conferred

It is possible to define the rights conferred by the award of licence as conditional rights, dependent upon a condition to be satisfied for the right to be either possessed or exercised. The conditions of the grant of a licence are usually outlined either within the legislative framework, or in administrative guidance notes that accompany a release of acreage for licensing.

Exclusive ownership of petroleum resources is a feature common to both the Norwegian and Australian petroleum regulation systems, as ownership of petroleum resources is vested in the State in both jurisdictions. As such, both jurisdictions are able to offer assurance of ownership of the petroleum resources to any oil company wishing to invest in the State.

The award of a petroleum licence creates property rights between the State and the participants. A contractual relationship is also created between the participants exploiting the petroleum through the establishment of a Joint Venture (JV) between the participants. Depending on the jurisdiction, a JV may be formed prior to the award of license, such as in Australia, or by the State upon the award of a licence, such as in Norway.

The ownership of an asset confers many property rights on the owner, including the use the asset, the right to change the asset's form and substance, and unfettered transfer rights.[164] As the owner of in situ petroleum resources,[165] the State has the

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161 *Offshore Petroleum Act 2006* (Cth), s 79 (5) a.

162 *Offshore Petroleum Act 2006* (Cth), s 79 (5) b.

163 Department of Tourism Industry and Resources, *Offshore Acreage Release 2006: Guide Notes for Applicants* (2006) www.industry.gov.au/acreagereleases/2006/HTML/Guidance /guidance_contents.html at 7 April 2007.

164 Jerome Davis, *Does One Size Fit All? Reflecting On Governance and North Sea Licensing Systems* (2004) Background Paper : BC Offshore: Potential and Problems A MASC Workshop for Lawyers, Dunsmuir Lodge, Sidney BC, March 18-21, 2004, 3.

unfettered right to award proprietary rights in its petroleum resources in order to exploit those resources.[166] In awarding a license, the State 'fetters' its ownership rights, since the State is unable to transfer its ownership rights over the resource area for the period of the license.[167] The States rights are fettered by regulatory framework, particularly the petroleum legislation, and the type of licence that has been granted. However once the licence has expired, the State is free to transfer proprietary rights in the acreage to others. The property rights of the State may also be fettered by that State's entry into a Union,[168] such as Norway's entry into the EEA, where the EU's common energy policy has had far reaching results, particularly in relation to Norway's domestic industries.

The award of a petroleum licence by a State confers property rights to the licensees.[169] Upon award of licence in both Norway and Australia,[170] the licensee is granted exclusive rights over the licence area.[171] These proprietary rights are transferable, and can be sold as is the case with other proprietary rights in property.

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165 Crown retains insitu rights over natural resources for two primary reasons. First, the resources provide the State with high economic value. Secondly, ownership of petroleum resources enables the government to have control over the development of those resources.

166 The sovereign right to the Continental Shelf for coastal States was established by the 1958 Convention on the Continental Shelf, and confirmed by the 1982 Convention on the Law of the Sea. Considering these sovereign rights and that petroleum is a natural resource on the continental shelf, coastal States have proclaimed and laid down in their petroleum law to be owner of the petroleum in the sea bed and subsoil of their continental shelf. This is confirmed by Article 18 of the 1994 European Energy Charter Treaty, which states: 'The Contracting Parties recognise State Sovereignty and sovereign rights over energy resources (defined as to include Petroleum). They reaffirm that these must be exercised in accordance with and subject to the rules of international law.' See, Bernard Taverne, *Petroleum Industry and Governments: A Study of the Involvement of Industry and Governments in the Production and Use of Petroleum* (2nd ed, 2008), 120-1.

167 Jerome Davis, *Does One Size Fit All? Reflecting On Governance and North Sea Licensing Systems* (2004) Background Paper: BC Offshore: Potential and Problems A MASC Workshop for Lawyers, Dunsmuir Lodge, Sidney BC, March 18-21, 2004, 4.

168 Jerome Davis, *Does One Size Fit All? Reflecting On Governance and North Sea Licensing Systems* (2004) Background Paper : BC Offshore: Potential and Problems A MASC Workshop for Lawyers, Dunsmuir Lodge, Sidney BC, March 18-21, 2004, 4.

169 Property rights in this context are those rights pertaining to the permissible (socially sanctioned) use of resources goods and services. See D W Pearce (ed), *The MIT Dictionary of Modern Economics* (1986), 364.

170 The exploration licence in Australia and the production licence in Norway.

171 The grant of an exploration license in Australia confers the right to explore for petroleum in the commonwealth's offshore zone under section 78 of the *Offshore Petroleum Act 2006*

In Australia, the transfer of title to licence occurs as part of a Farm-In/Farm-Out agreement. It is authorised under ss256-264 of the *Offshore Petroleum Act 2006* (Cth), and executed under ss 3-4 of the *Petroleum (Submerged Lands) Regulations 1995* (Cth) using prescribed forms set out in Schedule 4 of the Regulations. Similarly, it is possible to transfer a licence or participating interest in Norway. This right is conferred under s 10-12 of the *Petroleum Activities Act 1996* (Nor) and s 72 of the *Petroleum Regulations 1997* (Nor). In addition, the right is conferred in Article 23 of the *Joint Operating Agreement* (Nor). In both States, government approval is required for the transfer to occur.[172]

The right to produced petroleum is not expressly outlined in the Australian legislative framework. Rather, there is an implied right to ownership of the petroleum under s 137 (1) a of the *Offshore Petroleum Act 2006* (Cth), where an exploration license authorises the licensee to recover petroleum in the licensed area. Furthermore, the unauthorised recovery of petroleum from offshore areas is prohibited,[173] implying that ownership of any recovered petroleum is conferred only upon the licensee authorised to carry out petroleum production and recovery operations.

The award of a petroleum licence in Norway confers upon the licensee the right of ownership to the produced petroleum, typically upon lifting.[174] This right to petroleum is explicit in the *Norwegian Petroleum Activities Act*, conferring ownership

(Cth). Whilst the Act does not expressly confer exclusive rights over the permit area, the exclusivity of those rights are implied rights since the exploration for petroleum in the offshore area is prohibited under s 77(1) of the OPA, unless exploration activity is authorised by the grant of an exploration license under s77(2) of the OPA. The grant of an exploration permit entitles the licensee to apply for a production permit to recover petroleum in the event of a commercial discovery. In Norway, exclusive exploration and production rights are granted to the licensee upon the grant of a production license under section 3-3 [p2] of the *Petroleum Activities Act* 1996 (Nor).

172 For approval requirements in Australia see s 261 of the OPA. Approval for transfer of interest in Norway is required under s 10-12 of the PAA, and extends to direct or indirect transfer of interest or participation in the license, assignment of shareholdings and other ownership shares which may provide decisive control of a licensee possessing a participating interest in a licence.

173 Prohibited under s 136 (1).

174 'Lifting' of Petroleum is often seen as the point of delivery of oil, when the oil is capable is being transferred from the well to a storage or transportation vessel. Schlumbergers Glossary of Oilfield Terms does not define lifting, delivery or point of transfer. Instead, the point at which title passes is often defined in the relevant legislation.

of oil upon production to the licencee.[175] Ownership of petroleum is also expressed in the Norwegian Joint Operating Agreement (JOA), with each party having the right and obligation to take and dispose of a share of the produced oil, equivalent to each parties participating interest.[176] Under the Norwegian JOA, the property right, liability and risk pertaining to the produced oil is transferred to each party at a point of delivery which is determined by the management committee prior to the commencement of oil production.[177]

Field development and production

In both the Australian and Norwegian jurisdictions, the production of petroleum requires the approval of a field development plan (FDP). This plan is essentially an outline of the licensee's plan for the development of a petroleum field, and is used in both the Australian and Norwegian jurisdiction for that purpose.

In Australia, the Operator is required under the OPA[178] to apply for a production license for the commercial production of petroleum.[179] The licensee is required to produce a *preliminary field development plan* as part of the consultative process for the JAs approval of the production licence and associated infrastructure requirements.[180] After approval of the *preliminary field development plan*, and in consultation with the government, a *finalised field development plan* is submitted to facilitate formal field approval requirements. The granting of the production licence confers production rights on the licensee.[181] If a licensee wishes to change a FDP, it is required to seek the approval of the relevant bodies in accordance with the OPA.[182] The JA has a wide range of discretion in the approval of a production licence, with the ability to implement any conditions for the production of petroleum that it sees fit.

Government regulation of petroleum extraction in Australia is essentially a linear process. Upon approval of a FDP, the JA has no statutory authority or contractual

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

176 *Joint Operating Agreement* (Norway), Article 20.1: Lifting of Oil.

177 *Joint Operating Agreement* (Norway), Article 20.1: Lifting of Oil.

178 Required under s 143 OPA.

179 Section 142.

180 Resources Division, Department of Industry, tourism and Resources, Offshore Petroleum Guideline for Grant of a Production Licence and Grant of an Infrastructure Licence. (2002), 8.

181 See s 144 OPA.

182 See s 142 (4) and (5).

capacity to alter the terms of the Production License.[183] Essentially this means that once a FDP has been negotiated and approved, and the production license conferred, the oil company has total control over the recovery of petroleum from the field. Government intervention only occurs if the oil company fails to comply with the statutory requirements relating to defence, shipping and the environment.

In Norway, the grant of a production licence in Norway confers the right to exclusive exploration activities, including the drilling of test well. It does not automatically confer the right for production (similar to the Australian exploration license). The commencement of production rests upon the approval of a *Plan for Development and Operations* (PDO).[184]

When a new deposit is to be developed, the oil company must submit a PDO for approval.[185] Petroleum production must be conducted in accordance with the *prudent production* concept,[186] encompassing the use of appropriate technologies and sound economic principles, to ensure that as much of the petroleum resources are recovered.[187] To that end, the plan must contain an account of the economic, resource, technical, commercial and environmental aspects of the production, as well as decommissioning and disposal of the installation once production has ceased.[188] Where production is planned in two or more stages, the plan must, as far as possible, comprise a total development plan rather than a stage development plan.[189] Production cannot commence until the plan has been approved by the minister,[190] and where there has been significant deviation from the original production plan, the Ministry may require a new or amended plan to be submitted and approved.[191] An important part of the PDO is an environmental impact assessment which interested parties are given the opportunity to comment upon in a hearing round. The impact assessment describes the development's expected impact on the environment, any trans-boundary environmental effects, and affect on natural resources, fisheries and

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183 Sections 161-2 of the *Offshore Petroleum Act 2006* (Cth) are only available to the JA to regulate the recovery if petroleum where the JA has made an initial direction for the recovery of petroleum.

184 Petroleum Activities Regulation 1997 (Norway) ss 20-24.

185 The guidelines for the submission of a PDO is found in the guidelines for the Development and Operation of a Petroleum Deposit (PDO) and a plan for the installation and operation of Facilities for Transport and Utilisation of Petroleum (PIO) (200).

186 See *Petroleum Activities Act 1996* (Norway), s 4-1.

187 *Petroleum Activities Act 1996* (Norway), s 4-1.

188 *Petroleum Activities Act 1996* (Norway), s 4-2.

189 *Petroleum Activities Act 1996* (Norway), s 4-2.

190 *Petroleum Activities Act 1996* (Norway), s 4-2.

191 *Petroleum Activities Act 1996* (Norway), s 4-2.

society in general.[192] The governmental consideration of this assessment and development plan ensures a prudent project in terms of resources, as well as acceptable consequences for other matters of public interest.

The Ministry also has to approve the expected production schedule, which is only able to be altered if warranted by resource management or other significant social considerations.[193] The Ministry can stipulate for periods of time, the quantity of petroleum which may be produced, injected or cold vented at any time, and stipulates that burning of petroleum is not allowed without Ministry approval.[194] The regulation of depletion is not for the purpose of controlling overall production output. Rather it is to ensure the effective and efficient production from the field and to protect the reservoir. On all other production matters, the Ministry has discretion regarding preparation, commencement, and continuation of production,[195] and the use of production facilities by others, where deemed necessary for efficient operation or for the benefit of society.[196]

Conclusion

Petroleum law has a commonality of legal functions. Whether in Canada, the United Kingdom, Australia, or Norway, the petroleum regulatory framework is the licencing and concession system. Each jurisdiction has a regulatory framework that comprises common elements including petroleum policy, petroleum legislation, award of petroleum licence, and approval of field development plans. Yet there are also differences in the minutiae of detail between the Norwegian and Australian petroleum legislation. Australia has a statutory legislative framework with no contractual agreement between the State and the joint venturers. Conversely, Norway uses a uniform contractual agreement in combination with petroleum legislation to regulate petroleum extraction.

In both systems the elements of the petroleum regulatory framework are the same. The State, as owner of the petroleum, awards licences to oil companies through a licencing system. This award of licence confers proprietary rights upon the licensee, enabling petroleum to be extracted. Title to the petroleum passes top the licensee at the well head. In each jurisdiction the company carries out the extraction of the State-owned resource under licence for their own profit. These common elements traverse

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192 NPD,*Facts 2007* (2007) chapter 4.
193 *Petroleum Activities Act 1996* (Norway), s 4-4.
194 *Petroleum Activities Act 1996* (Norway), s 4-4.
195 *Petroleum Activities Act 1996* (Norway), s 4-6.
196 *Petroleum Activities Act 1996* (Norway), s 4-8.

both the Australian and the Norwegian petroleum regulation systems. It is only the application of the legislative framework that differs.

The petroleum regulatory framework also traverses political systems. It is equally capable of awarding a petroleum licence and regulating for petroleum production within the unitary Norwegian system under a single regulatory body as it is in the more challenging federalist system such as Australia. Certainly there are many more regulatory challenges in Australia as a consequence of the federal system. These challenges have been the subject of Australian Productivity Commission report which recommended that Australia adopt a single regulatory authority for petroleum regulation in Australia, similar to that in Norway.

By examining the functions of the petroleum regulatory framework of Australia and Norway, it has been possible to demonstrate the truly transnational nature of petroleum regulation, and the role that comparative law has in shaping petroleum regulation in individual States.