Joint operating agreements

a consideration of legal aspects relevant to joint operating agreements used in Great Britain and Australia by participants thereto to regulate the joint undertaking of exploration for petroleum in offshore areas, with particular reference to their rights and duties

Mildwaters, Kenneth Charles

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Kenneth Charles Mildwaters

1990

University of Dundee

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JOINT OPERATING AGREEMENTS:

A Consideration of Legal Aspects Relevant to Joint Operating Agreements used in Great Britain and Australia by Participants thereto to Regulate the Joint Undertaking of Exploration for Petroleum in Offshore Areas with Particular Reference to their Rights and Duties.

By

Kenneth Charles Mildwaters

A Thesis
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The University of Dundee
in fulfilment
of the requirements for the Degree of DOCTOR OF PHILOSOPHY
April 1990
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Many people have directly or indirectly assisted me in the preparation of this thesis. They are too numerous to list but I trust that they will not be offended by my not seeking to do so. For the assistance they have proffered, I offer my sincere thanks to all of them.

There are, however, a number of people who have assisted me whom I am of the opinion do warrant specific mention.

Professor and Mrs. Thomas have provided assistance, assurance and guidance throughout the preparation of this thesis; the value of their counsel to my family and me is beyond measure. My family and I will be forever indebted to them for the kindness and generosity that they have bestowed upon us.

Professor Bentham has guided this thesis from its embryonic stage to its conclusion. For this I am extremely grateful.

Ruth Keenan-Hall has spent many hours typing this thesis. Her willingness to do so was most welcome and is gratefully appreciated.

Finally, I would like to acknowledge the vast contribution made by my wife and children in seeing this thesis to its conclusion. They have suffered much to enable me to achieve one of my ambitions and it is to them that I dedicate this thesis.
DECLARATION

I, Kenneth Charles Midlwaters, declare that I am the author of this thesis; that, unless otherwise stated, all references cited have been consulted by me; that the work of which this thesis is a record has been done by me; and that this thesis has not been previously accepted for a higher degree.

Dated this 11th day of April 1990.

I certify that the conditions of the relevant Ordinance and Regulations have been fulfilled.
SUMMARY

This thesis examines the joint venture relationship in the context of the exploration phase of the development of an oil and gas field in Great Britain and Australia. It considers a number of issues relating to the relationship between the Participants of a typical Joint Operating Agreement within the legal regimes of Great Britain and Australia.

Against this background the main issues addressed in this thesis are-

1. the nature of the joint venture?
2. the relationship between the Participants inter se; and
3. the relationship between the Operator and the Participants.

In addressing these issues the following questions are addressed:-

(i) what is a joint venture?
(ii) is a joint venture a separate legal relationship?
(iii) how is a joint venture distinguished from a partnership?
(iv) what is the relationship between the participants inter se?
(v) what rights does a participant of a joint venture have in relation to the joint venture and the other participants of a joint venture?
(vi) what interest, contractual or proprietary, does a participant of a joint venture have in the joint venture and the property thereof?
(vii) what duties does a participant of a joint venture have to the joint venture and the other participants of the joint venture?; and

(viii) what is the legal position when a participant of a joint venture defaults in complying with its duties?
DEFINITIONS

1. In this thesis, unless the context otherwise requires, the following terms shall have the following meaning:

"accounting procedure" means the method of accounting applied in recording debits and credits to the Joint Account;

"Apea proforma" means the proforma Joint Operating Agreement issued by the Australian Petroleum Exploration Association Limited entitled "Guidelines for an Exploration Joint Operating Agreement" (1984 Edition) and a reference in the footnotes to "Apea" followed by a clause number is a reference to the designated clause in the Apea proforma;

"Britoil proforma" means the proforma Joint Operating Agreement issued by the Britoil Limited for the eighth round of offshore licencing in Great Britain and dated 12th August, 1982 and a reference in the footnotes to "Britoil" followed by a clause number is a reference to the designated clause in the Britoil proforma;

"Commonwealth adjacent area" means the area of the offshore area that is adjacent to and appertains to an Australian State or Territory;

"Designated Authority" means the relevant Minister for mining affairs of a particular Australian State or Territory in his
capacity as administrator of the Commonwealth adjacent area of the particular Australian State or Territory;

"Development Phase" means the development phase of a field development in an off-shore area;

"Exploration Phase" means the exploration phase of a field development in an offshore area;

"field" means an oil and gas field;

"field development" means all of the phases of the development of a field before, when and after it is brought into commercial operation;

"first right of acquisition" includes the right of first refusal and the right of pre-emption;

"Great Britain" means England, Wales and Scotland;

"host government" means the government within whose jurisdiction the project is to be or is being undertaken;

"Industry" means the oil and gas industries;

"Interest" means the undivided share held from time to time pursuant to the Joint Operating Agreement by a Participant in:

1. the petroleum title, all production from the petroleum title and the proceeds of sale of the production from the petroleum title;

2. all the property of whatsoever kind, be it real or personal, acquired by the Participants in the conduct, or for the purpose,
of the joint undertaking of the Operations; and

3. all other estate, right, title, interest or obligation of the Participants arising under or by virtue of the Joint Operating Agreement ⁴;

"Joint Account" means the account established and maintained by the Operator to record debits and credits made pursuant to the Joint Operating Agreement ⁵;

"Joint Authority" means the relevant authority consisting of a federal Minister and the Minister for mining affairs of a particular Australian State or Territory established in respect of the Commonwealth adjacent area of the particular State or Territory ⁶;

"Joint Operating Agreement" means a joint operating agreement or a joint venture agreement;

"Joint Property" means all property acquired or held for use in connection with the Operations;

"juridicial persons" includes governments and parastatal enterprises;

"Licence" means the production licence issued by the Secretary of State for Energy pursuant to the Petroleum (Production) Act 1934;

"offshore area" means, in the case of Great Britain, the area which extends outwards from the territorial sea to the outer limits of the Continental Shelf adjacent to the coast of Great Britain, and, in the case of Australia, means the area
which extends outwards from the three-mile limit to the outer limits of the Continental Shelf adjacent to the coast of Australia; 

"Operations" means activities undertaken by the Operator that are considered to be necessary or desirable in order to implement and give effect to the terms and purpose of the Joint Operating Agreement; 

"Operator" means the person from time to time who, pursuant to the terms of the Joint Operating Agreement, is designated, appointed or for whatever reason, becomes the operator for the joint venture formed by the Participants; 

"parastatal enterprise" includes governmental bodies and quasi-governmental bodies; 

"Participant" means a party to the Joint Operating Agreement and the successor or assignee thereof and the term "Participants" shall have a corresponding meaning; 

"Partnership Act 1890" means the Partnership Act 1890 (53 & 54 Vict., c. 39) (UK); 

"Permit" means an exploration permit issued pursuant to the Petroleum (Submerged Lands) Act 1967 (C'lh); 

"petroleum title" means a Licence or Permit; 

"project" means one or more, or part of one or more, of the phases in the development of a field;
"three-mile limit" means the area which extends three miles outwards from the mean low water mark of an Australian State or Territory.

2. Terms such as "Non Consent Operations", "Non Consent Participants", "Sole Risk Drilling", "Sole Risk Operations", "Sole Risk Participants" and "Non Sole Risk Participants" have the meanings assigned to them in the relevant chapters of this thesis.

3. Until very recently the general view has been that the Commonwealth of Australia alone does not have clear constitutional power to pass companies and securities legislation to apply throughout Australia. As a result of this view a scheme was developed whereby the Commonwealth Parliament would enact comprehensive companies and securities legislation and each of the States of Australia would then enact legislation to give force and effect to the Commonwealth legislation. The Commonwealth Parliament enacted the Companies Act 1981 (C'th). It applies only to the Australian Capital Territory. Each State of Australia and the Northern Territory thereafter passed an enabling Act in order that the provisions of the Companies Act 1981 (C'th), with some modifications, may apply in its jurisdiction. The resultant legislation is referred to as a code. For example, the relevant resultant legislation in the State of Western Australia is called the "Companies (Western Australia) Code". In this thesis the Companies (Western Australia) Code 1981 (WA) and sections thereof has ordinarily been used as the basic reference. Where appropriate, variations from the legislation of other States of Australia, the Northern Territory and the Companies Act 1981 (C'th), will be noted.

For the time being the scheme remains operative in Australia. The success of the challenge has meant that the package of legislative regulation has not been brought into force.

It should be noted that this general view as to the constitutional power of the Commonwealth of Australia is under challenge since the enactment, by the Commonwealth Parliament, of the Corporations Act
1989 (C'th) and fifteen additional, but closely associated, Acts. This package of legislation will have the effect, once brought into force, of placing the legislative regulation of companies and the securities industry within the domain of the Commonwealth of Australia. A successful challenge has been mounted in the High Court of Australia to test the validity of this package of legislation.¹²

FOOTNOTES

1. Britoil 27(i); Apea 1.1(a).

2. See section 10 of the Petroleum (Submerged Lands) Act 1982 (NSW); the Petroleum (Submerged Lands) Act 1982 (NT); section 9 of the Petroleum (Submerged Lands) Act 1982 (Qld); the Petroleum (Submerged Lands) Act 1982 (SA); section 8 of the Petroleum (Submerged Lands) Act 1982 (Tas); section 9 of the Petroleum (Submerged Lands) Act 1982 (Vic); section 11 of the Petroleum (Submerged Lands) Act 1982 (WA).

3. Section 5(i) of the Petroleum (Submerged Lands) Act 1967 (C'th).

4. Britoil 3.0 and 27 (xxix); Apea 1.1. (aa) and 3.1.

5. Britoil 27(xiv); Apea 1.1(m).


7. See the Territorial Sea Act 1987 (UK) and the Continental Shelf (Designated Areas) (Extended Territorial Sea) Order 1987.

8. Section 5A of the Petroleum (Submerged Lands) Act 1967 (C'th). See section 5(1) of the Petroleum (Submerged Lands) Act 1967 (C'th) for the definition of "continental shelf".

9. Britoil 27 (xxvii); Apea 1.1(n).

10. Britoil 27 (xxviii); Apea 1.1 (bb).

11. Apea 1.1(cc).

In this thesis, rather than refer on each occasion to the various partnership acts of the United Kingdom, each of the States of Australia and the Australian Capital Territory, the Partnership Act 1890 and sections thereof has ordinarily been used as the basic reference. A comparative table of the various partnerships is set out below.

1. The Various Partnership Acts

The United Kingdom: 53 & 54 Vict., c. 39.

New South Wales: No. XII of 1892, as amended by Supreme Court Act 1970 and Supreme Court (Amendment) Act 1972.


South Australia: No. 506 of 1891, as amended by the Statute Law Revision Act, No. 2246 or 1935, and Statute Law Revision Act (No. 2) 1975.


Western Australia: No. XXIII of 1895.

Australian Capital Territory: Ordinance No. 5 of 1963.

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2. Repealed 8, Edw. 7. No. 18, s.2.

CHAPTER I

THE OBJECT OF THIS THESIS AND THE CONTEXT WITHIN WHICH THAT OBJECTIVE IS PURSUED

1. INTRODUCTION

In the Industry in Great Britain and Australia it is not unusual for each of the various phases through which a field develops to be undertaken by more than one participant. Where more than one participant undertakes a project in relation to a field, the participants usually set out with the objective of all acting together and, more or less, in unison. The coming together of the participants in such a co-operative endeavour to undertake a project is rather the case than the exception in so far as the development of large fields are concerned. In Great Britain and Australia it is only necessary to look at the development of offshore petroleum resources in order to find examples of co-operative endeavours in the undertaking of a project.

2. THE PHASES OF A FIELD DEVELOPMENT

The evolution of a field development involves a number of different phases, each of which has its own particular and, in many cases, unique requirements. No two field developments are the same and the precise nature of such phases and their requirements will depend, in each field development, upon a number of varied factors and the manner in which those factors are dealt with will depend upon those circumstances peculiar to each field. Neither is the manner in which the factors are dealt with uniform throughout the Industry. For this reason, among others, it is not within the scope of this thesis to consider the factors and the possible manner in which each may be dealt with.
As the result of considering a substantial number of field developments it is possible to generalise, in so far as the phases of such developments are concerned and, in so doing, state that there are several reasonably well recognised phases. These phases may be summarised as:

1. the bidding phase;

2. the exploration phase, which includes geological surveying, prospecting (when the field is reconnoitred), exploration (when the reserves of the field are determined) and feasibility evaluation (when the technical, economic and political consequences of proceeding further with the development and exploitation of the reserves are appraised);

3. the development phase, which includes construction of any necessary facilities;

4. the exploitation phase, which includes the extraction or production and the primary removal of the reserves;

5. the processing phase, which includes concentration and refining;

6. the marketing phase; and

7. the abandonment or decommissioning phase.

The terminology used to describe the phases of a field development in this generalisation, and as is used in this thesis, is not uniform throughout the Industry. Notwithstanding, what the generalisation does do is illustrate the evolutionary process involved in a field development from beginning to end.

Not all fields proceed through all of the phases of development; the bidding phase is a prime example of a phase that is not always present. Furthermore, not all fields evolve through all of the phases. The development of a particular field may, for the combination of any number
of reasons, be halted and abandoned by the participants undertaking the
development at any point in the chain between beginning and end. Most of
the casualties of this nature occur either during, or at the end of, the
exploration phase.

3. THE PARTICIPANTS OF A PROJECT

The participants who come together in a co-operative endeavour to
undertake a project may be natural or juridical persons. Governments
throughout the world, either themselves or through parastatal
enterprises, have made ever-increasing use of state participation with
other participants in a co-operative endeavour to undertake projects. State participation in a co-operative endeavour to undertake a project is
not, as is often incorrectly assumed, limited to the non-western and
so-called third world countries. Throughout the world, including the
western and so-called developed countries, participation by the host
government in a co-operative endeavour to undertake a project within the
jurisdiction of that host government, either itself or through a
parastatal enterprise, has become the paradigm of field development in the
Industry in recent times. There are few projects entered into in this
day that do not provide, in one way or another, for either:

1. an initial share, or gradual acquisition of a share, in the
equity of the project for the host government or a parastatal
enterprise thereof;

2. an option for the host government or a parastatal enterprise
thereof to acquire, be it in the initial phases of the project or at
a deferred date, a share in the equity of the project; or

3. an obligation on the investors in the project to offer, be it
in the initial phases of the project or at a deferred date, a share
in the equity of the project to nationals of the country of the host
government.

In Great Britain the roles played in the past in offshore field
developments by the National Coal Board, the British Gas Corporation.
and the British National Oil Corporation illustrate many of these features. The role of these parastatal enterprises in the development of the Industry in Great Britain does not fall within the scope of this thesis for it is dealt with adequately elsewhere. It will suffice to point out that, primarily through the British National Oil Corporation, the host government participated in co-operative endeavours to undertake projects within its jurisdiction. This began in earnest in 1975 with the creation of the British National Oil Corporation and continued until the election of a Conservative government in the United Kingdom in 1979. Since 1979 the British National Oil Corporation has been gradually dismembered and thereby followed the gradual dismembering of state participation. The British National Oil Corporation was formally dissolved on March 27, 1986 consequence to the establishment of the Oil and Pipelines Agency.

The ending of the taking of royalty by taking oil in kind after December 1988 and the proposed winding-up of participation agreements entered into by the parastatal enterprise with oil companies, marked the conclusion of direct host government participation in co-operative endeavours to undertake projects within the jurisdiction at Great Britain.

In so far as Australia is concerned it is not possible to point to examples of state participation in co-operative endeavours to undertake projects of a similar nature to that which briefly existed in Great Britain. Attempts were made to establish a Petroleum and Minerals Authority with a mandate to explore for and develop Australia's petroleum and mineral resources and to promote Australian ownership and control of petroleum and mineral resources. The High Court of Australia subsequently held that the Petroleum and Minerals Authority Act, 1973 (C'th) was not a valid law in that it was not enacted in the required manner. With the defeat of the Labor government in 1975, the establishment of state participation in the Industry in Australia collapsed. There have been suggestions that the present Labor government will seek to resurrect the idea of state participation in the Industry by establishing an Australian Hydrocarbons Corporation for the purpose of participating in the
development of Australia's oil and gas resources. To date no attempt has been made to introduce the requisite bill to establish the Australian Hydrocarbons Corporation.

The participants of co-operative endeavours to undertake projects in Great Britain and in Australia are today invariably companies. In the course of research for this thesis not one instance was uncovered in which an entity other than a company was involved in a co-operative endeavour to undertake a project. The reason for this is no doubt associated with the nature of the protection that the company offers to individuals who aspire, for whatever reason, to participate in a co-operative endeavour to undertake a project. The assumption is therefore made in this thesis that the Participants will always be companies.

4. WHY A PARTICIPANT SEeks OTHER PARTICIPANT CO-OPERATION TO UNDERTAKE A PROJECT

The reasons for a participant seeking to act in unison with other participants to undertake a project as a co-operative endeavour rather than choosing to proceed with the project by itself are many, varied and complex. The basis of the reasoning of the participant, in most cases, involves a recognition by the participant that it lacks some or all of the skills or resources necessary to enable it to proceed with the project itself. The participant therefore finds it to be advantageous to obtain the requirements that it lacks from other participants, so as to enable it at least to participate in the undertaking of the project. The skills and resources in question include such matters as capital, technology, markets, experience, information and expertise.

The situations that give rise to a participant choosing to act in unison with other participants to undertake a project as a co-operative endeavour may be divided into a number of categories:

1. Where the participant seeks the capital investment of other participants with similar needs or interests to itself so as to:
(i) reduce the risk\textsuperscript{18} and cost of undertaking the project; or

(ii) create a presence that is, or may be, large enough or requisite to overcome any barriers that may exist to prevent entry into a project\textsuperscript{19};

2. where the participant possesses skills or resources that can be combined with the skills or resources of other participants to enable them, in a co-operative endeavour, to enter into the project, being one in which they as individuals have not prior thereto been engaged\textsuperscript{20}; and

3. where the participant seeks to form an association with other participants so as to insulate itself from adverse market fluctuations or so as to expand its operations and maximise its existing investment\textsuperscript{21}.

These categories may also be described in economic terms on the basis of the nature of the relationship of the participants to one another prior to their choosing to enter into the co-operative endeavour to undertake a project. These are:-

1. horizontal integration;

2. conglomerate intergration; and

3. vertical integration.

The description of the categories in economic terms assumes some importance when consideration is given to the restrictive trade practices or anti-trust aspects of participants acting in unison in a co-operative endeavour to undertake a project\textsuperscript{22}. However, the description of the categories in economic terms as such is of little importance in the context of this thesis where the participants had a different relationship from the relationships mentioned, prior to their choosing to act in unison in a co-operative endeavour to undertake a project.
5. SHARING OF RISK AND COST

The risks involved in undertaking a project take many forms, may vary with the circumstances of and surrounding the project and in most cases, but certainly not all, are not man made or capable of being controlled or eliminated by man. There are, or course, risks that can be reduced or eliminated by man.

The range of risks that have a bearing upon the undertaking of a project is extremely wide. They include such matters as environmental risk, climatic risk, reserve or reservoir risk, drilling risk, logistical risk, the risk of nationalisation, the risk of compulsory renegotiation of the terms of agreements, the risk of civil war, the risk of rising costs or cost overrun, tariff barriers, foreign exchange costs, royalties and taxation, other economic risk, technological or production risk, social risk, the risk of inhibited access to product, the risk of deferment of cost recovery, geological risk and other political risks; to name but a few. It is risks of this nature that must be taken into account when a participant considers the undertaking of a project. Furthermore, the risks must be viewed against the background of what appears to be the basic characteristics of field developments. These are:

1. a high failure to success ratio;

2. high exploration cost;

3. high development costs: associated with this is the difficulty in accurately projecting the actual development cost together with the high fixed to variable cost ratio;

4. the long lead time to production coupled with the long pay back period; and

5. the instability of prices, markets and sales for production.
It is the costs and the risks combined, considered against the background of the characteristics of a field development that a participant, in so far as is possible, seeks to share with other participants when it seeks to undertake a project as a co-operative endeavour. This is particularly the case at the Exploration Phase, where the risk of failure is high and the technology, particularly in the case of offshore exploration, is intensive; even more so in new and inhospitable areas. However this is not limited to the Exploration Phase; new commercial discoveries are difficult to make and expensive to develop. High risk is equally applicable to the development and production phases. This is particularly evident in respect of the continually changing market economics associated with oil and gas, such as have been experienced since late 1985 in the Industry and the demands upon available technology where refining or other processing is required.

The approach of a participant at the Exploration Phase may be summed up as being one of seeking to spread the "exploration dollar" to many projects rather than concentrate it on a few. Thus, by seeking to undertake an exploration project as a co-operative endeavour, a participant is able to obtain two major benefits:

1. it is able to spread its exploration risk; and
2. it is able to spread its "exploration dollar".

Mr. Justice Kennedy of the Supreme Court of Western Australia gave judicial recognition to the approach of participants in the Industry to the high risk and cost involved in undertaking a project and in particular, a project which involved the exploration phase of a field development, in Monarch Petroleum N.L. v Citco Australia Petroleum Limited:

"Oil exploration is an extremely high risk operation, accompanied by high costs. The area to which the permit relates was an exceedingly high risk area. Offshore drilling, due primarily to weather and drilling conditions, carries with it particular risks. The cost of drilling an offshore well can vary in a normal case from $5,000,000
to $15,000,000; but the cost can blow out, as in the case of the Vulcan well, to a figure in the order of $28,000,000. The tendency is to share the risks by having a number of participants in each permit. As one witness expressed it, it is better to have 10 per cent of 10 wells than 100 per cent of one well. High-risk capital is scarce."

That companies in the Industry do spread the risk and cost of undertaking a project can be illustrated by considering the table of Britoil P.L.C.'s principle United Kingdom field assets in 1985:

<table>
<thead>
<tr>
<th>FIELD</th>
<th>EQUITY INTEREST</th>
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</thead>
<tbody>
<tr>
<td>OIL</td>
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<tr>
<td>Thistle</td>
<td>18.41%</td>
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<tr>
<td>Area 6</td>
<td>15.60%</td>
</tr>
<tr>
<td>Beatrice</td>
<td>28.00%</td>
</tr>
<tr>
<td>Deveron</td>
<td>15.95%</td>
</tr>
<tr>
<td>Clyde</td>
<td>51.00%</td>
</tr>
<tr>
<td>Dunlin</td>
<td>9.77%</td>
</tr>
<tr>
<td>Ninian</td>
<td>21.37%</td>
</tr>
<tr>
<td>Murchison</td>
<td>24.98%</td>
</tr>
<tr>
<td>Statfjord</td>
<td>5.30%</td>
</tr>
<tr>
<td>South Brae</td>
<td>20.00%</td>
</tr>
<tr>
<td>Hutton</td>
<td>20.00%</td>
</tr>
<tr>
<td>North Brae</td>
<td>20.00%</td>
</tr>
<tr>
<td>Humbly Grove</td>
<td>7.50%</td>
</tr>
<tr>
<td>GAS</td>
<td></td>
</tr>
<tr>
<td>Viking</td>
<td>50.00%</td>
</tr>
<tr>
<td>Victor</td>
<td>25.00%</td>
</tr>
<tr>
<td>Sean</td>
<td>25.00%</td>
</tr>
</tbody>
</table>

6. BARRIERS TO PARTICIPATION

There are numerous types of barriers that may prevent a participant from undertaking a project. Many of these barriers are imposed by governments. Government-imposed barriers may be overt in that they are imposed by legislation or standard clauses in petroleum titles, or they may be covert in that they rely upon administrative discretion, as in Great Britain. One of the main barriers that a participant may seek to overcome by acting in unison with other participants, other than that of the magnitude of the finance required to undertake the project, is
government restriction on the entry into the market to undertake a particular project. In the main, this type of barrier is aimed at restricting foreign investment in the host country. Such foreign investment restrictions usually take the form of requiring a minimum local participation in the equity of the company or other entity established or utilised to enter the market to undertake a particular project.\textsuperscript{37}

Such a barrier is present in Australia in so far as foreign investment in, inter alia, natural resource developments is concerned. The foreign investment policy of the Australian government will not be discussed in this thesis; it is not part of the subject matter and is dealt with elsewhere.\textsuperscript{38} It will suffice to point out the salient features of the policy. Prior to 20th January 1988, where it was proposed to develop a new natural resource project, even if it was part of an existing business, involving expenditure of A$10 million or more, such proposal was required to be examined by the Foreign Investment Review Board to determine whether the development would produce net economic benefits to Australia and as such should proceed. Among the criteria that the Foreign Investment Review Board took into account, other than the net economic benefits to Australia in certain areas, was the amount of Australian participation in the equity, and the management and control of the proposed project. On 20th January 1988 the policy changed. The Australia government announced that thereafter, where the national resource project was an oil and or gas project involving expenditure of A$10 million or more, such proposal would be approved unless judged contrary to the national interest.

7. RELATIONSHIPS AVAILABLE FOR PARTICIPANTS TO UTILISE

There are a number of relationships that participants seeking to act in unison in a co-operative endeavour to undertake a project may elect to utilise in order to create the legal structure within which they can conduct their co-operative activities. The relationships that the participants may elect to utilise include:

1. a company;\textsuperscript{39}
2. a partnership;  
3. a limited partnership;  
4. a trust; and  
5. a joint venture.

8. MERGER AND CONTRACT

It is the desire of participants to preserve their independence, whilst at the same time gaining secure access to the skills or resources that they as individuals lack to enable them to undertake a project on their own, that rules out many of the relationships that the participants may elect to utilise in order to create the legal structure within which they can undertake a project as a co-operative endeavour.

Two options available to the participants which, although not relationships of the nature mentioned above, do require brief consideration are:

1. merger; and
2. contract.

The problem that the merger poses for the participants is that it is a drastic step which is practically irreversible. Each participant irrevocably abandons its independence in a particular area of business and this case a company is usually, although not inevitably, the result. The company or other relationship formed undertakes the particular area of business, or the whole business abandoned by the individual participants to the joint enterprise. Alternatively, one participant is absorbed into the framework of the legal structure of the other participants. Either way, the situation gives rise to a single economic relationship in the area of business or the business concerned with a single area of decision-making for all important activities, including financial and
investment planning and the distribution of economic risk. It could be said that where a merger occurs, control is substituted for co-operation.

In a purely contractual relationship, each participant must rely upon the other to fulfill its obligations without having the right to be directly involved in the manner in which those obligations are carried out. Each participant must rely on the other participant's ability without having the right to contribute. Risks, skills, know-how, experience, investment and resources are not shared, although confidentiality is preserved. A joint venture offers considerable advantages to the participants thereto when compared with a purely contractual relationship. The major advantages are:

1. A joint venture is usually managed by a board or committee on which the participants will be represented, usually in proportion to their interest in the joint venture. When there is an unequal distribution of control, that is, when there are minority interest holders, a joint venture will not be effective unless the minority interest holder has, or holders have, a meaningful share in the control of the joint venture. This is often attained by the requirement of unanimity in decisions of major importance, coupled with a sole risk provision which gives participants the right to pursue objectives pursuant to individual theories. In this manner a joint venture affords a participant a greater degree of power of co-determination than does a contractual relationship;

2. Joint control by joint decision allows the participant to consider matters of common interest as they arise and to deal with them in common, without either participant losing any right to protect its own interest or gaining any power to advance its own interest to the disadvantage of the other participants. In this respect a joint venture is more flexible than a purely contractual relationship;

3. As a result of co-determination a joint venture makes it easier for participants to undertake a project, particularly in places where one of the participants is not otherwise represented; and
4. A joint venture affords the psychological advantage that the participants meet on equal terms within the framework of the joint venture, irrespective of the size and importance of each participant outside the joint venture. In effect, unlike a purely contractual relationship, neither participant is seen as seeking advantage from the other participant leaning upon it.

It can be said, therefore, that unlike a purely contractual relationship, each participant to a joint venture has a closer involvement with the other participants in the project that is being undertaken as a co-operative endeavour, and a more equitable share of the risks and profits.

A joint venture can therefore be seen in the Industry as being something more than a contract although it is obviously less than a merger between the participants.

9. THE INCREASING UTILISATION OF JOINT VENTURES

The reasons for the participants seeking to undertake a project as a co-operative endeavour, selecting one relationship in preference to another, are many, varied and complex and for the most part have little or no direct bearing on the matters to be considered in this thesis. What is dealt with in this thesis is an examination of one of the relationships that, at present, is becoming increasingly the selection of the participants where the project to be undertaken is capital intensive and highly technological. Field developments in the Industry are capital-intensive and highly technological by nature and as such it is not surprising that the joint venture is common-place in the Industry.

An illustration of the increasing use of the joint venture in the Industry can be constructed, for Great Britain, using information relating to Licences.
The term "consortia" used in the table usually, but not always, refers to a joint venture of the nature discussed in this thesis. In Great Britain there has been a tendency to refer to such relationships as consortia rather than joint ventures.

10. THE CONTEXT IN WHICH THE TERM "JOINT VENTURE" IS USED IN THIS THESIS

In the context of the transactions entered into by governments with transnational corporations in order to develop oil and gas resources through all of the phases of development, the term "joint venture" has been used. As the use of the term in that context is not part of the subject matter of this thesis and is dealt with adequately elsewhere only a brief comment upon the use of the term will be offered. The term has been used in two ways:—

1. to describe a relationship whereby the host government and the transnational corporation come together and establish an operating company in which each holds a percentage of the issued share capital. The operating company undertakes the particular field
development. The host government thereby participates in the particular field development through its various phases. This is often referred to as an "equity joint venture"\(^{46}\); and

2. to describe a relationship whereby the host government and the transnational corporation enter into a contract somewhat akin to a partnership to undertake the particular field development. By participating in the contract the host government thereby participates in the field development through its various phases. This is often referred to as a "contractual joint venture"\(^{47}\).

This thesis considers the joint venture where it is utilised by non-government persons to achieve a desired object; to undertake in unison a project as a co-operative endeavour. However, even within the scope in which the joint venture is considered in this thesis, it is necessary to make clear the context in which the term "joint venture" is used.

A number of commentators\(^ {48}\) have made reference to two classes of joint venture, if they can be so called. These are:-

1. the class often referred to as incorporated joint ventures, which includes such descriptions as corporate joint venture, joint corporate venture and equity joint venture; and

2. the class often referred to as unincorporated joint ventures, which includes such descriptions as contractual joint venture and non-equity joint venture.

The above-mentioned division and the terminological variations thereof is not the only attempt at the division of the term "joint venture" so as to arrive at classes of joint venture. For the purpose of this thesis the division above will suffice to illustrate the comments which follow.

It is submitted, with all due respect to the commentators, that in Great Britain and in Australia in so far as the joint venture is concerned the law does not recognise such division.
If the commentators are using the terms in a non-legal sense in order to differentiate between two of the choices that are open for selection by participants who wish to undertake in unison and as a co-operative endeavour a project, that is, whether to conduct their relationship through an incorporated body or not, then, although that choice is acknowledged as being one that is available to the participants, it is submitted that the use of the term "joint venture" is misleading. Crommelin has described the use of the term as "unfortunate" and as inviting "confusion". However, despite this confusing or unfortunate situation, it is not suggested that a new name should be sought for the joint venture as considered in this thesis. This is particularly the case in Australia where the term is often used to distinguish an association of participants that is not a partnership, from one that is a partnership for taxation purposes.

An examination of what is called an incorporated joint venture reveals that, stripped to its bare essentials, it is nothing more than a company, usually in the form of a limited liability public or private company, created to carry out a particular project. As such the law relating thereto is, in the main, to be found in the various highly developed company statutes and codes of law. Why not call what is referred to as an incorporated joint venture what it really is, that is, a company? It is submitted that it is a misnomer to use the term "joint venture" in relation to a company.

If it is necessary to differentiate between a company incorporated for the purpose of participants undertaking, in unison, a project as a co-operative endeavour and a company incorporated for some other purpose then, it is submitted, the type of company first mentioned should be called something other than by a name that contains the term "joint venture." The fact that a so-called incorporated joint venture is a company, and nothing more, is recognised in American jurisprudence. In America it has been said that:

"Two individuals who form a corporation have chosen to have their dealings with third parties governed by the law of corporations which necessarily supersedes the common law of joint venture by imposing
limits on liability, on authority to bind the business by contract, and on the ability to terminate the association. To this extent a corporation must be distinguished from a joint venture or partnership."

The passage quoted above is based on dictum of Dill J. in Jackson v Hooper:

"If the parties have the rights of partners, they have the duties and liabilities imposed by law, and are responsible in solido to all creditors. If they adopt the corporate form, with the corporate shield extended over them to protect them against personal liability, they cease to be partners, and have only the rights, duties, and obligations of stockholders. They cannot be partners inter se and a corporations as to the rest of the world."

In so far as the writings of American commentators are concerned the following comment is apposite:

"Corporate joint ventures are now often themselves incorporated so that the vehicle is technically a commonly owned subsidiary rather than a joint venture."

What then of the so-called unincorporated joint venture? It is this class of joint venture, if class it be, that this thesis considers. Bearing in mind the comments made in relation to the so-called incorporated joint venture, the use of the term "unincorporated" adds nothing whatsoever, in the legal sense, to the term "joint venture". It is submitted that the use of the term "unincorporated" is superflous. It is submitted that what is being called an unincorporated joint venture is a joint venture and that it exactly what it should be called.

By its nature a joint venture must be a relationship that is other than incorporated; otherwise it would be called a company. The joint venture is an relationship of a non-corporate co-operative form. Furthermore, the rules of law governing the relationship between the participants to a joint venture are not to be found in legislation (as none of the legal systems of the major western industrial nations address themselves specifically to joint ventures), but in the terms of the agreement establishing the joint venture, the legislation controlling or having a bearing on the subject matter in relation to which the joint venture was established, and in the principles of general law, for example, the law of contract, the law of agency, the law of real and
personal property and the law of trusts. The relationship is nevertheless perceived as being essentially a contractual one.

Although no major western industrial nation has legislation specifically relating to the law applicable to joint ventures, some other countries, such as the People's Republic of China, Bulgaria, Yugoslavia, Romania, the Soviet Union and Hungary have taken steps to legislate in relation to joint ventures.

In Western Europe entities have been developed which enable participants to undertake in unison a project as a co-operative endeavour that do not take the strict form of a company but a form somewhere between a company and the joint venture discussed in this thesis. Such entities depend for their existence and form upon the legislative development within a particular legal system, such as the Groupement d'Interet Economique in France, the Gemeinschaftsunternehmen in Germany and the European Interest Grouping in the European Economic Community.

These entities do not create the joint venture relationship between the participants thereto, nor does the legislation pursuant to which they are established attempt to provide by statute what participants entering into a joint venture seek to create by contract. A detailed consideration of the entities and a comparison thereof with the joint venture falls outside of the ambit of this thesis.

Returning to the joint venture as considered in this thesis, the comment of Straube cited below is reflective of the true position of the western world (including Great Britain and Australia) in so far as the development of legislation and case law about, and dealing with, the joint venture is concerned:

"It is interesting to note that, in general, legal systems have not kept pace with the growing economic importance of joint-venture groups;..."

11. FACTORS INFLUENCING THE USE OF THE JOINT VENTURE

In the context of the legal regimes of Great Britain and Australia
there are a number of considerations that help explain why the joint venture is chosen by participants seeking in unison to undertake a project as a co-operative endeavour, in preference to some other relationship. In the main all the considerations may be summed up in one word - "flexibility". It has been said that the "keystone" to the joint venture is flexibility.

"As Professor Schmitthoff has rightly emphasised, when it comes to joint ventures, the important factor commercially is flexibility - flexibility to meet changing political situations, flexibility to meet the needs of the different participants in respect of the regulatory requirements and tax laws of both the country in which the venture is to operate and of the countries in which each of the participants has its seat."

It is this flexibility which allows a joint venture to take on almost any contractual form and have an almost unlimited number of participants. In the economic terms referred to earlier, a joint venture may be horizontal, vertical or conglomerate. The participants that make up a joint venture may be unrelated in business interest or they may be complimentary or even competitive. The purposes, that is, the projects, for which the joint venture is formed are numerous. However, for whatever purpose a joint venture is formed, a joint venture will only exist because the participants thereto are prepared to co-operate together as independent participants. It is this co-operation together by the participants which, whilst preserving their independence at the same time gains secure access to the skills and resources that the individual participants themselves lack so as to enable them to undertake the purpose for which the joint venture is formed, on their own, that can give rise to the restrictive trade practice or anti-trust aspects mentioned above. Such restrictive trade practice or anti-trust aspects are not within the ambit of this thesis and as such are not considered in this thesis.

The considerations that help explain why the joint venture is chosen in preference to some other relationship by the participants wishing to preserve their independence, whilst at the same time desiring to gain secure access to the skills and resources that the individual participants themselves lack so as to enable them to undertake the purpose for which the joint venture was formed on their own, include:-
1. the taxation regime applicable to each participant to, and, if it is relevant, to the joint venture itself. It is submitted that it is this consideration which is one of the main reasons, if not the main reason, that participants choose the joint venture as the appropriate relationship for the legal structure through which they can conduct the project in unison, as a co-operative endeavour. Each participant to the joint venture will seek to preserve or maintain its individual position in relation to such taxation options as are open to it whilst in the joint venture relationship with other participants. In particular the joint venture is seen to be tax efficient.

In the Australian context the main objective of the participants is to avoid coming within the definition of a company or of a partnership for taxation purposes. It must be appreciated that the definition of the terms "company" and "partnership" for taxation purposes does not correspond with the definitions set out in the various statutes relating to companies and partnerships.

Section 6(1) of the Income Tax Assessment Act defines the term "company" for income tax purposes as including:

"all bodies or associations corporate or unincorporate, but does not include partnerships."

and defines the term "partnership" for income tax purposes as meaning:

"an association of persons carrying on business as partners or in receipt of income jointly, but does not include a company."

As will become evident when the definition of the term "partnership" as set out in the various partnership acts is considered, the definition in the Income Tax Assessment Act of the term "partnership is wider than in the said statutes."

It has been argued, and to date accepted by the Federal Commissioner of Taxation, that a joint venture is not a company or a partnership for income tax purposes.
It is difficult to see what is the argument for a joint venture falling outside the definition of a company for income tax purposes. It is submitted that, after all, a joint venture is an unincorporated association.

The main thrust of the argument, in so far as a joint venture falling outside of the definition of a partnership for income tax purposes is concerned, is twofold:-

(i) the participants, by receiving their respective shares of production in specie and separately dealing with their share of production, or by each separately authorising a participant or a third party to deal with their separate share of production as agent for each of them individually, are not "in receipt of income jointly"; and

(ii) the participants to a joint venture do not carry "on business as partners".

The relationship between the participants being held to be that of joint venture rather than a company or partnership for income tax purposes is particularly important as certain taxation write-offs and other taxation benefits can, to a significant degree, be taken in such manner as to suit the individual participant's taxation requirements when a joint venture is utilised. The taxation benefits include:-

(i) each participant, by receiving its share of the production in specie and then separately dealing with its share of the production, is treated as directly carrying on prescribed petroleum operations under the Income Tax Assessment Act (C'th) and is thereby severally qualified for special taxation treatment. The special taxation treatment includes allowing a deduction in respect of certain expenditure of a capital nature incurred by a taxpayer in connection with the carrying on by it of such operations;
(ii) each participant is able to make its own election under
the Income Tax Assessment Act (C'th) as to how its interest in
the joint venture property is to be dealt with for taxation
purposes, particularly in the areas of write-offs and
depreciation\(^78\). Thus a participant, without regard to the
election of the other participants to the joint venture, can
elect to make use of either the general depreciation
provisions\(^79\), or special depreciation provisions\(^80\) of the
Income Tax Assessment Act (C'th), and in so doing may elect to
adopt various differing rates of depreciation. A participant,
without regard to the election of the other participants to the
joint venture, can also elect to treat its expenditure in such
manner as suit its individual requirements. Further, and again
without regard to the election of the other participants to the
joint venture, a participant can elect a different valuation
for income taxation purposes, of stock in hand at the end of an
accounting period\(^81\);

(iii) each participant is able to set off its expenditure,
including capital expenditure\(^82\) in some cases, in one or more
projects that it is engaged in as a joint venture participant
or on its own, or, other non-project expenditure of a
tax-deductible nature against income received as a result of it
separately dealing with its share of production from such one
or more projects that it is engaged in as a joint venture
participant or on its own, or, other non-project income of a
taxable nature\(^83\). Likewise, each participant is able to
determine its own method of valuing its share of product on
hand at balance sheet date\(^84\);

(iv) the possibility, where international business is
involved, to relocate, to some extent, as to place and to time,
sales income and/or profit\(^85\);

(v) there are no difficulties relating to the transfer of
trading stock between associated persons by a participant to a
joint venture retaining its individual share of production\(^86\);
(vi) if a participant to a joint venture is a foreign corporation it might enjoy certain taxation benefits under its domestic laws (be it to claim a deduction for expenditure or to obtain credits for any Australian taxes): such as was the case with American corporations, in relation to investment in the 87 Industry;

(vii) a joint venture is not required to lodge an income tax return with the Commissioner of Taxation 88; and

(viii) where interest is consolidated, a participant to a joint venture, if Australian, could utilise the exemption from withholding tax in respect of overseas borrowing 89.

2. in view of the risk and cost elements mentioned above, the ability of a participant to a joint venture to withdraw from, or diminish its contribution to, or pursue objects pursuant to individual theories within the joint venture's programme. Sole risk, non consent, dilution, withdrawal and the like are discussed later in this thesis. Thus, a participant is able to adjust its interest in a joint venture from time to time having due regard not only to risks and cost elements but also the perceived merits of the project and its own business position;

3. the nature of the project itself. This includes a consideration of the oil and gas to be extracted, the characteristics of the field, the production process, the project size, its technical complexity, as well as the financial capability, technical competence and previous exploration experience of the participants and, the domestic and non-domestic use for the end product. An example of an instance where a number of such factors have been involved giving rise to the use of the joint venture, is to be found in the State of Western Australia, where most of the major iron ore projects involve participation by Japanese trading houses, as it is through the Japanese trading houses that all iron ore passes on its way to the Japanese steel mills - the Japanese trading house therefore having an
interest in the product, to the extent that it is used in further processing undertaken within the group of which it forms a part;

4. the financing by each participant of its share of capital and operating costs involved in undertaking a project. Each participant severally seeks to be, and is, when a joint venture is utilised, free to make its own financing arrangements in such a way as suits it best. This may affect the rates or conditions a participant can obtain from a financier, based on its own perceived financial strength. A participant of a joint venture weak in the financial perspective would not, therefore, affect or "dilute" a strong participant. Also, by each participant financing its share of capital and operating costs there will not be any mutual credit risk. Furthermore, one participant may have access to substantial internal funding which it wishes to utilise. It is most unusual for joint ventures at the exploration phase of a field development to be financed other than severally by the participants. There is greater scope for joint financing in joint ventures at the production phase of a field development, although even this is not at all common;

5. from the accounting point of view, the freedom of each participant to treat its interest in the joint venture in such a manner as suits it best. This is because the accounting records of a joint venture are not a profit and loss statement and balance sheet. The accounting records do not contain more than details of outgoings, either on capital account, such as for construction costs, or on income account, such as for operating costs, and receipts in terms of money put up by the participants. There is no profit as such made by the joint venture, nor do the participants receive sales income jointly. Therefore, each participant can bring to account its own share or proportion of income and expenditure and, in so doing, can ultimately bring to account its profit or loss on the project in its own way;

6. in so far as liability to third parties in respect of the joint venture activities are concerned it has been suggested that, in the
absence of express or implied authority to the contrary, such liability is limited in the sense that each participant is severally liable, not jointly and severally liable, for monies owing to a third party. A participant to a joint venture is said not to be responsible for the acts of the other participants to the joint venture other than for the acts of a participant or third party undertaken within the limits of that participant’s or third party’s authority, as delegated expressly to the participant or third party or as otherwise implied to the participant or third party.

Likewise, a participant to a joint venture is said not to be able to pledge the credit or to bind the other participants to the joint venture other than in the case of the a participant or third party who is expressly authorised to pledge the credit of or to bind the other participant or participants. Thus the participants seek to insulate the non-operators from liability.

7. the absence of a requirement for the participants to agree upon a common dividend policy or a common drawing policy since each participant will receive its income as a result of the joint venture by the sale by it of its individual entitlement to the “product” of the joint venture;

8. each participant’s undivided interest as a tenant in common in the joint venture property and assets is readily chargeable under English and Australian Law, either by way of a fixed or floating charge or by some other form of security, if a participant seeks to mortgage its interest in support of borrowings required to finance its share of capital or operating costs, and also to provide security to the other participants, in support of its covenants to meet its share of such costs;

9. the fact that the principle of equity accounting can be taken advantage of, in the Australian context, below normally acceptable limits, viz, the accounts of a subsidiary company holding an entire five per cent (5%) interest in a joint venture can be consolidated into the parent’s group accounts.
10. how the product is to be disposed of. This includes such questions as: Is all of the product for sale?; is one of the participants a consumer of the product?; is the product solely or principally for the export or domestic market; and is further processing or treatment of the product required locally or overseas and, if so, by whom will it be done? Such questions must be considered against the background that each participant is to take and market its own share of the product of the joint venture severally. Consequently, if a participant requires its share of the product for its own use, it is free to so use it;

11. the ability to overcome nationalistic prejudices and to allow state participation 101;

12. the element of common or shared control of the project and the management of the project;

13. the absence of the need for permanency 102;

14. the right of the participants to make their own governing rules, taking into account their own separate and particular requirements and the requirements of the project, both present and future, about such matters as default, minority interest and termination. A joint venture thus enables the participants the maximum opportunity to control and develop a structure which is consistent with the requirements of the project, both present and future;

15. the past United States of America taxation practice which subjected American corporations to tax on their world wide income meant that it was essential for an American corporation that its expenditure on oil and gas exploration throughout the world be incurred through one of its own American incorporated corporations, so that the expenditure could be set off against profits attributed to its American head office. Historically the need to establish that the corporation had an "interest" in an oil and gas asset, as opposed
to an interest in an entity, coupled with other taxation factors led American corporations to favour the joint venture approach to oil and gas exploration and development. 1

16. save as provided in the terms of the agreement entered into by the participants, no participant owes to the other participants the degree of confidence or mutual trust owed by partners to one another, so that a participant of a joint venture could conceivably compete with the joint venture. Therefore a breach of confidence and mutual trust owed by one participant to another participant would not be a ground for dissolution of a joint venture unless it was provided for in the terms of the agreement entered into by the participants.

17. save as provided in the terms of the agreement entered into by the participants, each participant is free to transfer or assign its rights in and to the joint venture without consent of the other participants to the joint venture.

18. a joint venture is not a firm and as such it cannot sue or be sued in its own right. Any action would have to be taken by or against the participants to the joint venture. Where the management of the project for which the joint venture was formed is vested in a participant or a third party, this may provide a measure of protection against being joined in actions involving the other participants;

19. a joint venture is not required to file information with a central records office disclosing the activities of the joint venture as such;

20. the principle means by which non-oil companies or financial institutions with little or no knowledge of the Industry can become involved in oil exploration and production.
21. the concern to avoid the impact of the anti-trust laws in the United States of America and Australia by not participating in a partnership 111;

22. the need for existing participants in the Industry to raise funds and, in so doing, disposing of part of their interest in and to the joint venture 112;

23. the desire of a participant to become involved in a project more quickly than would result from the full exploration process 113;

24. clarity of purpose. Participation in a joint venture focuses the attention of the participants on the dominant business purpose for which the joint venture was established 114; and

25. the ability of a participant to give to the public a stake in the project without the consent of the other participants to the joint venture 115.

In most instances it is not possible to point to authorities supporting the claimed non-taxation advantages of the participants of a joint venture. The basis for the vast majority of these advantages depends upon a joint venture being treated as other than a partnership and, even then, upon the principles of partnership law not being applied to a joint venture. Many of the issues raised by the non-taxation advantages will be considered later in this thesis.

Judicial recognition has been given to a number of the non-taxation considerations by Wallace J. in Mount Isa Mines Limited v Seltrust Mining Corporation Pty. Limited in relation to a mining joint venture 116: 

"Joint venture agreements have become common place in the exploration and development of mineral resources in Australia during the last decade. This is because vast sums of money are involved and the corporate bodies concerned have not wished to lose their individual identity. Corporate responsibility and taxation considerations have also assisted in giving rise to this relatively new creature."
It is submitted that what Wallace J. has said about mineral resources is also true of oil and gas resources.

Just as there are numerous reasons why participants seeking to undertake a project as a co-operative endeavour seek to utilise the joint venture as the relationship to utilise in order for them to create the legal structure within which they can conduct operations, there are numerous reasons why participants do not elect to utilise the joint venture.

The primary reasons why a participant may not seek to utilise a joint venture include questions of the complex and time-consuming problems of fiscal, reporting, accounting, legal and financial matters that attend a joint venture; of liability to third parties; the lack of a management team which is independent of the participant or third party vested with the management of the project for which a joint venture is formed; the need for joint control and decision making\textsuperscript{117}, which may create a risk that problems, or even a stalemate, may develop in the decision-making process. Also there is the suggestion that the joint venture is less than adaptive in the event of inaccurate or false prognosis and as such can allow a build-up of conflict over time, due to subsequent shifts of bargaining power. This is a consequence of the fact that all of the interests of each participant to a joint venture are not uniform and as such the object of the joint venture cannot always be pursued with the same single-mindedness which an individual participant could adopt\textsuperscript{118}. This is often demonstrated in the early stages of putting together a joint venture where the interest of each participant may adversely influence the common objective of the joint venture. Having overcome the early conflicts each participant's position in the joint venture, its financial position and its association with other participants, represent further potential areas of conflict within the joint venture. These areas of conflict may be strengthened if unforeseen difficulties push demands upon the participants to the joint venture beyond the bound of the negotiated agreement between the participants. The resolution of areas of conflict may result in loss of valuable time for the project and, in some cases, weaken the overall flexibility of the joint venture in dealing with
changing circumstances. Moreover, the effectiveness of the joint venture may be undermined by negotiated compromises between the participants that replace the certainty of a more autocratic management.

12. THE JOINT VENTURE IN CONTEXT

Before setting out the issue to be considered in this thesis it is necessary to try to place the joint venture in the sort of context that may be found in a field development. Primarily, because of the peculiar financial requirements and the length of time of a development, joint ventures may be established for each phase of a field development, such as, inter alia, a separate agreement to cover each of the following:

1. bidding;
2. exploration;
3. appraisal and development;
4. exploitation;
5. drilling;
6. production;
7. transportation, whether by pipeline, tanker or otherwise, and terminals;
8. processing and refining;
9. marketing;
10. downstream processing; or
11. utilisation.
Furthermore, the participants to the different phases of a field development may vary from phase to phase, as may the percentage interests of the participants in each phase.

The agreements giving rise to the various joint ventures mentioned above are given descriptive names, for each phase of a field development. The descriptive names are very loose and far from universally applied. An example of this is to be found in a statement by Argyle:120

"...in the mining industry it is customary to talk of the agreement amongst the participants as a joint venture agreement, in the petroleum industry the same agreement is usually referred to as a joint operating agreement (JOA).

Examples of the descriptive names are:

1. at the bidding phase - a joint bidding agreement;

2. at the exploration and proving up phase, or the appraisal phase - a joint exploration agreement or joint appraisal agreement. It is not uncommon to find this phase combined with the development phase and as such a joint operating agreement or joint venture agreement is to be found; and

3. at the development phase - a joint development agreement.

It is not suggested that each of the types of agreement is to be found in each oil and gas field development. They certainly are not. However, in a lawyer's utopia, there would be prior written agreements between the participants of each phase of a field development for each separate phase of that field development. It is most unlikely that one agreement would cover all the phases of a field development, but one agreement could cover several phases. However, where a joint venture is formed it is usually restricted to a single project, be it a single phase or a number of phases of a field development or the whole of the field development.122
13. **ISSUES TO BE CONSIDERED IN THIS THESIS**

In Great Britain and Australia, there is neither general legislation specifically directed to the recognition and regulation of joint ventures nor is there a body of settled authority in this form of business relationship.

A joint venture is a creature of contract; the terms and conditions for the conduct of the joint venture appear in a document normally entitled the Joint Operating Agreement. The principles of law governing the joint venture include the law relating to contract, property and equity, but the fundamental business issues will be set out specifically in the Joint Operating Agreement.

This thesis will, in the main, concentrate on the joint venture in the Industry in the domestic commerce of Great Britain and Australia, on the assumption that the participants are nationals, but not parastatal enterprises, of the country in which they seek to undertake the Exploration Phase as a co-operative endeavour and to form a joint venture so to do.

In concentrating upon the joint venture in the context of the Industry it is not forgotten that the joint venture is not limited to the Industry. The joint venture is to be found in many industries, not the least mining, manufacturing, public utilities, banking, transport and shipping, research, buying and selling and real estate. Furthermore, it is recognised that a large number of joint ventures transcend national boundaries. Whilst not ignoring this fact completely, this thesis will not concentrate on the issues raised as a result of this transnational phenomenon.

The legal structure of the agreement establishing the joint venture for each of the phases of a field development is basically the same. This thesis will, in examining the joint venture in the context of the Exploration Phase, consider a number of issues relating to the relationship between the participants to a typical Joint Operating
Agreement within the ambit of the legal regimes of Great Britain and
Australia. Where considered relevant, the examination will take into
account the approach of other legal regimes, such as Canada, South Africa
and the United States of America.

Against this background the main issues to be considered in this
thesis will be:-

1. the nature of the joint venture;
2. the relationship between the Participants inter se; and
3. the relationship between the Operator and the Participants.

Save to the extent necessary for the consideration of a number of
issues relating to the relationship between participants of a typical
Joint Operating Agreement in the context of the legal regimes of Great
Britain and Australia, this thesis will not describe in detail the
underlying legal framework relating to the Industry or the impact on the
joint venture of international and domestic laws and regulations nor the
operation of international and domestic regulatory agencies. As this
thesis will consider the joint venture in the context of the legal regimes
of Great Britain and Australia, it will not consider the impact of foreign
laws on the joint venture.

In the introduction to *Fundamental Legal Conceptions as Applied in
Judicial Reasoning* Walter Wheeler Cooke stated:\(^{123}\):

"... none of us can claim to have been the originator of any very
large portion of any science, be it legal or physical. It is all
that can be expected if each one of us succeeds in adding a few
stones, or even one, to the evergrowing edifice which science is
rearing. It follows that anything which one writes must largely
be made up of a restatement of what has already been said by
others in another form. Each one of us may congratulate himself
if he has added something of value, even if that consists only in
so rearranging the data which others have accumulated as to throw
new light upon the subject - a light which will serve to
illuminate the pathway of those who come after us and so enable
them to make still further progress."
It is with these words in mind that this thesis will be developed.

14. PROFORMAS

Examples of each of the typical Joint Operating Agreements utilised for each of the various phases of a field development will not be considered in this thesis. Rather, in the consideration of the issues mentioned above, two typical Joint Operating Agreements will provide the background against which the consideration of the issues will be made. It is the Joint Operating Agreement which defines and regulates the activities to be undertaken by the participants of the undertaking in unison of a project as a co-operative endeavour and which defines the interests of the participants.

The proforma Joint Operating Agreement issued by Britoil Limited for the eighth licencing round will provide an example of a typical joint venture agreement utilised in the Great Britain jurisdiction. The "Guidelines for an Exploration Joint Operating Agreement" issued by the Australian Petroleum Exploration Association Limited will provide an example of a typical joint venture agreement utilised in the Australian jurisdiction. From the research conducted in preparing this thesis it is fair to say that although neither of the example proformas are in regular use by practitioners engaged in the areas of oil and gas law, in their entirety, the principle provisions contained therein are in regular use. This is particularly so in Great Britain.

The Joint Operating Agreement in Great Britain, as in Australia, finds its roots in the Form 610 developed by the American Association of Petroleum Landmen for use in onshore arrangements in the United States of America. With the advent of exploration for oil in Great Britain and Australia came attempts to adapt the American proforma for use in the Great Britain and Australian jurisdictions, although this did not lend to a standardised form in either case.

Matters changed in Great Britain in 1977 with the fifth licencing round and the participation of the British National Oil Corporation in all
Licences. One of the requirements for the issue of a Licence was that prospective licensees should conclude a Joint Operating Agreement with the British National Oil Corporation in a form acceptable to the Department of Energy. The Department of Energy invited the oil industry to submit proposals for a standard form of Joint Operating Agreement. A working group from the United Kingdom Offshore Operators Association prepared and submitted a draft. This draft was not adopted. Instead, the British National Oil Corporation issued its own draft Joint Operating Agreement. Each group of Licence applicants negotiated with the British National Oil Corporation on the basis of this draft, so as to arrive at the final form of Joint Operating Agreement to be submitted to the Department of Energy. In the main, the draft form was accepted with minor variations so as to meet the individual needs of each group of Licence applicants.

The proforma developed by the British National Oil Corporation provided and, continues to provide, the basis for Joint Operating Agreements entered into by groups of Licence applicants in licencing rounds subsequent to the fifth licencing round. The Britoil Limited proforma, which is considered in this thesis, is based upon the draft Joint Operating Agreement developed by the British National Oil Corporation in 1977.

The development of a standard form of Joint Operating Agreement in Australia was not the same, as there has been no incident of state participation of the nature experienced in Great Britain to force standardisation upon the Industry. This is not to say that, despite it being acknowledged that joint venture agreements have been entered into in respect of a large number of the major Industry developments in Australia, the structure and basic terms of Joint Operating Agreements have not attained a reasonable degree of consistency and uniformity; they have. Attempts have been made in Australia by the Australian Mining and Petroleum Law Association and by the Australian Petroleum Exploration Association Limited to produce a standard Joint Operating Agreement. After discussions between the two groups, the Australian Petroleum Exploration Association Limited produced its proforma Joint Operating
In this thesis, it is this proforma which forms the basic example for discussion from the Australian viewpoint.

The examination of the issues mentioned above, against the background of the two proforma examples, will give rise to a consideration of the general principles applicable to most, if not all, joint venture agreements of the types mentioned above. Naturally, the specific issues of the particular project being undertaken, for which the joint venture agreement is prepared, will vary widely and as such cannot form part of the issues to be considered here.
FOOTNOTES

1. See Daintith and Willoughby, editors, United Kingdom Oil and Gas Law: 2nd ed. (1984), para. 1-517 where it is said that in the seventh licensing round there was only one out of the ninety Licences awarded to a sole applicant. Cf. Willoughby "Control of Licence Operations" in Proceedings of the Petroleum Law Seminar organised by the Committee on Energy and National Resources (1978), Vol. 1, 5.1, 5.2.

Examples of field developments undertaken by one party in Great Britain include the Highlander field, the Petronella field and the Tartan field undertaken by Texaco North Sea U.K. Limited and the Cyrus field, the Cleton field and the Magnus field undertaken by B.P. Petroleum Development Limited.

Source: Development of the Oil and Gas Resources of the United Kingdom (1989), pp. 22, 24, 48, 50, 52, 54 and 58.


7. This may be a carried interest, as in the case of Den norske stata oljeselskap a.s. (Statoil) of Norway where, on the award of a production licence Statoil gets a minimum fifty per centum (50%) carried interest, or it may mean that the host government meets its share of the expenditure as the project develops, as in the case in
In the third licencing round it was an essential prerequisite for the allocation of Licences in the areas of the Irish Sea on offer, that the successful applicant group include among its number, either or both of the National Coal Board or the Gas Council.

Furthermore, the informal criteria established in relation to the second and third licencing rounds included, as a ground to be considered in the awarding of Licences, the availability afforded to the participation of nationalised industries in the applicant group.


9. For example, nationals must own at least fifty-one per centum (51%) of new oilfield service companies before a new oilfield service company will be licenced by the Abu Dhabi Chamber of Commerce. See "Corporate Law: United Arab Emirates" (1986) 14 I.B.L. 246. See also "Joint Venture Projects" (1987) 15 I.B.L. 373; Calvo-Drilon "Philippines" (1987) 15 I.B.L. 502; Murphy "Joint Ventures in East


It could be argued that the starting point for state participation in the Industry in Great Britain began with the Anglo-Persian Oil Company Acquisition of Capital Act, 1914 (UK), notwithstanding that...


13. Established pursuant to the Oil and Pipelines Act 1985 (UK).


"In total, 256 significant discoveries have been announced, resulting from 1186 exploration wells drilled in the last 23 years."

for Participation in Mining Projects" (1981) a paper delivered at The Law Society of Western Australia's Mining Law Course 1981, Lecture 5 at p. 2.


See also the Foreign Acquisitions and Takeovers Act 1975 (C'th).

39. See, Companies Act 1985 (UK); Companies (Western Australia) Code 1981 (WA).
40. Partnership Act 1890.

42. Including unit trusts and discretionary trusts and the numerous variations thereof. See Beeney "Partnership Law and Legal Implications of Joint Ventures" (1980), a paper delivered at "Commercial Law Problems - A Course for Accountants" held by the Leo Cussen Institute for Continuing Education and Institute of Chartered Accountants in Australia, p. 22; Ladbury "Mining Joint Ventures" (1984) 12 A.B.L.R. 312, 329-331.


44. Development of the Oil and Gas Resources of the United Kingdom (1989), pp. 94-95.


49. Lecture 11 of the Workshop Course in "Mineral Law" (Project Number 235/83) conducted by the Australian Mineral Foundation Incorporated at Perth, Western Australia, May 1983.


51. Waite "Australian Resources Joint Ventures: Some Legal Pointers for Investors" (1985) a paper delivered at the Lawasia Symposium on Energy Law, Jakarta, Indonesia, at p. 3; McFadgen "Why a Joint Venture."
Venture?" in Kelly, editor, Mineral and Petroleum Development in New Zealand: The Commercial Framework (1987), 1, 2. Jointly owned operating companies were the entities traditionally used to control exploration, development, production and distribution of income from production to the parent companies in accordance with the shareholding in the operating company. It has been suggested that the operating company made its first appearance in 1928 with the formation of Iraq Petroleum Company, principally by B.P. and Shell, with other oil companies subsequently being added; see Blair The Control of Oil (1976) 77, pp. 50-52. See also Al-Otaiba OPEC and the Petroleum Industry (1975), pp. 11-12, 92-93 and 95; Ampol Exploration Limited v Federal Commissioner of Taxation 85 A.T.C. 4760.

52. Note "Joint Venture Corporations: Drafting the Corporate Papers" (1964-1965) 78 Harvard Law Review 393, 397.

53. 75 A. 568, 571. See the similar comments made in Salomon v Salomon and Company Limited [1897] A.C. 23, 30 by Lord Halsbury: -

"... once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

For the interchangeability of the terms "partners" and "joint venturers" and "partnership" and "joint ventures" see below in this thesis.

54. Crane and Bromberg Partnership: (1968), p. 195. See also Wright "The Legal Framework of Coal Trade in the Region" in Energy Law in Asia and the Pacific (1982), 579, 590 where the same view is adopted in relation to the Australia so-called joint venture company.


63. Introduced by Ordinance of September 23, 1967.


67. Subject to certain exceptions, section 716(1) of the Companies Act 1985 (UK) restricts to twenty (20) the number of persons who may form a "company, association or partnership"... "for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association or partnership, or by its individual members, unless it is registered as a company" under the said Act. Likewise, subject to certain exceptions, section 33(3) of the Companies (Western Australia) Code 1981 (WA) restricts to twenty (20) the number of persons who may constitute "an association or partnership ... that has for its object the acquisition of gain by the association or partnership or individual members of the
association or partnership ... unless it is incorporated" under the said Code or formed pursuant to an Act or letters patent.


70. Companies Act, 1985 (UK); Companies (Western Australia) Code, 1981 (WA).

71. Partnership Act 1890.


75. Waite "Australian Resources Joint Ventures: Some Legal Pointers for Investors", (1985) a paper delivered at the Lawasia Symposium on Energy Law, Jakarta, Indonesia; Leslie "Joint Ventures and Farmouts: Including Types of Joint Ventures, Providing for Unknown Problems in


78. Walsh "Partnerships - Joint Ventures and Taxation" (1978-1979) 13 Taxation in Australian 478, 485; Knox "Mining Joint Ventures" (1982) 16 Taxation in Australia 802, 806; Waite "Partnerships in

79. Section 54 of the Income Tax Assessment Act (C'th).

80. See for example, section 57AJ of the Income Tax Assessment Act (C'th).

81. Section 31 of the Income Tax Assessment Act (C'th).


83. Walsh "Partnerships - Joint Ventures and Taxation" (1978 - 1979) 13 Taxation in Australia 478, 488; O'Connor "Tax Aspects of


Hood and Peacock "Petroleum resource rent tax - as it is” (1988) 23 Taxation in Australia 17, 19.


98. The difficulties of charging a participants' undivided interest as a tenant in common in the joint venture property and assets under Scottish law in discussed by Cameron "Security in Scotland" in Proceedings of the Energy Law Seminar organised by the Committee on Energy and Natural Resources (1979) Vol. 2, N4.1, N4.2-N.4.3.


100. Argyle "Legal Structures for Participation in Mining Projects" (1981) a paper delivered at The Law Society of Western Australia's Mining Law Course 1981, Lecture 5, at p. 28; Beeney "Partnership Law and Legal Implications of Joint Ventures" (1980), a paper delivered at "Commercial Law Problems - A Course for Accountants" held by the


105. See section 28 of the Partnership Act 1890. See also Walsh "Partnerships - Joint Ventures and Taxation" (1978-1979) 13 Taxation in Australia 478, 483.

Some basic comparisons with other structures" [1982] 5 O.G.L.T.R. 153, 155; Waite "Australian Resources Joint Ventures: Some Legal Pointers for Investors" (1985) a paper delivered at the Lawasia Symposium on Energy Law, Jakarta, Indonesia, at p. 22; Beeney "Partnership Law and Legal Implications of Joint Ventures" (1980), a paper delivered at "Commercial Law Problems - A Course for Accountants" held by the Leo Cussen Institute for Continuing Education and Institute of Chartered Accountants in Australia, p. 19; Ryan "Joint Venture Agreements" (1982) 4 A.M.P.L.J. 101, 128; Molyneux "Structuring new business" (1989) Taxation Institute of Australia - State Convention Papers South Australian Division, 56, 60. This will be discussed later in this thesis. The right to assign an interest without restriction may have considerable advantages under section 23(pa) of the Income Tax Assessment Act (C'th) if the transferor is a bona fide prospector.

107. For example, see Order 48A of the Rules of the Supreme Court of Victoria (Vic); Order 54 of the Rules of the Supreme Court of Queensland (Qld); Order 48A of the Rules of the Supreme Court of South Australia (SA); Order 54 of the Rules of the Supreme Court of Tasmania (Tas); Order 71 of the Rules of the Supreme Court of Western Australia (WA); Order 71 of the Rules of the Supreme Court of England and Wales (UK). New South Wales has no special rule and as such it is usual to deal with the same issue under Part 8 Rule 2 or Part 64 Rule 2 of the Rules of the Supreme Court of New South Wales (NSW). See Beeney "Partnership Law and Legal Implications of Joint Ventures" (1980), a paper delivered at "Commercial Law Problems - A Course for Accountants" held by the Leo Cussen Institute for Continuing Education and Institute of Chartered Accountants in Australia, p. 19; Ryan "Joint Venture Agreements" (1982) 4 A.M.P.L.J. 101, 128.

108. For example, Thompson Organisation and Blackfriars Oil Co. Ltd., a subsidiary of Associated Newspapers, in Great Britain.

109. Barclays Bank and The Trans-European Co. Ltd., a subsidiary of Kleinwort Benson Ltd. in Great Britain.


116. Unreported decision of the Full Court of the Supreme Court of Western Australia delivered on September 27, 1985 (Appeal Number 160/85) p. 3.


134. Entitled "The BNOC Pro Forma Joint Operating Agreement for 5th Round Licences".

135. David "Pitfalls of Joint Operating Agreements" [1983] 8 O.G.L.T.R. 180, 180. There has been a belief that the Joint Operating Agreement has to be approved by the Secretary of State of Energy. This is not correct. What is required is consent to the appointment of the Operator and those sections which relate to the disposal of petroleum and the allocation between the parties of production. These matters are discussed elsewhere in this thesis. See Clode "The State as Regulator and Participant" in Bentham, editor, Recent Developments in United Kingdom Petroleum Law 1984-85 (1985), 83, pp. 91-92.

CHAPTER II

THE PARTICIPANTS, OPERATING COMMITTEE AND OPERATOR: AN INTRODUCTION TO THE CONSIDERATION OF THEIR ROLES, RIGHTS AND DUTIES

1. INTRODUCTION

In considering the participants to a Joint Operating Agreement for the Exploration Phase, the roles that they adopt within the ambit of the Joint Operating Agreement and their rights and duties, it is proposed to limit the examination to what may be termed as those participants who fall within the direct ambit of the Joint Operating Agreement. To illustrate what is intended, the following diagram represents what may be called the direct interrelationship of the participants to a Joint Operating Agreement for the Exploration Phase:

```
PARTICIPANT ---------------------  PARTICIPANT
PARTICIPANT ---------------------  SOLE RISK PARTICIPANT
PARTICIPANT ---------------------  OPERATING COMMITTEE
PARTICIPANT ---------------------  OPERATOR
PARTICIPANT ---------------------  THIRD PARTIES
OPERATOR ------------------------  SOLE RISK PARTICIPANT
OPERATOR ------------------------  OPERATING COMMITTEE
OPERATOR ------------------------  THIRD PARTIES
```

A participant may be represented more than once. This is because the participant accepts more than one role within the ambit of the Joint Operating Agreement. The most obvious example of a multi-role situation
is that of a participant who is:

1. a Participant;

2. a member of the Operating Committee;

3. the Operator; and

4. a Participant to a Sole Risk Drilling.

This example can be expanded further if necessary, but for the purpose of the illustration it will suffice.

When considering the heading "third parties" one should bear in mind such third parties as:

1. relevant regulatory authorities and administrative authorities such as, in the United Kingdom, the Secretary of State for Energy and, in Australia, the Joint Authorities and the Designated Authorities;

2. employees of the Participants and of the Operator;

3. financial institutions;

4. consumers, be they affiliates of the Participants or otherwise;

5. contractors of the Participants and of the Operator; and

6. sub-contractors and agents of the Participants, of the Operator and of the contractors.

The list of third parties can also be expanded if necessary. However the list provided above will suffice to illustrate the point that the range of "third parties" is extensive.
The following chapters will consider, inter alia, the role, rights and duties of each of the following participants to a Joint Operating Agreement for the Exploration Phase and look at how the roles, rights and duties interrelate between:

1. the Participants;

2. the Operating Committee; and

3. the Operator.

Each of the participants will be considered separately. In so doing the overlap in their roles, rights and duties will become obvious, as will the way in which their roles, rights and duties interrelate. It is not proposed to consider the roles, rights and duties of the various third parties in so far as they relate to a Joint Operating Agreement for the Exploration Phase, save to the extent that such roles, rights and duties have a direct and material impact upon the roles, rights and duties of the participants.

The consideration will be set against the background of the proformas.

The issue of whether a Joint Operating Agreement for the Exploration Phase establishes the relationship of joint venture, as between the Participants or that of partnership, and whether a joint venture is a partnership, will not be discussed when the consideration of the role, rights and duties of the participants is undertaken. It will be dealt with separately, later in this thesis.
CHAPTER III

THE PARTICIPANTS: AN INTRODUCTION

1. INTRODUCTION

In this thesis it is proposed to consider the role, rights and duties of the Participants. In so doing it is proposed to examine only the major areas that are thought to require particular attention. The majority of the minor areas will be dealt with when considering the role, rights and duties of the Operator. It is not proposed to consider such matters from the point of view of the Participants in the chapters where the role, rights and duties of the Participants are considered. Such would achieve no more than viewing the same issues from a different perspective without giving rise to any issues which would warrant what could be seen as double treatment.

The Participants are those persons, usually unrelated companies, who, for whatever reason, have made the decision to join together to apply for a petroleum title covering one or more blocks, and who have been successful in their application. In Great Britain, the number of Participants may be limited by the requirement that there be no more than ten licencees in respect of any one block.

The number of participants who enter into a joint venture to undertake the Exploration Phase will vary from project to project. As a general rule, the greater the inherent risks involved and the costs associated with the Exploration Phase, the larger the number of participants. However, the point can be reached where the risks and costs associated with an Exploration Phase are so great that only very large companies can economically afford to be participants in the joint venture formed to undertake that phase.

In addition, there is also a statutory restriction as to the number of participants who can come together in a joint venture. Subject to
certain exceptions, section 716(1) of the Companies Act 1985 (UK) restricts to twenty the number of persons who may form a "company, association or partnership"... "for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association or partnership, or by its individual members, unless it is registered as a company" under the said Act. Likewise, subject to certain exceptions, section 33(3) of the Companies (Western Australia) Code 1981 (WA) restricts to twenty the number of persons who may constitute "an association or partnership ... that has for its object the acquisition of gain by the association or partnership or individual members of the association or partnership ... unless it is incorporated" under the said Code or formed pursuant to an Act or letters patent.

Notwithstanding, it is argued later in this thesis that, in a joint venture, there is no "acquisition of gain" by an association or partnership and that a joint venture is not a partnership, there is a tendency in the Industry to endeavour to keep the number of participants who form a joint venture below twenty. This may be because it is arguable that a joint venture is an unincorporated association.

In Great Britain, the coming together of the Participants usually occurs following, or in anticipation of, the announcement of a new licensing round. The coming together is usually evidenced by a formal agreement referred to, depending upon its nature, as either an area of mutual interest agreement or a joint bidding agreement. The position in Australia is very similar to that in Great Britain. Where applications are invited for blocks, area of mutual interest agreements and or joint bidding agreements are commonplace. In general terms, the participants seek to work together with the view of jointly applying for a petroleum title and in so doing share the cost of application and pool their respective knowledge, data and information in relation to the blocks on offer or to be offered.

2. AREA OF MUTUAL INTEREST AGREEMENTS

An area of mutual interest agreement relates to an area, the area of mutual interest, within which the participants agree that they will
conduct operations only jointly as a group. This precludes a participant from conducting operations in the area of mutual interest either as an individual or as a participant in a group other than the group formed pursuant to the area of mutual interest agreement. The restriction may be tempered by providing that a participant can conduct operations other than jointly, as mentioned above, provided that it first invites the other participant or participants of the area of mutual interest agreement to join in the operations proportionately, in the same shares as the participants had agreed to co-operate within the area of mutual interest. The operations would include the making of application for any petroleum title, and the farming-in to any existing petroleum title, within the area of mutual interest.

3. **JOINT BIDDING AGREEMENTS**

A joint bidding agreement differs from an area of mutual interest agreement in that it relates only to the application for new petroleum titles within the area of mutual interest. In Great Britain, because of the informal indication given by the Department of Energy in the seventh, eighth and ninth licencing rounds that an important criteria for selecting a group of participants for a Licence would be the degree of participation by United Kingdom entities in the competing bidding groups, the joint bidding agreement assumed an important role. Indirectly, the informal criteria assisted the growth of participation in joint ventures in the Industry in Great Britain. A non-United Kingdom entity seeking a Licence found it most desirable to join with a United Kingdom entity in making application to the Secretary of State for Energy for a Licence. A spin-off from this approach was the number of United Kingdom entities, a large number of whom had had no previous Industry experience or involvement, who were sought out and included as participants to bidding groups, in an endeavour to increase the British entity content of the group.

A joint bidding agreement usually seeks to:

1. commit the participants, during one or more licencing rounds or
a stated period of time, to apply jointly and on an exclusive basis
for petroleum titles within the area of mutual interest;

2. require the participants to endeavour to agree the block or
blocks within the area of mutual interest in relation to which
application or applications will be made for a petroleum title or
titles. It is normally the case that the agreement must be unanimous;

3. prohibit a participant from making or joining in any other
application for a petroleum title within the area of mutual interest
during the term of the agreement;

4. establish the consequences resulting from the participants
failing to reach agreement upon specified matters within a specified
period of time;

5. nominate the person who will be the Operator for the purpose of
the agreement and also when and if the application or applications
for a petroleum title or titles is or are successful;

6. nominate the intended percentage interest of each participant
for the purpose of the agreement and also the intended Interest of
each participant if the application or applications for a petroleum
title or titles is or are successful; and

7. require the participants to undertake to enter into a Joint
Operating Agreement if the application or applications for a
petroleum title or titles is or are successful.

4. OBJECTIVE OF THE PARTICIPANTS

The objective of the Participants, having been successful in their
application for a petroleum title, in entering into a Joint Operating
Agreement extends to the scope of the agreement: the searching or boring
for, or exploring for, petroleum within the area to which the petroleum
title relates. The agreement may also extend to the production of
petroleum and other activities associated therewith. However, the
agreement will nearly always state that the objective of the Participants
is to exclude from within the scope of the agreement any joint financing, marketing or sale arrangements. The objective of the Participants will be carefully drafted - even if in general terms - as it defines the parameters within which the joint venture will operate. To go beyond of those parameters will require the consent of all of the Participants. Furthermore, each Participant will want to know at what point the activity undertaken or to be undertaken pursuant to the Joint Operating Agreement, may conflict with its other activities.

5. THE INTERESTS OF THE PARTICIPANTS

The Joint Operating Agreement will set out very clearly the undivided share of each Participant, as at the date of the commencement of the agreement, in:

1. the petroleum title, all production from the petroleum title and the proceeds of the sale of production from the petroleum title;

2. all the property of whatsoever kind, be it real or personal, acquired by the Participants in the conduct, or for the purpose, of the joint undertaking of the Operations; and

3. all other estate, right, title, interest or obligation of the Participants arising under or by virtue of the agreement.

A Participant's undivided share - its Interest - is usually expressed as a percentage. The Participants' Interests relate to the proportionate undivided share as tenants in common of each of the respective Participants in the ownership of the assets, as well as the bearing of the liabilities of their activity, that is, in the entirety of the activity. It is not correct to refer to these assets and liabilities as the assets and liabilities of the joint venture; they are the assets and liabilities of the Participants. This distinction is most important and is often overlooked. In this sense, the interest of a participant to a joint
venture in such assets and liabilities and hence the Interest of a Participant can be distinguished from that of a partner in partnership property. The High Court of Australia in Canny Gabriel Castle Jackson Advertising Pty. Limited v Volume Sales (Finance) Pty. Limited described the interest of a partner in partnership property as follows:

"The partner's share in the partnership is not a title to specific property but a right to his proportion of the surplus after the realization of assets and the payment of debts and liabilities. However, it has always been accepted that a partner has an interest in every asset of the partnership and this interest has been universally described as a "beneficial interest" notwithstanding its peculiar character ..."

... Nevertheless we think that the interest of the partner in an asset of the partnership is sui generis ... It is, as we have said, recognized as a beneficial interest."

In Federal Commissioner of Taxation v Everett Barwick C.J., Stephen, Mason and Wilson JJ. said:

"Although a partner has no title to specific property owned by the partnership, he has a beneficial interest in the partnership assets, indeed in each and every asset of the partnership: Canny Gabriel Castle Jackson Advertising Pty. Limited v Volume Sales (Finance) Pty. Limited (1974) 131 CLR 321 at 327-328; 8 ALR 407 at 412; Livingston v Comr. of Stamp Duties (Qld) (1960) 107 CLR 411 at 453. His share in the partnership consists of a right to a proportion of the surplus after the realization of the assets and the payment of the debts and liabilities of the partnership: Bakewell v DFC of T (SA) (1937) 58 CLR 743 and 770; Bolton v FC of T (1964) 9 AITR 385 at 389. Historically the interest of a partner in a partnership has been considered to be an equitable interest because it is a right or interest enforceable in equity and not at law: Bolton, supra."

A participant to a joint venture and hence a Participant, unlike a partner, has a separate and identifiable interest in each asset acquired by the participants in the conduct, or for the purpose of the joint venture.

It is important to appreciate that the undivided share of each Participant is an undivided share as a tenant in common with the other Participants. It is possible for a situation to arise where the Participants do not have the same interest in each and every asset and or
liability. This is to be contrasted with the position of the Participants in relation to the Licence: they are joint tenants\textsuperscript{24}. The fact that the Joint Operating Agreement does set out the respective Interests of the Participants is important, as the Licence itself does not set out the respective interests of the Participants. The Licence merely establishes a joint entitlement on the part of the Participants as a group. The Participants are collectively granted the right to search or bore for, or explore for, or extract petroleum from, the licenced area. The Licence also provides that where the Licence is held by more than one person, the obligations to be observed and performed under the Licence shall be performed and observed by the Participants jointly and severally\textsuperscript{25}. Hence the Joint Operating Agreement seeks to sever the joint tenancy created by the Licence in so far as the Participants inter se are concerned and in so far as all third parties, other than the Secretary of State for Energy, are concerned\textsuperscript{26}. The position of the Participants in relation to the Permit is the same: they are joint tenants. The same considerations as discussed in relation to the Licence apply to the Permit.

Another way in which the Interest of a Participant can be distinguished from that of a partner in partnership property is that, unlike a partner\textsuperscript{27}, the Participant has certain rights or choses in action represented by the Joint Operating Agreement and related agreements\textsuperscript{28}.

The setting out of the Interests of the Participants also takes into account the situation where the Participants are not the same as the holders of the relevant petroleum title. In Great Britain this situation often arose where the holder of an interest in a Licence sought to pass its economic interest through to an associated party, usually a company incorporated in America. The passing through of the economic interest was done by an illustrative agreement (sometimes also called a pass through agreement) under which the legal interest was held by a United Kingdom resident company whilst the American resident company held the beneficial interest in any production resulting under the Licence. The need for this device arose as a result of regulation 4 of the Petroleum (Production) Regulations 1966 which required applicants for a Licence to be resident citizens of the United Kingdom and colonies or companies incorporated in
the United Kingdom. This requirement was abolished in 1976 in order that the United Kingdom might comply with its obligations not to discriminate against EEC nationals and companies. Coupled with the requirement for applicants for a Licence was also the desire of American companies to be able to retain full freedom to write off expenditure for United States tax purposes.

Where an illustrative agreement has been utilised it is the associated party who will be the Participant - the holder of an Interest. The holder of the interest in the Licence who has passed its economic interest through to the associated party will also be a Participant but with no economic rights or duties under the Joint Operating Agreement whilst the illustrative agreement remains operative: It will not be the holder of an Interest whilst the illustrative agreement remains operative.

In this thesis it will be presumed that the Participants are the same as the holders of the relevant petroleum title.

The Interest of each Participant is subject to adjustment and variation from time to time. The matters giving rise to these alterations are set out in the Joint Operating Agreement and will include such matters as withdrawal, default and assignment.

Some Joint Operating Agreements will provide for a limit below which a Participant’s Interest cannot be reduced without the consent of all of the Participants.

In general terms, the nature of the Interest of a Participant may be said to be both proprietary and contractual. The Interest is proprietary, in so far as it relates to the undivided share as tenant in common in the assets and contractual, in so far as it comprises choses in action relating to management of the Operations and in so far as the right of one Participant as against another Participant is concerned. The dual character of the Interest of a Participant requires the application of the relevant principles of the law of property and the law of contract, to be considered in any analysis of a Joint Operating Agreement and the joint
venture formed thereby and of the interest of a Participant. The consequences of this dual character will be demonstrated later in this thesis, particularly when the assignment of a part or the whole of the interest of a Participant is considered.
FOOTNOTES

1. This is to be contrasted with the situation in Norway where since 1973, unlike in Great Britain and Australia where the participants themselves choose who will join together to apply for a petroleum title, the participants make application for a petroleum title as individuals and thereafter the participants who are to form a joint venture in relation to a particular block are chosen and put together as a group, by the government itself. This has been referred to in Daintith and Willoughby, editors, United Kingdom Oil and Gas Law: 2nd ed. (1984), para. 1-612, footnote 3, and by Tronslin "The Norwegian Petroleum Regime" (1986) lecture delivered at the Centre for Petroleum and Mineral Law Studies, University of Dundee, as a "forced marriage". The policy of the government is not to permit individual participants to join together by their own choice and then apply for a petroleum title.

2. In Great Britain, in offshore areas, a block is the area delineated as such on the reference map deposited at the principal office of the Department of Energy. See regulation 7(2) of the Petroleum (Production) (Seaward Areas) Regulations 1988. Each block is defined by lines of longitude at twelve minute intervals and by lines of latitude at ten minute intervals, giving an area of approximately two hundred to two hundred and fifty square kilometres.

In Australia, in offshore areas, a block is defined by lines of longitude at five minutes, or a multiple of five minute, intervals and by lines of latitude at five minute, or a multiple of five minute, intervals. See sections 17 and 149 of the Petroleum (Submerged Lands) Act 1967 (C'th).


5. Patrick "Joint Application Agreements" (1986) lecture delivered at the Centre for Petroleum and Mineral Law Studies, University of Dundee.


The person who will be operator, if the application is successful, must be named on the application form where there is a joint application for a petroleum title.

The intended percentage Interest of each participant, if the application is successful, must be stated on the application form.

A draft Joint Operating Agreement or, more often than not, an indication of what the agreement will contain, will form part of the joint bidding agreement. Maloney "Off-Shore Mining and Petroleum - Practical Problems" (1981) A.M.P.L.J. 235, 243 suggests that this is rarely the case in Australia.

Britoil 2.1.1; Apea 2.1. See Argyle "Legal Structures for Participation in Mining Projects" (1981) a paper delivered at The Law Society of Western Australia's Mining Law Course 1981, Lecture 5, at p. 18.
14. See Britoil 2.1.1., but subject to the necessary consent of the Secretary of State for Energy. Apea 2.1. expressly excludes the agreement applying to "the production ..., treatment, storage or transportation" of petroleum. These matters will be covered by subsequent agreements in the event that petroleum is discovered and the discovery warrants further attention by the Participants.


18. Britoil 27 (xxix); Apea 1.1. (y)(i).

19. Britoil 3.0 and 27 (xvi) and (xxix); APEA 1.1 (n) and (y)(i). The reason for the reference to "joint undertaking" is to exclude activities that relate to matters of sole risk - See APEA 1.1(n).

20. Britoil 3.0; Apea 1.1 (y)(iii).


32. Britoil 3.0, by implication; Apea 3.2.
33. These matters will be discussed later in this thesis.


CHAPTER IV

THE PETROLEUM TITLE

1. INTRODUCTION

One of the assets in which each Participant has, as a general rule, an undivided share as a tenant in common, is the petroleum title. It is around the petroleum title that the Joint Operating Agreement revolves. It is the main reason that the Participants enter into the Joint Operating Agreement; to exploit the area to which the petroleum title relates for their individual benefit.

The petroleum title, in the case of the Britoil proforma, is the Licence issued by the Secretary of State for Energy to the Participants and, any other Licence issued to the Participants in substitution or partial substitution for the original Licence.

The petroleum title, in the case of the Apea proforma, is the Permit issued by the Joint Authority to the Participants and any variation, amendment, extension or renewal thereof and all petroleum exploration, development, production, transporation and retention tenements granted in substitution thereof or as an adjunct thereto.

2. PROPERTY IN PETROLEUM IN SITU

In order to examine the nature of and the rights of the Participants under a petroleum title, it is first necessary to determine in whom the property in petroleum in situ is vested. After all, if a petroleum title grants to the Participants the exclusive, or virtually exclusive, right to search, bore for and get petroleum within the area to which the petroleum title relates, it is desirable to know in whom the property in the petroleum in situ is vested.
In so far as any rights in petroleum in situ in the offshore area is concerned, the position is governed by Article 2 of the 1958 Geneva Convention on the Continental Shelf and section 1 of the Continental Shelf Act 1965.

By virtue of the 1958 Geneva Convention on the Continental Shelf the Crown has:

"... sovereign rights for the purpose of exploring [the continental shelf proximate to its coast] and exploiting [its] natural resources."9

The sovereign rights are:

"... exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources no one may undertake these activities ... without the express consent of the coastal State."10

This does not mean that the coastal State owns the continental shelf proximate to its coast. The regime relating to the continental shelf cannot be assimilated with territory11. The coastal State merely has an exclusive right to explore and exploit the natural resources of the continental shelf proximate to its coast. The coastal State cannot exercise full governmental powers over the continental shelf proximate to its coast, it can only exercise such powers as the 1958 Geneva Convention on the Continental Shelf permits and as are necessary for the enjoyment of the exclusive right. Thus, though the coastal State does not have ownership of the continental shelf proximate to its coast, it does have rights which are considered to be proprietary in nature12. Hence, the coastal State can pass to the the holder of a petroleum title relating to an area on the continental shelf proximate to its coast, at least, the right to explore for and exploit the natural resources of the continental shelf proximate to its coast that is proprietary in nature13.

The natural resources of the continental shelf proximate to a State's coast referred to "... consist of the mineral and other non-living resources of the sea-bed and subsoil ..."14.
The term "continental shelf" refers:

"(a) to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas;

(b) to the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands."  

In this thesis it is not proposed to consider further the 1958 Geneva Convention on the Continental Shelf or, the numerous issues that are raised thereby in relation to the application thereof or the physical extent of the continental shelf proximate to the United Kingdom and Australia respectively. These, and similar issues, are dealt with adequately elsewhere.

To make the provisions of the 1958 Geneva Convention on the Continental Shelf operative in domestic, as opposed to international, law and thereby binding upon and in so doing affecting the rights and freedoms of the subjects of the United Kingdom or Australia, as the case may be, it was necessary for the enactment of specific legislation transforming the provisions of the treaty into municipal law. This objective was addressed:

1. in the case of Great Britain, by the Continental Shelf Act 1964 (UK) which sought to vest in the Crown:

"Any rights exercisable by the United Kingdom outside territorial waters with respect to the sea-bed and subsoil and their natural resources ..."  

Section 1(3) of the Continental Shelf Act 1964 (UK) when read in conjunction with section 1(8) of the Continental Shelf Act 1964 (UK) and section 1(2) of the Petroleum (Production) Act 1934 (UK) makes it clear that the "natural resources" referred to in section 1(1) of the Continental Shelf Act 1964 (UK) include oil and natural gas. Furthermore, the definition of the term "natural resources" in the 1958 Geneva Convention on the Continental Shelf would appear to include oil and natural gas. In the absence of a
definition of the term "natural resources" in the law of the United
Kingdom that is inconsistent with what has been submitted, it is
further submitted that the courts of England and Scotland would give
to that term under the Continental Shelf Act 1964 (UK) a meaning
consistent to that set out in the 1958 Geneva Convention on the
Continental Shelf;22

2. in the case of Australia, by the Seas and Submerged Lands Act
1973 (C'th) which, inter alia, declared:-

"that the sovereign rights of Australia as a coastal State in
respect of the continental shelf of Australia, for the purpose
of exploring it and exploiting its natural resources, are
vested in and exerciseable by the Crown in right of the
Commonwealth"23.

The Australian States challenged the validity of the Seas and
Submerged Lands Act 1973 (C'th). The High Court of Australia in New
South Wales v Commonwealth24 confirmed, inter alia, the
jurisdiction of the Commonwealth Parliament over petroleum resources
in the offshore area when all members of the High Court of Australia
supported the declaration of Commonwealth "sovereign rights" over the
natural resources in the offshore area. The High Court of Australia
held that the Submerged Lands Act 1973 (C'th) was, inter alia, an
effective implementation of the 1958 Geneva Convention on the
Continental Shelf.

Although the Seas and Submerged Lands Act 1973 (C'th) does not
state what is meant by the term "natural resources", the definition
of the term in the 1958 Geneva Convention on the Continental Shelf
would appear to include oil and natural gas. Furthermore, as with
the courts of England and Scotland, courts of Australia would, in the
absence of a definition of the term "natural resources" in the law of
Australia that is inconsistent with what has been submitted, give to
that term, under the Seas and Submerged Lands Act 1973 (C'th), a
meaning consistent to that set out in the 1958 Geneva Convention on
the Continental Shelf25.
In June 1979, agreement was reached at a Premiers' Conference to establish a joint Commonwealth/State regime for, inter alia, the petroleum resources of the offshore area, with Commonwealth responsibility for policy issues and State responsibility for administrative arrangements. The relevant legislation is the Commonwealth legislation; day-to-day administration is vested in the hands of the Designated Authority and the more significant powers are vested in the Joint Authority. The agreement does not impinge upon the fact that the Commonwealth has jurisdiction over petroleum resources in the offshore area.

The question may be asked as to what is the nature and extent of the rights exercisable by the United Kingdom referred to in section 1(1) of the Continental Shelf Act 1964 (UK) and, by Australia, referred to in Section 11 of the Seas and Submerged Lands Act 1973 (C'th).

Neither the Continental Shelf Act 1964 (UK) nor the Seas and Submerged Lands Act 1973 (C'th) of itself provides the answer and, as such, recourse must be had to conventional and customary international law. This leads back to Article 2(1) of the 1958 Geneva Convention on the Continental Shelf where the rights are described as "... sovereign rights for the purpose of exploring ... and exploiting" the natural resources of the continental shelf proximate to the coast of the State. As is evident from the Continental Shelf Act 1964 (UK) and the Seas and Submerged Lands Act 1973 (C'th), these rights are not assimilated to State territory, in that it does not mean that the coastal State "owns" the continental shelf proximate to its coast or the natural resources thereof. What, then, are these rights? Are they of a proprietary nature? Do they confer, inter alia, ownership of petroleum in situ in the offshore area in the Crown?

It is not proposed in this thesis to consider the conflicting arguments advanced in answer of the questions raised. They have been adequately addressed elsewhere. To the extent that there has been a judicial pronouncement on the underlying issue one is left with the obiter dictum of Slade J. in Earl of Lonsdale v Attorney General and the dicta in New South Wales v Commonwealth.
Slade J. said: -

"These obiter conclusions as to the interpretation of these two Acts [Petroleum (Production) Act 1934 (UK) and Continental Shelf Act 1964 (UK)] may be thought to invoke certain anomalies in that, if correct, they mean that the Crown can claim a statutory title to oil and natural gas situated beneath the continental shelf, ..." 34

The effect of this dictum, in the context of the decision, was to hold the view that section 1(1) of the Continental Shelf Act 1964 (UK) expropriated to the Crown any rights in petroleum in situ in the offshore area which might previously have been vested in private hands 35. It is submitted that to have advanced such a view Slade J. must have considered that the rights were of a proprietary nature.

In *New South Wales v Commonwealth* 36 Barwick C.J. said: -

"Sovereign rights at least imply exclusive and paramount rights to exploit together with all the power necessary to secure the principal rights." 37, and

Stephen J. said: -

"... their subject matter [Division 2 of the Seas and Submerged Lands Act 1973 (C'th)] is not proprietorship inconsistent with State interests, nor is it even sovereignty, but sovereign rights for specific purposes, the exploration and exploitation of natural resources." 38

Hence, the High Court of Australia saw the position as being one of sovereign rights rather than proprietary rights 39.

There is strong support for the view that the rights are of a proprietary nature to be found in the writing of the commentators 40.

The argument runs that petroleum in situ in the offshore area can no longer be regarded as res nullius, for a determinate person, the Crown, has, in the case of Great Britain, by virtue of section 1(1) of the Continental Shelf Act 1964 (UK), and, in the case of Australia, by virtue of Section 11 of the Seas and Submerged Lands Act 1973 (C'th), the right to reduce that petroleum into possession and the right to exclude any other person from so doing. These rights are said to equate with proprietary rights. It is conceded that the Crown may not thereby have gained full ownership of petroleum in situ in the offshore area.
nevertheless it is argued that the Crown does thereby gain a limited or qualified form of ownership thereof. It has been suggested that the nearest analogy available in the United Kingdom and Australia would be the profit a' prendre of English and Australian law and the lease of mineral rights in Scottish law.

From the point of view of this thesis, the lack of certainty as to the nature of the Crown's right to petroleum in situ in the offshore area is not of major importance. It is sufficient that the Crown has the right to reduce such petroleum into possession and the right to exclude other persons from so doing and thereby has the right to delegate to other persons the right to explore for and to exploit petroleum in situ in the offshore area through, in the current situation, a licence regime.

3. THE PETROLEUM TITLES AND THE RIGHTS THEY CONFER

3.1 Great Britain

There are, at present, two types of petroleum licence that can be granted by the Secretary of State for Energy in relation to petroleum exploration in the offshore area. The petroleum licences are:

(i) an exploration licence which incorporates the model clauses set out in Schedule 5 to the Petroleum (Production) (Seaward Areas) Regulations 1988, unless modified or excluded by the Secretary of State for Energy. This licence permits the licencee "to search for petroleum in the strata of the islands and in the sea bed and subsoil", which includes the right to prospect, carry out geological surveys and drill to a depth not exceeding three hundred and fifty metres for the purpose of obtaining geological information but, does not include any right to get petroleum.

An exploration licence permits the licensee to locate likely petroleum-bearing areas only. It does not permit the licensee to discover and delimit reservoirs by the drilling of exploration and appraisal wells. To do this the licensee requires a Licence.
An exploration licence is granted at large allowing exploration over the whole area, with the exception of blocks held under a Licence.\(^49\)

Possession of an exploration licence does not give the licencee any preferential right to a Licence if the licencee is successful in discovering petroleum under the exploration licence.\(^50\)

Due, in the main, to the lack of exclusivity of an exploration licence, there has been a distinct lack of interest in seeking such a licence;

(ii) a Licence\(^51\) which incorporates the model clauses set out in Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988\(^52\) unless modified or excluded by the Secretary of State for Energy.\(^53\) This exclusive licence permits the licencee "... to search and bore for, and get, petroleum in the sea-bed and subsoil ..." within the area to which the Licence relates.\(^54\)

The overall licencing regime has been amended, modified or varied time to time. It is not proposed in this thesis to consider the earlier licencing regime in any detail or the transition from one licencing regime to another. It will suffice in this thesis merely to point out that, depending upon the time at which the application was made for the grant of a Licence, a different set of model clauses may apply to the Licence.

### 3.2 Australia

There are at present a number of types of petroleum licences that can be granted by the relevant Joint Authority in relation to petroleum exploration in the offshore area. There is nothing equivalent to the model clauses used in Great Britain. The terms upon which a petroleum licence is issued will be contained in the Petroleum (Submerged Lands) Act 1967 (C'th) on the petroleum licence. The petroleum licences are:-
(i) a Permit. This Permit permits the permittee "to explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose, in the permit area".

A Permit allows the permittee to locate likely petroleum-bearing areas only. This includes the right to drill wells for exploratory purposes. It does not allow the permittee to discover and delimit reservoirs by the drilling of exploration and appraisal of wells.

Commercial production is prohibited and property in any petroleum within the area to which the Permit relates does not pass to a permitee until production. However, there is a right given to a permitee to obtain a production licence upon discovery of petroleum within the area to which the Permit relates.

The exploratory rights acquired under a Permit are virtually exclusive, although the holder of an access authority may undertake limited operations within the area to which the Permit relates;

(ii) a special prospecting authority. This authority allows the authorised person to carry on the "exploration operation" specified in the authority. It has been suggested that this authority may be used to permit prospective bidders for an advertised Permit or production licence to evaluate the potential of the area to which the authority relates before submissions of tenders. It does not authorise the drilling of a well;

(iii) an access authority. This authority permits a permittee or the holder of a production licence to conduct such "exploration operations" on an area adjacent to the area of the relevant Permit or production licence, as the case may be, as are specified in the authority. It has been suggested that this authority may be used to permit the completion of a grid pattern of seismic lines, extending beyond the boundaries of the area to which a Permit relates, or to permit the holder of a production licence to survey a
pipeline route over another person's Permit. It does not authorise the drilling of a well;

(iv) the written consent of the relevant Designated Authority to petroleum exploration operations conducted in the course of scientific investigations. This provision has been used to authorise preliminary exploration such as aeromagnetics and seismic studies.

4. THE APPLICATION FOR AND GRANTING OF PETROLEUM TITLES

The purpose of the licencing regimes that have been established in Great Britain and Australia is to temporarily transfer, to private individuals, on a long-term contractual basis, the Crown's right, over a defined period and area, to explore for and exploit petroleum in situ. On the one hand, under the licencing regimes, the holder of a petroleum title attains title to petroleum when it is reduced into possession, usually at the well-head. On the other hand, the holder of a petroleum title pays to the Crown certain fees together with a royalty on production and accepts a wide range of obligations as to the way in which operations are conducted under the petroleum title.

4.1 Great Britain

The Secretary of State for Energy is empowered by the Petroleum (Production) Act 1934 (UK) to grant "licences to search and bore for and get petroleum". The provision of the Petroleum (Production) Act 1934 (UK) empowering the Secretary of State for Energy to grant licences has been extended to areas of the United Kingdom continental shelf, designated under the Continental Shelf Act 1964 (UK) by the Continental Shelf Act 1964 (UK), so that it applies in relation to petroleum in situ in the designated areas as it would apply to petroleum in situ in Great Britain.

The Secretary of State for Energy is required to make regulations in respect of licences to be granted under the Petroleum (Production) Act 1934 (UK), which regulations may vary with the different types of licences, dealing with such matters, inter alia, as the manner in which
applications may be made\textsuperscript{74}, whom may make application for a licence \textsuperscript{75}, and the model clauses which shall, unless the Secretary of State for Energy thinks fit to modify or vary them in a particular case, be incorporated in a licence \textsuperscript{76}. These regulations have been made and are evidenced, in the current licencing regime, by the Petroleum (Production) (Landward Areas) Regulations 1984 and the Petroleum (Production) (Seaward Areas) Regulations 1988. This thesis is only concerned with the Petroleum (Production) (Seaward Areas) Regulations 1988.

The Petroleum (Production) (Seaward Areas) Regulations 1988 provide that any person may apply for a Licence\textsuperscript{77} by making application either in pursuance of an invitation from the Secretary of State for Energy or on its own initiative.

The Secretary of State for Energy will, subject to an exception, always invite applications for Licences\textsuperscript{78}. The exception\textsuperscript{79} is designed to facilitate the financing of field development by granting a separate Licence, extending only to the area covered by the field, and to permit Licences revoked on the default of one participant to a joint venture to be re-granted, for example, to the non-defaulting participants.

The procedure for the application for and the granting of a Licence, where applications are invited by the Secretary of State for Energy, is not at all complex. It is not proposed in this thesis to discuss the procedure in detail, as much of the process is little more than mechanical in nature. It is usually the case that by the time the participants to a joint venture have entered into a Joint Operating Agreement in relation to the Exploration Phase, a Licence will have been granted by the Secretary of State for Energy. Therefore, it is proposed to outline very briefly the procedure and in general terms only, where it has a bearing on the Exploration Phase. The procedure involves the holding of licencing rounds; a licencing round is commenced by the Secretary of State for Energy causing to be published in the London, Edinburgh and Belfast Gazettes, a notice inviting applications Licences\textsuperscript{80} for a number of designated blocks.
To date, eleven licencing rounds have been conducted. The Gazette notice will specify the method or methods that will be employed in allocating the blocks. The method or methods are not laid down by legislation or regulation. They are chosen at will by the Secretary of State for Energy. To date, three methods of allocation have been employed. These are:

(i) discretionary allocation. This is the method that has been employed in all but a few cases for the award of Licences. The term "discretionary" refers to the method of allocation in which no single criterion is indicated as being a criterion which would be determinative of the choice to be made by the Secretary of State for Energy where the choice is between competing applications. What has occurred, when this method has been employed, is for the Secretary of State for Energy to indicate informally, from time to time, a number of criteria which will be taken into account in reaching such a decision. These criteria, being non-statutory in character, do not have any legal force, but they do play a major part in evaluating competing applications.

As has been indicated earlier in this thesis, the criteria have led to the formation of joint ventures between groups of companies in such a manner as to satisfy these informal criteria, in so far as the companies can or are prepared to do. However, the approach to satisfying the criteria is somewhat haphazard, as the process of applying them so as to arrive at the allocation of a Licence for a specific block to one of a number of competing applications, is carried out entirely in private by the Department of Energy through private negotiations with the applicants. Due to the privacy of the Department of Energy's considerations and negotiations and the fact that reasons are not given for the granting or refusal of an application, it is difficult for potential applicants to assess the weight that will be given to each criterion; hence, the emphasis in compiling a joint venture grouping to satisfy the criteria.
It is considered correct to speak in terms of the "weight" to be given to each of the criteria as what little is known about the process of applying the criteria is that a number of quantitative tests, in which the applicant must show a certain minimum standard, are applied by the Department of Energy before an application will be seriously considered. In 1974 the Department of Energy explained\(^{85}\) that a measured weight factor was applied to each criterion. The degree to which an applicant met each criterion aided the selection of who would, if anyone would, be the successful applicant in respect of each particular block for which applications had been sought. However, the practical working of this rating and weighting system was not, and has yet to be, explained.

It is not just the criteria that aid in determining the successful applicant, if there is to be one. The work programmes proposed by the applicants also play a major role in the process of determination.

In all licencing rounds, stress has been placed on the continuing need for expeditious, thorough and efficient exploration. It is this need that has given rise to negotiations between the Department of Energy and applicants on the work programmes the applicants will undertake if granted a Licence. The work programmes cover the amount of surveying the applicant will undertake and the number of wells the applicant will drill under the terms of the Licence. Where a Licence is granted, the work programme negotiated by the applicant with the Department of Energy will be incorporated into the terms of the Licence and the holder of the Licence will be under a contractual obligation to carry out the work programme during the initial term of the Licence;

(ii) discretionary allocation with fixed cash premium. This method was implemented in the seventh licencing round. Applications for Licences were invited for blocks which the applicants themselves could nominate from within defined areas. For the privilege of this freedom of choosing the blocks which would be licenced and of being allocated a Licence on this basis, the successful applicants were
required to pay a fixed non-recurrent premium of five million pounds per block on allotment, in addition to the usual fees, royalties and rentals which relate to licenced blocks.\textsuperscript{86}

Notwithstanding the premium that was to be paid, the allocation process followed the discretionary allocation method discussed above, other than that work programmes were not required.

The legislative power to seek the payment of a fixed cash premium on the grant of a Licence falls within the provision that a licence "shall be granted for such consideration (whether by way of royalty or otherwise) as the Secretary of State [for Energy] with the consent of the Treasury may determine ...."\textsuperscript{87} This provision is extended to areas of the United Kingdom continental shelf designated under the Continental Shelf Act 1964 (UK)\textsuperscript{88} by the Continental Shelf Act 1964 (UK)\textsuperscript{89}, so that it applies in relation to petroleum in situ in the designated areas as it would apply to petroleum in situ in Great Britain;

(iii) variable cash tender. This method was implemented in the fourth, eighth and ninth licencing rounds. Applicants were invited to bid for blocks, in as much as they would agree to pay a cash premium, which was not fixed but nominated by them, in the event that they were granted a Licence in respect of the block or any one or more of the blocks bid for.

Where this method of allocation was used, work programmes were not required and the criteria did not apply. However, the Secretary of State for Energy retained his discretion in the allocation process, by reserving the right to reject the highest, or any, bid for a block.

The legislative power to seek bids for the grant of a licence is likewise to be found in the Petroleum (Production) Act 1934 (UK)\textsuperscript{90}. This provision is similarly extended to areas of the United Kingdom continental shelf\textsuperscript{91}. 
Once the Secretary of State for Energy has issued the invitation to apply for a Licence for one or more of the blocks designated in the Gazette notice, an applicant is required to lodge its application within the period specified in the notice. The period specified is usually in the region of two months.

The application, which must be in writing, is required to be in or substantially in the form specified and required to be delivered to the Department of Energy, accompanied by the appropriate application fee and such supporting evidence as is required by, and is appropriate to, an application in the form specified. Should any of the information supplied by the applicant change, during the period after the making of the application for Licence but before the Secretary of State for Energy either grants or refuses the application, the applicant must forthwith give written notice to the Secretary of State for Energy setting out particulars of the change.

After the closing date for applications, all applications received are considered by the Department of Energy which arranges for a presentation by the applicants under consideration and negotiates with them an appropriate work programme. At the conclusion of the process the Secretary of State for Energy then decides and announces the awards to be made.

4.2 Australia

The relevant Joint Authority is empowered by the Petroleum (Submerged Lands) Act 1967 (C'th) to grant Permits.

Save where the method to be employed in allocating a block or blocks is to be the cash bidding method, the Designated Authority must always, subject to a number of exceptions, invite applications for Permits. The invitation may be initiated by the Designated Authority on its own undertaking or at the request of the relevant Commonwealth Minister. A person cannot make an application for and be granted a Permit on its own initiative, except where the Designated Authority has invited applications
for the granting by the Joint Authority of a Permit in respect of a block or blocks or, in respect of a block or blocks that have been surrendered, cancelled or determined and no application is made or, after considering the applications, a Permit is not granted for any of those applications in respect of the designated block or all or some of the designated blocks. In such circumstances, the Designated Authority may cause a notice to be published, in the Commonwealth of Australia Gazette advising that a Permit has not been granted in respect of the designated block or all or some of the designated blocks and thereafter, at any time, may receive an application for the grant by the Joint Authority of a Permit in respect thereof, without further notice or invitation.

Where the method to be employed in allocating a block or blocks is to be the cash bidding method, it is the Joint Authority that must invite applications for the Permits.

The procedure for applying for the granting of a Permit where applications are invited by the Designated Authority or Joint Authority, as the case may be, is not complex. It is not proposed in this thesis to discuss the procedure in detail, since, as in Great Britain, much of the process is nothing more than mechanical in nature. It is usually the case that by the time the participants to a joint venture have entered into a Joint Operating Agreement in relation to the Exploration Phase, a Permit will have been granted by the Joint Authority. Therefore it is proposed to outline, very briefly, the procedure and in general terms only, where it has a bearing on the Exploration Phase.

The procedure is commenced by the Designated Authority or Joint Authority causing to be published, in the Commonwealth of Australia Gazette, a notice inviting applications for the grant by the Joint Authority of a Permit or Permits for a number of designated blocks.

The Commonwealth of Australia Gazette notice will specify where the method to be employed in allocating a block or blocks is to be the cash bidding method. In such circumstances, the Commonwealth of Australia
Gazette notice will, in addition to specifying the period as mentioned below, specify whether the Permit or Permits to be granted will be able to be renewed; will contain a summary of the conditions subject to which the Permit is or Permits are to be granted and specify the matters that the Joint Authority will take into account in determining whether or not to reject an application.

An example of the use of the cash bidding method commenced on November 29, 1985, when five blocks in the Commonwealth adjacent area of Ashmore and Cartier Islands were gazetted for application, employing the cash bidding method. The Commonwealth of Australia Gazette notice specified that:

(i) an applicant was required to lodge notice of its application on or before February 28, 1986;

(ii) any Permit or Permits to be granted would be for one six-year period and would not be able to be renewed; and

(iii) in determining whether to reject an application the matters that the Joint Authority would take into account include:

(a) whether the applicant had sufficient technical and financial resources to effectively carry out exploration operations in the area to which any Permit would relate; and

(b) whether the bids received from applicants were inadequate because of insufficient competition, for example, where there has been collusive bidding.

The Commonwealth of Australia Gazette notice will specify a period within which an applicant is required to lodge the notice of its application.

The application, which must be in writing, is required to be in accordance with an approved form, made in an approved manner, in respect of not more than a specified number of blocks or, in the case
where the block or blocks to be allocated are the subject of the cash bidding method, be in respect of that block or all such blocks\textsuperscript{119}, accompanied by particulars of the proposals of the applicant for work and expenditure in respect of the blocks to which the application relates\textsuperscript{120}, the technical qualifications\textsuperscript{121}, the technical advice\textsuperscript{122} and the financial resources available to the applicant\textsuperscript{123}, and accompanied by the appropriate application fee\textsuperscript{124} and may set out such other matters as the applicant wishes to be considered\textsuperscript{125}. Where the method to be employed in allocating a block or blocks is to be the cash bidding method, the application is required to specify the amount the applicant is prepared to pay, in a single payment, in respect of the grant of a Permit\textsuperscript{126}. The amount is to be in addition to the prescribed fee\textsuperscript{127}. However, in such circumstances, the application is not required to be accompanied by particulars of the proposals of the applicant for work and expenditure in respect of the block or blocks. Where the application is in respect of a block or blocks that have been surrendered, cancelled or determined, the application is required to specify the amount the applicant is prepared to pay, but not necessarily in a single payment, in respect of the grant of a Permit\textsuperscript{128}. The amount is to be in addition to the prescribed fee\textsuperscript{129}. Furthermore, the application must be accompanied by a deposit of the amount specified\textsuperscript{130}.

The Designated Authority may, at any time, require the applicant to furnish, within a stated period of time, further information in writing in connection with the application\textsuperscript{131}.

After the closing date for applications, the Joint Authority has the discretion to reject all or any of the applications for the grant of a Permit\textsuperscript{132}. There are no grounds laid down in the Petroleum (Submerged Lands) Act 1967 (C'th) upon which the Joint Authority may exercise its discretion to reject an application. However, it has been suggested that the Joint Authority will exercise its discretion to reject an application if it is not satisfied with the information accompanying the application in regard to the proposal for work and expenditure, technical qualifications or advice on the financial resources available to the applicant\textsuperscript{133}.
If the Joint Authority reject all but one of the applications for the grant of a Permit, the Joint Authority may advise the applicant, in writing, that it is prepared to grant to the applicant a Permit in respect of a designated block or blocks\(^{134}\). Thus the Joint Authority would appear to be at liberty to select the successful candidate. Where two or more applications remain unrejected, as may be the case where the method employed in allocating a block or blocks in the cash bidding method or where the applications are in respect of a block or blocks that have been surrendered, cancelled or determined, the Joint Authority may advise the applicant whom has specified the higher amount\(^{135}\), in writing, that it is prepared to grant to the applicant a Permit in respect of a designated block or blocks\(^{136}\).

In either event, where the Joint Authority advises the applicant that it is prepared to grant to the applicant a Permit in respect of a designated block or blocks, the Joint Authority must also set out, in the written advice to the applicant, a summary of the conditions subject to which the Permit is to be granted\(^{137}\) and a statement to the effect that the application will lapse if the applicant does not make a request to the Joint Authority in respect of the grant of the Permit\(^{138}\) and does not lodge with the Designated Authority the security that the applicant is required to lodge as security for compliance with the conditions and the Petroleum (Submerged Lands) Act 1967 (C'th) and any regulations made thereunder\(^{139}\) (advice of such requirement to be set out in the written advice)\(^{140}\) and or pay the amount\(^{141}\) or the balance of the of the amount\(^{142}\) to be paid in respect of the grant of the Permit to the applicant, as the case may be.

5. **ACCEPTANCE OF AN OFFER OF A PETROLEUM TITLE**

5.1 **Great Britain**

Where an applicant is offered a Licence by the Secretary of State for Energy, such Licence may be offered on the condition that within a specified period of time from the date of the offer, the applicant, inter alia:
(i) confirms acceptance of a work programme proposed by the Secretary of State for Energy following discussion with the applicant; and

(ii) remits to the Secretary of State for Energy the initial fee.

5.2 Australia

Where an applicant is advised by the Joint Authority that it is prepared to grant to the applicant a Permit in respect of a designated block or blocks, the applicant may, within a stated period of time, by written notice to the Designated Authority, request the Joint Authority to grant to it the Permit and lodge with the Designated Authority the security that the applicant is required to lodge and or pay the amount or the balance of the amount to be paid in respect of the grant of the Permit to the applicant, as the case may be.

Once the applicant has made its request to the Joint Authority and has otherwise complied with the procedure mentioned above, the Joint Authority is required to grant it the Permit.

If the applicant does not make a request to the Joint Authority or otherwise fails to comply with the procedure mentioned above, its application lapses.

6. LEGAL CHARACTERISTICS OF PETROLEUM TITLES

6.1 Great Britain

A Licence is contractual in form. It is executed as a deed by the Secretary of State for Energy and the Participants. Its terms contain many elements that are of a commercial nature. The model clauses, although regulatory, in that they are in effect determined by Parliament, are nothing more than model clauses until, by the terms of the Licence
contract, they are incorporated into the Licence and become Licence obligations\textsuperscript{151}. Prior to this the model clauses have no legal force\textsuperscript{152}. The substance of a Licence is also contractual: valuable rights to the exploitation of property are given in return for payment\textsuperscript{153}.

A Licence is also regulatory in nature. The issue of a Licence is regulated, the model clauses to be incorporated into a Licence are determined by Parliament, and the Secretary of State for Energy has the power to direct certain of the activities that may be taken under the Licence by the Participants\textsuperscript{154}. But, once granted, the Licence stands on its own as a contract between the Crown and the Participants.

It may, therefore, be said that a Licence is of a dual character: it is both contractual and regulatory\textsuperscript{155}.

It is of interest to note that in Inland Revenue Commissioners v Mobil North Sea Ltd.\textsuperscript{156} Harman J. was of the view that a Licence was not within the meaning of the term "contract" as used in s. 111(7) of the Finance Act 1981.

6.2 Australia

Although there has been no judicial consideration of the question by the courts of Australia\textsuperscript{157}, it is submitted that a Permit is statutory rather than contractual in nature\textsuperscript{158}. One commentator, Carr\textsuperscript{159}, has based his view to this effect upon the absence of satisfaction of the traditional tests for determining whether a contract comes into existence, arguing that:

(i) there is no offer made which is accepted, but rather the exercise of a statutory discretion in favour of an applicant;

(ii) there may be consideration for the obligations accepted by the applicant and the Joint Authority; and
(iii) it is doubtful whether the applicant and the Joint Authority intend to create legal relations and make a contract as the rights of the applicant and the Joint Authority are protected by statute, which means that they have no need to have recourse to the law of contract. The question, therefore, of contractual remedies does not arise.

The majority of commentators have based their view upon that expressed by Crommelin. Crommelin's view is that the legal characteristics of a Permit is determined by interpreting the relevant provision of the Petroleum (Submerged Lands) Act 1987 (C'th) and not by considering the form of the Permit. A consideration of the relevant provisions shows that they provide an extensive statutory framework of rights and obligations, coupled with the power to award such rights and obligations in the form of a Permit. Therefore, Crommelin argues that the ordinary meaning of the Petroleum (Submerged Lands) Act 1987 (C'th) would seem to be that the rights and obligations are statutory rather than contractual in nature.

7. THE NATURE OF INTERESTS UNDER THE PETROLEUM TITLE

The nature and extent of the right that the Crown possesses in petroleum in situ has been discussed above. It was submitted that the Crown possesses rights of a proprietary nature in petroleum in situ and that the nearest analogy would appear to be the mining lease in Scotland and the profit à pendre in England and Australia.

7.1 Great Britain

What then of the nature of the interest that the Participants obtain under a Licence? The Participants do not, by the Licence or otherwise, gain property in the petroleum in situ. Property in the petroleum is obtained by the Participants when the petroleum is reduced into possession pursuant to the terms of the Licence usually, at the well-head.

The operative words of a Licence, insofar as the Participants are concerned, are that the holder of the Licence has the:
"... EXCLUSIVE LICENCE AND LIBERTY during the continuance of this licence and subject to the provisions hereof to search and bore for petroleum, and get petroleum."166

This would appear to confer upon the Participants an exclusive licence (to engage in activities in the area to which the Licence relates which would otherwise infringe the Crown’s exclusive privilege of exploration and exploitation) coupled with a grant (of all petroleum which the Participants may get under the Licence)167.

Hence the Licence is said to equate, in so far as the Participants are concerned, with a licence coupled with a grant and as such, closely resembles the mining lease in Scotland and the profit à prendre in England168. This confers the right to take the produce of another's land. However, the Licence goes further than the mining lease in Scotland and the profit à prendre in England, in that it is also a right to exhaust another's property, rather than merely use it.

It follows that the exclusive right to search and bore for, and get, petroleum which is conferred by a Licence, would be a real right in Scotland or a proprietary right in England. Consequently, the Participants may, for example, act directly to restrain any unlicenced drilling or other exploratory activity in the area to which the Licence relates or, any unlicenced or unlawful activity outside that area which has the effect of diminishing in value the Participants’ interest169.

7.2 Australia

The starting point for considering the nature of the interest that the Participants obtain under the Permit, is the same in Australia as it is in Great Britain: the Participants do not, by the Permit or otherwise, obtain property in petroleum in situ. Property in petroleum is obtained by the Participants, upon recovery of any petroleum170.

The operative words of the Petroleum (Submerged Lands) Act 1976 (C'th), in so far as the Participants are concerned, are that:-
"A Permit, while it remains in force, authorizes the permitee, subject to this Act and the regulations and in accordance with the conditions to which the permit is subject, to explore for petroleum, and to carry on such operations and execute such works as are necessary for that purpose ..." 171

As has been pointed out above, a Permit confers on the Participants a virtually exclusive right to conduct exploratory operations within the area to which it relates. In addition, a Permit confers on the Participants a non-exclusive right of access to the area to which it relates and a right to apply for and obtain a production licence in respect of a discovery of petroleum within the area to which the permit relates 172. Whilst the right to obtain a production licence is significant, statutuory and extremely valuable rights it should also be recognised that a Permit does not confer on the Participants a right to recover petroleum 173. What then, is the nature of the interest conferred on Participants by the Permit?

There has been no judicial consideration by the courts of Australia of the question which raises the issue of whether a Permit is proprietory and, if it is, what form of property it is 174. Although it is said that the question raises such an issue, the view of a number of commentators 175 is that a Permit, being statutory in nature, bears little or no relationship to the forms of proprietory interests recognised by common law and, as such, rather than seeking to characterize the interest that the Participants obtain under the Permit in common law terms, any consideration of the question should involve matters of statutory interpretation. Nevertheless, courts of Australia have tended, in similar circumstances, to turn to the common law forms of proprietory interest and classify the interest before them accordingly 176. Furthermore, a number of the commentators have tended to proceed to look at decisions of courts of Australia in cases involving mineral titles, on the basis that such decisions may give some indication of how the courts of Australia would answer the question 177.

It is thought, by the majority of commentators and, it is submitted, correctly so, that the nature of the interest that the Participants obtain under the Permit is proprietary 178. However, the issue of what form of
property the interest is, is not clearly answered by those commentators. It is difficult to identify a common law interest that corresponds with the interest that Participants obtain under the Permit. It does not correspond with a mere or bare licence, easement, lease, or profit à prendre.

In view of the difficulty in identifying the common law interest that corresponds with the interest that the Participants obtain under the Permit, there have been calls for the courts of Australia to adopt a more flexible approach and recognise a new category of proprietary interest outside the forms of proprietary interest recognised by the common law, for instance, an irrevocable licence, proprietary in nature. If such were to be the case, the interest that the Participants obtain under the Permit would be seen as a licence revocable only in accordance with the Petroleum (Submerged Lands) Act 1967 (C'th).

8. THE LAW GOVERNING THE PETROLEUM TITLE

8.1 Great Britain

In practice, the question of what law, Scottish or English, govern a particular Licence, is of limited importance, in that the rules of contract which are relevant to the Licence in both legal regimes are in most respects the same. What differences there are, are not likely to create major difficulties within the Licence framework.

Where difficulties do arise and it is necessary to determine the law governing the Licence, recourse to the model clauses will not alone provide the answer. The model clauses do not contain an express choice of governing law. Turning then to the rules of conflicts of law relating to the governing law of contracts, the position is the same in both English and Scottish law: where the participants have made no express choice of governing law, the contract will be governed by the law impliedly chosen, or, failing an implied choice, by the system of law with which the contract has the closest connection.
8.2 **Australia**

The question of what law governs a particular Permit is not an issue. Each Permit is issued under the Petroleum (Submerged Lands) Act 1967 (C'th) and as such it is the interpretation of that Act, by courts of Australia exercising federal jurisdiction, which governs the Permit.


2. The licencing regime in the United Kingdom is now administered by the Secretary of State for Energy, through the Department of Energy. See The Secretary of State (New Departments) Order 1974, S.I. 1974 No. 692.


4. See, for example, sections 22(1), 22A(1), 22B(1), 23(1) and 27 of the Petroleum (Submerged Lands) Act 1967 (C'th).

5. APEA 1.1 (cc).

6. APEA 1.1 (gg).


8. In the case of Australia, the Crown means the Crown in right of the Commonwealth of Australia. See, for example, New South Wales v Commonwealth [1975-6] 8 A.L.R. 1, 9, 27 and 112.


16. Likewise, it is not proposed to consider the 1982 United Nations Convention on the Law of the Sea.


19. Section 1(1) of the Continental Shelf Act 1964. There is an exception set out in section 1(1) in relation to coal, which is reserved to the National Coal Board by section 1(2).


25. See in New South Wales v Commonwealth [1975-6] 8 A.L.R. 1, 8 the discussion on the interpretation of the term "sovereign rights" by Barwick C.J.

26. Compare this with the situation in Norway with the Norwegian Royal Decree of May 31, 1963.


28. Section 1 of the Continental Shelf Act 1964 (UK).


34. [1982] 3 All E.R. 579, 627.


44. Regulation 4(b) of the Petroleum (Production) (Seaward Areas) Regulations 1988.


46. Regulations 3(1) and 8(1) of the Petroleum (Production) (Seaward Areas) Regulations 1988.

47. Model clause 2 of Schedule 5 to the Petroleum (Production) (Seaward Areas) Regulations 1988.


49. Model clause 2 of Schedule 5 to the Petroleum (Production) (Seaward Areas) Regulations 1988.


51. Regulation 4(a) of the Petroleum (Production) (Seaward Areas) Regulations 1988.

52. Regulation 8(2)(a) of the Petroleum (Production) (Seaward Areas) Regulations 1988.

53. Regulations 3(1) and 8(1) of the Petroleum (Production) (Seaward Areas) Regulations 1988.

55. Section 28 of the Petroleum (Submerged Lands) Act 1967 (C'th).

56. Section 39 of the Petroleum (Submerged Lands) Act 1967 (C'th).

57. Section 127 of the Petroleum (Submerged Lands) Act 1967 (C'th).

58. Sections 43 and 44 of the Petroleum (Submerged Lands) Act 1967 (C'th).

59. Section 112 of the Petroleum (Submerged Lands) Act 1967 (C'th).

60. Section 111(4) of the Petroleum (Submerged Lands) Act 1967 (C'th).


62. Section 111(5) of the Petroleum (Submerged Lands) Act 1967 (C'th).

63. Sections 112(1) and 112(4) of the Petroleum (Submerged Lands) Act 1967 (C'th).


65. Section 112(5) of the Petroleum (Submerged Lands) Act 1967 (C'th).

66. Section 123 of the Petroleum (Submerged Lands) Act 1967 (C'th).


70. Section 2(1) of the Petroleum (Production) Act 1934 (UK).

71. Section 1(7) of the Continental Shelf Act 1964 (UK).

72. Section 1(3) of the Continental Shelf Act 1964 (UK). The effect of section 1(3) of the Continental Shelf Act 1964 (UK) is discussed to Bentham "Legal and Regulatory Developments Affecting the United Kingdom Oil and Gas Industry" in Bentham, editor, First Annual UK Oil and Gas Accounting Conference (1985) 1, 5.


74. Section 6(1)(a) of the Petroleum (Production) Act 1934 (UK).

75. Section 6(1)(a) of the Petroleum (Production) Act 1934 (UK).

76. Section 6(1)(d) of the Petroleum (Production) Act 1934 (UK).

77. Regulation 4 of the Petroleum (Production) (Seaward Areas) Regulations 1988. This was not always the case; see Daintith and Willoughby, editors, United Kingdom Oil and Gas Law: 2nd ed. (1984), para. 1-207.

78. Regulation 7 of the Petroleum (Production) (Seaward Areas) Regulations 1988.


80. Regulation 7(1)(a) of the Petroleum (Production) (Seaward Areas) Regulations 1988.


82. By Parliamentary statement or notice in the London, Edinburgh and/or Belfast Gazettes, or both.

83. See the discussion of the criteria in Daintith and Willoughby, editors, United Kingdom Oil and Gas Law: 2nd ed. (1984), para 1 - 212. See also Bentham "Legal and Regulatory Developments Affecting
the United Kingdom Oil and Gas Industry" in Bentham, editor, First Annual UK Oil and Gas Accounting Conference (1985) 1, 6; Arnold Britain's Oil (1978) pp. 354-357; Cameron The Oil Supplies Industry: A comparative study of legislative restrictions and their impact (1986) pp. 47-49.


84. The legal status of the criteria are discussed in Daintith and Willoughby, editors, United Kingdom Oil and Gas Law: 2nd ed. (1984), para. 's 1-214 and 1-215.

85. Select Committee on Nationalised Industries, Nationalised Industries and the Exploitation of North Sea Oil and Gas (1974-1975) H.C. 345, Appendix XIX, Answer III.


87. Section 2(2) of the Petroleum (Production) Act 1934 (UK).

88. Section 1(7) of the Continental Shelf Act 1964 (UK).

89. Section 1(3) of the Continental Shelf Act 1964 (UK).

90. Section 2(2) of the Petroleum (Production) Act 1934 (UK).

91. Sections 1(3) and 1(7) of the Continental Shelf Act 1964 (UK).

92. Regulation 7(1)(b) of the Petroleum (Production) (Seaward Areas) Regulations 1988.


94. Regulation 5(1) of Schedule 3 to the Petroleum (Production) (Seaward Areas) Regulation 1982.

95. Regulation 9(2) of the Petroleum (Production) (Seaward Areas) Regulations 1988.


99. See, for example, sections 20(1)(a), 22(1)(a)(i), 22(B)(1), 22(B)(2), 23(1), 23(2), 25(1), 25(2), 25(3) and 27 of the Petroleum (Submerged Lands) Act 1967 (C'th).

100. Sections 20(1) and 23(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).

101. Section 20(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).

102. Section 20(3) of the Petroleum (Submerged Lands) Act 1967 (C'th).

103. Section 23(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).

104. Sections 20(3)(a) and 23(2)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

105. Sections 20(3)(b) and 23(2)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

106. Sections 20(3) and 23(2) of the Petroleum (Submerged Lands) Act 1967 (C'th). Note sections 20(4) and 23(3) of the Petroleum (Submerged Lands) Act 1967 (C'th).

107. Section 22A(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).

108. Sections 20(1)(a) and 23(1) of the Petroleum (Submerged Lands) Act 1967 (C'th). Note section 20(1A) of the Petroleum (Submerged Lands) Act 1967 (C'th).

109. Section 22A(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).

110. Section 22A(1) of the Petroleum (Submerged Lands) Act 1967 (C'th). Note section 22A(2) of the Petroleum (Submerged Lands) Act 1967 (C'th).

111. Section 22A(3)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

112. Section 22A(3)(c) of the Petroleum (Submerged Lands) Act 1967 (C'th).

113. Section 22A(3)(d) of the Petroleum (Submerged Lands) Act 1967 (C'th).


115. Sections 20(1)(b), 22A(3)(a) and 23(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).

116. Sections 21(1)(a), 22A(5)(b) and 23(4)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

117. Sections 21(1)(b), 22A(5)(c) and 23(4)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).
118. Section 21(1)(c) of the Petroleum (Sumberged Lands) Act 1967 (C'th). Note sections 21(2) and 21(3) of the Petroleum (Submerged Lands) Act 1967 (C'th). See also sections 20(2) and 20(5) of the Petroleum (Submerged Lands) Act 1967 (C'th).

119. Section 22A(5)(d) of the Petroleum (Submerged Lands) Act 1967 (C'th).

120. Sections 21(1)(d)(i) and 23(4)(c) of the Petroleum (Sumberged Lands) Act 1967 (C'th); See the discussion in Maloney "Off-Shore Mining and Petroleum - Practical Problems" (1981) 3 A.M.F.L.J. 234, 243-245.

121. Sections 21(1)(e), 22A(5)(e)(i) and 23(4)(c) of the Petroleum (Sumberged Lands) Act 1967 (C'th).

122. Sections 21(1)(d)(ii), 22A(5)(e)(ii) and 23(4)(c) of the Petroleum (Sumberged Lands) Act 1967 (C'th).

123. Sections 21(1)(d)(iii), 22A(5)(e)(iii) and 23(4)(c) of the Petroleum (Sumberged Lands) Act 1967 (C'th).

124. Sections 21(1)(d)(iv), 22A(5)(e)(iv) and 23(4)(c) of the Petroleum (Sumberged Lands) Act 1967 (C'th).

125. Sections 21(1)(f), 22A(5)(f) and 23(4)(c) of the Petroleum (Sumberged Lands) Act 1967 (C'th).

126. Section 22A(5)(f) of the Petroleum (Submerged Lands) Act 1967 (C'th).

127. Section 22A(5)(f) of the Petroleum (Submerged Lands) Act 1967 (C'th).

128. Sections 23(4)(d) of the Petroleum (Submerged Lands) Act 1967 (C'th).

129. Sections 23(4)(d) of the Petroleum (Submerged Lands) Act 1967 (C'th).

130. Sections 23(4)(d) of the Petroleum (Submerged Lands) Act 1967 (C'th). Note sections 24(2)(b) and 24(3) of the Petroleum (Submerged Lands) Act 1967 (C'th).

131. Sections 21(4), 22A(b) and 23(5) of the Petroleum (Submerged Lands) Act 1967 (C'th).

132. Sections 22(1)(b), 22B(1), 22B(2), 25(1), 25(2) and 25(3) of the Petroleum (Submerged Lands) Act 1967 (C'th).


134. Sections 22(1)(a)(i), 22B(1), 22B(2)(a), 25(1), 25(2)(a) and 25(3) of the Petroleum (Submerged Lands) Act 1967 (C'th).

135. See sections 22A(5)(f) and 23(4)(d) of the Petroleum (Submerged Lands) Act 1967 (C'th).
136. Sections 22B(2)(b) and 25(2)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

137. Sections 22(2)(a), 22B(3)(a) and 25(5)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

138. Sections 22(2)(b), 22B(3)(b) and 25(5)(b)(i) of the Petroleum (Submerged Lands) Act 1967 (C'th).

139. Sections 22(2)(b) and 25(5)(b)(iii) of the Petroleum (Submerged Lands) Act 1967 (C'th).

140. See sections 22(1)(a)(ii) and 25(4) of the Petroleum (Submerged Lands) Act 1967 (C'th).

141. Section 22B(3)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

142. Section 25(5)(b)(ii) of the Petroleum (Submerged Lands) Act 1967 (C'th). Note also the option to enter into an agreement under section 109 of the Petroleum (Submerged Lands) Act 1967 (C'th) in respect of the balance of the amount to be paid: Section 25(5)(b)(ii) of the Petroleum (Submerged Lands) Act 1967 (C'th).


144. Sections 22(3), 22B(4) and 26(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).

The period of time may be extended by the Designated Authority: See sections 22(3) and 26(1) of the Petroleum (Submerged Lands) Act 1967 (C'th). However, there is no power to extend the period of time where the cash bidding method is used.

145. Sections 22(3)(a), 22B(4)(a) and 26(1)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

146. Sections 22(3)(b) and 26(1)(c) of the Petroleum (Submerged Lands) Act 1967 (C'th).

147. Section 22B(4)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

148. Section 26(1)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th). Note also the entering into an agreement under section 109 of the Petroleum (Submerged Lands) Act 1967 (C'th) where the option to do so has been exercised pursuant to section 25(5)(b)(ii) of the Petroleum (Submerged Lands) Act 1967 (C'th): Section 26(1)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

149. Sections 23(4), 22B(5) and 27 of the Petroleum (Submerged Lands) Act 1967 (C'th).
150. Section 23(5), 22B(6) and 26(2) of the Petroleum (Submerged Lands) Act 1967 (C'th). Note sections 22B(7) and 26(3) of the Petroleum (Submerged Lands) Act 1967 (C'th).


165. Lewis "Alternative Financing Modes" in Proceedings of the Energy Law Seminar organised by the Committee on Energy and Natural Resources (1979), N2.1, N2.2-N2.3; Cameron Property Rights and Sovereign Rights: The Case of North Sea Oil (1983) pp. 50-51.

166. Model clause 2 of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.


170. Section 127 of the Petroleum (Submerged Lands) Act 1967 (C'th).

171. Section 28 of the Petroleum (Submerged Lands) Act 1967 (C'th).

172. Sections 36-44 of the Petroleum (Submerged Lands) Act 1967 (C'th).

173. Section 39 of the Petroleum (Submerged Lands) Act 1967 (C'th).


This is based on the view that a mere or bare licence is personal in nature (not proprietary): see Wood v Leadbitter (1845) 13 M. & W. 838, 844-845; the Permit is transferable: see sections 78-85 of the Petroleum (Submerged Lands) Act 1967 (C'th); and the Permit is not revocable at will but rather only where there has been a failure to comply with its particular terms and conditions: see Wood v Leadbitter (1845) 13 M. & W. 838, 844-845; Nicholas v Western Australia [1972] W.A.R. 168, 172.


This is based on the view that there are no dominant and servient tenements.


This is based on the view that the holder of a Permit is not in strict terms, entitled to recover and remove petroleum from the area to which the Permit relates and, because the element of grant is absent: Ex parte Henry; Re Commissioner of Stamp Duties [1963] S.R. (N.S.W.) 298; Unimin Pty. Limited v Commonwealth (1974) 22 F.L.R. 299, 306-308;


CHAPTER V

THE PARTICIPANTS AND ABANDONMENT

1. INTRODUCTION

The decision to abandon the whole or part of the Operations is vested in the Participants. Once they have made a decision to abandon the whole or part of the Operations, the Operator is obliged to recover and try to dispose of such of the property of the Participants as the Operating Committee directs can economically and reasonably be recovered, or as may be required under the petroleum title or any Act, regulation or by-law.

Joint Operating Agreements usually, in a very general way, seek to address the main issue that arises, as between the Participants, from a decision to abandon the whole or part of the Operations: the sharing of the cost of abandonment between the Participants and the provision of security by the Participants in relation to their respective individual potential liability. However, Joint Operating Agreements usually address the issue in the context of development or production; that is, after the Exploration Phase. To a large extent this is because it has been estimated that considerable cost may be involved as a result of the Participants deciding to abandon the whole or part of the Operations where that decision involves the decommissioning of an offshore production structure. By way of contrast, at the Exploration Phase, the cost has not been estimated to be as considerable. Nevertheless, it is considered necessary to look at what obligations are imposed at the Exploration Phase upon the Participants of the petroleum title or by any Act, regulation or by-law. This is so, notwithstanding that Joint Operating Agreements rarely specifically address the sharing of the cost of abandonment between the Participants, where abandonment arises at the Exploration Phase. The abandonment of the whole or part of the Operations at the Exploration Phase would nevertheless fall within the scope of the Joint Operating Agreement and as such would be an activity for which the Participants are liable to meet the cost according to their respective Interest share.
In looking at the obligations it is not proposed to consider the international law aspects of abandonment of the whole or part of the Operations. These have been dealt with adequately elsewhere.  

2. ABANDONMENT IN GREAT BRITAIN

To abandon a well, the Participants require the consent in writing of the Secretary of State for Energy.

It would appear that the Secretary of State for Energy could withhold consent or impose conditions upon the granting of consent. An example of what may be required by the Secretary of State for Energy when imposing conditions upon the granting of consent to abandon a well, is as follows:

"In giving consent to the abandonment of the well, it is a requirement that at the conclusion of the work a certificate that the seabed is free of all obstructions be submitted. The Secretary of State will be prepared to accept a signed certificate from the operator or his authorised sub-contractor stating:

(a) that all strings of casing have been cut at a depth to be quoted (10ft or more) below the seabed and that all structures above this point other than possibly the temporary guide base (the details of which, if left on the seabed, shall be stated) have been recovered with the casing;

(b) that the seabed within at least 70 metres of the abandoned well has been surveyed either visually or by another technique appropriate to the visibility conditions and that any debris located, which originated from the drilling operations and which could possibly cause damage to fishermen's nets, has been removed. Alternative methods of demonstrating that the seabed is free of all obstruction can be submitted for consideration in advance of abandonment;

(c) the location within the U.K. where any removed wellheads, sub-sea completions and/or recovered debris will be available for inspection for a period of not less than 21 days following the date of the submission of the signed certificate, or failing their availability for inspection the location where any of the aforementioned matters have been utilised or otherwise disposed of, and the manner of such utilisation or disposal." 

Where consent is granted subject to conditions the Participants are obliged to comply with those conditions. Furthermore, where a well is
plugged, such must be done in accordance with a specification approved by the Secretary of State for Energy and must be carried out in an efficient and workmanlike manner\textsuperscript{11}.

Where the conditions imposed by the Secretary of State for Energy relate to the plugging or sealing of a well, the Secretary of State for Energy may from time to time cause the well and the records relating to the well to be examined, as specified by the Secretary of State for Energy, at the expense of the Participants. The examination can be carried out in such manner, upon such occasions, at such intervals and by such persons as the Secretary of State for Energy may specify\textsuperscript{12}.

Any well that has not, with the consent of the Secretary of State for Energy, been abandoned at the expiration or determination of the Participants' rights in respect of an area or part thereof in which that well is drilled must, at the discretion of the Secretary of State for Energy, either:-

1. be left in good order and fit for further working together with all casings and any well-head fixtures which, if removed, would cause damage to the well\textsuperscript{13}, all of which becomes the property of the Secretary of State for Energy\textsuperscript{14}; or

2. be plugged and sealed in accordance with directions specifying the manner in which the well is to be plugged and sealed and the time within which such work is to be done\textsuperscript{15}, if the Secretary of State for Energy so directs by notice in writing not less than one month before the holder of the Participants' rights in respect of the area or part thereof in which the well is situate expire or determine\textsuperscript{16}.

It is suggested that where a well has not, with the consent of the Secretary of State for Energy, been abandoned at the expiration or determination of the Participants' rights in respect of the area or part thereof in which the well is drilled, the responsibility in relation to the well and the subsequent abandonment thereof would be that of the Secretary of State for Energy.
Were the Participants to fail to comply with any condition imposed by the Secretary of State for Energy relating to the plugging, sealing or abandonment of a well, the Secretary of State for Energy is empowered, after giving to the Participants reasonable notice in writing of his intention, to execute any works and to provide and install any equipment which, in the opinion of the Secretary of State for Energy, may be necessary to secure the performance of the obligation or obligation imposed under the conditions and to recover the cost and expense of so doing from the Participants. Furthermore, the Secretary of State would be in a position to revoke the Licence due to the failure of the Participants to comply with the terms and conditions of the Licence. The effectiveness of the threat of revocation could well turn on the value attributable by the Participants to the Licence at that point in time.

In so far as the Secretary of State for Energy is permitted to impose conditions on the grant of consent to abandon a well, the conditions imposed could be to the effect that the Participants make good, to the satisfaction of the Secretary of State for Energy, any damage to the seabed or subsoil in the area to which the Licence relates including the clearing of the sea bed of debris.

The position relating to the abandonment of the structure from which the well is drilled on the United Kingdom Continental Shelf is a little more complex. Where it is the desire of the Participants to abandon a structure, there are a number of possible methods by which a requirement may be imposed that the structure be in whole or in part removed, and enforced, on a case by case basis.

In so far as the Secretary of State for Energy is permitted to impose conditions on the grant of consent to abandon a well, the conditions imposed could, it has been argued, be to the effect that the structure from which the well is drilled must itself be in whole or in part removed, failing which the removal could be carried out by the Secretary of State for Energy at the cost and expense of the Participants in the same manner as discussed above. Failure to comply with such a condition would also give to the Secretary of State for Energy the same remedies, as
discussed above, of recovering the costs and expense of undertaking the obligation and or revocating the Licence.

The question must be asked as to whether this line of argument is valid. The consent in writing of the Secretary of State for Energy is required before commencing or, after abandonment, re-commencing to drill a well and before abandoning a well. Furthermore, it would appear that the Secretary of State for Energy could withhold consent or impose conditions upon the granting of consent with which the Participants must comply. But could the Secretary of State for Energy impose a condition to the effect that the structure, from which the well is drilled, must be in whole or in part removed once the well has been drilled and or abandoned?

A problem with accepting a positive answer to the question may be that the power of the Secretary of State for Energy to withhold consent and or impose conditions upon the granting of consent is not unlimited. Any such action by the Secretary of State for Energy may have to be within the ambit of the purpose for which the power was conferred. To begin with, the model clauses make reference to the abandonment of wells, not of the structures from which they are drilled. If the view is adopted that the discretion given to the Secretary of State for Energy is one to which administrative law applies, then the Secretary of State for Energy must exercise his discretion for the purpose for which the power was given to him under the legislation. Therefore, the Secretary of State for Energy, in giving consent, could not impose conditions other than conditions relating directly to the abandonment of wells, which would not necessarily include the imposition of conditions addressing the abandonment of the structures from which the wells are drilled. If, however, the view is adopted that the model clauses are merely terms of a contract between the Participants and the Secretary of State for Energy, then none of the restrictions referred to above would apply. The issue involves answering the question of whether a Licence is contractual or regulatory in nature. The question has been discussed above.

Another possible method by which a requirement that the structure from which the well is drilled and which the Participants desire to
abandon be in whole or in part removed, is to be found in the Petroleum (Production) Act 1934 (UK), where the Secretary of State for Energy is empowered to grant licences upon such terms and conditions as he thinks fit. The provision of the Petroleum (Production) Act 1934 (UK), empowering the Secretary of State for Energy to impose conditions on the grant of a licence, is extended to areas of the United Kingdom Continental Shelf designated under the Continental Shelf Act 1964 (UK) by the Continental Shelf Act 1964 (UK) so that it applies as in relation to petroleum in situ in Great Britain. It would thereby be possible for the Secretary of State for Energy to impose conditions in the Licence sufficient to regulate the abandonment of the structures from which the well is drilled, on the ground that control of exploration for and exploitation of petroleum in situ includes the control of the termination of the Exploration Phase.

A further possible method is to be found in the Coast Protection Act 1949 (UK). The relevant provisions of the Coast Protection Act 1949 (UK) are extended to areas of the United Kingdom Continental Shelf designated under the Continental Shelf Act 1964 by the Continental Shelf Act 1964 (UK) so that they apply in relation to the designated areas as they would to Great Britain.

Before a structure, including a structure from which a well is drilled, can be placed on or removed from the United Kingdom Continental Shelf and before the construction, alteration or improvement of such a structure can be effected, the consent, conditional or otherwise, of the Secretary of State for Transport is required so as to prevent any obstruction or danger to navigation. In the main, the consent of the Secretary of State for Transport will be sought by and granted to the Operator rather than the Participants. To date, the standard form of consent granted by the Secretary of State for Transport contains the condition:

"... that in the event of the structure being abandoned or disused, the Secretary of State shall be notified and the site cleared to the satisfaction of the Secretary of State within such period as he directs so that no obstruction or danger to navigation is caused or likely to result."
Were the Operators to fail to comply with a condition imposed by the consent given, the Secretary of State for Transport could serve notice requiring the structure to be removed or alterations made.

The Petroleum Act 1987 (UK) has great bearing upon the abandonment of structures. The Petroleum Act 1987 (UK) imposes another tier to the structure of consents and obligations mentioned above and to the obligations, if any, of the Participants pursuant to the Joint Operating Agreement.

The most important consequence of the Petroleum Act 1987 (UK) is that it allows the Secretary of State for Energy to deal with the abandonment of structures on a case-by-case basis, including the structure from which a well is drilled. The timing of and the direction to implement the abandonment provisions in respect of a particular structure is at the discretion of the Secretary of State for Energy.

The Petroleum Act 1987 (UK) permits the Secretary of State for Energy, at his discretion, to require, by written notice any one or more of a number of persons to submit to him a programme setting out the measures proposed to be taken in connection with the abandonment of a structure. The persons to whom the notice is directed are required, within the time specified, to submit an abandonment programme dealing with such matters as the estimated cost of the measures proposed, the timing of the measures proposed and provisions for continuing maintenance in the event that the structure is to be left in position or is not to be wholly removed. The notice may also require the persons to whom it is directed to carry out such consultations as may be specified in the notice before submitting an abandonment programme.

The persons to whom the Secretary of State for Energy may direct such a notice are:

1. the person whom (at the time of the giving of the notice) has registered the structure under the Mineral Workings (Offshore Installation) Act 1971 (UK) or, if there is no such person, the
person (at the time of the giving of the notice) having the management of the structure \(^{49}\). This would, in the first case, usually include the owners of the structure and, in the second case, the Operator \(^{50}\); 

2. any person (at the time of the giving of the notice) is a concession owner in relation to the structure, for the purpose of the Mineral Workings (Offshore Installations) Act 1971 (UK) \(^{51}\), or whom was a concession owner for those purposes, when an activity within section 12(2) of the Mineral Workings (Offshore Installation) Act 1971 (UK) was last carried on from, by means of or on the structure \(^{52}\). This would, in most cases, include the Participants \(^{53}\); 

3. any person (at the time of the giving of the notice) not within either of 1. or 2. above whom is a participant of a Joint Operating Agreement or similar agreement relating to rights by virtue of which a person is within 2. above \(^{54}\). This would include the Participants, if any, whom are not holders of the Licence; 

4. any person (at the time of the giving of the notice) not within 1., 2. or 3. above whom owns an interest in the structure otherwise than as security for a loan \(^{55}\); or 

5. any company (at the time of the giving of the notice) not within 1., 2., 3. or 4. above but is associated with a company (at the time of the giving of the notice) that is within 1., 2., 3. or 4. above \(^{56}\). What amounts to one company being associated with another turns upon the control of the company \(^{57}\). What amounts to control is specified in some detail \(^{58}\) but in the main it relates to control through share capital \(^{59}\), the entitlement to exercise votes in general meetings of the company \(^{60}\), the entitlement to distribution income \(^{61}\), the entitlement to the distribution of assets on a winding up \(^{62}\) or the ability to direct, directly or indirectly, the affairs of the company in accordance with its wishes \(^{63}\). One interesting aspect is the unusual level of shareholding that determines control, viz., "one half or more" \(^{64}\). It matters not
whether the respective companies were incorporated in the United Kingdom or elsewhere.

The Secretary of State for Energy has given notice requiring the submission of an abandonment programme in respect of all "installations in place in January 1988".

In this thesis it is proposed to consider the position of the Participants and the Operator and not that of any other person to whom the Secretary of State for Energy may direct a notice requiring the submission of an abandonment programme in respect of a structure.

The Secretary of State for Energy may give notice to any one or more of the Participants and or to the Operator requiring the submission of an abandonment programme in respect of a structure, notwithstanding that an abandonment programme has already been submitted and, either rejected or, approval thereof has been withdrawn. Furthermore, any notice given to any one or more of the Participants and or the Operator, may be withdrawn prior to the submission of an abandonment programme or a further notice, either in substitution for or in addition to the notice, may be given to any one or more of the Participants and or the Operator, by the Secretary of State for Energy.

On receipt of an abandonment programme the Secretary of State for Energy may reject it or approve it, and where it is approved, with or without modification and or whether subject or not to conditions or not. Where there is modification to the abandonment programme or conditions to be imposed, such abandonment programme cannot be approved by the Secretary of State for Energy without the Participant, Participants and or the Operator who submitted the abandonment programme having the opportunity to make written representations in respect of the modification or conditions. Even where an abandonment programme has been approved, either the Secretary of State for Energy or such of the Participant, Participants and or the Operator who submitted the abandonment programme may, by written notice, propose to alter the abandonment programme or any condition attached to the approval thereof. Where the proposal is made by the Secretary of State for Energy the Participant, Participants
and or the Operator who submitted the abandonment programme, must be given the opportunity to make written representations in respect of the proposal. Once the Secretary of State for Energy has determined that the alteration should be made, notice of the determination must be given to such of the Participant, Participants and or the Operator whom had the obligation under the prior approval or have the obligation under the varied abandonment programme to carry out the abandonment programme.

If the Participant, Participants and or the Operator to whom a notice requiring the submission of an abandonment programme in respect of a structure, fails to submit an abandonment programme or if an abandonment programme is submitted but rejected by the Secretary of State for Energy, the Secretary of State for Energy may prepare, at the expense of such of the Participant, Participants and or Operator to whom the notice was given, an abandonment programme. The abandonment programme prepared by the Secretary of State for Energy, once notified to such of the Participant, Participants and or the Operator to whom notice was given, has effect as if submitted by the Participant, Participants and or the Operator and approved by the Secretary of State for Energy.

In order for the Secretary of State for Energy to prepare an abandonment programme in respect of a structure, the Petroleum Act 1987 (UK) empowers the Secretary of State for Energy, by notice in writing directed to such of the Participant, Participants and or the Operator whom was given notice to require it or them to supply such records and drawings and such other information as may be specified within the time specified. Failure to comply with such a notice without reasonable excuse amounts to an offence.

Once an abandonment programme in respect of a structure has received approval, it becomes the duty of the Participant or each of the Participants and or the Operator who submitted it, to secure that it is carried out and that any condition to which the approval is subject is complied with. It is submitted that the combined effect of sections 1, 2 and 8 of the Petroleum Act 1987 (UK) is to make the Participant, Participants and or the Operator who submit the abandonment programme jointly and severally liable to secure that it is carried out and that any...
condition to which the approval is subject, is complied with. Any one or more of the Participants and or the Operator who submitted the abandonment programme may request the Secretary of State for Energy to withdraw the approval. If less than all of the Participant, Participants and or the Operator who submitted the abandonment programme seeks the withdrawal of approval the Secretary of State for Energy must give such of the Participant, Participants and or the Operator whom not seeking the withdrawal of approval the opportunity to make written representations as to whether approval should be withdrawn. The Secretary of State for Energy must notify the Participant or all of the Participants and or the Operator who submitted the abandonment programme of the determination of the request to withdraw approval.

The Secretary of State for Energy or any of the Participant, Participants and or the Operator who submitted the abandonment programme may propose in writing that any person under a duty to secure the carrying out of an abandonment programme shall cease to have that duty, or that another person who does not have that duty should have it either in addition to those that do or, in substitution for one or more of those that do. Where the proposal is that some other person comes under such a duty, such person must fall within the class of persons referred to above to whom notice could be given, at the time when the proposal is made or when the first notice requiring the submission of an abandonment programme was given.

Where such a proposal is made, the Secretary of State for Energy must give to any person who may come under such a duty or cease to have such a duty as a result of the proposal, the opportunity to make written representations concerning it. Upon making a determination in respect of the proposal, the Secretary of State for Energy must give notice of the determination to every person whom before, and every person whom as a result of, the determination was or is under such a duty.

If an approved abandonment programme in relation to a structure is not carried out or a condition is not complied with, the Secretary of State for Energy may give written notice to the Participant or any of the
Participants and or the Operator who submitted the abandonment programme requiring them to take the remedial action specified in the notice within the time specified \(^92\). Failure to comply with such a notice amounts to an offence, unless it is proved that due diligence was exercised to avoid failure to comply \(^93\). Failure to comply with such a notice may also result in the Secretary of State for Energy carrying out the remedial action required by the notice at the expense of the Participant, the Participants and or the Operator to whom the notice was given \(^94\).

The Secretary of State for Energy may, after giving notice to submit an abandonment programme to a Participant, the Participants and or the Operator and, before approving the abandonment programme submitted, require, by written notice, the Participant, the Participants and or the Operator to whom notice to submit an abandonment programme was given, to provide information as to any documentation in relation to their financial affairs \(^95\). The Secretary of State for Energy may, at any time by written notice require that Participant, the Participants and or the Operator to provide, as specified in the notice and within the time specified in the notice, information and supply copies of documents, in order to satisfy himself that a Participant, the Participants and or the Operator having a duty to secure that an abandonment programme is carried out will be capable of discharging that duty \(^96\). Failure to comply with either of the notices without reasonable excuse \(^97\) or providing information known to be false in a material particular or recklessly providing information which is false in a material particular \(^98\) is an offence \(^99\).

If the Secretary of State for Energy is not satisfied that a Participant, the Participants and or the Operator will be capable of discharging the duty to secure that an abandonment programme is carried out, he may by written notice, after consulting the Treasury, require the Participant, the Participants and or the Operator to take such action as is specified in the notice within the time specified in the notice \(^100\). Any Participant, the Participants and or the Operator upon whom such a notice is to be served must be given by the Secretary of State for Energy the opportunity to make written representations as to whether the notice
should be given. Failure to comply with such a notice is an offence unless it is proved that such Participant, the Participants and or the Operator exercised due diligence to avoid the failure.

The Petroleum Act 1987 (UK) also empowers the Secretary of State for Energy to make regulations relating to the abandonment of structures. Such regulations may relate to matters such as standards and safety requirements applicable to dismantling, removal and disposal, standards and safety requirements where anything is left in the water, prevention of pollution and inspection.

The Petroleum Act 1987 (UK) also deals with fees, offences, penalties and proceedings in relation thereto.

An interesting aspect of the Petroleum Act 1987 (UK) is the limitation placed on the ability of a Participant, the Participants and or the Operator to question the validity of certain actions of the Secretary of State for Energy. It would appear that if a Participant, the Participants and or the Operator wishes or wish to question the validity of an action it or they must be aggrieved by the proceedings taken and the action taken must relate to questioning the validity of the action on the ground that it was not within the power of the Secretary of State for Energy or that the relevant procedural requirements had not been complied with. What may be questioned is listed and any application for review must be made within forty-two days of the taking of the action. Otherwise than as stated, the validity of the action of the Secretary of State for Energy is not reviewable. Where reviewable, if a court is satisfied that the act was not within the power of the Secretary of State for Energy or that the applicant has been substantially prejudiced by the failure to observe the procedural requirements, it may quash the act.

A number of interesting issues arise from the Petroleum Act 1987 (UK). Possibly, the issue that will concern the Participants the most is that they cannot rely for all time upon the approval of the Secretary of State for Energy for an abandonment programme in respect of a structure.
The Secretary of State for Energy can, in effect and notwithstanding the right of the Participants in most cases to make representations, alter, add to or delete from an approved abandonment programme, or approve the addition or deletion of persons upon whom the duty falls to carry out the abandonment programme. Not only does this create a degree of uncertainty as to the final form that the abandonment programme may take or as to the persons who may ultimately have the duty of carrying out the abandonment programme, but it also could create problems when a Participant seeks to assign all or part of its interest. In the event that an abandonment programme had been approved and the assignor was a person upon whom the duty fell to carry out the abandonment programme there is no statutory release or right of release from the duty, even upon satisfying given criteria as to the suitability of the assignee to undertake the duty in lieu of the assignor. The way out appears to be for the assignor to seek to have the duty lifted under section 6(1)(b) of the Petroleum Act 1987 (UK). Even so, the lifting of the duty is entirely within the discretion of the Secretary of State for Energy, although in such cases there is some right of judicial review of the determination made\textsuperscript{114}.

Another issue that will concern the Participants is how to determine the point at which the obligation in respect of abandonment of the structure arises. Such appears to be almost entirely at the discretion of the Secretary of State for Energy. Furthermore, the question of for how long the duty remains is not addressed. Theoretically, where the abandonment programme requires a structure to be left in position or not wholly removed, the maintenance obligation could continue in perpetuity\textsuperscript{115}. In a case requiring other than complete removal, what maybe the position where the structure vests in the Secretary of State for Energy\textsuperscript{116}? Do the persons – which could include a Participant, the Participants and or the Operator – who have the duty to carry out the abandonment programme, continue to have a duty to maintain the structure or part or parts thereof not removed? It would appear that such could be the case. Furthermore, would such persons be liable to a third party who suffered damage on the partially removed structure?\textsuperscript{117} In principle, there should be no liability arising from a breach of statutory duty or negligence if the structure has been partially removed in accordance with an approved abandonment programme.
Having considered the statutory regime as it applies to the abandonment of a structure, which includes the structure from which a well is drilled, it is appropriate to mention a number of other statutes that have a bearing upon the undertaking, by the Operator of the removal in whole or in part of the abandoned structure.

The disposal of the wholly or partially removed structure may require a permit under the Food and Environmental Protection Act 1975 (UK). However, whether this Act would apply to the dumping of the wholly or partially removed structure on the United Kingdom Continental Shelf is unclear.

In carrying out the removal of the abandoned structure, in whole or in part, the Prevention of Oil Pollution Act 1971 (UK) would apply were there to be a discharge of oil during the undertaking of the process.

Also applicable to the removal of the abandoned structure, in whole or in part, is the Mineral Workings (Offshore Installations) Act 1971 (UK). This Act enables regulations to be made for the purpose of certification as to the fitness of structures. The prime object is to ensure the safety of structures when being assembled or dismantled. Regulations made pursuant to the Act, the Offshore Installations (Construction and Survey) Regulations 1974, require each structure to have a valid certificate of fitness after a certain date and, before a structure that has a current certificate of fitness can be dismantled it is necessary that the procedure established by the regulations be followed. As an aside, it has been suggested that the power to make regulations about matters arising out of the termination of a certificate of fitness would enable regulations to be made which control the manner in which abandonment of a structure is exercised. With all due respect, it is submitted that such would not support an obligation to remove a structure that no longer has a certificate of fitness. At best, it would support the regulation of the process of removal.
Finally, in this regard, note should be made of the model clause incorporated into a Licence which requires that any operation authorised by the Licence must not be carried out in such a way as to interfere unjustifiably\textsuperscript{127} with navigation or fishing in the waters of the area to which the Licence relates or with the conservation of the living resources of the sea\textsuperscript{128}. This may give rise to the need to remove a structure or sea bed debris as such might cause such unjustifiable interference\textsuperscript{129}.

The question of on whom the cost of abandonment rests, including the cost of removing a structure, in whole or in part, has been discussed above. However, a number of additional comments are considered apposite.

In so far as the requirement to abandon arises under the Licence, each Participant is jointly and severally liable for any obligations arising pursuant to the Licence or any of the model clauses incorporated therein\textsuperscript{130} and hence for the cost thereof. The Participants, by the Joint Operating Agreement, seek to sever this joint tenancy in so far as the relationship between the Participants themselves is concerned and substitute therefor the relationship of tenants in common in specified shares; thereby substituting several liability for joint and several liability. To this end, at the post Exploration Phase, the Joint Operating Agreement seeks to have the Participants enter into an abandonment agreement before the time for the submission of the Annexe 'B', which agreement will provide for the equitable sharing of the liabilities of abandonment between the Participants and the provision of security by the Participants in relation to their potential liability\textsuperscript{131}. Not all Joint Operating Agreements make such provision. Furthermore, and more important\textsuperscript{132}, it is extremely rare for the Joint Operating Agreement to address such issues at the Exploration Phase. In the main, this has been the result of uncertainty as to the extent of removal which will be required on abandonment of the structure. This position is not remedied by the Petroleum Act 1987 (UK). However, the Petroleum Act 1987 (UK) has given imputus to the need for the Participants to reach an abandonment agreement. It is important to appreciate that even if an abandonment agreement were to be entered into by the Participants for the Exploration Phase, such an agreement could not alter
the liability of the Participants, or one or more of them, to third parties. It would only alter the liability of the Participants inter se.

In so far as the obligation in respect of the abandonment of a structure arises under the Coast Protection Act 1949 (UK), it would appear that in most cases it will be solely the Operator who will be liable for implementing an abandonment programme required thereby. This would be so regardless of whether or not a contribution could be obtained by the Operator from the other Participants. This situation would arise since the necessary consent by the Secretary of State for Transport would be given to the Operator and not to the other Participants. It is the person to whom the consent is given who assumes the liability for compliance with conditions imposed on the granting of consent and for compliance with the provisions of the Coast Protection Act 1949 (UK).

Were the Operator to change, subsequent to the grant of consent or the authorisation, the new Operator would not assume the obligation unless the relevant permit were transferred to it, with the necessary approvals.

Whether the Operator has a right to a contribution by the other Participants in such circumstances, is one that is required to be addressed in the Joint Operating Agreement. Such a right does not arise by statute.

Whilst it will often be the case that the Joint Operating Agreement addresses the Operator's right of contribution by the other Participants, it is rare for a Joint Operating Agreement to address a Participants' right of contribution by the other Participants, where the liability falls on one of the Participants other than the Operator. Such could occur where the Participants' liability vis-à-vis a third party is joint and several and the third party, the relevant authority, takes action against one of the Participants other than the Operator. Such could occur under the Petroleum Act 1987 (UK), where only one Participant could be called upon to submit an abandonment programme and that Participant is left with the sole duty to comply with the abandonment programme. It is doubtful
whether there would, in such circumstances, be any common law right of contribution.

Were the Joint Operating Agreement to be silent on the right of a Participant, other than the Operator, to seek a contribution where liability is not expressed by statute to be joint and several, it could be argued that a right of contribution arises under the Licence. The Licence, being a contract into which all the Participants have entered into, binds them jointly and severally. The problem is that the Joint Operating Agreement seeks to sever that joint and several liability between the Participants inter se and replace it with several liability.

An issue that arises under the Joint Operating Agreement in relation to the question of cost of abandonment, is how to address the situation where a Participant defaults in meeting its obligation to contribute to the cost of abandonment. The usual remedy for failure to contribute the requisite share of a cost is ultimately the forfeiture of the Participant’s Interest. The problem with this remedy, other than the legal problems discussed later in this thesis, is the value of what is to be forfeited. If the value of what is to be forfeited will be less than the contribution required to be made towards the abandonment cost, there is no security for the other Participants in the forfeiture remedy once the point has been reached where the potential liability towards the cost of abandonment exceeds the value of what could be forfeited. Admittedly, at law, there would be the right of the other Participants to proceed against the defaulting Participant’s other assets to recover the contribution in regard to which default has been made. However, if the defaulting Participant does not have available assets which could give rise to the funds that may be required, then another form of security will need to be sought. To this end, alternative security against default is required. This is particularly so in so far as the Operator is concerned, as it will need, in most cases, the protection against the consequence of the default by a Participant in meeting its obligation to contribute to the cost of abandonment.
To date, a number of different types of security have been proposed\textsuperscript{136}. In very general terms the type that appears to have received the most support is a scheme based on guarantees given by third parties. Each Participant is obliged to provide to the other Participants, including the Operator, an irrevocable guarantee in a form, and from a third party (be it a parent, bank or financial institution), acceptable to the other Participants to the effect that the Participant will contribute its share of the cost of complying with the requirements concerning abandonment, failing which the guarantor will itself become liable to the other Participants for such share\textsuperscript{137}.

It is suggested that the success of establishing security arrangements of the type mentioned above would be best achieved if the negotiation and settlement of the arrangements could be made before the commencement of the work programme. Preferably, the arrangements should form part of the Joint Operating Agreement. It would be more difficult to reach such an arrangement once the likely cost of abandonment exceeds the perceived value of consequences of the exploration being undertaken.

It has, however, been suggested\textsuperscript{138} that if the majority of Participants who have had imposed upon them the duty of carrying out an abandonment programme under the Petroleum Act 1987 (UK), wished to establish a security arrangement of the type mentioned above, but were prevented from doing so by the dissent of a minority of the Participants, the majority could bring the matter to the attention of the Secretary of State for Energy. The dissenters may then be asked why they refuse to join in the security arrangements proposed by the majority and if the Secretary of State for Energy were not satisfied with the minority's explanation, the Secretary of State for Energy may serve notice, pursuant to section 1 of the Petroleum Act 1987 (UK) on companies associated with the dissenting Participants. By means of a combination of exposing associated companies to such a notice and being required to explain their reasons for dissent, it is believed that the Secretary of State for Energy could provide a powerful incentive to the Participants to establish security arrangements, whilst also preventing the majority Participants from forcing unreasonable security arrangements on the minority Participants.
3. **ABANDONMENT IN AUSTRALIA**

The abandonment of wells and structures from which they are drilled and the clearing of the sea bed of debris by the Participants can be controlled and conditions relating thereto can be imposed by the Designated Authority.

The Designated Authority may at any time by notice in writing direct the Participants to:

1. remove or cause to be removed from the area to which the Permit relates all property brought into the area by any person engaged or concerned in the operations authorised by the Permit or to make arrangements that are satisfactory to the Designated Authority with respect to that property. This would include property brought into the area by the Operator and or the contractors of the Operator;

2. plug or close off, to the satisfaction of the Designated Authority, all wells made in the area to which the Permit relates, by any person engaged or concerned in the operations authorised by the Permit. Once again, this would include activities undertaken by the Operator and or the contractors of the Operator;

3. make provision, to the satisfaction of the Designated Authority, for the conservation and protection of the natural resources in the area to which the Permit relates; and

4. make good, to the satisfaction of the Designated Authority, any damage to the sea-bed or subsoil in the area to which the Permit relates caused by any person engaged or concerned in the operations authorised by the Permit. Once again, this would include activities undertaken by the Operator and or the contractors of the Operator.
The position is the same where the Permit has been wholly or partly determined, wholly or partly cancelled or has expired, save that the direction or directions may be given by the Designated Authority to the Participants or those persons who were the Participants, as the case may be, in relation to the Permit. This would enable the Designated Authority to give directions in relation to a well or structure notwithstanding the expiration or determination of the Participants' rights in respect of the area or part thereof in which the well is drilled or the structure from which the well was drilled, is situated.

Were the Participants to fail to comply with the direction or directions of the Designated Authority on or before the date of expiration of the Permit or, where the Permit has been wholly or partly determined, wholly or partly cancelled or has expired, within the time specified in the notice given by the Designated Authority they would be liable to a fine. Furthermore, were the Participants to fail to comply with the direction or directions of the Designated Authority within the time mentioned above or to fail to carry out an arrangement to remove or cause to be removed from the area to which the Permit relates property brought into the area by any person engaged or concerned in the operations authorised by the Permit, the Designated Authority may do all or any of the things required by the direction, directions or arrangement to be done. In addition, if the Participants fail to remove or cause to be removed such property, the Designated Authority may, by notice published in the Commonwealth of Australia Gazette, direct that the owner or owners of the property remove it from the area to which the Permit relates or dispose of the property to the satisfaction of the Designated Authority, within the time specified in the notice. The Designated Authority must serve a copy of the notice on each person whom the Designated Authority believes to be the owner of the property or any part thereof. The owner or owners may, or course, include any one or more of the Participants and the Operator.

Furthermore, were the owner or owners of the property to fail to comply with the direction of the Designated Authority, the Designated Authority may:
1. remove, in such manner as the Designated Authority thinks fit, all or any of the property;\textsuperscript{153}

2. dispose of, in such manner as the Designated Authority thinks fit, all or any of the property;\textsuperscript{154} and

3. if a copy of the notice has been served on a person whom the Designated Authority believed to be the owner of the property or any part thereof, sell, by public auction or otherwise, as the Designated Authority thinks fit, all or any of that property in relation to which a notice has been served.\textsuperscript{155} The Designated Authority may deduct from the proceeds of sale costs and expenses incurred in relation to the property,\textsuperscript{156} costs and expenses incurred in relation to the doing of any things required by a direction given by the Designated Authority to be done by the person\textsuperscript{157} and any fees or amounts due under the Petroleum Submerged Lands) Act 1967 (C'th) by the person.\textsuperscript{158}

All costs and expenses incurred by the Designated Authority in relation to the removal, disposal or sale of property, are a debt due by the owner of the property to the Commonwealth of Australia,\textsuperscript{159} whilst all costs and expenses incurred by the Designated Authority in relation to the doing of any thing required by a direction to be done by the Participants (other than as the owner of property) are a debt due by the Participants to the Commonwealth of Australia.\textsuperscript{160}

In effect, neither the Participants nor the owner of the property may bring an action against the Designated Authority in respect of the removal, disposal or sale of property.\textsuperscript{161}

In addition to the power vested in the Designated Authority to deal with the abandonment of wells, structures and debris, there is the additional sanction vested in the Joint Authority to cancel the Permit as to all or some of the blocks in respect of which the Permit relates,\textsuperscript{162} were the Participants not to comply with a direction given by the
Designated Authority, or not to pay any amount payable, such as costs and expenses incurred by the Designated Authority in relation to the removal, disposal or sale of property or in relation to the doing of any thing required by a direction to be done by the Participants, within three months after the day on which the amount became payable.

Before the Joint Authority can cancel the Permit as to all or some of the blocks in respect of which the Permit relates, the Joint Authority must have given at least one month's written notice to the Participants of its intention to cancel the Permit. The notice must have specified a date on or before which the Participants may, by written notice served on the Designated Authority, submit any matters that the Participants wish to be considered. Further, the Joint Authority must have taken into account any action taken by the Participants to remove the ground upon which the Joint Authority intends to cancel the Permit or to prevent the recurrence of similar grounds and any matters submitted on or before the specified date by the Participants.

The effectiveness of the threat of cancellation could well turn on the value attributable by the Participants to the Permit at that point.

The Petroleum (Submerged Lands) Act 1967 (C'th) also provides for regulations to be made for securing, regulating, controlling or restricting the removal of structures, equipment and other property brought into an area for or in connection with exploration for petroleum that are not used or intended to be used in connection with exploration for petroleum in the area. To date no such regulations have been made.

The abandonment of wells and structures and the clearing of the sea bed of debris could also be dealt with in two other manners. Firstly, a Permit can be granted subject to such conditions as the Joint Authority thinks fit. There would be nothing to stop the Joint Authority imposing conditions which addressed the abandonment issues. Secondly, the relevant Minister can give directions with respect to the prevention of pollution, or other damage to the environment, by a structure from which the well is drilled.
If the abandonment of a well or a structure or the clearing of the sea bed of debris involves the dumping of waste or any other matter from a structure or the dumping of a structure, the owner of the structure and or the person in charge of the structure will need to be issued with a permit pursuant to the Environmental Protection (Sea Dumping) Act 1981 (C'th). In such circumstances, if a permit is not obtained, the owner of the structure and or the person in charge of the structure will be guilty of an offence.

A permit may be applied for by anyone and may be granted subject to such condition and, at any time while the permit is in force, conditions may be imposed.

Where waste or any other matter is dumped from a structure or a structure is dumped and the relevant Minister considers the dumping likely to:

1. cause obstruction, or constitute a danger, to vessels;
2. result in harm to human or marine life; or
3. result in interference with the exercise of the sovereign rights of Australia as a coastal State to explore and exploit the natural resources of the continental shelf of Australia,

the relevant Minister may cause such steps to be taken as he thinks proper to repair or remedy any condition, or to mitigate any damage, arising from the dumping. Where the relevant Minister has incurred expense or other liability undertaking such repair or remedy, and a person has been convicted of an offence as a result of the dumping of waste or any other matter from a structure or the dumping of a structure without having a permit to do so, the person convicted is liable to pay to the Commonwealth an amount equal to the total amount of those expenses and liabilities.
The Petroleum (Submerged Lands) Act 1967 (C'th) does not specify the standards for the abandonment of a well or the removal of a structure or the cleaning of the sea bed of debris. It would appear that the standards are to be those set by the Designated Authority: it is to the satisfaction of the Designated Authority that, in most cases, matters have to be dealt with.

Finally in this regard, note should be made of the Petroleum (Submerged Lands) Act 1967 (C'th) which requires that any operations authorised by the Permit must be carried on in a manner that does not interfere with navigation, fishing, the conservation of the resources of the sea and sea bed or any operations of another person being lawfully carried on by way of exploration for, recovery of or conveyance of a mineral (which for such purposes includes petroleum), or by way of construction or operation of a pipeline, to a greater extent than is necessary for the reasonable exercise of the rights and performance of the duties of the Participants. This may give rise to the need to remove a structure or sea bed debris as it might cause such interference.

The question of on whom the liability for the cost of abandonment rests, is rather interesting. It is to the holders of the Permit - the Participants - that the Designated Authority may issue its directions. It would appear that the directions must be issued to all, and not just one or more of the Participants. However, in the case of the failure by the Participants to remove, or cause to be removed from the area to which the Permit relates property brought into the area by any person engaged or concerned in the operations authorised by the Permit, the Designated Authority may issue directions to the owner or owners of that property, which could include the Operator and the contractors of the Operator, to remove it or dispose of it to the satisfaction of the Designated Authority.

In such circumstances, it is submitted that under the Permit, each Participant is jointly and severally liable for any obligations arising pursuant to the Permit and hence for the costs thereof. As is the case in Great Britain, the provisions of the Joint Operating Agreement which seek to substitute several liability for joint and several liability do not
alter the liability of the Participant or any one or more of them to third parties. Therefore, were the Participants to enter into an abandonment agreement for the Exploration Phase such an agreement would only alter the liability of the Participants inter se.

The difficulties with arrangements under the Joint Operating Agreement in so far as abandonment is concerned and default by a Participant in meeting its obligations to contribute to the cost of abandonment, have been discussed above in relation to Great Britain. The discussion applies equally in relation to Australia.
FOOTNOTES

1. Britoil 5.10.2.; implied Apea 5.15.

2. Britoil 5.10.1; implied Apea 4.8.

3. Britoil 5.10.3; Apea 10.3.


7. The term "well" includes a borehole. See model clause 1(1) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.


27. Section 2(2) of the Petroleum (Production) Act 1934 (UK).

28. Section 1(7) of the Continental Shelf Act 1964 (UK).

29. Section 1(3) of the Continental Shelf Act 1964 (UK).

31. Section 1(7) of the Continental Shelf Act 1964 (UK).

32. Section 4(1) of the Continental Shelf Act 1964 (UK).

33. Section 34(3) of the Coast Protection Act 1949 (UK).

34. Section 34(1) of the Coast Protection Act 1949 (UK).


37. Section 36 of the Coastal Protection Act 1949 (UK).


40. See section 1(5) of the Mineral Workings (Offshore Installations) Act 1971 (UK).

42. Section 1(1) of the Petroleum Act 1987 (UK).

43. Section 1(2) of the Petroleum Act 1987 (UK).

44. Section 1(4)(a) of the Petroleum Act 1987 (UK).

45. Section 1(4)(b) of the Petroleum Act 1987 (UK).

46. Section 1(4)(c) of the Petroleum Act 1987 (UK).

47. Section 1(3) of the Petroleum Act 1987 (UK).

48. Section 2 of the Mineral Workings (Offshore Installations) Act 1971 (UK). See also section 1(5) of the Mineral Workings (Offshore Installations) Act 1971 (UK) for the definition of the term installation.

49. Section 2(1)(a) of the Petroleum Act 1987 (UK).


51. Section 12(2) of the Mineral Workings (Offshore Installations) Act 1971 (UK).

52. Section 2(1)(b) of the Petroleum act 1987 (UK).


54. Section 2(1)(c) of the Petroleum Act 1987 (UK).

55. Section 2(1)(d) of the Petroleum Act 1987 (UK).

56. Section 2(1)(e) of the Petroleum Act 1987 (UK).

57. Section 2(5) of the Petroleum Act 1987 (UK).

58. See sections 2(5) and 2(6) of the Petroleum Act 1987 (UK).


60. Section 2(5)(b) of the Petroleum Act 1987 (UK).

61. Section 2(5)(c) of the Petroleum Act 1987 (UK).


63. Section 2(5) of the Petroleum Act 1987 (UK).
64. Section 2(5)(a) of the Petroleum Act 1987 (UK).

65. Section 16(2)(b) of the Petroleum Act 1987 (UK).

66. Development of the Oil and Gas Resources of the United Kingdom (1989), p. 82.

67. Section 1(6) of the Petroleum Act 1987 (UK).

68. Section 3(6) of the Petroleum Act 1987 (UK). Note the effect of withdrawal of a notice or the serving of an additional notice on any other notice - section 3(7).

69. Section 4(1) of the Petroleum Act 1987 (UK).

70. Section 4(2) of the Petroleum Act 1987 (UK). See Development of the Oil and Gas Resources of the United Kingdom (1989) p. 82 where the conditions attached to the approval by the Secretary of State for Energy to the abandonment programme submitted in relation to the Piper Alpha platform are discussed. See also "News in Brief: United Kingdom", Petroleum Economist (1989) Vol. LVI, No. 1, p. 36.

71. Section 4(3) of the Petroleum Act 1987 (UK).

72. Section 6(4) of the Petroleum Act 1987 (UK).

73. Section 6(1)(a) of the Petroleum Act 1987 (UK).

74. Section 6(5) of the Petroleum Act 1987 (UK).

75. Section 6(7) of the Petroleum Act 1987 (UK).


77. Section 5(1) of the Petroleum Act 1987 (UK).

78. Section 5(7) of the Petroleum Act 1987 (UK).

79. Section 5(2) of the Petroleum Act 1987 (UK).

80. Section 5(3) of the Petroleum Act 1987 (UK).

81. Section 8 of the Petroleum Act 1987 (UK).


83. Section 7(1) of the Petroleum Act 1987 (UK).
84. Section 7(2) of the Petroleum Act 1987 (UK).
85. Section 7(3) of the Petroleum Act 1987 (UK).
86. Section 6(4) of the Petroleum Act 1987 (UK).
87. Section 8 of the Petroleum Act 1987 (UK).
88. Section 6(1)(b) of the Petroleum Act 1987 (UK).
89. Section 6(2)(a) of the Petroleum Act 1987 (UK). Note section 6(3) of the Petroleum Act 1987 (UK).
90. Section 6(6) of the Petroleum Act 1987 (UK).
91. Section 6(7) of the Petroleum Act 1987 (UK).
92. Section 9(1) of the Petroleum Act 1987 (UK).
93. Section 9(2) of the Petroleum Act 1987 (UK).
94. Section 9(3) of the Petroleum Act 1987 (UK). Note sections 9(4) and 9(5) of the Petroleum Act 1987 (UK) with regard to interest.
95. Section 10(1) of the Petroleum Act 1987 (UK).
96. Section 10(2) of the Petroleum Act 1987 (UK).
97. Section 10(3)(a) of the Petroleum Act 1987 (UK).
98. Section 10(3)(b) of the Petroleum Act 1987 (UK).
99. Section 10(3) of the Petroleum Act 1987 (UK).
100. Section 10(4) of the Petroleum Act 1987 (UK).
102. Section 10(6) of the Petroleum Act 1987 (UK).
103. Section 11(1) of the Petroleum Act 1987 (UK).
104. Section 11(2)(a) of the Petroleum Act 1987 (UK).
106. Section 11(2)(c) of the Petroleum Act 1987 (UK).
109. Section 14(1) of the Petroleum Act 1987 (UK). See the comments of Sas "Legal Aspects of the Decommissioning of Submarine Pipelines on
10. Sections 14(2) and 14(5) of the Petroleum Act 1987 (UK).


16. For example, see section 25(1) of the Petroleum and Submarine Pipelines Act 1975 (UK).


18. Replacing Section 5 of the Continental Shelf Act 1964 (UK).


20. Sections 3(1), 3(2) and 6 of and the Schedule to the Mineral Workings (Offshore Installations) Act 1971 (UK).

21. Section 6(3) of and para. 1(2) of the Schedule to the Mineral Workings (Offshore Installations) Act 1971 (UK).


23. Regulation 7(4) of and Part VII of Schedule 2 to off the Offshore Installations (Construction and Survey) Regulations 1974.


125. Section 3(2)(c) of the Mineral Workings (Offshore Installations) Act 1971 (UK).


130. Model clause 1(2) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.


136. It is not proposed to discuss the merits, or the method of implementation or the variation of each of the types. Such has been undertaken in part by Beazley "Abandonment of UKCS Installations:


139. The Participants being the holders of a Permit.

140. Section 107(2)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

141. Section 107(2)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

142. Section 107(2)(c) of the Petroleum (Submerged Lands) Act 1967 (C'th).

143. Section 107(2)(d) of the Petroleum (Submerged Lands) Act 1967 (C'th).

144. Section 107(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).

145. Section 107(3)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

146. Section 107(3)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

147. Section 107(3) of the Petroleum (Submerged Lands) Act 1967 (C'th).

148. An arrangement made pursuant to section 107(2)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

149. Section 108 of the Petroleum (Submerged Lands) Act 1967 (C'th).

150. Section 108(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

151. Section 108(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

152. Section 108(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).
153. Section 113(1)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).
154. Section 113(1)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).
155. Section 113(1)(c) of the Petroleum (Submerged Lands) Act 1967 (C'th).
156. Section 113(2)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).
157. Section 113(2)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).
158. Section 113(2)(c) of the Petroleum (Submerged Lands) Act 1967 (C'th).
159. Section 113(3)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).
160. Section 113(3)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).
161. Section 113(4) of the Petroleum (Submerged Lands) Act 1967 (C'th).
162. Section 105(1)(e) of the Petroleum (Submerged Lands) Act 1967 (C'th).
163. Section 105(1)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).
164. Section 105(1)(d) of the Petroleum (Submerged Lands) Act 1967 (C'th).
165. Section 105(2)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).
166. Section 105(2)(c) of the Petroleum (Submerged Lands) Act 1967 (C'th).
169. Sections 157(1) and 157(2)(m) of the Petroleum (Submerged Lands) Act 1967 (C'th).
170. Section 33(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).
171. Section 283F(1) of the Navigation Act 1912 (C'th). Note section 283K(1) of the Navigation Act 1912 (C'th) which provides that such directions cannot be inconsistent with the Petroleum (Submerged Lands) Act 1967 (C'th) or any regulations or directions made under that Act.
172. See the definition of "Offshore industry mobil unit" in section 8(3) of the Navigation Act 1912 (C'th).
173. Section 10 of the Environmental Protection (Sea Dumping) Act 1981 (C'th). See section 4(1) of the Environmental Protection (Sea Dumping) Act 1981 (C'th) for the definition of a structure: "Australian platform".
174. Sections 11(b) and 11(c) of the Environmental Protection (Sea Dumping) Act 1981 (C'th).

175. Section 19(1) of the Environmental Protection (Sea Dumping) Act 1981 (C'th).

176. Sections 10 and 11 of the Environmental Protection (Sea Dumping) Act 1981 (C'th).

177. Section 18(1) of the Environmental Protection (Sea Dumping) Act 1981 (C'th).

178. Section 21(1) of the Environmental Protection (Sea Dumping) Act 1981 (C'th).

179. Section 16(a) of the Environmental Protection (Sea Dumping) Act 1981 (C'th).

180. Section 16(b)(i) of the Environmental Protection (Sea Dumping) Act 1981 (C'th).

181. Section 16(b)(ii) of the Environmental Protection (Sea Dumping) Act 1981 (C'th).

182. Section 16(b)(iii)(B) of the Environmental Protection (Sea Dumping) Act 1981 (C'th).

183. Section 16 of the Environmental Protection (Sea Dumping) Act 1981 (C'th).

184. Section 17(1)(b) of the Environmental Protection (Sea Dumping) Act 1981 (C'th).

185. Section 17(1)(a) of the Environmental Protection (Sea Dumping) Act 1981 (C'th).

186. Section 17(1) of the Environmental Protection (Sea Dumping) Act 1981 (C'th). Note section 17(2) of the Environmental Protection (Sea Dumping) Act 1981 (C'th) which addresses the situation where there are two or more persons convicted of an offence.


188. Section 124(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

189. Section 124(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

190. Section 124(c) of the Petroleum (Submerged Lands) Act 1967 (C'th).

191. Section 124(d) of the Petroleum (Submerged Lands) Act 1967 (C'th).

1. **RESERVATION OF RIGHTS BY THE PARTICIPANTS**

The Participants will reserve unto themselves individually the rights that they have under the petroleum title, save to the extent that such rights are fettered by the terms of the Joint Operating Agreement\(^1\).

2. **RIGHT OF INSPECTION**

Each Participant will have the right to inspect the books, records and inventories of whatsoever kind or nature maintained by or on behalf of the Operator and relating to the Operations. Such right will not extend to books, records and inventories maintained by or on behalf of the Operator as the owner of an Interest. To exercise the right of inspection a Participant will be required to give to the Operator a minimum period of notice prior to the date upon which it desires to make the inspection and identify the person or persons who will undertake the inspection. The inspection will be required to be undertaken at a reasonable time and during usual business hours. The right of inspection will be in addition to the right to audit the accounts and records of the Joint Account\(^2\).

3. **INSURANCE**

Each Participant may, in addition to the insurance required to be effected by the petroleum title, any Act, regulation or by-law or otherwise, at its own expense and for its own account obtain such other insurance pertaining to the Operations or materials acquired under the Joint Operating Agreement as it deems advisable\(^3\). However, the Joint Operating Agreement will usually provide that such additional insurance must not interfere, directly or indirectly, with the Operator's negotiations for, or placement of, such insurance as the Operator is required to obtain and effect under the Joint Operating Agreement\(^4\).

The Joint Operating Agreement will require each Participant to obtain
and maintain such insurance or other evidence of financial responsibility as may be decided from time to time by the Operating Committee in respect of its share of any liability to third parties which may arise in connection with the Operations. This insurance is in addition to any other insurance of the nature mentioned above. Each Participant will be required to provide to the Operating Committee such evidence, as may be reasonably required, of the effecting of the insurance or other evidence of financial responsibility, and the maintenance thereof, as and when requested to do so by the Operating Committee.

4. **OPOL**

The Joint Operating Agreement will require the Participants to execute a "non-operators undertaking" and to furnish such other forms and information as are necessary to establish financial responsibility in accordance with the rules of the Offshore Pollution Liability Association Limited ("OPOL").

5. **LITIGATION**

A Participant will be required to notify the other Participants of any claim relating to or which may affect the Operations. In so far as a claim does relate to or affect the Operations, the Participant will be required to defend or settle the claim in accordance with the directions of the Operating Committee. The costs, expenses and damages payable as a result of such defence or settlement will be met from the Joint Account.

If any other Participant wishes to participate in such defence or settlement it will be permitted to do so, but at its sole cost and expense.

6. **WORK AND EXPENDITURE OBLIGATIONS**

In Great Britain as has been mentioned above in this thesis, after the closing date for applications for Licences, all applications received are considered by the Department of Energy, which arranges for a
presentation by the applicants under consideration and negotiates with them an appropriate work programme. Thereafter, where an applicant is offered a Licence by the Secretary of State for Energy, such Licence will usually be offered on the condition that within a specified period of time of the date of the offer the applicant, inter alia, confirms acceptance of a work programme proposed by the Secretary of State for Energy. The work programme will, in most cases, be that negotiated between the Department of Energy and the applicant12.

The work programme will be set out in Schedule 4 to the Licence13.

The Licence requires the holders of the Licence to carry out the scheme of prospecting, including any geological survey by any physical or chemical means and the programme of test drilling as may be set out in the Licence during the initial term of six years14.

Where a Licence has been issued as the result of the discretionary allocation with fixed cash premium method (as implemented in the seventh licencing round) or the variable cash tender method (as implemented in the fourth, eighth and ninth licencing round) the practice is not to set out a particular work programme in the Licence15.

In the event that the holders of the Licence do not carry out the work programme set out in the Licence the Secretary of State for Energy may revoke it16.

In Australia, an applicant must set out, in its application for a block or blocks, particulars of its proposals for work and expenditure in respect of the block or blocks to which the application relates17. This requirement does not apply where the cash bidding method of allocating a block or blocks is employed18.

When the Joint Authority advises an applicant that it is prepared to grant to the applicant a Permit in respect of the block or blocks to which the application relates, the Joint Authority must set out in the written advice, inter alia, a summary of the conditions subject to which the Permit will be granted19. Other than where the Permit is to be granted
as a result of the cash bidding method of allocating blocks\textsuperscript{20}, a Permit may be granted subject to such conditions as the Joint Authority thinks fit and are set out in the Permit\textsuperscript{21}. The conditions may include conditions with respect to work to be carried out in or in relation to the area to which the Permit relates during, the term of the Permit and or amounts to be expended by the applicant in the carrying out of such work\textsuperscript{22}. Once the applicant makes its request to the Joint Authority to grant it the Permit\textsuperscript{23} and has lodged with the Designated Authority the security that the applicant is required to lodge\textsuperscript{24} and, paid the balance of the amount\textsuperscript{25} to be paid in respect of the grant of the Permit, the Joint Authority will grant the Permit to the applicant\textsuperscript{26}.

If the applicant's proposals for work and expenditure are accepted by the Joint Authority they will form the basis of the work and expenditure conditions set out in the Permit\textsuperscript{27}. As such, great care must be taken by the applicant in preparing the proposals for work and expenditure\textsuperscript{28}. After all, the Participants may find themselves in the position whereby, to comply with the conditions set out in the Permit, they have to carry out minimum work and or minimum expenditure in relation to the area to which the Permit relates\textsuperscript{29}. In the case of both, compliance with either the minimum work condition or the minimum expenditure condition will not suffice to satisfy the Participants' obligations\textsuperscript{30}. To avoid breaching the conditions set out in the Permit it is therefore usual for the proposals to be drafted in general terms in so far as work is concerned and conservatively in so far as expenditure is concerned\textsuperscript{31}. In addition, where for example, work has been done or expenditure made in a year in excess of that required for the year, a prudent Operator would ascertain whether the excess can be credited against the next year's minimum work programme or minimum expenditure requirement\textsuperscript{32}.

In the event that the holders of the Permit do not comply with the conditions set out in the Permit, the Joint Authority may cancel the Permit\textsuperscript{33} and forfeit the security given\textsuperscript{34}.

Due to the consequences that can flow from failure, to carry out the work programme set out in the Licence in the case of Great Britain and, to comply with the work and or expenditure conditions set out in the Permit,
in the case of Australia, it is usual for the Joint Operating Agreement to stipulate that the work and or expenditure conditions stipulated in the petroleum title which are obligatory, be incorporated into the Joint Operating Agreement and made obligatory on all Participants. To this end, the Joint Operating Agreement will usually provide that there can be no Non-Consent Operations or Sole Risk Operations in respect of the obligatory work and or expenditure conditions stipulated in the petroleum title.

7. PROGRAMMES AND BUDGETS

   The proposed programmes and budgets are to be considered, revised and approved by the Operating Committee as soon as is practicable and in most cases prior to a stated date or within a period of time.

8. AMENDMENT OF PROGRAMMES, BUDGETS AND AUTHORISATIONS FOR EXPENDITURE

   The Joint Operating Agreement usually provides that a Participant may, at any time by notice to the other Participants, propose that an approved programme and budget and or authorisation for expenditure be amended. To the extent that the amendment is approved by the Operating Committee, the approved programme and budget and or authorisation for expenditure will be deemed amended accordingly. However, such amendment will not operate to invalidate any authorised commitments or expenditure made by the Operator prior to the amendment.

9. NON-CONSENT

   The general rule established by the Joint Operating Agreement is that all Operations under the petroleum title are to be carried out by the Operator, subject to the overriding control of the Operating Committee, as Operator for and on behalf of all the Participants. As will be discussed later, there is usually at least one exception to this rule: Sole Risk Operations.
A Sole Risk Operation is an activity under the petroleum title carried out in accordance with the terms of the Joint Operating Agreement, usually by the Operator, as Operator for and on behalf of fewer than all the Participants, this being an activity which has been proposed by the Operator and has not received the requisite affirmative vote to proceed as part of the Operations.43

The converse of a Sole Risk Operation is a Non-Consent Operation. The Joint Operating Agreement will usually permit a Participant to elect not to participate in an activity under the petroleum title in accordance with the terms of the Joint Operating Agreement, this being an activity which has been proposed by the Operator and received the requisite affirmative vote (but less than a unanimous affirmative vote) to proceed as part of the Operations.44

The main difference between a Sole Risk Operation and a Non-Consent Operation is one of emphasis. In a Sole Risk Operation it is, in effect, one Participant desiring to carry out an activity in which the other Participants do not desire to participate45, whilst in a Non-Consent Operation it is, in effect, one Participant not desiring to participate with the other Participants in carrying out an activity46.

The same legal principles apply alike to Sole Risk Operations and Non-Consent Operations. Sole Risk Operations are considered in some detail later in this thesis47. The comments made in that consideration apply equally to Non-Consent Operations48. What is more, the consequences of Sole Risk Operations and Non-Consent Operations are often the same49. As such, the discussion of Non-Consent Operations which follows is limited but should be considered in conjunction with the discussion of Sole Risk Operations.

It is not unusual for the Joint Operating Agreement to provide for Sole Risk Operations and Non-Consent Operations50. Nevertheless, some Joint Operating Agreements do not permit non-consent to arise at the Exploration Phase. They may permit it to arise, in given circumstances, at the Development Phase, where a Participant may have the right to elect,
in given circumstances, not to proceed with the development.\textsuperscript{51}

The rationale for prohibiting a Participant from electing not to participate in an activity at the Exploration Phase is that, in high risk areas, it would act as a deterrent to participation as the risk factor and cost factor increased.\textsuperscript{52}

Other Joint Operating Agreements do permit non-consent to arise at the Exploration Phase.\textsuperscript{53}

The rationale for permitting a Participant to elect not to participate in an activity at the Exploration Phase is that a Participant should not be compelled to so participate without its consent.\textsuperscript{54}

The non-consent provision usually provides that a Participant which voted against an operating programme and budget adopted by the Operating Committee\textsuperscript{55} or a Participant which voted in favour of an operating programme and budget adopted by the Operating Committee\textsuperscript{56} may, within a stated period of time of the vote which adopts the operating programme and budget, give notice to the other Participants that it will not contribute to the proposed operating programme and budget.\textsuperscript{57} It is usually the case that such notice can only be given in respect of a proposal to drill an exploratory well which is not part of the minimum work programme\textsuperscript{59} for the current year.\textsuperscript{60}

On receipt of the notice given by the Non-Consent Participant, the Participants receiving the notice are usually given the right, within a stated period of time of receipt, to give like notice to all other Participants. If such Participants do not give notice within the time specified they will be deemed to have confirmed their intention to participate in the proposed operating programme and budget.\textsuperscript{61}

If Participants holding, in aggregate, a stated percentage or more of the Interests have given notice that they will not participate, the proposed operating programme and budget will usually not proceed. A Participant which voted for the proposal may however, give notice, to
secure the right to conduct Sole Risk Drilling of its intention to carry out a Sole Risk Drilling.

However, if the percentage is less than the stated percentage, then the proposed operating programme and budget will proceed at the sole risk and expense of, and all costs of the Non-Consent Operation shall be borne by, the Participating Participants in the same proportion as their respective Interests bear to each other and all matters directly relating to the conduct of the operating programme and budget will be decided by the Participating Participants. Even so, the Non-Consent Participants will be required to be kept fully informed of all Non-Consent Operations and all data from the operations will be required to be made available to them as soon as practicable and at no cost other than that which is reasonable for copying and delivery.

The Participating Participants are usually required to indemnify and hold harmless the Non-Consent Participants from and against all liability, costs, claims, expenses or loss directly incurred as a result of the Non-Consent Operations.

The Non-Consent Operation will be carried out in accordance with the terms of the Joint Operating Agreement, by the Operator, for and on behalf of the Participating Participants, as part of the Operations.

In the event that the Non-Consent Operation result in a particular discovery of petroleum assessed by the Operating Committee to be capable of exploitation, the Participating Participants will be entitled to recover from each Non-Consent Participant a sum equal to a stated multiple of the total costs of the Non-Consent Operation, as would have been payable by each Non-Consent Participant had it and all other Participants participated. The recovery of the sum is usually effected by the Non-Consent Participant funding each Participating Participant's share of all operating programmes and budgets with respect to evaluation, development or exploitation of the discovery until the sum payable has been expended. On satisfactory reimbursement, any property acquired by or on behalf of the Participating Participants for the purpose of the Non-Consent Operations will vest in all of the Participants as tenants in
Each Non-Consent Participant will have the right, at its own expense, to have an audit carried out by its own or independent auditors to verify the amount of the sum payable by it and each Participant will have a like right of audit to verify that the reimbursement obligations have been satisfied.

10. RENEWAL OF THE PETROLEUM TITLE

In Great Britain, a Licence is granted in the first instance for a term of six years, may be contained for a further term of twelve years and may thereafter continue for a further maximum period of eighteen years. Progression from the initial term to the third term, depends upon the due performance by the Participants of the work obligations and with the other terms and conditions of the Licence. Furthermore, progression from the initial term to the second term is subject to surrender provisions. The initial and second terms can be seen as the exploration and appraisal terms, whereas the third term can be seen as the development term. This thesis will, therefore, only consider the initial and second terms.

At any time, not later than three months before the expiration of the initial term, the Participants may give notice in writing to the Secretary of State for Energy that they desire the Licence to be continued as to part of the area to which the Licence relates and to determine as to the residue of the area to which the Licence relates; the area to be surrendered.

The notice is required to describe the area to be surrendered and to specify a date, not later than the expiry of the initial term, upon which the area to be surrendered is to be surrendered. On the date specified the rights granted by the Licence will cease in respect of the area surrendered but without prejudice to any obligations or liabilities imposed upon or incurred by the Participants under the Licence prior to that date.
In Australia, a Permit is granted in the first instance for a term of six years\textsuperscript{82} and may be continued for further terms of five years\textsuperscript{83}. Progression from the initial term to the second term, and from the second term to the third term and so forth, depends upon the due performance by the Participants of the conditions set out in the Permit\textsuperscript{84}, compliance with the provision of the Petroleum (Submerged Lands) Act 1967 (C'th)\textsuperscript{85}, and otherwise at the discretion of the Joint Authority\textsuperscript{86}. Furthermore, progression is, in each case, subject to surrender provisions\textsuperscript{87}. At any time, not later than three months before the expiration of the initial or then current term\textsuperscript{88}, the Participants may make application to the Designated Authority for renewal by the Joint Authority of the Permit in respect of the blocks specified in the application\textsuperscript{89}. The notice is required to be in accordance with an approved form\textsuperscript{90}, in an approved manner\textsuperscript{91} and be accompanied by the prescribed fee\textsuperscript{92}. Application for renewal of a Permit cannot be made where the method employed in allocating a block or blocks to which the Permit relates is the cash bidding method if, the notice inviting application for the grant of the Permit stated that it was not able to be renewed\textsuperscript{93} or a renewal of the Permit has previously been granted by the Joint Authority\textsuperscript{94}. The application is also required to specify the blocks to which the renewed Permit is to relate, being one half of the blocks to which the Permit related\textsuperscript{95}. The balance of the blocks to which the Permit related are surrendered. Where the Participants make an application for the renewal of a Permit, the Joint Authority:-

1. must, if the Participants have complied with the conditions set out in the Permit and the provisions of the Petroleum (Submerged Lands) Act 1967 (C'th)\textsuperscript{96}, or
2. may, if the Participants have not so complied and the Joint Authority is satisfied that, although the Participants have not so complied, special circumstances exist to justify the granting of the renewal of the Permit,

inform the Participants by notice in writing that it is prepared to grant to them the renewal of the Permit and that the Participants are required to lodge a security for compliance with the conditions to which the Permit, if the renewal is granted, will from time to time be subject and with the Petroleum (Submerged Lands) Act 1967 (C'th). On the other hand, if the Participants have not so complied and if the Joint Authority is not satisfied that special circumstances exist to justify the granting of the renewal of the Permit, the Joint Authority must, by notice in writing served on the Participants, refuse to grant the renewal of the Permit.

Before it can refuse to grant the renewal of the Permit the Joint Authority must have given to the Participants not less than one month's written notice of its intention to refuse to grant the renewal of the Permit. The notice must have given particulars of the reasons for the intention and have specified a date on or before which the Participants or any other person on whom the notice was served may, by notice in writing served on the Designated Authority, submit any matter that they wish to be considered. Furthermore, the Joint Authority must have thereafter considered any matter submitted to it for consideration.

The notice advising the Participants that the Joint Authority is prepared to grant to them a renewal of the Permit must contain a summary of the conditions to which the Permit, on the grant of renewal, is to be subject and a statement to the effect that the application will lapse if the Participants do not make a request to the Joint Authority to grant to them the renewal of the Permit and lodge with the Designated Authority the security referred to.
The Participants have one month after service of the notice advising them that the Joint Authority is prepared to grant to them a renewal of the Permit to serve upon the Designated Authority a written notice requesting the Joint Authority to grant to them the renewal of the Permit\textsuperscript{108} and to lodge with the Designated Authority the security referred to\textsuperscript{109}.

Once the Participants have complied with these requirements the Joint Authority is required to grant to them the renewal of the Permit\textsuperscript{110}. Were the Participants to fail to comply with these requirements, the application will lapse at the end of the one-month period\textsuperscript{111}.

The rationale for relinquishment provisions, of the type utilised in Great Britain and Australia, is that it ensures additional pressure will be placed upon the Participants to explore thoroughly the area to which the petroleum title relates, in order to make a decision as to which areas to relinquish. Furthermore they ensure that areas which do not produce a discovery or where the Participants have decided not to conduct further exploration will, within a reasonable time, revert to the government\textsuperscript{112}.

The renewal of the petroleum title is approached in a different manner by each of the proformas.

Under the Britoil proforma, when it comes to the making of a decision upon whether to continue the Licence\textsuperscript{113} upon the expiration of the initial term of six years, it is a case of determining which Participants desire to continue the Licence and which are in agreement upon the delineation of the surrender area to be described in the notice of renewal\textsuperscript{114}. If a majority\textsuperscript{115} of those Participants wish to renew the Licence, then the renewal of the Licence shall be sought\textsuperscript{116}.

In quantifying at the Participants entitled to vote, the vote by any Participants against continuation is ignored. The matter is decided by those Participants that desire to continue\textsuperscript{117}.

The renewal clause is stated to be without prejudice to each Participant’s right to give notice to the other Participants that it
wishes to withdraw from the Licence and the Joint Operating Agreement during the initial term of the Licence. It is also stated to be subject to the rights of the Participants relating to sole risk.

Under the APEA proforma, the Operator is required, within a stated period of time prior to the expiration of the current term of the Permit, to submit to the Operating Committee the issue of whether, if the Permit is capable of renewal, to apply for renewal.

Any Participant not voting in favour of applying for renewal of the Permit is required to withdraw from the Permit with effect from the expiration of the current term of the Permit.

Thereafter, within a stated period of time prior to the last day upon which an application for renewal of the Permit is required to be submitted, each Participant that elects to join in applying for the renewal of the Permit must notify the other Participants of its election. The Operator is required to advise each Participant of the last date on which it can make such an election within a stated period of time prior to such election date.

If no Participant elects to apply for the renewal of the Permit the Operator is required to conclude the Operations with respect to the Permit and no application for renewal of the Permit can be made.

If at least one Participant elects to apply for the renewal of the Permit, those Participants that do not so elect are deemed to have given notice of withdrawal from the Permit with effect from the date of expiration of the current term of the Permit and must, if so required by the Participants that do so elect, execute such documents and do such acts and things as are necessary to obtain the Permit.

If only one Participant elects to apply for the renewal of the Permit, that Participant is to have sole charge and control over the method and conditions of application for renewal of the Permit.
If there is more than one Participant that elects to apply for the renewal of the Permit it must decide on the minimum work programme and the minimum expenditure commitment to be submitted in the application for renewal and, if appropriate, the block or blocks in respect of which renewal will be sought. The Operator is required to submit the application for renewal on the basis of the agreed work and expenditure commitments.

Each Participant so electing to join in applying for the renewal of the Permit will have the right to be represented individually in any discussions or meetings that take place with the Joint Authority in relation to the application for or on the conditions upon which renewal of the Permit will be granted. The Operator will not be empowered to advance to the Joint Authority any proposals with respect to such matters, nor to agree any minimum work commitment or minimum expenditure commitment unless the same has been previously agreed by the Participants who elected to join in the application.

In the event that the Joint Authority is prepared to grant a renewal of the Permit upon conditions which differ materially from those submitted in the application, each Participant who elected to join in the application will have the right, within a stated period of time from the date of receipt of notice from the Operator of such conditions, to give notice to all other Participants which elected to join in the application, of withdrawal from the Permit. The Operator is required to give notice of such conditions promptly after the receipt of the information from the Joint Authority.

Where a Participant gives notice of withdrawal, it will be deemed to have given notice of withdrawal with effect from the date of expiration of the current term of the Permit and must, if so required by the Participants that do not give like notice, execute such documents and do such acts and things as are necessary to obtain renewal of the Permit.

If at least one of the Participants which elected to join in applying for the renewal of the Permit does not give notice of withdrawal, the
Operator is required to request the grant of renewal of the Permit on behalf of that Participant or those Participants.

11. **WITHDRAWAL**

A Joint Operating Agreement will usually prohibit a Participant from withdrawing from the petroleum title or the Joint Operating Agreement unless such withdrawal is undertaken in the manner established by the Joint Operating Agreement.

A Participant may give notice to the other Participants that it wishes to withdraw from the petroleum title or the Joint Operating Agreement. The time at which the notice may be given will usually be stipulated in the Joint Operating Agreement as, depending upon the time at which it is given, certain consequences will flow from the giving of the notice. Issues of timing and the consequences flowing from the giving of notice will differ from Joint Operating Agreement to Joint Operating Agreement. It is usual to provide:

1. if a Participant gives notice earlier than a stipulated period prior to, in some cases, the expiration of the initial term of the petroleum title, and in other cases the expiration of the current year, the Participant has the right to withdraw from the petroleum title and the Joint Operating Agreement; and

2. if the petroleum title is extended for a further term, if a Participant gives notice at any time during the further term that Participant has the right to withdraw from the petroleum title and the Joint Operating Agreement.

The Joint Operating Agreement will usually require all work and or expenditure obligations to have been completed, be it for the initial term or the current year, before a Participant can give notice of its desire to withdraw. This is because it would be unacceptable for a Participant to pass on an increased financial burden to the other Participants by withdrawing earlier.
In addition, the Joint Operating Agreement will give to the other Participants the right to give notice, within a stipulated period of the receipt of the notice, that they also wish to withdraw from the petroleum title and the Joint Operating Agreement. If all other Participants give notice that they also wish to withdraw, the Participants will be deemed to have agreed to abandon the Operations and the petroleum title will be required to be surrendered at the earliest possible date. Each participant will be required to take promptly any and all actions, and execute any and all documents necessary to effect such surrender.

If fewer than all of Participants give notice that they also wish to withdraw from the petroleum title and the Joint Operating Agreement, the withdrawing Participants (the Participant that gave the initial notice and the Participants who subsequently gave notice) are required to withdraw from the petroleum title and the Joint Operating Agreement on the earliest possible date and to assign their respective Interests to the non-withdrawing Participants. The Joint Operating Agreement will usually provide that the withdrawing Participants are not to receive compensation for the assignment of their respective Interests.

The actual withdrawal of a withdrawing Participant from the petroleum title and the Joint Operating Agreement will be subject to a number of conditions. In so far as the Joint Operating Agreement is concerned these conditions will usually include:

1. a requirement that the withdrawing Participant assigns all its Interest to the non-withdrawing Participants. The assignment of all or part of the Interest of a Participant is considered in some detail later in this thesis. The comments made in that consideration apply equally to the assignment of an Interest by a withdrawing Participant and as such will not be addressed here;

2. a stipulation that the Interest of the withdrawing Participant be either acquired by the non-withdrawing Participants in proportion to the total proportion of the Interests or in such other proportions as they may themselves agree upon;
3. a requirement that the withdrawing Participant join with the non-withdrawing Participants in such actions as may be necessary or desirable to obtain any consents or approvals, including, in the case of Great Britain, that of the Secretary or State for Energy and, in the case of Australia, that of the Joint Authority to the assignment;  

4. a requirement that the withdrawing Participant and the non-withdrawing Participant execute and deliver any and all documents necessary to effect the assignment;  

5. a provision that the costs, stamp duty, transfer taxes and other expenses of the assignment are the obligation of the withdrawing Participant;  

6. an obligation, notwithstanding the giving of the notice, of the withdrawing Participant to join with the non-withdrawing Participants in such actions as may be required by them for the maintenance of the petroleum title. This requirement will be so drafted to provide that, by participating in the actions, the withdrawing Participant will not incur any financial obligations beyond those incurred immediately prior to the giving of the notice and those provided for by the provisions of the Joint Operating Agreement relating to withdrawal;  

7. a provision that the costs, fines, penalties and other expenses incurred by the non-withdrawing Participants in connection with the withdrawal of the Participant are the obligation of the withdrawing Participant;  

8. a stipulation that the withdrawing Participant is not permitted to withdraw from the petroleum title and the Joint Operating Agreement if its Interest is subject to any liens, changes or encumbrances unless the non-withdrawing Participants are willing to accept the assignment subject to such liens, charges or encumbrances; and
9. A stipulation that unless the non-withdrawing Participants agree to accept the withdrawing Participants' liabilities and obligations, the withdrawing Participant will remain liable and obliged for its percentage share of all expenditure accruing to the Joint Account under any programme or budget approved by the Operating Committee and authorised by an authorisation for expenditure prior to the date on which the notice of withdrawal was given, even if the operations concerned are implemented after that date. This stipulation will be so drafted to provide that the withdrawing Participant will not be liable for any amounts which it would not have been obliged to pay had it not withdrawn. The one exception may be with respect to costs of abandonment. The Joint Operating Agreement will provide that the withdrawing Participant remains liable and obligated for its share of all costs and obligations relating to abandonment. This will apply to all Operations and Sole Risk Drilling in which the withdrawing Participant has participated. The difficulty with this exception is to establish the amount of the contribution to be made by the withdrawing Participant to the costs of abandonment. Usually the costs of abandonment are to be calculated on an equal share basis as at the time of withdrawal. In the absence of agreement between the non-withdrawing Participants and the withdrawing Participant, the Joint Operating Agreement may provide for the costs of abandonment to be determined by an independent third party, such as a surveyor, to be appointed by the Participants. The independent third party will usually act as an expert and not as an arbitrator, his decision being final and not subject to review or appeal. The Joint Operating Agreement will then provide that the withdrawing Participant either pays the amount determined as payable by it to the Operator who will credit the amount received to each non-withdrawing Participant in the Joint Account or provide the non-withdrawing Participants with such security for such amount as is acceptable to all of the non-withdrawing Participants. An alternative to determining the amount to be paid by the withdrawing Participant as mentioned above is for the withdrawing Participant to remain liable and obligated for its share of all costs and
obligations relating to abandonment, if abandonment occurs within a stipulated period after the effective date of withdrawal. In such cases, the withdrawing Participant will be required to provide the non-withdrawing Participants with such security therefore as is acceptable to all of the non-withdrawing Participants. In either event, in the case of Great Britain, the withdrawing Participant, if under a duty to secure the carrying out of an abandonment programme, will seek to be released from that obligation.

Where a Participant seeks to withdraw from the petroleum title and the Joint Operating Agreement, such withdrawal and the assignment necessitated thereby will not be effective until a stipulated date. The stipulated date may be either the effective date of the assignment or the end of the current year. The withdrawing Participant will cease to have any rights in respect of the petroleum title on and after the stipulated date. If all the Participants give notice of their desire to withdraw, the effective date of withdrawal will be the date on which the surrender takes effect.

During the period commencing with the giving of notice by the Participant of its desire to withdraw from the petroleum title and the Joint Operating Agreement and terminating of such withdrawal and assignment becoming effective, the withdrawing Participant will hold its Interest upon trust for the non-withdrawing Participants. Each non-withdrawing Participant will be required to indemnify the withdrawing Participant against any and all costs, expenses, claims and liabilities arising from the commencement of the period, until the effective date of the assignment. The withdrawing Participant will be required, during that period, to execute such documents and do such acts and things as are necessary to comply with the obligations of the holder of the petroleum title and, as directed by the Operator, otherwise and on behalf of the non-withdrawing Participants.

Two interesting questions that arise when considering the right of a Participant to withdraw from the petroleum title and the Joint Operating Agreement are:-
1. what is to happen if a discovery is made by a well, to which the withdrawing Participant has contributed, after the giving of notice of a desire to withdraw?; and

2. does the withdrawing Participant retain its entitlement to vote at meetings of the Operating Committee in respect of operations for which it remains liable and obligated?

In the first case, the Joint Operating Agreement may provide the answer by stating that the withdrawing Participant shall have the right within a stated period of time to elect that it be deemed not to have withdrawn from the trapping unit resulting from the discovery. On the other hand, the Joint Operating Agreement may be silent on the issue. In the latter instance, it is submitted, the withdrawing Participant has no right to participate in the discovery.

In the second instance, the Joint Operating Agreement may provide for the withdrawing Participant to retain its entitlement to vote at meetings of the Operating Committee in such circumstances, but apart from this, the withdrawing Participant is not entitled to vote at meetings of the Operating Committee. In most cases the Joint Operating Agreement will be silent on the issue. In the latter case, it is submitted the withdrawing Participant will retain its entitlement to vote at meetings of the Operating Committee until such time as the assignment of its Interest becomes effective.

12. SURRENDER OF THE PETROLEUM TITLE

In the case of Great Britain, the Participants may at any time during the initial term, by giving to the Secretary of State for Energy not less than six months' written notice, surrender or determine the Licence. The Licence will expire on an anniversary date of the date of commencement of the initial term. The Participants may cancel the notice by giving to the Secretary of State for Energy not less than one months written notice to that effect before the expiration of the first notice.
In the case of Australia, the Participants may at any time, by application in writing served on the Designated Authority, apply to surrender all of the blocks in respect of which the Permit is in force. The Designated Authority cannot give his consent to the surrender unless the Participants have:

1. paid all fees and amounts payable by them under the Petroleum (Submerged Lands) Act 1967 (C'th) or have made arrangements, that are satisfactory to the Designated Authority, for the payment of those fees and amounts;

2. complied with the conditions set out in the Permit and with the provisions of the Petroleum (Submerged Lands) Act 1967 (C'th);

3. to the satisfaction of the Designated Authority, removed or caused to be removed from the area to which the surrender relates all property brought into that area by any person engaged or concerned in the operations authorised by the Permit, or have made arrangements that are satisfactory to the Designated Authority with respect to that property;

4. to the satisfaction of the Designated Authority, plugged or closed-off all wells made, in the area to which the surrender relates, by any person engaged or concerned in the operations authorised by the Permit;

5. subject to the provisions of the Petroleum (Submerged Lands) Act 1967 (C'th), made provision, to the satisfaction of the Designated Authority, for the conservation and protection of the natural resources in the area to which the surrender relates; and

6. to the satisfaction of the Designated Authority, made good any damage to the sea-bed or subsoil, in the area to which the surrender relates, caused by any person engaged or concerned in the operations authorised by the Permit.
In most cases, items 1., 4. and 6. will relate to the activities undertaken by the Operator for and on behalf of the Participants.

If the Participants have complied with the requirements listed above, the Designated Authority cannot unreasonably refuse consent to the surrender. Hence, there is a discretionary power vested in the Designated Authority as to whether he will consent to the surrender.

If the Participants have not complied with the requirements listed above, the Designated Authority can give his consent if he is satisfied that special circumstances exist that justify the giving of consent to the surrender.

Where the Designated Authority does give his consent to the application to surrender, the Participants may, by notice in writing served on the Designated Authority, surrender the Permit.

Of recent date it has been the practice to grant Permits subject to the condition that the Participants complete the minimum work programme for the first three years of the initial term or renewed term before they can successfully apply for consent to the surrender of the blocks in respect of which the Permit is in force. This policy would appear to relate to Permits and renewed Permits alike.

The consent of all Participants is required to determine the petroleum title. The Participants are required to make application jointly to surrender the petroleum title and each Participant must take promptly any and all actions, and execute any and all documents, necessary to effect such surrender.

13. SURRENDER OF PART OF THE AREA TO WHICH THE PETROLEUM TITLE RELATES

In the case of Great Britain and Australia, the requirements relating to the surrender of the petroleum title apply alike to the surrender of part of the area to which the petroleum title relates.
The consent of all Participants is required to surrender any part of the area to which the petroleum title relates.
FOOTNOTES

2. Britoil 6.2. Under Apea the Participants are limited to the right of audit.
3. Britoil 7.1.1; Apea 14.4.
5. Britoil 7.1.2.
6. Form FR-5 referred to in Form B annexed to the rules of the association.
7. In accordance with Form B annexed to the rules of OPOL.
8. Britoil 7.2.4.
9. Britoil 7.3.3.
10. Britoil 7.3.4.
11. Chapter IV.
16. Model clauses 42(1) and 42(2)(b) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.
18. The requirement is not contained in section 22A of the Petroleum (Submerged Lands) Act 1967 (C'th). See also section 33(2A) of the Petroleum (Submerged Lands) Act 1967 (C'th).


23. Section 22(3)(a) and 26(1)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).


25. Section 26(1)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th). Note also the entering into an agreement under section 109 of the Petroleum (Submerged Lands) Act 1967 (C'th) where the option to do so has been exercised pursuant to section 25(5)(b)(ii) of the Petroleum (Submerged Lands) Act 1967 (C'th): Section 26(1)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

26. Section 23(4) and 27 of the Petroleum (Submerged Lands) Act 1967 (C'th).


34. The security will have been given in accordance with section 114 of the Petroleum (Submerged Lands) Act 1967 (C'th).

35. O'Regan and Taylor "Joint ventures and operating agreements" (1984) 14 V.U.W.L.R. 85, 94.

36. Non-Consent Operations and Sole Risk Operations are discussed below in this thesis.

37. Britoil 9.1.2, 10.1.2, 11.1.2 and 12.12; Apea 6.3.

38. Apea 9.1.2, 11.1.2 and 12.12; Apea 6.1 and 6.3.

39. Britoil 9.3 and 12.3. Apea 6.6 refers to the review and revision, rather than amendment, by the Operating Committee.

40. Britoil 9.3 and 12.3.

41. Britoil 9.3 and 12.3.

42. Chapter VII.

43. The criteria for a Sole Risk Operation in discussed in Chapter VII.


47. Chapter VII.


53. See, for example, Apea 6.8.


56. Apea 1.1(s)(ii).


60. Apea 6.12.


62. See Apea 11.5.

63. Apea 6.9.

64. Apea 1.1(z).


66. Apea 6.11.


72. Apea 6.16.

73. Apea 6.16.

74. Model clause 3 of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988. See also model clauses 4(4) and 5(4) of the Petroleum (Production) (Seaward Areas) Regulations 1988.

75. Model clauses 3, 4(1) and 5(1) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.


77. See model clauses 5 and 6 of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.

78. Model clause 4(1) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988. The Participants have a right to vary the area to be surrendered: model clause 4(2) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.

79. Model clause 4(2)(a) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988. See also model clauses 4(2)(a)(i), 4(2)(a)(ii) and 8(1) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988 which set out the minimum area and minimum dimensions of the area to be surrendered.


81. Model clause 8(2) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.

82. Section 29(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

83. Section 29(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

84. Section 32(1)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th). Note section 32(1)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th) which provides for renewal in the discretion of the Joint Authority notwithstanding failure to comply with the conditions set out in the Permit.

85. Section 32(1)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th). Note section 32(1)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th) which provides for renewal in the discretion of the Joint Authority notwithstanding failure to comply with the provisions of the Petroleum (Submerged Lands) Act 1967 (C'th).
86. Section 32(1)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).
87. Section 31 of the Petroleum (Submerged Lands) Act 1967 (C'th).
88. Section 30(2)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th). As to abridging the time for the application, see section 30(3) of the Petroleum (Submerged Lands) Act 1967 (C'th). See also section 32(8) of the Petroleum (Submerged Lands) Act 1967 (C'th).
89. Section 30(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).
90. Section 30(2)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).
91. Section 30(2)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).
92. Section 30(2)(c) of the Petroleum (Submerged Lands) Act 1967 (C'th).
93. Section 30(1A)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).
94. Section 30(1A)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).
95. Section 31(1) of the Petroleum (Submerged Lands) Act 1967 (C'th). See also sections 31(2) to 31(6) inclusive of the Petroleum (Submerged Lands) Act 1967 (C'th) which sets out the minimum area, minimum specifications and dimensions and minimum number of blocks that can be included in the application for renewal of the Permit. See Thompson "Comment on Petroleum (Submerged Lands) Act: The Nature and Security of Offshore Titles" (1979) 2 A.M.P.L.J. 160, 164-165; Thompson "Legal Aspects of Petroleum Tenement Management in Western Australia" (1987) 6(1) A.M.P.L.A. Bulletin 17, 31.
96. Section 32(1)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).
97. Section 32(1)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).
98. Section 32(1)(c) of the Petroleum (Submerged Lands) Act 1967 (C'th).
99. Section 32(1)(d) of the Petroleum (Submerged Lands) Act 1967 (C'th). This will not apply to the renewal of a Permit (if renewable) where the method employed in allocating a block or blocks to which the Permit relates was the cash bidding method.
100. Section 32(2) of the Petroleum (Submerged Lands) Act 1967 (C'th).
101. Section 32(3)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).
102. Section 32(3)(c)(i) of the Petroleum (Submerged Lands) Act 1967 (C'th).
103. Served pursuant to section 32(3)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).
104. Section 32(3)(c)(ii) of the Petroleum (Submerged Lands) Act 1967 (C'th).
105. Section 32(3)(d) of the Petroleum (Submerged Lands) Act 1967 (C'th).


107. Section 32(4)(b)(ii) of the Petroleum (Submerged Lands) Act 1967 (C'th). There will be no request to lodge security where the renewal of the Permit is in respect of a block or blocks allocated pursuant to the cash bidding method: section 32(4)(b)(i) of the Petroleum (Submerged Lands) Act 1967 (C'th).

108. Section 32(6)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

109. Section 32(6)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th). This will not apply to the renewal of a Permit where the method employed in allocating a block or blocks to which the Permit relates was the cash bidding method.

110. Section 32(6) of the Petroleum (Submerged Lands) Act 1967 (C'th).

111. Section 32(7) of the Petroleum (Submerged Lands) Act 1967 (C'th).


114. To be given under model clause 4(2)(a) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.

115. The majority is determined as being the percentage figure set for a decision of the Operating Committee: Britoil 8.9.2.


117. Britoil 8.9.2.

118. Britoil 8.9.2 and 22.2.1.

119. Britoil 8.9.2 and 13.2.9.

120. Apea 12.15.

121. Withdrawal is discussed in this chapter.

122. Apea 12.15.
123. Apea 1.1(g).
124. Apea 12.16.
125. Apea 12.16.
129. Apea 1.1(r) and 12.20(a).
130. Apea 1.1(q), 1.1(r) and 12.2(a).
131. Apea 1.1(e).
133. Apea 12.20(b).
134. Apea 12.20(b).
135. Apea 1.1(r) and 12.20(a).
136. Apea 1.1(q) and 12.20(a).
137. Apea 12.20(b).
140. Apea 12.21.
141. Apea 12.22.
143. Britoil 22.2.1 and 22.2.2; Apea 12.1.
144. Britoil 22.2.1.
146. Britoil 22.2.1; Apea 12.1.
147. Britoil 22.2.2.

149. Britoil 22.2.1 and 22.2.2; Apea 12.2.


151. Apea 12.4. The surrender of a petroleum title is discussed later in this chapter.


154. Britoil 22.3(i); Apea 12.9. Note that the Apea proforma contains a provision that invokes a power of attorney pursuant to which the Operator is empowered to effect the assignment on behalf of the withdrawing Participant if it fails to do so: Apea 12.9.

155. Chapter VIII.

156. See Britoil 21.1.

157. Britoil 22.3(i); Apea 12.4.

158. Britoil 22.3(ii) and 22.3(iii); Apea 12.10. Note that the Apea proforma contains a provision that invokes a power of attorney pursuant to which the Operator is empowered to effect the actions on behalf of the withdrawing Participant if it fails to do so: Apea 12.10.

159. Britoil 22.3(ii) and 22.3(iii); Apea 12.9 and 12.10.

160. Britoil 22.3(ii) and 22.3(iii); Apea 12.10.

161. Britoil 22.3(iv); Apea 12.8.

162. Britoil 23.3(iv); Apea 12.8.
163. Britoil 22.3(v).

164. Other than those that arise under the petroleum title. See Britoil 22.3(vi).

165. Britoil 22.3(vi).

166. Britoil 22.3(vii); Apea 12.7.

167. Britoil 22.3(vii).

168. Britoil 22.3(viii); Apea 12.6 and 12.7.

169. The costs will be net costs, that is, the cost of abandonment less salvage recovered. See Apea 12.6. Note the reference to net costs in Britoil 22.3(viii).


175. Britoil 22.3(viii).


178. See the discussion of abandonment in Chapter V and in particular that of section 6 of the Petroleum Act 1987 (UK) whereby a Participant can seek to be released from the obligation.

179. Britoil 22.3(ii) and 22.3(iii); Apea 12.3.

180. This is discussed in Chapter VIII. See Britoil 22.3(ii) and 22.3(iii).

181. Apea 12.3.

183. Apea 12.3
187. Apea 12.11.
188. As does the Britoil proforma.
190. Model clause 7(1) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.
192. Model clause 7(2) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.
193. Section 104(1)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).
194. Section 104(2)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).
195. Section 104(2)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th). See the comments relating to when the conditions set out in the Permit will have been complied with in Thompson "Legal Aspects of Petroleum Tenement Management in Western Australia" (1987) 6(1) A.M.P.L.A. Bulletin 17, 28.
196. Section 104(2)(c) of the Petroleum (Submerged Lands) Act 1967 (C'th).
197. Section 104(2)(d) of the Petroleum (Submerged Lands) Act 1967 (C'th).
198. Section 104(2)(e) of the Petroleum (Submerged Lands) Act 1967 (C'th).
199. Section 104(2)(f) of the Petroleum (Submerged Lands) Act 1967 (C'th).
200. Section 104(2) of the Petroleum (Submerged Lands) Act 1967 (C'th).
201. Section 104(3) of the Petroleum (Submerged Lands) Act 1967 (C'th).
202. Section 104(4) of the Petroleum (Submerged Lands) Act 1967 (C'th).
204. Britoil 8.9.3; Apea 5.15(c) and 12.4.
205. Apea 12.4.

206. Model clause 7 of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988 and Section 104 of the Petroleum (Submerged Lands) Act 1967 (C'th).

207. Britoil 8.9.3; Apea 5.15(e).
CHAPTER VII

THE PARTICIPANTS AND SOLE RISK DRILLING

1. INTRODUCTION

The general rule established by the Joint Operating Agreement is that all Operations under the petroleum title are to be carried out by the Operator, subject to the overriding control of the Operating Committee, as Operator for and on behalf of all the Participants, albeit that their interests may vary. The one exception to this rule is what is known as a Sole Risk Operation. This is an activity under the petroleum title carried out in accordance with the terms of the Joint Operating Agreement, usually by the Operator, as Operator for and on behalf of less than all the Participants¹.

Sole Risk Operations reflect a recognition of the need to enable a Participant to take independent action where an activity has been proposed by the Participant and the Operating Committee has voted against or failed to vote in favour of the activity. The reasoning for the Operating Committee's action or inaction may reflect a difference in technical opinion or a recognition of budgeting restraint². Sole Risk Operations can therefore provide an effective way to overcome an impasse between the Participant who holds very strong views in favour of undertaking the activity and the Operating Committee³, overcome the situation where one or more of the Participants through the Operating Committee have an effective veto over the activity which, for it or their own reasons, it or they choose not to support⁴; allow a Participant to follow its own view or interests⁵ or allow flexibility in the work that can be carried on in the area to which the petroleum title relates⁶.

The provisions of the Joint Operating Agreement which provide for Sole Risk Operations are usually drafted with a view to persuading Participants to join in the Sole Risk Operations by making it expensive for a Participant that does not join in, if the Sole Risk Operation
proves successful and the Participant wishes to subsequently participate in the Sole Risk Operation. On the other hand, the provisions are usually drafted so as to encourage a Participant to take the risk of carrying out an activity. The balance would appear, in most cases, to be successful; there having been very few occasions when Sole Risk Operations have been undertaken at the Exploration Phase.

2. THE SCOPE OF A SOLE RISK OPERATION

At the Exploration Phase, the type of activity which may be conducted as a Sole Risk Operation under the Joint Operating Agreement is strictly limited in a number of respects. In part, this is to prevent a Participant from specifying a Sole Risk Operation whereby it could, if it so elected, develop a project sequentially as a Sole Risk Operation and in so doing effectively prevent the other Participants from ever coming into the project.

At the Exploration Phase it is usual for the only Sole Risk Operation permitted, to be drilling undertaken for and on behalf of fewer than all of the Participants. This is known as "Sole Risk Drilling".

The situations within which Sole Risk Drilling may be undertaken are strictly limited. Sole Risk Drilling is limited to:

1. the drilling of an exploratory well or the deepening, plugging back, side-tracking or testing of a suspended well or of a well which is in the course of being drilled but which the Operating Committee has decided to abandon, neither such wells being inside the interpreted closure of any geological structure or stratigraphic trap on which a well has been drilled, in which petroleum of potentially significance has been found to be present. This is known as a "without trapping unit drilling";
2. the drilling of an exploratory well or the deepening or side-tracking of a suspended well inside the interpreted closure of any geographical structure or stratigraphic trap on which a well has been drilled in which petroleum of potentially commercial significance has been found to be present and which well is drilled, deepened or side-tracked to a different stratigraphic level to that in which such petroleum was found to be present. The approval of the Operating Committee is required before such drilling, deepening or side-tracking is carried out. This is known as a "within trapping unit drilling"; or

3. the deepening or side-tracking of a well which is in the course of being drilled and which does not form part of a development programme. Unless the Operating Committee otherwise agrees, any test programme by the Participants must have been carried out, the Participants informed of the results and a decision of the Operating Committee taken to abandon the well before any such deepening or side-tracking is carried out. This is known as "a non development programme drilling".

There is a further overriding limitation in that a Sole Risk Drilling cannot be carried out if it is substantially similar to, conflicts with or would, in the opinion of the Operating Committee, interfere with all or any part of a programme that has been approved by the Operating Committee and which is current at the commencement of the Sole Risk Drilling, any Sole Risk Drilling which has previously been proposed, or the planned fulfilment of the minimum work obligations.

3. THE PROPOSING OF A SOLE RISK DRILLING

A Sole Risk Drilling comes about because it is proposed by one or more of the Participants. Before a proposal for a Sole Risk Drilling of the type permitted under the Joint Operating Agreement can be made, certain criteria may have to be satisfied.
4. **THE SOLE RISK DRILLING CRITERIA**

Before Sole Risk Drilling may be proposed, in the case of both a without and a within trapping unit drilling, it is necessary that:—

1. the drilling shall have been proposed to the Operating Committee at the time of the consideration of the current exploration programme but was not included in the programme; or

2. the drilling, having been included in the current exploration programme, the Operating Committee voted against or failed to vote in favour of an authorisation for expenditure relating to the drilling within a stated period of time of the submission of the authorisation for expenditure to the Participants. A decision by the Operating Committee to change the timing of such drilling within the year to which the current exploration programme relates, does not amount to a vote against the authorisation for expenditure; or

3. the drilling was proposed to the Operating Committee in reasonably sufficient detail by way of amendment to the current exploration programme and the Operating Committee voted against or failed to vote in favour of the drilling within a stated period of time of the submission of the amendment to the Participants.

5. **PROPOSAL AND ACCEPTANCE OF A SOLE RISK DRILLING**

In the case of a without trapping unit drilling and a within trapping unit drilling a Sole Risk Drilling is proposed by the Participant wishing to make the proposal, giving notice to the other Participants setting out the proposed location of the drilling and all other relevant information. The relevant information is required to include the scope and nature of the Sole Risk Drilling, the geological prognosis and objectives of the Sole Risk Drilling, detailed authority for expenditure and the date on which it is proposed that the Sole Risk Drilling should commence, such date being within a stated period of time of the notice. In some cases, the notice must be given within a
stated period of the Operating Committee having voted against or failed to vote in favour of the proposed drilling or an authorisation for expenditure relating to a drilling.

Either:

1. each recipient of a notice is required to respond within a stated period of time by giving notice to all other Participants of whether it elects to participate and, if a Participant fails to respond within the time period, it is deemed to have elected not to participate, or

2. each recipient of a notice desiring to participate is required to respond within a stated period of time by giving notice to all other Participants that it elects to participate.

In the case of a non-development programme, drilling a Sole Risk Drilling is proposed by the Participant wishing to make the proposal, giving as much notice as is possible to the other Participants, stating whether it wishes to use joint property for the Sole Risk Drilling and, if so, what items thereof. The notice should also set out such relevant information as is necessary in order to allow the other Participants to consider the proposal and elect whether or not to participate.

Each recipient of a notice is required to respond within a stated period of time by giving notice, to all other Participants, of whether it elects to participate. If a Participant fails to respond within the time period it is deemed to have elected not to participate.

If the percentage of Interests of the Participants electing to participate together with the percentage of Interests of the Participants proposing the Sole Risk Drilling is:

1. either:
(i) \textit{equal} to the combined percentage of Interests of all of the Participants; or \textsuperscript{38}

(ii) \textit{not less than} the percentage pass mark for resolutions of the Operating Committee \textsuperscript{39};

the Sole Risk Drilling shall be carried out, in accordance with the notice, by the Operator as a part of the Operations as if determined by the Operating Committee and, if appropriate, the current relevant programme shall be deemed amended accordingly and the Operator shall promptly notify the Participants of the consequential amendments to the current relevant budget \textsuperscript{40}; or

2. (i) \textit{less than} the percentage referred to in (a)(i) above; or

(ii) \textit{less than} the percentage pass mark referred to in (a)(ii) above;

such Participant, together with any other Participants which have elected to participate may, subject to the provisos mentioned in relation to a within trapping unit drilling or a non development programme drilling in the case of Sole Risk Drilling thereunder, within a stated period of time following the expiration of the notice, require the Operator to undertake the Sole Risk Drilling \textsuperscript{41}. In such event, if the same arose as the result of the Operating Committee voting against or failing to vote in favour of an authorisation for expenditure under a current exploration programme, such programme shall be deemed amended accordingly and the Operator shall promptly notify the Participants of the consequential amendments to the current exploration budget. In the case of a notice given in relation to a Sole Risk Drilling under a without trapping unit drilling or a within trapping unit drilling, the Sole Risk Drilling may not be commenced later than a stated period of time following such notice and in the case of a notice given in relation to a non development programme drilling, the Sole Risk Drilling may be commenced as soon as it is possible to do so without interference to the Operations on that well \textsuperscript{42}. In the event that the Sole Risk
Drilling is not commenced within the stated period, the right to commence usually lapses. The lapse of the right to commence the Sole Risk Drilling does not prevent a Participant again proposing a Sole Risk Drilling with respect to the same matter as that covered by the right to commence a Sole Risk Drilling that has lapsed.

6. DELIMITATION OF INTEREST OF THE PARTICIPANTS IN A SOLE RISK DRILLING

A Sole Risk Drilling is required to be carried out at the sole risk, cost and expense of the Participant which proposes the Sole Risk Drilling and any Participant which has elected to join the Sole Risk Drilling. These Participants, the Sole Risk Participants, if more than one, are to bear the risk, cost and expense of the Sole Risk Drilling in proportion to that which each such Participant's Interest bears to the sum of the Interests of the Sole Risk Participant's. The ratio may be varied by agreement.

7. GENERAL RULES OF CONDUCT FOR A SOLE RISK DRILLING

Sole Risk Participants are required to exercise all necessary precautions to ensure that the Sole Risk Drilling does not jeopardise, hinder or unreasonably interfere with the Operations.

Further, the Sole Risk Participants are required to:

1. indemnify and hold harmless all Non Sole Risk Participants against all actions, claims, demands and proceedings whatsoever brought by any third party, including an employee of a Sole Risk Participant, arising out of or in connection with the Sole Risk Drilling;

2. in so far as it may be within their control, keep the petroleum title free from all liens, charges and encumbrances which might arise by reason of the conduct of the Sole Risk Drilling; and

3. indemnify all Non Sole Risk Participants against all damages, costs, losses and expenses whatsoever directly or indirectly caused
to or incurred by them as a result of anything done or omitted to be done in the course of carrying out such Sole Risk Drilling, excepting only damage inflicted to the subsurface including any reservoir.

The fact that the Non Sole Risk Participants approve of the Sole Risk Drilling, whether or not such approval is required, is deemed not to constitute a waiver of the above mentioned obligations placed upon the Sole Risk Participants.

The value of the indemnity given by the Sole Risk Participants is only worth what the Sole Risk Participants are worth.

8. USE OF PROPERTY, DATA AND INFORMATION BELONGING TO ALL THE PARTICIPANTS

A Sole Risk Participant carrying out a non development programme drilling as a Sole Risk Drilling is entitled to use joint property for such unless the Operating Committee otherwise decides, within the period for response to the notice, stating that the Sole Risk Participant wishes to use the joint property for the Sole Risk Drilling.

In all other cases of Sole Risk Drilling if the Sole Risk Participant wishes to use the joint property, it is required to give notice to all Non Sole Risk Participants stating the purpose for which the joint property is to be used. Within a stated period of time of the giving of the notice, the Operating Committee is required to decide whether the Sole Risk Participant is to be authorised to use the joint property and, if so, on what terms and conditions. The Operating Committee may not unreasonably withhold authorisation to use the joint property and any charges for the use of the joint property is to be on a reasonable and equitable basis.

In so far as data and information which is owned by the Participants is concerned, a Sole Risk Participant is entitled to use such data and information for a Sole Risk Drilling. On the other hand, any data or information obtained in respect of the Sole Risk Drilling is to be made available to all Participants, although the property in the data and information remains with the Sole Risk Participant until one or more of
the Non Sole Risk Participants discharges, in full, its liability to the Sole Risk Participants under the provisions of the Joint Operating Agreement which allow a Non Sole Risk Participant to elect to participate by the payment of the sums mentioned below\(^{54}\), when the data and information becomes the joint property of the Participants discharging such liability and the Sole Risk Participant\(^{55}\). The requirement that the Sole Risk Participant make available to all Participants any data or information obtained in respect of the Sole Risk Drilling is to enable the Non Sole Risk Participants to make an informed decision as to whether to elect to participate in the subsequent appraisal or development programme.

9. **THE ROLE OF THE OPERATOR**

The general rule is that the Sole Risk Drilling is to be carried out by the Operator on behalf of the Sole Risk Participant\(^{56}\). In Great Britain this rule is conditional upon the obtaining of any necessary consent of the Secretary of State for Energy\(^{57}\). The rule may be subject to the proviso that if the Operator is not participating in the Sole Risk Drilling, and in Great Britain the Secretary of State for Energy will approve the appointment of a Sole Risk Participant as operator for the Sole Risk Drilling, the Operator may decline to carry out the Sole Risk Drilling and the Sole Risk Participant is to act as operator to carry out Sole Risk Drilling\(^{58}\).

10. **GENERAL RULES APPLICABLE TO A SOLE RISK DRILLING**

The following general rules apply to all Sole Risk Drilling:

1. the Sole Risk Drilling is to be carried on under the overall supervision, direction, and control of a committee consisting of the Sole Risk Participants\(^{59}\). This committee takes the place of the Operation Committee;

2. the committee is required to require each Sole Risk Participant to take out and maintain, in respect of the Sole Risk Drilling, such levels of insurance as shall have been determined by the Operating Committee in respect of Operations\(^{60}\). On the issue of insurance,
the provisions relating to insurance, in so far as they apply to the Sole Risk Drilling, shall apply in such a manner so that Non Sole Risk Participants are treated and regarded as third parties;  

3. the computation of costs and expenses of the Sole Risk Drilling incurred by the Sole Risk Participants is to be made in accordance with the principles established in the Accounting Procedure;  

4. the Operator, or the operator appointed to carry out the Sole Risk Drilling, is required to maintain separate books, records and accounts (including bank accounts) for the Sole Risk Drilling. These are to be subject to the same right of examination and audit by the Sole Risk Participants, and, so long as they are entitled to elect to participate in the Sole Risk Drilling, the Non-Sole Risk Participants, as those relating to the Operations;  

5. the costs and expenses of the Sole Risk Drilling are not to be reflected in the statements and billings rendered by the Operator for the Operations;  

6. if the Operator is carrying out a Sole Risk Drilling on behalf of a Sole Risk Participant, the Operator is entitled to make cash calls on the Sole Risk Participant in connection with the Sole Risk Drilling and is not to use Joint Account funds and nor is it required to use its own funds for the purpose of paying the costs and expenses of the Sole Risk Drilling. Furthermore, the Operator is not obliged to commence or, having commenced, to continue the Sole Risk Drilling unless and until the relevant advances have been received from the Sole Risk Participant;  

7. the Operator, or the operator appointed to carry out the Sole Risk Drilling, is required to keep the Operating Committee informed on the progress of the Sole Risk Drilling;  

8. if a Sole Risk Drilling results in the discovery of petroleum the matter must be referred to the Operating Committee for appropriate action; and
9. the terms of the Joint Operating Agreement shall apply to the
Sole Risk Drilling mutatis mutandis \(^{69}\). This causes some
difficulty, particularly with regard to withdrawal, assignment and
default. It is not proposed to discuss these difficulties in this
thesis.

11. THE RIGHT OF A NON SOLE RISK PARTICIPANT TO ELECT TO SUBSEQUENTLY
PARTICIPATE

If a Sole Risk Drilling is carried out which results in a particular
discovery \(^{70}\), any Participant which was a Non Sole Risk Participant in
all or part of such Sole Risk Drilling will be required to elect, within a
stated period of time, whether it wishes to participate in appraisal
drilling or a development programme relating to that discovery. There are
two basic approaches to the election:–

1. the Non Sole Risk Participant must give notice within the
stated period of time to all the Participants of its desire to so
participate \(^{71}\); or

2. the Non Sole Risk Participant must give notice within the
stated period of time to all the Participants of its desire not to so
participate, failing which, it is deemed to have elected to so
participate \(^{72}\).

A Participant which elects to participate in respect of any such Sole
Risk Drilling in which it was a Non Sole Risk Participant and in respect
of which it has not previously contributed to the cost and expense
thereof, shall pay to the Sole Risk Participants, and if more than one, in
proportion to their respective Interests in the petroleum title or in such
other proportions as they may have agreed, an amount equal to the amount
it would have contributed to the Joint Account had such Sole Risk Drilling
been carried out as a part of the Operations \(^{73}\).
In addition, such a Participant is required to pay, in the case of Great Britain, when the Secretary of State for Energy has authorised (whether by consenting or by approving or serving a programme) the commencement of the development of a discovery in respect of which Sole Risk Drilling has been carried out or, in the case of Australia, within a stated period of time of the grant of a production tenement in respect of the discovery, to each Sole Risk Participant which is also participating in the development, a "premium" amount calculated in accordance with a rather complex formula in respect of each Sole Risk Drilling in which it did not participate. The formula need not be discussed in this thesis.
FOOTNOTES


11. Britoil 13.2.2(i)(a); Apea 11.3(a) and 11.3(b).

12. Apea 11.3(a) and 11.3(b).

13. Britoil 13.2.2.(i)(a); Apea 11.3(a) and 11.3(b).

14. Apea 11.3(a) and 11.3(b).

15. Britoil 13.2.2(i)(a); "inactive" in the case of Apea 11.3(a) and 11.3(b).

16. Apea 11.3(b).


18. Britoil 13.2.2(i)(b); Within trapping unit drilling is prohibited by Apea 11.2.

19. Britoil 13.2.2(i)(c). There is no similar provision in the Apea proforma.


23. Britoil 13.2.1; Apea 11.7(b).


27. Britoil 13.3.1(iii); Apea 11.4(b). In the case of the Apea proforma, the Participant proposing a Solo Risk Drilling may extend the stated period within which the Operating Committee must have voted against or failed to vote in favour of the drilling; Apea 11.4(b). See Moroney "Solo Risk in Mining and Petroleum Ventures: An International Perspective" [1986] A.M.P.L.A. Yearbook 164, 171.

28. Britoil 13.3.3(i); Apea 11.5. See MacWilliam and Muir "Offshore Operating Agreements" (1973) 11 Alta L. Rev. 503, 508.


31. Britoil 13.3.3(ii).

32. Apea 11.5(a) and 11.5(b).

34. Apea 11.6.
35. Britoil 27(xix).
36. Britoil 13.3.4.
37. Britoil 13.3.4.
39. Britoil 13.3.5.
40. Britoil 13.3.5; Implied Apea 11.6.
41. Britoil 13.3.6. This is subject to Britoil 13.2.8 which is discussed below in this chapter. Apea 11.7; implied Apea 11.6. In the case of the Apea proforma the stated period of time within which the Operator can be required to undertake the Sole Risk Drilling may be extended by the aggregate of the period or periods during which the Operator is unable to conduct the Sole Risk Drilling; Apea 11.7.
42. Britoil 13.3.6.
43. Apea 11.7.
46. Britoil 13.2.4.
48. Britoil 13.2.5.
50. Britoil 13.2.5.
52. Britoil 13.2.6.

54. Under Britoil 13.4.

55. Britoil 13.2.7.


57. Britoil 13.2.8.


61. Britoil 13.2.10(wi).

62. Britoil 13.2.10(ii).


64. Britoil 13.2.10(iv).

65. Britoil 13.2.10(v).

66. Britoil 13.2.10(v); Apea 11.7(e).

67. Apea 11.7(f).


70. Under Britoil 13.2.2(i)(a), 13.2.2(i)(b) or 13.2.2(i)(c); Under Apea 11.3(a) or 11.3(b).


73. Britoil 13.4.10; Apea 11.7(c) and 11.8(a).


75. Britoil 13.4.2.

76. Apea 11.8(a).


A consideration of whether the "premium" could be considered a penalty falls outside the scope of this thesis as it falls outside of the Exploration Phase.
CHAPTER VIII

DEFAULT BY THE PARTICIPANTS

1. INTRODUCTION

The principal object of the default provisions in a Joint Operating Agreement is:

1. to provide a method by which the joint venture can continue to operate in the event of default in the performance by a Participant of its duties; and

2. to provide a disincentive against default in the performance by a Participant of its duties.

There are a number of types of duty under a Joint Operating Agreement, such as:

1. the duty of each Participant to pay cash calls issued by the Operator;

2. the duty of the Operator;

3. the duty of each Participant to appoint a representative to the Operating Committee;

4. the duty of each Participant to be just and faithful and not do anything that could place the property of the Participants in jeopardy;

5. the duty of each Participant to keep information of the joint venture confidential;

6. in most cases, the duty of each Participant to negotiate in good faith a development and production agreement in the event of a commercial discovery of petroleum;
7. the duty of each Participant to observe the provisions of the Joint Operating Agreement when dealing with withdrawal and assignment; and

8. in most cases, the duty of each Participant to maintain a minimum Interest.

In so far as default in the observance of these types of duty is concerned, the Joint Operating Agreement usually addresses only the first two types of duty, that is:

1. the duty of each Participant to pay cash calls issued by the Operator; and

2. the duty of the Operator.

The reason why these two types of duty are addressed by the Joint Operating Agreement is that the consequences of a breach by a Participant would be that the non defaulting Participants are left to the remedies available at law and in equity. These remedies are "clumpy and unsuitable for joint ventures".

The other duties, which are referred to as secondary duties, are rarely, if ever, the subject of the default provisions in a Joint Operating Agreement. The Joint Operating Agreement does not spell out the consequences of a breach by a Participant of a secondary duty. The non defaulting Participants are left to the remedies available at law and in equity.

This chapter is concerned with the default provision in a Joint Operating Agreement which addresses the breach by a Participant of its duty to pay cash calls issued by the Operator. Breach by the Operator of its duty is dealt with elsewhere in this thesis.

The ramifications of the breach by a Participant of its duty to pay cash calls issued by the Operator will depend upon the stage the Exploration Phase programme has reached. One of the results of such a
breach by a Participant is, at best, to impose an unexpected temporary financial burden upon the non defaulting Participants and, at worst, to entirely destroy the joint venture. A further consequence would be that the Operator could incur the risk of individual liability to third parties. This would be contrary to the foundation upon which the Operator acts; a "no gain, no loss" basis, with the Operator's liability only for loss or damage arising from, inter alia, wilful misconduct.

Any consideration of the default provisions in Joint Operating Agreements must be set against the background of the Industry and the Exploration Phase. In *Monarch Petroleum N.L. v Citco Australia Petroleum Limited* Kennedy J. considered the default provisions in a Joint Operating Agreement and said:

"It is useful at this stage to comment shortly upon the provisions permitting the non-defaulting parties to require an assignment of a defaulting party's interest. Oil exploration is an extremely high-risk operation, accompanied by high costs. The area to which the permit related was an exceedingly high-risk area. Offshore drilling, due primarily to weather and drilling conditions, carries with it particular risks. The cost of drilling an offshore well can vary in a normal case from $5,000,000 to $15,000,000; but the cost can blow out, as in the case of the Vulcan well, to a figure in the order of $28,000,000. The tendency is to share the risks by having a number of participants in each permit. As one witness expressed it, it is better to have 10 per cent of 10 wells than 100 per cent of one well. High-risk capital is scarce.

In these circumstances, participants in oil exploration ventures cannot contemplate anything other than a commercial operation which flows smoothly and is not liable to disruption, for example, by the default of any participant. A steady flow of funds is essential. Commitments must be made a long time ahead and it is important that programmes be adhered to. Any default by one participant places a heavy burden upon the other participants. Participants normally have a budget for the year, which covers all their operations, and to find additional funds part of the way through the year can place considerable strains upon them, sometimes necessitating cutbacks in other areas or even necessitating a complete withdrawal, with the consequent loss of the permit.

There is a need perceived within the industry to be able rapidly to forfeit a defaulting party's interest, and provisions similar to those in the operating agreement are common place, if not standard. Indeed, the present tendency is to shorten periods of default for this purpose. The acquisition of a defaulter's interest is not seen as being beneficial in the exploration stage of a venture. On the contrary, it involves an additional financial commitment without
necessarily any return on it. If there is eventually any return, it will frequently only be revealed after the expenditure of further funds to which the defaulting party should have contributed, but to which it did not contribute." (Emphasis added)

2. DEFAULT PROVISIONS

The default provisions in a Joint Operating Agreement are aimed at establishing a degree of certainty concerning the rights and obligations of the Participants and to preserve the joint venture established by the Joint Operating Agreement by providing for the adjustment of the rights of the Participants per se following the default of a Participant.

The Participants are virtually entitled to provide in the Joint Operating Agreement such remedies upon default by a Participant as the Participants deem fit. This entitlement is limited by the general principles of the law of contract. Any default by a Participant will be tantamount to a breach of contract and the courts will enforce contractual provisions designed to operate in the event of such default.

There are many types of default mechanisms. These may include:

1. liability to pay interest;
2. loss of rights to voting and withholding of information;
3. acquisition of the Interest of the defaulting Participant;
4. payment by the non defaulting Participants' under the security of cross charges;
5. liability to pay a premium; and
6. lien.

A great deal of care will be taken to ensure that provisions operational upon default do not give rise to a registerable charge. If the effect of a default mechanism is to create a charge over the Interest of the defaulting Participant such charge will need to be registered. It is not proposed to discuss the circumstances in which the mechanism may give rise to a registerable charge or the effect of failing to register the charge as such matters fall outside of the ambit of this thesis. This is because in nearly all cases, the relevant default mechanisms, forfeiture and dilution, will have two primary objects:-
1. to adjust the Interests of the Participants in an equitable way having regard to their respective contributions to the Operations; and

2. to remove the defaulting Participant from the joint venture.

The primary object will not be to secure the repayment of a debt, even where a debt exists.

Likewise, it is not proposed to discuss the situation where a liquidator or receiver is appointed to or over the, or the Interest of, the defaulting Participant and the effect thereof upon the default mechanisms. Again, such matters fall outside of the ambit of this thesis.

Coupled with the types of default mechanism are a number of deadlock breaking mechanisms. These include:

1. withdrawal;
2. sole risk operations; and
3. non-consent operations

and are discussed elsewhere in this thesis. These mechanisms can eliminate, or at best minimise, the risk of default by a Participant.

The default provisions will provide that if a Participant fails to pay in full its share of any sum payable by it pursuant to the Joint Operating Agreement that Participant is deemed to be in default. The duty to pay is strict. Not only failure, but any shortfall or any delay in payment is deemed to be a default. There is no distinction drawn between a technical breach and total failure to perform. As a result, it is to be implied that time is of the essence. The way in which the provisions make use of the types of default mechanism following the default by a Participant will vary with each Joint Operating Agreement. However, it is possible to discern a pattern in the use of the types of default mechanism. They are that:
1. interest shall commence to run on the unpaid amounts as from and including the due date until the actual date of payment. The interest will be calculated in accordance with a stated formula, which will usually provide for all interest unpaid at the end of each month to be added to the principal amount and itself bear interest until paid.

Care must be taken in determining the formula by which interest is to be calculated. It must give rise to such a rate as to be a disincentive to a Participant attempting to accept a free ride rather than making payment on the due date but not be so excessive as to constitute a penalty. In addition, in the case of Australia, care must be taken to ensure that the rate of interest does not infringe any money lenders legislation.

In the absence of an express provision in the Joint Operating Agreement requiring the payment of interest by the defaulting Participant, interest will not be payable by it. This is because interest is not recoverable at common law upon a debt.

The Operator will be authorised to bring suit against the defaulting Participant to enforce collection of any indebtedness;

2. the Operator will be required to give notice to the Participants of the default. The notice will be required to state the amount in default;

3. the non defaulting Participants will be required to pay to the Operator a share of the amount in default. The amount each non defaulting Participant is required to pay will be calculated as the proportion that each such Participants' Interest bears to the Interests of all such Participants. Following payment to the Operator, the non defaulting Participants will be subrogated to the extent of the payment to the rights of the Operator to collect the amount from the defaulting Participant.
The non defaulting Participants will be required to make their payment to the Operator within a stated period of time of the giving of notice by the Operator of the default.\(^{29}\)

Should a non defaulting Participant fail to pay to the Operator its share of the amount in default within the requisite period, that Participant will be deemed to be in default and the default provisions of the Joint Operating Agreement will in turn apply.\(^{30}\)

4. pending receipt by the Operator of the amount payable by the non defaulting Participants in relation to the default, the Operator may be required to make arrangements to meet any commitments falling due by borrowing the necessary finance from a third party or by making the necessary finance available itself.\(^{31}\) The cost of the finance will be borne by the non defaulting Participants.\(^{32}\) If the Operator makes the finance available, it will bear interest calculated in accordance with a stated formula.\(^{33}\)

5. the provisions of the Joint Operating Agreement which provide for the non defaulting Participants to pay to the Operator a share of the amount in default will apply to all subsequent cash calls made by the Operator attributable to the defaulting Participant until such time as the defaulting Participant has remedied its default in full or until the forfeiture provisions of the Joint Operating Agreement have been invoked.\(^{34}\)

6. whilst the Participant is in default it may be deprived of its entitlement to be represented and to vote at any meeting of the Operating Committee or any sub-committee of the Operating Committee or to vote on matters dealt with by written resolution.\(^{35}\) Where use is made of this type of default mechanism, the non defaulting Participants will, whilst a Participant is in default, have a vote proportionate to the Interest of the non defaulting Participants bears to the combined Interests of the non defaulting Participants.\(^{36}\) In addition the defaulting Participant may be deprived of further access to any data and information relating to the Operations.\(^{37}\)
If the defaulting Participant remedies its default its right to vote will be reinstated. However, no vote taken or matter decided without the vote of the former defaulting Participant during the interim will be invalid for want of its vote.

The deprevation by the Joint Operating Agreement of the defaulting Participants rights freezes the defaulting Participant out of the Operations until the default is remedied. This type of default mechanism can cause considerable hardship because even if the default is remedied the defaulting Participant has no knowledge of the Operations during the time that its rights have been suspended.

7. the defaulting Participant will have the right to remedy its default until the forfeiture provisions of the Joint Operating Agreement are invoked. To remedy the default the defaulting Participant will be required to pay to the Operator, or if the non defaulting Participants have paid any amounts in relation to the default, the non defaulting Participants, all amounts in respect of which the defaulting Participant is in default together with interest thereon calculated in accordance with a stated formula. Interest will be calculated from and including the due date for payment of such amounts until the actual date of payment.

If a non defaulting Participant needs to borrow from a third party in order to meet its share of the amount in default, interest will usually be calculated in accordance with a formula which includes provision for a percentage equal to the rate charged to the non defaulting Participant by the third party plus a percentage to cover the cost and expense of arranging the borrowing. If the Joint Operating Agreement provides for this method of calculating interest a provision will usually be included in the Joint Operating Agreement requiring the non defaulting Participants to use reasonable endeavours to secure the best rates reasonably obtainable.

8. if the default continues beyond a stated period of time the non defaulting Participants will have the right to have forfeited to them and to acquire the Interest of the defaulting Participant without
compensation.

The right may arise be efluxion of time or by the non defaulting Participants each having a right to give notice to the defaulting Participant and the other Participants to have forfeited to them and acquire the Interest of the defaulting Participant.

In the former case, the Interest of the defaulting Participant is forfeited to and acquired by the non defaulting Participants in the proportion that each non defaulting Participants' Interest bears to the Interest of the other non defaulting Participants. In the latter case, the Interest of the defaulting Participant is forfeited to and acquired by the non defaulting Participants who exercise the right to give notice to have forfeited to them and acquire the Interest in the proportion that each non defaulting Participants Interest bears to the Interests of the other non defaulting Participants who have given such notice. If none of the non defaulting Participants exercise their right to give such notice then the Participants will be deemed to have decided to abandon the Operations. This will be without prejudice to any further rights of the non defaulting Participants in relation to the defaulting Participant. Furthermore, each Participant, including the defaulting Participant, will be required to pay its share of the costs of abandoning the Operations;

9. the forfeiture to and acquisition of the Interest of the defaulting Participant will be:

(i) subject to any necessary consent or approval of, in the case of Great Britain, the Secretary of State for Energy, or, in the case of Australia, the Joint Authority;

(ii) without prejudice to any other rights of the non defaulting Participants including rights of the non defaulting Participants against the defaulting Participant in relation to the amount due and owing by it;
(iii) so forfeited to and acquired by the non defaulting Participants as beneficial owners free of all charges and encumbrances;

(iv) subject to the defaulting Participant remaining liable for its share under operating programmes and budgets approved prior to the default;

(v) subject to the defaulting Participant remaining liable for its share of all net costs and obligations that in anyway relate to abandonment of Operations; and

(vi) effective as of the date of default.

10. the defaulting Participant will be required to promptly join in such action as may be necessary or desirable to obtain any necessary consent or approval of, in the case of Great Britain, the Secretary of State for Energy, or, in the case of Australia, the Joint Authority. Further, the defaulting Participant will be required to execute and deliver any and all documents necessary to effect the forfeiture and acquisition. The costs, stamp duty, transfer taxes and other expenses of the forfeiture and acquisition including losses incurred by the non defaulting Participants by reason of the default and consequent actions will be the responsibility of the defaulting Participant. To give effect to these requirements, the Joint Operating Agreement may provide that each Participant grants to the Operator an irrevocable power of attorney. This would be exercisable after the lapse of the period during which the Interest of the defaulting Participant can be forfeited to and acquired by the non defaulting Participants. In the absence of a power of attorney the non defaulting Participants would have to rely on an action for specific performance of the provisions setting out the requirements;

11. adjustment may be made between the non defaulting Participants of the amounts paid and or incurred by them as a result of the default. Such a provision will be apposite when less than all of
the non defaulting Participants acquire the Interest of the defaulting Participants and the acquisition is not in proportion to their respective Interests.

The default provisions in a Joint Operating Agreement rarely provide for what is to occur if the Operator, in this capacity as a Participant rather than in its capacity as Operator, were to fail to pay in full its share of any sum payable by it pursuant to the Joint Operating Agreement. In such circumstances the Operator would have to look to its fiduciary obligations and tread a very cautious and wary path. There is, however, the right of the Participants to remove the Operator in such circumstances. This will be discussed later in this thesis. The removal of the Operator does take away the conflict but does not remove the problem: the default by a Participant.

A number of Joint Operating Agreements add an additional tier between the initial default by a Participant and the forfeiture of and acquisition by the non defaulting Participants of the Interest of the defaulting Participant. This tier is known as dilution (or withering) of the Interest of the defaulting Participant.

Dilution clauses provide a mechanism whereby the respective Interests of the Participants may be adjusted in accordance with their relative level of contribution to expenditure. They usually take effect by reducing the Interest of the defaulting Participant in accordance with a formula which is based on the relative contributions to the Operations as between the defaulting Participants and the non defaulting Participants. There are two main types of dilution formula:

1. straight line formula; and

2. exponential formula.

In the case of a straight line formula the Interest of the defaulting Participant is decreased by a stipulated number of percentage points for a fixed amount not contributed. The Interest of the non defaulting Participants' will be increased proportionately.
In the case of an exponential formula the Interest of the Participants is re-determined by reference to the expenditure of the defaulting Participant as a percentage of the total expenditure of the Participants in the Operations. The decrease in the Interest of defaulting Participant is brought about by the increase in the contribution to expenditure by the non defaulting Participants.

The speed at which the Interest of the defaulting Participant will be decreased will very much depend upon the formula chosen. However, it is usual to provide that once the Interest of the defaulting Participant is reduced to a stated percentage, the defaulting Participant will be deemed to have elected to withdraw from the petroleum title and the Joint Operating Agreement. In such circumstances the withdrawal provisions in the Joint Operating Agreement will apply. These provisions have been discussed above.

The Joint Operating Agreement may allow the defaulting Participant, following a decrease in its Interest, to restore itself to its former Interest by remedying the default. This will involve paying in full all amounts due to the Operator and or the non defaulting Participants plus a limited punitive element or premium to compensate the non defaulting Participants for the extra risk they had assumed as a result of the default.

Dilution clauses are seen to have a number of benefits. To begin with they are seen as clauses which mitigate the harshness of forfeiture. They enable the continuation of Operations, notwithstanding the default of a Participant, without rendering the defaulting Participant liable to forfeiture of the whole of its Interest. Nevertheless, no matter how the dilution clause is phased, it is submitted that it will be seen for what it really is; a forfeiture of part of the Interest of the defaulting Participant. It is submitted that the courts will not view a dilution clause as the reduction of the Interest of the defaulting Participant but rather as a partial extinguishment of that Interest.
If a dilution clause is seen to give rise to a partial forfeiture of the Interest of the defaulting Participant, the defaulting Participant may have recourse to the courts for relief against forfeiture. This latter is discussed below. It is not proposed to consider the application of the rules relating to relief against forfeiture here. It will suffice to point to a number of reasons why a court may be persuaded not to grant the defaulting Participant relief against the forfeiture of all or part of its Interest pursuant to a dilution clause:

1. the defaulting Participant would have been aware of the consequences of the default;

2. the defaulting Participant and the non defaulting Participants would have entered into a purely commercial transaction, acting at arms length and on an equal footing;

3. the defaulting Participant was given the opportunity to remedy the default;

4. by recognising the dilution is an election by a defaulting Participant not to contribute to the expenditure rather than a result of the default by the defaulting Participant. Use may then be made of the principle that relief against forfeiture will only apply where there is a breach of contract;

5. the result of a dilution clause is to reduce the defaulting Participants' liability to contribute to expenditure in the future. It does not accelerate or increase that liability;

6. in assessing the disparity between the value of the Interest of the defaulting Participant that is forfeited and the damage caused by the default the court will take account of the fact that the non defaulting Participants' liability to contribute to expenditure in the future will be increased in proportion to the reduction in the defaulting Participant's liability in that regard. The increased liability to contribute to expenditure is not necessarily a benefit
to the non defaulting Participants. At the Exploration Phase it goes without saying that in most cases the level of contribution to expenditure is usually significantly in excess of the value of the Interest of the defaulting Participant.\(^84\)

Another issue that must be considered when considering a dilution clause is whether the opportunity may arise for the defaulting Participant to apply to the court for relief from the effect of the clause on the ground that it is a penalty.

The rules relating to penalties are discussed below. It is not proposed to consider their application here although it will be helpful to examine a number of reasons, in addition to the reasons discussed above in relation to forfeiture, why a court may be persuaded that a dilution clause is not penal:

1. unless the dilution clause is most virulent, given that the purpose of the clause is to provide a quick solution to the default by a Participant and given the need for certainty in contribution to expenditure in the future, the clause is not included in the Joint Operating Agreement to secure the enjoyment of a collateral object.\(^85\). The aim is to provide certainty without having to go through lengthy legal proceedings;\(^86\)

2. dilution usually only results from a most serious event: the failure of a Participant to pay in full its share of sums payable by it pursuant to the Joint Operating Agreement;\(^87\)

3. at the Exploration Phase it is virtually impossible to ascertain at the time when the Joint Operating Agreement is entered into by the Participants what the total exploration expenditure required by the Operations will be.\(^88\). Likewise, it is virtually impossible to ascertain the value of the Interest of the defaulting Participant that is forfeited to and acquired by the non defaulting Participants.\(^89\). As such it is most unlikely that the courts will intervene in what is a classic situation of the type referred to by
Lord Dunedin in *Dunlop Pneumatic Tyre Co. Limited v New Garage and Motor Co. Limited*\(^90\) - a situation where it is probable that the dilution clause will give rise to a genuine attempt to liquidate prospective damages of an uncertain amount; and

4. the minimal period of time within which the defaulting Participant may remedy the default will not necessarily be seen as penal if, at the Exploration Phase, provision for a longer period of time would afford a Participant the opportunity to remain in the joint venture if the Operations lead to the discovery of petroleum but avoid contributing to expenditure if the Operations do not\(^91\).

Where acquisition of the Interest of the defaulting Participant by the non defaulting Participants is involved there are two alternatives:-

1. loss of the Interest of the defaulting Participant, that is, forfeiture; or

2. abatement of the Interest of the defaulting Participant, that is, dilution.

These two alternatives usually consist of at least two elements:

1. the recoupment of the cost, expense and loss sustained by the non defaulting Participants as a result of the default by the defaulting Participant; and

2. the receipt of a premium over and above such cost, expenses and loss.

The total loss of Interest by the defaulting Participant is an extreme result of default\(^92\). Where there is a dilution of the Interest of the defaulting Participant, the defaulting Participant is allowed to remain a Participant on payment in full to the Operator of the full amount relating to the default\(^93\).
Dilution is a less extreme form of forfeiture and a less extreme result of default\textsuperscript{94}. It is submitted that there is an essential difference between forfeiture and dilution in that forfeiture involves divestiture of proprietary rights of the defaulting Participant whilst dilution involves a rearrangement of those rights\textsuperscript{95}. However, the result may be seen as being the same.

It is submitted that dilution will not be a penalty where the dilution formula is one which dilutes the Interest of a defaulting Participant in proportion to the amounts paid by the non defaulting Participants following the default by the defaulting Participant\textsuperscript{96}.

In summary the default provisions discussed above:

1. allow the joint venture to continue by giving the Operator the right to call on the non defaulting Participants to pay the amount that has not been paid by the defaulting Participant\textsuperscript{97}; and

2. act as a disincentive against default by a Participant in that:

   (i) interest accrues on the unpaid amount at a high rate\textsuperscript{98};

   (ii) continuation of the default beyond a stated period of time may result in the defaulting Participant forfeiting its Interest and that Interest being acquired by the non defaulting Participants\textsuperscript{99}; and

   (iii) the defaulting Participant will lose the right to be represented and vote at meetings of the Operating Committee and of access to any data and information relating to the Operations\textsuperscript{100}.

The default provisions are a straightforward way of dealing with default by a Participant. There is no attempt to disguise the forfeiture of the Interest of the defaulting Participant as a deemed withdrawal and thereby attempting to soften the notion of penalty by arguing that the defaulting Participant forfeits its Interest by election rather than by
breach of contract. The default provision will be without prejudice to any other rights and remedies that the Operator and or the non defaulting Participants may have.

3. TWO BASIC RULES - PENALTY AND RELIEF AGAINST FORFEITURE

The default provisions in a Joint Operating Agreement are subject to two basic rules:

1. where the Participants have agreed in the Joint Operating Agreement for the payment by the defaulting Participant of a specified sum of money or the transfer of specified property, the sum or transfer may be classified by the courts as either penal (irrecoverable) or liquidated damages (recoverable). Courts of equity have held that if the sum payable or the property transferable by the defaulting Participant is really a penalty contained in the Joint Operating Agreement to ensure that a promise is not broken the non defaulting Participants will only be entitled to receive by way of damages the sum which would compensate them for their actual loss; and

2. equity may relieve against forfeiture of the Interest of the defaulting Participant, even after termination of the Joint Operating Agreement, if in the circumstances it would be oppressive and unconscionable for the non defaulting Participants to acquire the Interest of the defaulting Participant in such circumstances.

There is no reason why these two basic rules should not apply to the payment of interest and or a premium under the default provisions by the defaulting Participant to the extent that such payment is excessive. They could also apply to any sole risk premium and any non consent premium. Further, there is no reason why the right of the non defaulting Participants to acquire the Interest of the defaulting Participant may involve forfeiture of the Interest if it is acquired at full market value.
The two basic rules are discussed immediately below in this chapter. The jurisdictions for each of the rules is distinct. The default provisions in a Joint Operating Agreement may be penal. The forfeiture by the defaulting Participant of its Interest may give rise to relief against forfeiture. However, for there to be relief against forfeiture it is not necessary that the default provision in the Joint Operating Agreement be penal\textsuperscript{105}.

4. **PENALTY**

4.1 **Introduction**

The Participants may agree at the time of entering into the Joint Operating Agreement that in the event of default on the part of any Participant the damages that will flow from the defaulting Participant to the non-defaulting Participants. Thus the Participants can introduce into their Joint Operating Agreement their own assessment of damages. It is both practical and sensible that the Participants provide for assessment in this way, as Tindal C.J. in *Kemble v Farren*\textsuperscript{106} points out:

"... we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point."

The right of the Participants to assess damages as such will be accepted and the assessment will be enforced by the courts\textsuperscript{107}.

The damages to be paid may amount to the requirement to pay over a certain sum ascertained as to amount in a given manner, as was the case with *Kemble v Farren*\textsuperscript{108} where the amount was stated to be $1,000 (but was held to be penal in nature) and in *Suisse Atlantique Societe D'Armement Maritime S.A. v N.V. Rotterdamsche Kolen Centrale*\textsuperscript{109} where the demurrage was set at $1,000 per diem, or by the forfeiture of a sum already paid, as in the case of *Stockloser v Johnson*\textsuperscript{110} where the contract called for the forfeiture of installments of the purchase price
already paid under the contract prior to default and the repossession of the item of sale, or by the transfer of property, as in the case of Jobson v Johnson where the contract called for the transfer of shares. If damages can include a requirement to transfer property, the requirement that the defaulting Participant transfer all of its Interest to the non defaulting Participants in the event that the default continues beyond a stated period of time could be treated as damages assessed by the Participants.

In allowing the Participants to so provide for damages in the event of default the courts will not exclude the application of the rule built up over time that damages for breach of contract are intended to compensate the aggrieved Participants for the actual loss they have suffered. To this end there has developed the practise of distinguishing between such provisions as are genuine attempts to liquidate prospective damages of an uncertain amount, that is, a genuine pre-estimate of the loss which is likely to flow from the breach and called "liquidated damages", and such provisions as are not genuine pre-estimates of the loss but are in the nature of a penalty, that is, designed to secure performance of the contract.

Before considering the distinction between liquidated damages and penalty it is proposed to consider the effect of a provision being held to be either liquidated damages or a penalty.

4.2 Amount Recoverable

If the sum provided to be paid in the event of default by a Participant is liquidated damages then it represents agreed damages and is recoverable without the necessity of proving the actual loss suffered.

In Suisse Atlantique Societe D'Armement Maritime S.A. v N.V. Rotterdamesche Kolen Centrale Viscount Dilhorne said:

"Here the parties agreed that demurrage at a daily rate should be paid in respect of the detention of the vessel and, on proof of breach of charterparty by detention, the appellants are entitled to the demurrage payments without having to prove the loss they suffered in consequence."
The fact that loss on default is actually suffered by the non defaulting Participants is greater or lesser than the liquidated damages stipulated in the Joint Operating Agreement is unimportant. The Participants will be bound by the damages stipulated in the Joint Operating Agreement and the amount of loss will be, whether greater or lesser, the amount of the liquidated damages. Such was the effect of the judgement of Kennedy J. in *Diestal v Stevenson*\(^{114}\) when it was held that the liquidated damages was the measure of damages payable for breach of the contract, not the amount of actual damage suffered. Kennedy J. summed up the rationale:

"In this case I have come to the conclusion that what the parties really meant was not to leave the matter at large, but in order to avoid the difficulty, as between shipper at Newcastle and buyer at Lubeck, of proving the value of the goods in a market which is constantly fluctuating, to assess the damage beforehand ... But it is said that there were two classes of coal of different prices, and that the loss by the non-delivery of one of those classes of coal might be greater than by the non-delivery of the other. It is true that they might be different. But that is not enough ... Here there is nothing to shew a priori that the loss in respect of both classes of coals might not be the same, and, therefore, nothing to render it improbable that the parties should have fixed the same sum of 1s. per ton as representing the damage in both classes."\(^{115}\)

However, where the damages sought are not within the scope of the loss covered by the provision relating to liquidated damages, the non defaulting Participants may recover damages over and above the liquidated damages\(^{116}\).

It is always open to Participants to agree liquidated damages at a level which the Participants know, or ought to know, is less than the loss that will be suffered in the event of default by a Participant. In such cases the Participants will be bound by the liquidated damages provided for\(^{117}\).

If the sum agreed to be paid in the event of default by a Participant is a penalty then the sum is not recoverable and the non defaulting Participants must prove what damages they can\(^{118}\).
Lord Justice-Clerk made a similar statement as to the law in Commercial Bank of Scotland Limited v Beal:

"A mere penalty will not be enforced according to its terms, but inquiry will be allowed as to the real amount which the other party has suffered, and the penalty will be modified accordingly."

In effect, the courts take the view that equity will grant relief against the penalty and as such reduce the amount payable to the non defaulting Participants to the extent of the actual damage sustained by those Participants. Put another way, the courts in equity assume that a penalty is designed to secure performance of the contract and a Participant is sufficiently compensated where there has been a breach if it is compensated by being indemnified for its actual loss. Such a Participant would be seen to be acting unconscionably if it were to demand a sum disproportionate to the injury suffered. Thus a Participant in such circumstances gains no more than for the damage recovered. In Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited Lord Parmoor held:

"My Lords, there is no question as to the competency of parties to agree beforehand the amount of damages, uncertain in their nature, payable on the breach of a contract. There are cases, however, in which the Courts have interfered with the free right of contract, although the parties have specified the definite sum agreed on by them to be in the nature of liquidated damages, and not of a penalty. If the Court, after looking at the language of the contract, the character of the transaction, and the circumstances under which it was entered into, comes to the conclusion that the parties have made a mistake in calling the agreed sum liquidated damages, and that such sum is not really a pactional pre-estimate of loss within the contemplation of the parties at the time when the arrangement was made, but a penal sum inserted as a punishment on the defaulter irrespective of the amount of any loss which could at the time have been in contemplation of the parties, then such sum is a penalty, and the defaulter is only liable in respect of damages which can be proved against him. It is too late to question whether such interference with the language of a contract can be justified on any rational principle."

As to the rationale behind the approach of the courts to the issue of penalty, Lord Radcliffe in Bridge v Campbell Discount Co. Limited saw the courts attitude as being one of public policy:

"The refusal to sanction legal proceedings for penalties is in fact a rule of the court's own, produced and maintained for purposes of
public policy (except where imposed by positive statutory enactment, as in 8 & 9 Will. 3, c. 11; 4 & 5 Anne, c. 16)."

In the Scottish case of Forrest and Barr v Henderson, Coulborn and Company the Lord President saw the basis upon which equity intervened as being one aimed at preventing a claim that was exorbitant and unconscionable: -

"...; for I hold it to be part of our law on this subject that, even where parties stipulate that a sum of this kind shall not be regarded as a penalty, but shall be taken as an estimate and ascertainment of the amount of damage to be sustained in a certain event, equity will interfere to prevent the claim being maintained to an exorbitant and unconscionable amount."

and where the amount was exorbitant and unconscionable the court held that it had the power to modify the amount. Lord Deas said: -

"Upon the first of these questions I cannot entertain any doubt, - I meant that a stipulation for liquidated damages in such a contract as this may be modified upon certain grounds; ..."

Lord Young saw the matter in terms of punishment in Robertson v Alexander: -

"But if, again, the penalty be a true penalty - that is, a punishment - the Court will not allow that, because the law will not let people punish each other. They may contract that the one will be bound to reimburse the other for any loss caused, but not for punishment. Anything beyond compensation, which is reasonable enough penalty, is punishment, and will not be enforced."

In assessing the damages where the court has held that the provision is a penalty, the court is at liberty to assess the same at a sum either greater than or less than that provided for in the penal provision of the Joint Operating Agreement.

Where the amount of the penalty would not compensate the non defaulting Participants for the actual loss suffered, they must elect either to sue on the penalty provision in the Joint Operating Agreement and as such recover no more than the sum stipulated therein, or, sue for breach of contract and recover damages in full in so far as the same can be proved. As to liquidated damages, such an option may not be available to the non defaulting Participants.
The fact that the non defaulting Participants may elect to sue on the penalty provision in the Joint Operating Agreement, or ignore it and sue for damages for breach of contract, particularly where the damage suffered exceeds the sum stated, was accepted by Bailhache J. in Wall v Rederiaktiebolaget Luggude 128:

"The right to sue either for the penalty or damages for breach of contract disregarding the penalty, or in archaic phraseology to sue in debt or in assumpsit, is again expressly asserted by Lord Ellenborough in Harrison v Wright ..."

This being the state of the law as I understand it, one easily sees why in charterparty cases no one sues on the penalty clause now. You cannot under it recover more than the proved damages, and if the proved damages exceed the penal sum you are restricted to the lower amount. As the penalty clause may be disregarded it always is disregarded and has become a dead letter, or from another point of view a "brutum fulmen" as Blackburn J. called it in Godard v Gray.

Where the non defaulting Participants elect to sue on the penalty provision in the Joint Operating Agreement their damages cannot exceed the stipulated amount. This view is supported in the judgement of Bailhache J. in Wall v Rederiaktiebolaget Luggude 129:

"The result of suing for the penalty is therefore that the plaintiff recovers proved damages, but never more than the penal sum fixed: see Hardy v Bern; Branscombe v Scarbrough; Dimech v Corlett."

The onus of establishing that the provision in the Joint Operating Agreement is a penalty lies on the defaulting Participant 130.

4.3. Need for Breach

The question of whether a provision is a penalty or is liquidated damages can only arise when the event upon which the amount becomes payable is a breach of contract. Where the Joint Operating Agreement provides for a sum to be payable in an event that does not involve a breach of contract, such as where a Participant has the option to terminate the Joint Operating Agreement or an agreement thereunder, for example, withdrawal, sole risk operations and non consent operations, and exercises that option, it is suggested that the law as to penalties does
not apply and as such the stipulated amount is recoverable by the other Participants.  

4.4 **Distinguishing between liquidated damages and penalty**

As was stated by Upjohn L.J. in Lombank Limited v Excell:—

"It is necessary to examine some of the earlier authorities on this question of liquidated damages and penalties, and locus classicus is, of course, Dunlop Pneumatic Tyre Co. Limited v New Garage and Motor Company Limited ..."

The judgement of Lord Dunedin in Dunlop Pneumatic Tyre Co. Ltd. v New Garage and Motor Co. Ltd. is taken to be the starting point in almost all analysis of the distinction between a penalty and liquidated damages:

"... In view of that fact, and of the number of authorities available, I do not think it advisable to attempt any detailed review of the various cases, but I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative:—

1. Though the parties to a contract who have used the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.

2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (Clydebank Engineering and Shipbuilding Co. v Don Jose Yzquierdo y Castaneda).

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged as at the time of the making of the contract, not as at the time of breach (Public Works Commissioner v Hills and Webster v Bosanquet).

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in Clydebank Case.
(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (Kemble v Farren). This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable, — a subject which much exercised Jessel M.R. in Wallis v Smith — is probably more interesting than material.

(c) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and other but trifling damage" (Lord Watson in Lord Elphinstone v Monkland Iron and Coal Co.).

On the other hand:

(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (Clydebank Case, Lord Halsbury; Webster v Bosanquet, ...)."

It is proposed to take each of the rules laid down by Lord Dunedin and consider them in turn.

4.4.1 Substance, Not Form

The first test in the judgement of Lord Dunedin in Dunlop Pneumatic Tyre Co. Ltd. v New Garage and Motor Co. Limited134 was:—

"1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case."

Thus the courts are more concerned with substance than with form. It is for the courts to determine what in truth the Participants have provided for.
In Johnston v Robertson the Lord Justice-Clerk said:

"The mere use of the word "penalty" is not conclusive as to the true character of the stipulation. A consequence may be a penalty, although it is not called so; and, on the other hand, it may not be a penalty, though it receives that name."

However, it is suggested that the terminology used by the Participants may well have a bearing on the burden of proof. In Willson v Love Lord Esher M.R. said:

"... where the parties themselves call the sum made payable a "penalty", the onus lies on those who seek to shew that it is to be payable as liquidated damages."

It is clear that the intention of the Participants themselves will be overruled if the courts consider that the words used by the Participants do not represent the real nature of the transaction or what in truth it is to be taken to be. Lord Radcliffe so held in Bridge v Campbell Discount Co. Limited:

"The intention of the parties themselves is never conclusive and may be overruled or ignored if the court considers that even its clear expression does not represent "the real nature of the transaction" or what "in truth" it is to be taken to be."

From what has been said it should not be taken that the expression used by the Participants is to be ignored. In Willson v Love Lord Esher further remarked:

"... the term "penalty" or "liquidated damages" is not conclusive; but no case, I think, decides that the term used by the parties themselves is to be altogether disregarded, ..."

4.4.2 Difference in Essence

The second test in the judgement of Lord Dunedin in Dunlop Pneumatic Tyre Co. Limited v New Garage and Motor Co. Limited was:

"2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage ..."
In Law v Local Board of Redditch\textsuperscript{140} Lopes L.J. said:

"The distinction between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages."

4.4.3 Construction

Lord Dunedin, in Dunlop Pneumatic Tyre Co. Limited v New Garage and Motor Co. Limited,\textsuperscript{141} applied a third test:

"3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged as at the time of the making of the contract, not as at the time of breach ..."

The question referred to is a question of law, as was made clear by Wilde C.J. in Sainter v Ferguson\textsuperscript{142}:

"But is is now clearly settled, that, whether the sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty or as liquidated and ascertained damages, is a question of law, to be decided by the judge upon a consideration of the whole instrument."

When dealing with the question of construction in Phonographic Equipment (1958) Limited v Muslu\textsuperscript{143} Donovan L.J. said "the contract has to be regarded as a whole..."

This may well give rise to the situation where on different facts and in different circumstances, a clause is held to be penal in one instance and yet the same clause is held to be liquidated damages in another\textsuperscript{144}. Thus a clause held to be a penalty in Lombank Limited v Excell\textsuperscript{145} was, despite being drafted in, held to be for liquidated damages in Phonographic Equipment (1958) Limited v Muslu\textsuperscript{146}.

In the Joint Operating Agreement representations of the intention of the Participants that the default provisions are not to constitute a penalty, in that they are "necessary to ensure maintenance of the
[petroleum title] in good standing"\textsuperscript{147}, will be of no avail if the criteria for distinguishing between liquidated damages and penalty are not satisfied.

4.4.4 Relation to Loss Suffered

The fourth test in the judgement of Lord Dunedin in Dunlop Pneumatic Tyre Co. Limited v New Garage and Motor Co. Limited\textsuperscript{148} was:

"4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

(a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach ..."

This guideline is drawn from the judgement of the Earl of Halsbury L.C. in Clydebank Engineering and Shipbuilding Company Limited v Don Jose Ramos Yzquierdo Y Castaneda\textsuperscript{149}:

My Lords, it is impossible to lay down any abstract rule as to what it may or it may not be extravagant or unconscionable to insist upon without reference to the particular facts and circumstances which are established in the individual case. I suppose it would be possible in the most ordinary case, where people know what is the thing to be done and what is agreed to be paid, to say whether the amount was unconscionable or not. For instance, it you agreed to build a house in a year, and agreed that if you did not build the house for £50, you were to pay a million of money as a penalty, the extravagance of that would be at once apparent. Between such an extreme case as I have supposed and other cases, a great deal must depend upon the nature of the transaction - the thing to be done, the loss likely to accrue to the person who is endeavouring to enforce the performance of the contract, and so forth. It is not necessary to enter into a minute disquisition upon the subject, because the thing speaks for itself. But, on the other hand, it is quite certain, and an established principle in both countries, that the parties may agree beforehand to say, "Such and such a sum shall be damages if I break my agreement...".

4.4.5 Payment of Smaller Sum

The fifth test in the judgement of Lord Dunedin in Dunlop Pneumatic Tyre Co. Limited v New Garage and Motor Co. Limited\textsuperscript{150} was:
4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

... 

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (Kemble v Farren)..."

This test has direct relevance to the default provisions in the Joint Operating Agreement. The value of the loss of the Interest by the defaulting Participant may be substantially greater than the sum which ought to have been paid by the defaulting Participant.

4.4.6 Single Sum for any Breach

The sixth test in the judgement of Lord Dunedin in Dunlop Pneumatic Tyre Co. Limited v New Garage and Motor Co. Limited was:

"4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

... 

(c) There is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage (Lord Watson in Lord Elphinstone v Monkland Iron and Coal Co.)."

In the Australian case of Lamson Store Service Co. Limited v Russell Wilkins & Sons Limited O'Connor J. held:

"Where there are covenants to do or refrain from doing several things, the performance of some having a definite value such as the payment of a sum of money, and the performance of others having an uncertain value, and one fixed amount is stipulated to be paid for any of the breaches, the fixed amount will be adjudged to be a penalty and not liquidated damages."

Being a presumption the same can be displaced by other considerations, in which case the provision may still be found for liquidated damages.
4.4.7 Difficulty of Estimation

Finally, the seventh test in the judgement of Lord Dunedin in Dunlop Pneumatic Tyre Co. Ltd. v New Garage and Motor Co. Limited was:

"4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

..."

On the other hand:

(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties."

In English Hop Growers Limited v Dering Scrutton L.J. said:

"If in a case where breach of a contract may occasion serious damage but damage which is difficult to value exactly, people contracting on equal terms agree beforehand to value or ascertain beforehand a conventional figure which shall represent on an average the probable damage from breaches of the same kind, I see no reason to interfere with their "genuine covenanted pre-estimate of damage", as Lord Dunedin describes it. That the damages are difficult to estimate is all the more reason why the parties should make their agreement effective and easy to enforce by previously agreeing a measure of damage. That damages of the same kind, but difficult to value exactly, may be averaged to avoid the difficulty seems to me also reasonable."

4.5. Summary

There is an increasing reluctance on the part of courts to set aside commercial arrangements, which do not conflict with other laws or with public policy, merely because those arrangements seem harsh or unfair in the circumstances prevailing at the time of default. This will be particularly true where the Participants are at arm's length, well placed to make the business judgements involved, and have access to professional legal advice at the time of entering into the Joint Operating Agreement. The power of the court to grant relief in appropriate cases, remains as ever. However, even when jurisdiction is assumed the exercise of the power has always been discretionary, and it is not unlikely that such
discretion would be exercised against the enforecability of any default provisions which are made amongst participants of any reputation in the Industry.

The background of the Industry against which the default provisions in Joint Operating Agreements must be set may be taken as some indication that the courts would adopt a more flexible and commercial approach to construing default provisions in high risk activities. In the case of penalty, the specific nature of the activity undertaken at the Exploration Phase makes a genuine attempt to liquidate propsective damages difficult and courts may well give effect to a formula which seems to be an attempt at such and which in turn differentiates between the consequences for trivial and serious breaches of contract.

The default provisions will not be held to be penal where the defaulting Participant is required to pay interest on the unpaid amounts. It is submitted that such would be a genuine attempt to liquidate prospective damages as well as being a foreseeable loss suffered by the Operator or the non defaulting Participants as a result of any default. However, if the interest rate is seen as excessive at the time the Participants entered into the Joint Operating Agreement it is likely that it will be viewed as a consequence of breach of contract and is liable to be attacked as a penalty.

The default provision will not be viewed as penal where the non defaulting Participants are required to, and do, pay to the Operator a share of the amount in default, and are thereafter subrogated to the extent of the payment to the rights of the Operator to collect, and they seek to collect, the amount from the defaulting Participant together with interest thereon at a commercial rate. It is submitted that this would be a genuine attempt to liquidate prospective damages as well as being a foreseeable loss suffered by the non defaulting Participants as a result of the default by the defaulting Participant. However, if the interest rate is seen to be excessive at the time the Participants entered into the Joint Operating Agreement it is a consequence of breach of contract and liable to be attacked as a penalty.
It is submitted that, on balance, default provisions of the type discussed above in a Joint Operating Agreement will not be considered as penal. The next issue to consider is whether equity will grant relief against forfeiture of the Interest of the defaulting Participant.

5. FORFEITURE

The jurisdiction of the courts to grant relief against forfeiture was discussed by Lord Wilberforce in Shiloh Spinners Limited v Harding 157:

"There cannot be any doubt that from the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The jurisdiction has not been confined to any particular type of case. The commonest instances concerned mortgages, giving rise to the equity of redemption, and leases, which commonly contained re-entry clauses; but other instances are found in relation to copyholds, or where the forfeiture was in the nature of a penalty. Although the principle is well established, there has undoubtedly been some fluctuation of authority as to the self-limitation to be imposed or accepted on this power. There has not been much difficulty as regards two heads of jurisdiction. First, where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate, and also costs (Peachy v Duke of Somerset (1721) 1 Stra. 447 and cases there cited). Yet even this head of relief has not been uncontested: Lord Eldon L.C. in his well-known judgement in Hill v Barclay (1811) 18 Ves. Jun. 56 expressed his suspicion of it as a valid principle, pointing out, in an argument which surely has much force, that there may be cases where to oblige acceptance of a stipulated sum of money even with interest, at a date when receipt has lost its usefulness, might represent an unjust variation of what had been contracted for: see also Reynolds v Pitt (1812) 19 Ves. Jun. 140. Secondly, there were the heads of fraud, accident, mistake or surprise, always a ground for equity's intervention, the inclusion of which entailed the exclusion of mere inadvertence and a fortiori of wilful defaults.

Outside of these there remained a debatable area in which were included obligations in leases such as to repair and analogous obligations concerning the condition of property, and covenants to insure or not to assign...

... it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a
stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word "appropriate" involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach."

Some ten years after the decision in Shiloh Spinners Limited v Harding the jurisdiction of the courts to grant relief against forfeiture was considered in Scandinavian Trading Tanker Co. A.B. v Flota Petrolera Ecuatoriana (The Scaptrade). Shortly thereafter followed Sport International Bussum B.V. v Inter-Footwear Limited and B.I.C.C. PLC v Burndy Corporation. Each of these decisions cast doubt in one way or another on the jurisdiction of the courts to grant relief against forfeiture. They have particular relevance to Joint Operation Agreements and whether a defaulting Participant can seek relief against forfeiture of its Interest under the default provisions.

In Scandinavian Trading Tanker Co. A.B. v Flota Petrolera Ecuatoriana (The Scaptrade) Robert Goff L.J. reading the judgement of the Court of Appeal sought to explain the basis of the jurisdiction of the courts to grant such relief. His Honour then turned to consider whether the jurisdiction extended to intervening and relieving time charterers from the consequences of default, saying:

"... we have come to the conclusion (as indeed we were urged by counsel to do) that the time has come when, in the interests of certainty, the courts must face up to the question whether they have jurisdiction to grant relief in cases such as the present.

We proceed upon the basis that the equitable jurisdiction which the charterers invoke should not be regarded as rigidly confined to certain specific circumstances, or as incapable of development. Even so, we must have regard to the fact that, so far as is relevant to the present case, the principal areas in which courts of equity have been prepared to grant relief in the past are (1) relief against the forfeiture of property, notably in cases concerning mortgages and leases, and (2) relief against penalties.

... equitable relief may be available in the context of a transaction which can be described as commercial; for example, in the case of leases of commercial premises, and of penalties in contracts which may be described as commercial (though foreign parties to English commercial contracts are sometimes startled to discover that this is so).
... However the cases where equity has intervened are cases where parties were frequently not at arm's length; and frequently also where the relevant contract conferred an interest in land, the loss of which could have serious personal consequences.

... The mere fact that its application in the cases of leases has led to its being capable of application to some commercial transactions of the same kind provides, we consider, little or no justification for its extension to commercial contracts such as time charters. The question whether it should be so extended must be considered on its merits, as a matter of policy, taking into account the relatively slight assistance available to us from the authorities, though the fact that the jurisdiction has never been extended to purely commercial transactions must surely cause us to regard the extension, which we are now invited to make, with a considerable degree of caution.

... Indeed, when we come to consider the nature of a contract such as a time charter, and the circumstances in which it is likely to be made, we see the most formidable arguments against the proposed extension of the equitable jurisdiction. In the first place, a time charter is a commercial transaction in the sense that it is generally entered into for the purposes of trade between commercial organisations acting at arm's length.

... It is of the utmost importance in commercial transactions that, if any particular event occurs which may affect the parties' respective rights under a commercial contract, they should know where they stand. The court should so far as possible desist from placing obstacles in the way of either party ascertaining his legal position, if necessary with the aid of advice from a qualified lawyer, because it may be commercially desirable for action to be taken without delay, action which may be irrevocable and which may have far-reaching consequences. It is for this reason, of course, that the English courts have time and again asserted the need for certainty in commercial transactions - for the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly.

... The policy which favours certainty in commercial transactions is so antipathetic to the form of equitable intervention invoked by the charterers in the present case that we do not think it would be right to extend that jurisdiction to relieve time charterers from the consequences of withdrawal. We consider that the mere existence of such a jurisdiction would constitute an undesirable fetter upon the exercise by parties of the contractual rights under a commercial transaction of this kind."

On appeal, in Scandinavian Trading Tanker Co. A.B. v Flota Petrolera Ecuatoriana (The Scaptrade) 163, Lord Diplock said on behalf of the House of Lords:

"... your Lordships have heard argument upon one question only: "Has the High Court any jurisdiction to grant relief against the exercise by a shipowner of his contractual right, under the withdrawal clause in a time charter, to withdraw the vessel from the service of the
charterer upon the latter's failure to make payment of an instalment of the hire in the manner and at a time that is not later than that for which the withdrawal clause provides?" I call this the jurisdiction point.

...

My Lords, the judgement of the Court of Appeal ..., delivered by Robert Goff L.J., on the jurisdiction point was the first direct decision by any English court, given after hearing argument, upon the question that I have set out at the beginning of this speech. For reasons admirably expressed, and which, for my part, I find convincing, the Court of Appeal held that there was no such jurisdiction.

...

To grant an injunction restraining the shipowner from exercising his right of withdrawal of the vessel from the service of the charterer, though negative in form, is pregnant with an affirmative order to the shipowner to perform the contract; juristically it is indistinguishable from a decree for specific performance of a contract to render services; and in respect of that category of contracts, even in the event of breach, this is a remedy that English courts have always disclaimed any jurisdiction to grant. This is, in my view, sufficient reason in itself to compel rejection of the suggestion that the equitable principle of relief from forfeiture is juristically capable of extension so as to grant to the court a discretion to prevent a shipowner from exercising his strict contractual rights under a withdrawal clause in a time charter which is not a charter by demise.

...

My Lords, Shiloh Spinners Limited v Harding was a case about a right of re-entry upon leasehold property for breach of a covenant, not to pay money but to do things on land. It was in a passage that was tracing the history of the exercise by the Court of Chancery of its jurisdiction to relieve against forfeiture of property that Lord Wilberforce said, at p. 722:

"There has been much difficulty as regards two heads of jurisdiction. First, where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate, and also costs ..."

That this mainly historical statement was never meant to apply generally to contracts not involving any transfer of proprietary or possessory rights, but providing for a right to determine the contract in default of punctual payment of a sum of money payable under it, is clear enough from Lord Wilberforce's speech in The Laconia [1977] A.C. 850.
For all these reasons I would dismiss the appeal. I do so with the reminder that the reasoning in my speech has been directed exclusively to time charters that are not by demise. Identical considerations would not be applicable to bareboat charters and it would in my view be unwise for your Lordships to express any views about them."

Robert Goff L.J. and Lord Diplock, taken together, can be said to have laid down the following principles in relation to the jurisdiction of the courts to grant relief against forfeiture:

1. the basis of the jurisdiction is not confined to specific circumstances and nor is it incapable of development;  

2. up to that point in time the principle areas in which the courts had been prepared to grant relief against forfeiture were:  

   (i) where there was to be forfeiture of property, most noticeably in cases concerning mortgages and leases; and  

   (ii) to relieve against penalties;  

3. frequently the courts have been prepared to grant relief against forfeiture where:  

   (i) the parties were not at arm's length;  

   (ii) the relevant contract conferred an interest in land; and  

   (iii) the loss could have had serious personal consequences; and  

4. the courts would not be prepared to grant relief against forfeiture in the case of purely commercial transactions, that is, transactions entered into for the purposes of trade between commercial organisations acting at arm's length. This is particularly so where there was a need for certainty in that the parties need to know where they stand: it being desirable to avoid
delay while determining whether or not a court would grant relief. This was the approach adopted by the Supreme Court of the Northern Territory in considering whether to grant relief against forfeiture upon the default of a Participant in Monarch Petroleum N.L. v Mid East Mineral N.L. 171.

In addition, Lord Diplock made a number of observations which merit mention: -

1. the decision was confined to time charters. His Honour reserved his position in relation to bare boat charters 172;

2. the relationship between relief against forfeiture and the availability of other equitable remedies, such as specific performance was noted 173. A court would not grant relief against forfeiture where the effect of so doing would amount in practice to an order for specific performance of a contract for services 174; and

3. a court would not grant relief against forfeiture where the essential aim of the right of forfeiture was to secure the payment of money if the contract concerned did not involve the transfer of proprietary or possessory rights 175.

About the same time, in Australia, the High Court of Australia handed down its decision in Legione v Hateley 176 reaffirming the essential features for the application of the jurisdiction of the courts to grant relief against forfeiture laid down by Lord Wilberforce in Shiloh Spinners Limited v Harding 177.

The issue of the jurisdiction of the courts to grant relief against forfeiture was also addressed by Lord Templeman, in the House of Lords, in Sport International Bussum B.V. v Inter-Footwear Limited 178. Lord Templeman said: -

"In Scandinavian Trading Tanker Co. A.B. v Flota Petrolera Ecuatoriana, The Scaptrade ..., this House declined to apply the equitable doctrine of relief against forfeiture to a time charter. Lord Diplock confined that power to contracts concerning the transfer of proprietary or possessory rights ... Counsel submitted that in the present case the licences to use the trade marks and names created proprietary and possessory rights in intellectual property. He admits, however, that so to hold would be to extend the boundaries of the authorities dealing with relief against forfeiture. I do not
believe that the present is a suitable case in which to define the boundaries of the equitable doctrine of relief against forfeiture. It is sufficient that the appellant cannot bring itself within the recognised boundaries and cannot establish an arguable case for the intervention of equity. The recognised boundaries do not include mere contractual licences and I see no reason for the intervention of equity.”

Oliver L.J., in the Court of Appeal, had considered the judgement of Lord Diplock in *Scandinavian Trading Tanker Co. A.B. v Flota Petrolera Ecuatoriana (The Scaptrade)* and saw no reason why the jurisdiction of the courts to grant relief should extend to property other than interests in land. Oliver L.J. did not hold that the jurisdiction could not so extend; His Honour saw no reason to so extend it. This went beyond the decisions in *Scandinavian Trading Tanker Co. A.B. v Flota Petrolera Ecuatoriana (The Scaptrade)* where Robert Goff L.J. and Lord Diplock did not rule out the possibility of relief against forfeiture being granted in commercial contracts. In nearly all other respects, the decision of Oliver L.J. and Lord Templeman can be seen as reaffirming the earlier decisions of Robert Goff L.J. and Lord Diplock.

The certainty that had been established was then eroded by the judgements in *Scandinavian Trading Tanker Co. A.B. v Flota Petrolera Ecuatoriana (The Scaptrade)* and *Sport International Bussum B.V. v Inter-Footwear Limited* by Dillon L.J. in *B.I.C.C. PLC v Burndy Corporation and Another*. Dillon L.J. held:-

"There are here two questions, viz.: has the court jurisdiction to grant Burndy relief against forfeiture by an extension of time and; if so, is it appropriate that the court should exercise that jurisdiction in Burndy's favour?

The judge decided, in reliance especially on the judgment of the Court of Appeal in *Scandinavian Trading Co. A.B. v Flota Petrola Ecuatoriana (The Scaptrade)*, that the court had no such jurisdiction, because the assignment was a commercial agreement between commercial parties. The decision of the Court of Appeal in The Scaptrade was, as the judge noted, affirmed by the House of Lords. As I understand the decision of the House of Lords, however, and the decision of the House of Lords in the subsequent case of *Sport International Bussum B.V. v Inter-Footwear Ltd.*, their effect was to confine the court's jurisdiction to grant relief against forfeiture to contracts concerning the transfer of proprietary or possessory rights: see the speech of Lord Templeman in the latter case. The present case, however, is distinguishable from those cases in that clause 10(iii) of the assignment is concerned with a transfer of property rights.
... There is no clear authority, but for my part I find it difficult to see why the jurisdiction of equity to grant relief against forfeiture should only be available where what is liable to forfeiture is an interest in land and not an interest in personal property. Relief is only available where what is in question is forfeiture of proprietary or possessory rights, but I see no reason in principle for drawing a distinction as to the type of property in which the rights subsist. The fact that the right to forfeiture arises under a commercial agreement is highly relevant to the question whether relief against forfeiture should be granted, but I do not see that it can preclude the existence of the jurisdiction to grant relief, if forfeiture of proprietary or possessory rights, as opposed to merely contractual rights, is in question. I hold, therefore, that the court has jurisdiction to grant Burnby relief.189

Kerr L.J.190 and Ackner L.J.191 expressed their approval of the judgment of Dillon L.J.

In his judgement, although obiter192, Dillon L.J. saw no reason why courts could not grant relief even though:—

1. the forfeiture arose pursuant to a purely commercial transaction;

2. the contract involved the transfer of proprietary or possessory rights and not merely contractual rights; and

3. the interest concerned was an interest in personal property rather than land193.

Dillon L.J. regarded the fact that the case involved a purely commercial transaction as having a bearing upon the exercise of the discretion to grant relief against forfeiture rather than upon the jurisdiction of the courts to grant relief against forfeiture194. In this instance the common feature with the judgements of Robert Goff L.J., Lord Diplock, Oliver L.J. and Lord Templeman discussed above was that relief against forfeiture would only be granted where the contract involves the transfer of proprietary or possessory rights and not merely contractual rights195.

Turning again to the default provisions in Joint Operating Agreements, there can be little doubt that they provide for forfeiture, and as such the question must be asked as to whether the Interest of a Participant creates proprietary or possessory rights. As has been
submitted earlier, the Interest of a Participant is both proprietary and contractual.

A further point for examination must be whether the default provisions in Joint Operating Agreements have as their primary purpose the securing of the payment by the Participants of their respective full share of any sum payable by them pursuant to the Joint Operating Agreement. It is submitted that one of the objects of the default provisions in a Joint Operating Agreement - but not the primary object - is to ensure the prompt payment by the Participants of their respective full share of any sums payable by them pursuant to the Joint Operating Agreement. This is to assist the Participants in attaining the primary object of a Joint Operating Agreement entered into at the Exploration Phase: the discovery of petroleum. One of the disincentives against default by a Participant in the performance of its duty to make such prompt payment is the possibility that its Interest may be forfeited to and acquired by the other Participants, without compensation.

Furthermore, it is submitted that the primary object of the default provisions in a Joint Operating Agreement is to secure payment by the Participants of their respective full share of any sum payable by them pursuant to the Joint Operating Agreement. The right of forfeiture can also be seen as providing security over an easily available asset of the defaulting Participant. A secondary, although nevertheless very important, object of the default provisions in a Joint Operating Agreement is to sever the relationship between the defaulting Participant and the non defaulting Participants so as to allow the non defaulting Participants to rearrange their interests and funding obligations, thereby relieving them of the burden of relying upon the defaulting Participant and providing them with continuing and regular support for the Operations.

To the extent it is still open to argument that courts do not, or will only in very rare circumstances, have jurisdiction to grant relief against forfeiture, or, if they do have such jurisdiction, will not exercise their discretion to grant relief, where the participants have, at arm's length, entered into a purely commercial transaction it is submitted that the Joint Operating Agreement is just such an agreement. The
entering into Joint Operating Agreement is very much a purely commercial transaction entered into by the Participants acting at arm's length\textsuperscript{203}. If the entering into of a Joint Operating Agreement is considered against the background of the Industry and the Exploration Phase it is difficult to see how it can be argued otherwise and that the Participants should not be free to make enforceable arrangements as between themselves regulating the events which follow the default of a Participant\textsuperscript{204}. In the event the courts did hold that they had jurisdiction to grant relief against forfeiture they will nevertheless grant relief in appropriate and limited case\textsuperscript{205}, and the following matters will be taken into consideration before granting relief against the forfeiture of its Interest to a defaulting Participant\textsuperscript{206}:–

1. the defaulting Participant would have been aware of the consequences of the default;

2. the defaulting Participant and the non defaulting Participants would have entered into a purely commercial transaction, acting at arm's length and on an equal footing;

3. the defaulting Participant was given the opportunity to remedy the default; and

4. the conduct of the defaulting Participant\textsuperscript{207}. In Southern Cross Exploration N.L. v Bennett\textsuperscript{208} the court was influenced by the past record of default by the Participant. The defaulting Participant had a continuous record of default in the payment of cash calls with the result that the non defaulting Participants had been forced over a period of time to continue in a relationship of joint venture with a Participant who was once again in default. In such circumstances the court was not prepared to exercise its discretion and grant relief against forfeiture.

One particular aspect of the defaulting Participants' conduct which the courts will scrutinise is the nature of the default; was it wilful or inadvertent\textsuperscript{209}? Wilful is taken
to mean a failure by the defaulting Participant to act with reasonable diligence and prudence\(^{210}\). For example, the inability, as opposed to the unwillingness, of a Participant to pay will not be seen as a wilful default and as such the courts may be more willing to grant relief against forfeiture\(^{211}\).

The question of the conduct of the Participant seeking relief was addressed in passing by Mocatta J. in C.V.G. Siderurgicia Del Orinoco S.A. v London Steamship Owners’ Mutual Insurance Association Limited (The "Vainqueur Jose")\(^{212}\):

"... it is in my judgement clear that the member's conduct in this case, an extraordinary amalgam of action and inaction, inexplicable on any rational basis, denies him or those standing in his shoes any right there might otherwise have been to relief against forfeiture."

In so far as wilful breaches are concerned Lord Wilberforce said:—

"... wilful breaches should not, or at least should only in exceptional cases, be relieved against, ..."\(^{213}\);

5. the gravity of the default; and

6. the discrepancy existing between the value of the Interest of the defaulting Participant that is forfeited to and acquired by the non defaulting Participants, and the damage caused by the default\(^{214}\). Simply, a comparison will be made between the defaulting Participant's loss and the non defaulting Participants' gain in the event of the forfeiture and acquisition of the Interest of the defaulting Participant.

At the Exploration Phase, until such time as petroleum is discovered, the Interest of the defaulting Participant that is forfeited to and acquired by the non defaulting Participants may be of insignificant value or even worthless\(^{215}\). Hence, a challenge by the defaulting Participant to the forfeiture and acquisition of its Interest may well depend upon the likelihood of petroleum being discovered. Such would appear to have been the case in Monarch Petroleum N.L. v Citco Australia Petroleum Limited\(^{216}\). The
defaulting Participant appears not to have challenged the imminent forfeiture and acquisition until petroleum was discovered. The decision reached by Kennedy J. in that case did not require consideration of whether the applicant's action in seeking relief against forfeiture had merit. Nevertheless, where a Participant is in default and in such circumstances seeks relief against forfeiture, it may be estopped from obtaining relief by the doctrine of laches.

Where the Interest of a defaulting Participant is forfeited to and acquired by the non defaulting Participants, it would not be correct to say that the defaulting Participant has not received any benefit under the Joint Operating Agreement. The defaulting Participant will have received the benefit of all exploration up to the date upon which its Interest is forfeited to and acquired by the non defaulting Participants.

A slight discrepancy, though clear and predictable, between the value of the Interest of the defaulting Participant that is forfeited to and acquired by the non defaulting Participants and the damage caused by the default will be insufficient to persuade the courts to grant relief against forfeiture.

In considering the defaulting Participants' application for relief against forfeiture the courts will look at all the facts and circumstances at the time of the forfeiture. They will not be constrained, as is the case when considering the issue of penalty, to the facts and circumstances at the time the Participants entered into the Joint Operating Agreement.

Courts have a discretion as to whether or not they will exercise their jurisdiction to grant relief against forfeiture. The relief granted may go so far as to remould the provisions of the Joint Operating Agreement to the extent necessary to avoid the otherwise unconscionable aspects of the default provisions. However, before courts grant relief against forfeiture it is usual for them to require the defaulting Participant to pay in full the amount in default, or to obtain an assurance that the amount will be paid, and to seek an assurance that all
future amounts payable by the defaulting Participant pursuant to the Joint Operating Agreement will be paid when due\textsuperscript{221}. The effect of granting relief against forfeiture is not to strike out the default provisions in the Joint Operating Agreement which gave rise to the forfeiture, but to afford more time in which the defaulting Participant may remedy the default\textsuperscript{222}.

If in exercising its discretion to grant relief, the court fixes a time limit for performance of any condition attached to that relief, the court can similarly extend such time limit. In Chandless-Chandless v Nicholson\textsuperscript{223} Lord Greene M.R. said:

"I hold the view without hesitation that notwithstanding the omission of the words "liberty to apply" an order of this kind, which gives relief on terms to be performed within a specified time, is one in respect of which the court retains jurisdiction to extend that time if circumstances are brought to its notice which would make it just and equitable that extension should be granted."

If it later appears that the relief granted by way of an extension of time ought to be further extended and that this can be done without prejudicing the interests of the other Participants the court has jurisdiction to so grant an extension. In Starside Properties Limited v Mustapha\textsuperscript{224} Edmund Davies L.J. said:

"... the court grants relief against the forfeiture which would otherwise follow from it in such circumstances as justice requires, and it grants relief on such terms as are equitable in those circumstances. If it should later appear that the relief by way of an extension of time first granted ought to be extended, and that in fairness to the other party that can be done, I see no difficulty in holding that the court has the jurisdiction to do that which the justice of the case is seen to require."

The fact that relief against forfeiture confers more time for the defaulting Participant to remedy the default may pose problems for the defaulting Participant when making its application for relief. After all, the default provisions in a Joint Operating Agreement give the defaulting Participant time to remedy the default before even the forfeiture mechanism applies. The defaulting Participant would need to show:

1. the default was not wilful;
2. there was a genuine failure to raise funds after using all reasonable endeavours to obtain finance; and

3. there was a genuine intent to pay in full all amounts giving rise to and arising as a result of the default.

The Joint Operating Agreement will often provide for a stated period of time in which the defaulting Participant may make good its default thus rendering spurious the avenue of relief against forfeiture.

Default by a Participant during the Exploration Phase, where nothing has as yet been found, is unlikely to attract much opposition to the strict exercise of the default provisions in the Joint Operating Agreement by either the courts or the defaulting Participant. At the Exploration Phase there will usually be either no joint venture property or it will be of insignificant value. Furthermore, there will be no cash flow. Once the joint venture moves on to the appraisal phase or the Development Phase, the stance of the defaulting Participant and the courts may be different. However, such considerations are outside the ambit of this thesis.

6. CROSS CHARGES

A Joint Operating Agreement at the Exploration Phase may provide a mechanism whereby each Participant charges its Interest in favour of the other Participants and the Operator to secure the payment in full of any sum payable by it pursuant to the Joint Operating Agreement. Thus the cross charge mechanism may be used to protect the interest of the non defaulting Participants in the event of a default. The cross charge will be a fixed charge over the Participant's interest in the petroleum title and other property and a floating charge over stocks and consumables. As such, the charge will be registerable. The cross charge will usually have first priority as against all other charges or encumbrances created by the Participant and will provide by agreement for all pre-existing charges or encumbrances to be postponed to it. It is outside of the scope of this thesis to address the somewhat complex priority arrangements between creditors and other matters that arise from
the cross charge mechanism. Primarily this is because it is most unusual to find the cross charge mechanism used in Joint Operating Agreements entered into to undertake the Exploration Phase\textsuperscript{231}.

7. **PREMIUM**

It is not usual for the Joint Operating Agreement to impose a premium upon the defaulting Participant as part of what is required to remedy its default\textsuperscript{232}. Premiums may, however, appear in relation to Sole Risk Operations, non consent operations and dilution clauses. Sole Risk Operations and non consent operations are discussed in this thesis. Dilution clauses have been discussed above in this chapter.

8. **LIENS**

Where there has been a default by a Participant, until the default is remedied, the early Joint Operating Agreements usually provided for the non defaulting Participants to have a lien over that part of the Interest of the defaulting Participant as constitutes its share of the property as owned by the Participants in undivided shares as tenants in common\textsuperscript{233}. This would include all equipment, plant and machinery in which the defaulting Participants has an interest.

The provision in the Joint Operating Agreement which provides for the lien is a hangover from the various North American model form Joint Operating Agreement\textsuperscript{234}. For reasons that will be obvious from the discussion which follows, such a provision is rarely provided for now.

A lien is the right of the non defaulting Participants to retain the property of the defaulting Participant which they have in their possession until the demands on the defaulting Participant by the non defaulting Participants are satisfied\textsuperscript{235}. One of the problems with a lien is that it does little more than provide security for the payment by the defaulting Participant of the amounts paid by the non defaulting Participants to the Operator to meet the defaulting Participant's share of the sums payable by it pursuant to the Joint Operating Agreement\textsuperscript{236}.
Another of the problems with a lien is that it is founded in possession\textsuperscript{237}. At the Exploration Phase there is usually no specific property held by the defaulting Participant. As mentioned each Participant usually has an undivided share as tenant in common in the property held by the Participants under the Joint Operating Agreement. For obvious reasons, the non defaulting Participants cannot take possession of the defaulting Participant's interest in property held in this way\textsuperscript{238}.

Moreover a lien does not carry the right for the non defaulting Participants to sell and therefore realise the property of the defaulting Participant\textsuperscript{239}. Any right of sale is at the discretion of the courts\textsuperscript{240}. However, the sale of the property of the defaulting Participant would largely defeat the object of the joint venture as it could deprive the non defaulting Participants of essential equipment, plant and machinery\textsuperscript{241}.

The final problem with a lien is that in most cases it will constitute a registerable charge\textsuperscript{242}.
FOOTNOTES


"Default Clauses in North Sea Joint Operating Agreements: Current 
Legal Issues" (Unpublished Thesis, Centre for Petroleum and Mineral 
Law Studies, University of Dundee, 1985) p. 43; Doeh "Default 

96.

17. Britoil 15.1; Apea 9.4.; See Hill "Joint Operating Agreements" in 
Proceedings of the Petroleum Law Seminar organised by the Committee 

18. Diggory "Default Clauses in North Sea Joint Operating Agreements: 
Current Legal Issues" (Unpublished thesis, Centre for Petroleum and 

19. Apea 9.4. See also Roberts "Panel Discussion on Default Provisions 
in Mining and Petroleum Joint Ventures" (1980) 2 A.M.P.L.J. 360, 361 
and 362; MacDonald "Joint Ventures: Breakdowns and Repairs Rights 
Taylor "Joint ventures and operating agreements" (1984) 14 V.U.W.L.R. 
85, 97; Willoughby "Forfeiture of Interests in Joint Operating 
Agreements" (1985) 3 J.E.N.R.L. 256, 256; Diggory "Default Clauses 
in North Sea Joint Operating Agreements: Current Legal Issues" 
(Unpublished thesis, Centre for Petroleum and Mineral Law Studies, 
University of Dundee, 1985), p. 22.

20. Wadham "Penalty and Other Aspects of Default Clauses in Energy Joint 
Ventures" in McAfee and Oh, editors, Energy Law and Policy in Asia 
and the Western Pacific (1984) 348, 349; Waite "Australian 
Resources Joint Ventures: Some Legal Pointers for Investors" (1985) a 
paper delivered at the Lawasia Energy Section International Symposium 
on Energy Law, Jakarta, Indonesia, at p. 50-51; Diggory "Default 
Clauses in North Sea Joint Operating Agreements: Current Legal 
Issues" (Unpublished thesis, Centre for Petroleum and Mineral Law 


22. Diggory "Default Clauses in North Sea Joint Operating Agreements: 
Current Legal Issues" (Unpublished thesis, Centre for Petroleum and 

23. Apea 9.4. See Roberts "Panel Discussion on Default Provisions in 

24. Britoil 15.1(i); Apea 9.6. See Roberts "Panel Discussion on Default 
Provisions in Mining and Petroleum Joint Ventures" (1980) 2 
A.M.P.L.J. 360, 361; MacDonald "Joint Ventures: Breakdowns and 

25. Britoil 15.1 (iii); Apea 9.6.

26. Britoil 15.1(i); Apea 9.6. See Hill "Joint Operating Agreements" in

27. Britoil 15.1(i); Apea 9.6.


29. Britoil 15.1(iii) and (iv); Apea 9.6.


32. Britoil 15.1(ii).

33. Britoil 15.1(ii).


36. Britoil 15.3.2; Apea 9.5.

37. Britoil 15.3.2.

38. Apea 9.5.

39. Britoil 15.3.2; Apea 9.5.


42. Britoil 15.2.

43. Britoil 15.2.


South Wales dated 19th March 1987) is discussed and in particular the discussion on automatic forfeiture.

46. Apea 9.7.

47. Britoil 15.3.3(i)


49. Britoil 15.3.3(i). See Daintith and Willoughby, editors, United Kingdom Oil and Gas Law: 2nd ed. (1984), para. 1-633.


51. Britoil 15.3.3(ii).


53. Britoil 15.3.4(i). See the discussion on the need for consents or approvals of relevant authorities in Chapter VIII. The forfeiture and acquisition of the interest of the defaulting Participant will include the assignment of its interest in the petroleum title. As such, the discussion in Chapter VIII applies equally to such an assignment. See also Daintith and Willoughby, editors, United Kingdom Oil and Gas Law: 2nd ed. (1984), para. 1-633; Diggory "Default Clauses in North Sea Joint Operating Agreements: Current Legal Issues" (Unpublished thesis, Centre for Petroleum and Mineral Law Studies, University of Dundee, 1985), p. 88.


57. Britoil 15.3.4(iv).

58. Britoil 15.3.4(iv).

59. Britoil 15.3.4; Apea 9.7.

60. Britoil 15.3.4; Apea 9.7 and 9.7(b).
61. Britoil 15.3.4.


63. Britoil 15.5.

64. Britoil 15.5(a).

65. Britoil 15.5(b).


74. Argyle Argyle "Legal Structures for Participation in Mining Projects"


90. [1915] A.C. 79.


108. (1829) 6 Bing. 141.


119. (1890) 18 R. 80, 85. See also Wilbeam v Ashton (1807) 1 Camp. 78.


122. (1869) 8 M. 187, 193.

123. (1869) 8 M. 187, 196.

124. (1881) 8 R. 555, 562.

125. Winter v Trimmer (1762) 1 Black. W. 396; Harrison v Wright (1811) 13 East 343, 347; George Craig and Son v M'Beath (1863) 1 M. 1020, 1023-1024. See also Jobson v Johnson [1989] 1 All E.R. 621, 626.


129. [1915] 3 K.B. 66, 72.


135. (1861) 23 D. 646, 655.


139. [1915] A.C. 79, 86. See also Clydebank Engineering and Shipping Company Limited v Don Jose Ramos Yzquierdo Y Castaneda [1905] A.C.

140. [1892] 1 Q.B. 127, 132.


142. (1849) 7 C.B. 716, 727.


146. [1961] 3 All E.R. 626.


153. [1906] 4 C.L.R. 672, 687.


Forfeiture (irritancy) is recognised in Scotland. However, the law of Scotland does not recognise the jurisdiction of courts to grant relief against irritancy: See Hill "Joint Operating Agreements" in Proceedings of the Petroleum Law Seminar organised by the Committee on Energy and Natural Resources (1978) Vol. 1, 14.1, 14.14.


159. [1983] Q.B. 529 (Court of Appeal) and [1983] 2 A.C. 694 (House of Lords).

160. [1984] 1 All E.R. 376 (Court of Appeal) and [1984] 2 All E.R. 321 (House of Lords).


171. Unreported decision of the Supreme Court of the Northern Territory delivered June 1983.


188. [1985] 2 W.L.R. 132.

190. [1985] 2 W.L.R. 132, 147.


196. Chapter III.


208. Unreported decision of the Court of Appeal in New South Wales


226. Roberts "Panel Discussion on Default Provisions in Mining and


ASSIGNMENT OF INTEREST BY A PARTICIPANT

1. INTRODUCTION

The capacity of a Participant to assign all or part of its Interest to a third party is dependent upon the nature of that Interest. In the main, the Interest of a Participant is made up of three elements:

1. a petroleum title interest;
2. a property interest; and
3. a Joint Operating Agreement interest.

The Interest of a Participant, as is evidenced by these elements, has both proprietary and contractual aspects. Each of these aspects must be considered separately.

In so far as the Interest is made up of proprietary rights, in the absence of statutory restraint, a Participant has the capacity to assign all or part of those rights. Whether it is possible for the Joint Operating Agreement to place a restraint upon the capacity of a Participant to assign all or part of those rights is a question which will be considered later in this chapter.

In so far as the Interest is made up of contractual rights, the general rule is that a Participant has the capacity to assign all or part of those rights in equity. The Participant may not be able to assign all or part of those rights at law. It is because the burdens undertaken are not severable from the benefits conferred, that the capacity of a Participant to assign all or part of its Interest is confined to an equitable assignment, in so far as that Interest is made up of contractual rights. To avoid the inconvenience of being confined to an equitable assignment, it is necessary for specific provisions governing the
capacity of a Participant to assign all or part of those rights to be set out in a contract between the Participants. This is usually one of the matters that the Joint Operating Agreement addresses. In any event the Joint Operating Agreement will often seek to place a restraint upon the capacity of a Participant to assign all or part of its contractual rights. The effectiveness of such a restraint is a question which will be considered later in this chapter.

In seeking to restrain the capacity of a Participant to assign all or part of its Interest, the question immediately posed is, what is the provision in the Joint Operating Agreement specifically designed to prohibit? It is submitted that it is designed to prohibit the situation arising whereby, other than with the consent of the other Participants, a third party steps into the shoes of the Participant, for all purposes, in respect of all or part of the Interest of the Participant: that is, where the Participant assigns both the benefit (the rights) and the burden (the duties) of the contract between the Participants, in respect of all or part of the Interest of the Participant, to a third party without the consent of the other Participants.

In considering the purpose of the provision yet another question is posed: If, as it is submitted, the provision is designed to prohibit the situation arising whereby, other than with the consent of the other Participants, a third party steps into the shoes of the Participant, for all purposes, in respect of all or part of the Interest of the Participant, is it correct to speak in terms of assignment? That is, is it indeed possible in law for a Participant to assign both the benefit (the rights) and the burden (the duties) of the contract between the Participants in respect of all or part of the Interest of the Participant to a third party?

The answer to this second question requires a consideration of what is meant by the term "assignment". An assignment is "the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee". The contractual rights that arise under the Joint Operating Agreement between the Participants are proprietary rights: they are, it is submitted, legal choses in action. This is
not the place to discuss the distinction between legal and equitable choses in action, the historical distinction as to their respective assignability and the formal requirements to effect an assignment thereof. It will suffice to point out that it is possible to assign a legal chose in action in the absence, in the main, of statutory prohibition, prohibition on the ground of public policy or an express contractual prohibition. What is important to appreciate is that the use of the term "assignment" is primarily concerned with the transfer of rights: the benefit of the contract.

1.1 Assignment of the benefit

For the time being, considering only the transfer of rights - the benefit of contract - it is apposite to point out that two of the prohibitions against the assignment of a chose in action already referred to are present in the context of the Joint Operating Agreement, viz., a prohibition on the ground of public policy and an express contractual prohibition.

In this context one of the prohibitions against the assignment of the benefit of the contract depends upon whether, on the construction of the Joint Operating Agreement, taking into account the facts (including the subject matter of the Joint Operating Agreement) and circumstances surrounding the relationship between the Participants, the contract between the Participants is one which requires the personal performance of each of the Participants. Whether the contract will be so construed is a question of law. If, however, the contract is construed as one which requires the personal performance of each of the Participants, it would appear that such a legal chose in action could not be assigned by a Participant without the consent of the other Participants, irrespective of whether the Joint Operating Agreement prohibited an assignment. The transfer of the benefit of the Joint Operating Agreement can only be effected in such cases by novation of the contract.

In determining whether the Joint Operating Agreement constitutes a contract between the Participants which requires the personal performance of each Participant, it is submitted that the courts will take into
account such matters as:-

(i) whether the skill, experience and judgement of the Participant formed a material part of the consideration for the contract;  

(ii) the extent to which the rights of the other Participants under the contract would be altered by an assignment;  

(iii) the good faith and credit-worthiness of the Participant;  and  

(iv) the non-pecuniary character of the right sought to be assigned.  

Along side such matters must be placed the matters in rebuttal: if the Joint Operating Agreement itself expressly deals with the possibility of assignment or if the terms of the Joint Operating Agreement, when properly construed, are seen to provide for assignment, then the contract ought not to be deemed to be one requiring the personal performance of the Participant.  

However, it is submitted that the Joint Operating Agreement does give rise to a contract between the Participants that requires the personal performance of each of the Participants. There can be little doubt that a material consideration in the coming together of the Participants to form a joint venture to undertake activities at the Exploration Phase is the skill, experience and judgement of the Participants and the good faith and credit-worthiness of the Participants. This is particularly apposite when the management of the joint venture established by the Joint Operating Agreement is considered.  

To the extent that the Joint Operating Agreement calls for personal performance, a Participant lacks the capacity to assign all or part of the contractual rights which make up the Interest of the Participant, unless the Joint Operating Agreement provides otherwise.  

Coupled with the prohibition on the ground of public policy is the express prohibition against assignment in the Joint Operating Agreement.
If the submission that the Joint Operating Agreement would give rise to the prohibition on the ground of public policy is correct, then the coupling of the two prohibitions would put beyond doubt that a Participant could not assign any rights under the Joint Operating Agreement. If, on the other hand, the submission is incorrect, it would be necessary to consider whether the express contractual prohibition is binding so as to render any assignment void and inoperative. One must consequently look to the construction of the Joint Operating Agreement, taking into account the facts and circumstances surrounding the relationship between the Participants.

The mere presence of the prohibition will not necessarily prevent the assignment of all beneficial interests under the Joint Operating Agreement. If the prohibition is not a condition but is rather a stipulation in the nature of a warranty, a breach of the provision will give rise to a claim for damages without invalidating the assignment constituted by the breach. On the other hand, if the prohibition is a condition and is an essential part of the contract to the extent that the Participants would not have entered into the contract with each other unless assured of strict observance of the prohibition, or the prohibition goes to the substance and foundation of the contract, then the effect of breach of the provision ought to be treated as voidable and inoperative as between the Participants. For the same type of reason as mentioned above it is submitted that the express contractual prohibition is a condition, not a warranty, of the Joint Operating Agreement and as such breach thereof would give rise to the assignment being held to be void and inoperative.

1.2 Assignment of the burden

So much for the assignment of rights under the Joint Operating Agreement. What about the transfer of the duties - the burden of the contract?

To begin with, it is necessary to consider the distinction between conditional benefits and independent obligations, or "the pure principle of benefit and burden" discussed in Tito v Waddell (No. 2).
Megary V.C. held that the conditional benefits principle applied where the assignment conferred a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or certain burdens assumed, such being an intrinsic part of the right assigned, so that if the assignee were to take the benefit of the right as it stands it must also take the burden: the benefit is a conditional benefit. It is submitted that this principle does not conflict with the general rule as to the assignment of the burden of a contract discussed below.

On the other hand, the pure principle of benefit and burden does not sit well with the general rule. Megary V.C. applied the pure principle of benefit and burden to the situation where, although the right and the burden may arise under the same instrument, they are in fact independent of each other. If, for example A grants a right to B and by the same instrument B independently covenants with A to perform a certain act there is no doubt that B is bound by its covenant to perform the act. The question that arises is, if B assigns its right, does the assignee take the right free of B's obligation to perform the act or is the assignee bound by the obligation under the "pure principle of benefit and burden".

The pure principle of benefit and burden is said to arise only where the construction of the transaction or instrument which creates benefits and burdens leads to the decision that the conditional benefits principle does not apply. If the conditional benefits principal does not apply then it is a case of determining whether the pure principle of benefit and burden applies. If it does not apply then the general rule as to the assignment of the burden of a contract discussed below will apply.

Whether the pure principle of benefit and burden will apply will depend upon the circumstances surrounding which the assignee comes into the assignment transaction and in particular whether the assignee expressly agreed to assume not only the benefits but also the burdens. This is to be determined, in the main, from the documentation evidencing
the transaction but the surrounding circumstances will also play their part in the construction process.

In applying the pure principle of benefit and burden in Tito v Waddell (No. 2) Megarry V.C., having decided that the conditional benefits principle did not apply, posed two questions:

(i) did the circumstances in which the assignee became connected with the original agreement show that the assignee ought not to be able to take the benefit without accepting the burden?; and

(ii) did the assignee have a sufficient title to the benefit?

In the final analysis, Megarry V.C. held that the assignee did not intend to accept the benefits without the burdens, but that in one case the pure principal of benefit and burden, which was a broad principle of justice to be satisfied by what is real and substantial, did not apply as the real benefits enjoyed by the assignee did not arise under the terms of the original agreement that imposed the burden, whilst in another the assignee did enjoy real benefits under the terms of the assigned agreement.

The general rule would hold that a Participant cannot transfer its duties under the Joint Operating Agreement in such a way that the contractual duties are transferred to a third party. To transfer the contractual duties under the Joint Operating Agreement would require the novation of the contract between the Participants. This means that, with the consent of the other Participants, a third party would be substituted for the Participant and the Participant would cease to have any rights and duties in relation to the other Participants, in the absence of conditions to the contrary in any agreement effecting the novation.

It is submitted that it is not correct to speak of an assignment in such circumstances. A new contract is substituted for the existing contract. There is not a transfer of any property at all. There is the annulment of one contract and the creation of a substitute in its place. The new contract may be between the original participants or
different participants. However, the important point is that the existing contract is discharged by the new contract.\(^44\)

The reason given for the Participants' consent to the novation could be the discharge of existing contract and the substitution of a new contract therefor and could also include the condition that the Participant remains responsible to the Participants for the conduct and performance by the third party\(^45\) of the rights and duties it assumes and is required to undertake and perform as a Participant under the new contract. Otherwise, the other Participants would merely be consenting to the extinguishment of the Participant's rights and duties under the Joint Operating Agreement with the result that the substitution of the third party would amount to the acceptance of the third party as the sole person liable thereafter under the Joint Operating Agreement. It is important to appreciate that novation acts as a complete release: no rights can be reserved and no right of recovery can remain.\(^46\) On the other hand, it is important to appreciate that by novation both the benefit and the burden can, in effect, be passed from the Participant to the third party.

The requirements for a valid novation can be summarised as follows\(^47\):

(i) the consent of the other Participants is required to the substitution of the third party;\(^48\)

(ii) there must be a total extinction of the original contract between the Participants;\(^49\) and

(iii) the novation must be supported by consideration.\(^50\)

Even if all the requirements are satisfied it is still necessary to demonstrate, although the satisfying of the requirements may in themselves so demonstrate, that the Participants intended to effect a novation.\(^51\)

The novation may be express or implied.\(^52\) One consequence of this is that in many cases what is referred to as an assignment is in fact a novation. Agreements executed as assignments on closer examination turn out to be novations with a condition imposed that the Participant is to
remain responsible to the other Participants for the conduct and performance by the third party of the rights it assumes and the duties it is required to undertake and perform.

If the Participant were to purport to "transfer" the duties under the Joint Operating Agreement without the consent of the other Participants the agreement between the Participant and the purported transferee would not amount to a novation. The purported transfer, which may operate as an assignment, may well be binding as between the Participant and the purported transferee\textsuperscript{53}, but it could not per se deprive the other Participants of their right to proceed against the Participant as the contracting party with the other Participants.

The transfer of the burden of the Joint Operating Agreement should not be confused with the delegation by a Participant of its duties under the Joint Operating Agreement to a third party: so called "vicarious performance"\textsuperscript{54}. Such is something quite different as will be demonstrated later in this thesis. There is no shifting of the burden from the shoulders of one person and onto those of another in such circumstances\textsuperscript{55}. The Participant will remain contractually liable to the other Participants for the non-performance of the vicarious person. Furthermore, the vicarious person does not thereby acquire the right to sue the Participants as it is merely fulfilling the duties of another; it is not party to the Participants' contract, only to that between it and the Participant for whom it has undertaken to discharge specified duties.

Returning to the three elements which make up the Interest of a Participant, it is evident that the right of a Participant to assign all or part of its petroleum title interest is, in addition to being governed by the terms of the Joint Operating Agreement, governed by the terms of the petroleum title and is subject to all of the consents and approvals required by the petroleum title or any Act or regulations to which it is subject and or pursuant to which it was granted\textsuperscript{56}. The right of a Participant to assign all or part of its property interest and its Joint Operating Agreement interest is governed by the terms of the Joint Operating Agreement\textsuperscript{57}. The right of a Participant to assign all or part of its Joint Operating Agreement interest, in so far as that interest
flows from the petroleum title, must take into account the fact that the right to assign all or part of a petroleum title interest is governed by the terms and subject to the consents and approvals mentioned above.58

The Joint Operating Agreement usually addresses the assignment by a Participant of all or part of its Interest to:

(i) a third party that is an affiliate of the Participant; and

(ii) a third party that is not an affiliate of the Participant.

The discussion which follows does not consider the various methods by which a Participant can assign all or part of its Interest or the various methods by which such may be wholly or partially restrained, nor the taxation implications, the competition implications or, in the case of Australia, the foreign investment implications that may arise in the context of the assignment by a Participant of all or part of its Interest.

2. ASSIGNMENT TO AN AFFILIATED THIRD PARTY

2.1 Interest to be assigned

The Joint Operating Agreement will usually permit a Participant to assign or transfer all or part of its Interest to a third party that is affiliated to it.59

2.2 Definition of an "affiliate"

The Joint Operating Agreements will usually define the term "affiliate". The definition will, in most cases, follow the basic formula set out below:

(i) where a Participant is a subsidiary60 of another company61 ("the holding company"), the holding company62 and all other companies that are subsidiaries of the holding company63 are deemed to be affiliates of the Participant; and
(ii) where a Participant is not a subsidiary of another company, all companies that are subsidiaries of the Participant are deemed to be affiliates of the Participant 64.

The test as to when a company will be deemed to be a subsidiary of another company is usually caste in the mold of control, both direct and indirect. One company is usually seen to have control of another company when it can control:

(i) the composition of the board of directors of the other company 65; or

(b) fifty per cent (50%) or more of the equity share capital of the other company 66.

There are, of course, many variations of circumstances that can be used to provide the test pursuant to which a company is deemed to be a subsidiary of another for the purpose of a Joint Operating Agreement. The question of how tight the definition is drafted will depend largely upon the desire of the Participants.

An interesting factor common to most Joint Operating Agreements is that there is no attempt made to control the transfer of ownership or control of a Participant 68. Take, for example, a Participant which has an interest in numerous petroleum titles or Joint Operating Agreements and wishes to dispose of one only of its interests to a third party without triggering the first right of acquisition provisions contained in a Joint Operating Agreement. What is to stop the Participant forming a subsidiary, assigning the interest to the subsidiary and then transferring ownership or control of the subsidiary to a third party? Bearing in mind that once all or part of Interest is assigned to an affiliate that affiliate, for the purposes of the Joint Operating Agreement, becomes "the Participant" 69, it would appear that, in so far as the Joint Operating Agreement is concerned, what may not be possible to achieve directly as between the Participants could be achieved indirectly.

However, in the case of Great Britain, the model clauses do give to
the Secretary of State for Energy power, after a person has effected a change in the control of a corporate Participant, to serve written notice on the Participant stating that he proposes to revoke the Licence unless such further change in the control of the Participant as is specified in the notice takes place within three months beginning with the date of service of the notice. In the event that the further change in control of the Participant does not occur within the period of time, the Secretary of State for Energy may revoke the Licence.

For the purpose of the model clauses a change of control arises when a person attains control of the Participant who did not have control when the Licence was granted. The test of whether a person has or had control of a Participant is, in effect, whether the person exercises or at the time exercised, or is or at the time was able to exercise or is or at the time was entitled to acquire direct or indirect control over the Participant's affairs.

There is no procedure for obtaining the prior clearance of the Secretary of State for Energy to a proposed change in the control of the Participant. However, it has been suggested, that the practice is for suitable assurances to be given by the Secretary of State for Energy where considered appropriate. Furthermore, there is no requirement for the change sought, by the notice served by the Secretary of State for Energy to restore the status quo ante.

2.3 Consent of the other Participants.

The general practice in the Industry is that the consent of the other Participants is not required where a Participant is assigning all or part of its Interest to an affiliate. However, the situation can arise where consent is, in effect, required. By making it a condition of such an assignment that the Participant demonstrate "to the satisfaction of the other Participants the affiliate's financial capability to meet its prospective obligations" under the Joint Operating Agreement it is possible for an assignment of such Interest or part thereof to be rejected on the limited basis that the other Participants are not so satisfied.
2.4 Compliance with general requirements

The assignment of all or part of the Interest of a Participant to an affiliate will be required to comply with the general requirements discussed later in this chapter.

3. ASSIGNMENT TO AN INDEPENDENT THIRD PARTY

3.1 Interest to be assigned

A joint venture formed to undertake activities at the Exploration Phase is usually, but not always, made up of companies which have a long standing and close relationship. In such circumstances the identity of the other participants of the joint venture is important to each participant. On the other hand, by the very nature of a joint venture each Participant owns an undivided share as tenant in common of the assets and as such there is no reason why the right to assign that share should not be available to them. One of the aims of the Joint Operating Agreement is, therefore, to strike a balance between not unduly restricting the future activities of each Participant and ensuring that unsuitable persons cannot be introduced by a Participant into the joint venture. In seeking to strike this balance it is usually considered inappropriate for an independent third party to be introduced into the joint venture by a Participant when other Participants desire to take up all or part of the Interest of the Participant on fair terms. In addition, the Joint Operating Agreement will usually seek to ensure the indivisibility of the Interest of the Participant by seeking to guard against any assignment whereby rights and obligations under the Joint Operating Agreement would be split between different parties.

The Joint Operating Agreement may also seek to provide the opportunity for the other Participants, who have invested in the activities at the Exploration Phase at a time of high risk, to increase their respective percentage Interest in an area that may have turned out to be successful or to be highly prospective when a Participant is desirous of assigning all or part of its Interest. This may be so notwithstanding that they may have to pay a fair and reasonable price to
To this end the Joint Operating Agreement will not usually permit a Participant to assign all or part of its Interest to an independent third party without first allowing the other Participants the opportunity to acquire the Interest or part thereof sought to be assigned and without the consent of the other Participants.

3.2 **First right of acquisition**

The Joint Operating Agreements will usually require a Participant desirous of assigning all or part of its Interest to an independent third party to allow the other Participants the opportunity to acquire the Interest, or part thereof, before it is assigned to the independent third party. A wide variety of mechanisms have been developed by which the first right of acquisition operates. However, it is possible to discern a pattern in the various mechanisms:

(i) it matters not how the desire to assign the Interest or part thereof arose, be it voluntary, compulsory, solicited or otherwise;

(ii) the Participant desirous to assign its Interest or part thereof ("the transferor") must notify the other Participants of the terms and conditions upon which it desires to assign its Interest or part thereof;

(iii) the other Participants have the right, within a given time-period, to notify the transferor of their ("the transferee") desire to acquire the Interest or part thereof on the same or similar (in the financial sense) terms and conditions;

(iv) if there is more than one transferee, the transferees must either acquire the Interest or part thereof in proportion to the total proportion of their Interests or in such other proportions as they may themselves agree.
(v) the transferee must acquire the whole of the Interest or part thereof that the transferor is desirous of assigning\(^95\);

(vi) if the other Participants do not give notice to acquire the Interest or part thereof within the limited time period, the transferor is free to assign the Interest or part thereof, within a limited time period, to the independent third party on terms no more favourable to the independent third party than those contained in the notice given by the transferor to the other Participants\(^96\); and

(vii) the right to assign the Interest or part thereof to the independent third party is not unfettered in that no assignment of the Interest or part thereof to the third party will be effective or binding upon the other Participants unless the assignment has the written consent of the other Participants\(^97\) and there has been compliance with the general requirements discussed later in this chapter\(^98\).

The Joint Operating Agreement may except, from the operation of the first right of acquisition mechanism, a proposed assignment of all or part of the Interest of a Participant to the other Participants.

Once again, an interesting factor common to most Joint Operating Agreements, is that no attempt is made to control the transfer of ownership or control of a Participant. A transfer of ownership or control of a Participant does not usually trigger the first right of acquisition mechanism\(^99\).

The first right of acquisition mechanism is not always seen as being commercially favourable\(^100\). The existence of such a right can have the effect of considerably depressing the price that an independent third party is willing to offer for all or part of the Interest of a Participant. The independent third party may not be prepared to spend the time, effort and money involved in properly investigating and evaluating the Interest or part thereof which may be necessary for it to obtain an idea as to the value of the Interest or part thereof and in negotiating
terms and conditions acceptable to the Participant and itself. This is largely because there is no guarantee that its offer will be successful. What is more, the independent third party will be aware that its offer may only serve to indicate to the other Participants a fair market price to be paid for all or part of the Interest of the Participant. A further disincentive to the independent third party may also be the time period that must elapse before the first right of acquisition granted to the other Participants lapses.

To overcome this difficulty, the first right of acquisition mechanism may be altered to provide that there need not be an offer from an independent third party before the mechanism is triggered. The Participant may merely indicate a desire to assign all or part of its Interest. The other Participants are then given the right to acquire the Interest or part thereof on the terms and conditions stipulated by the Participant. If the other Participants do not desire to acquire the Interest or part thereof on the terms and conditions stipulated, the Participant is free to assign the Interest or part thereof to an independent third party on terms and conditions no more favourable to the independent third party then those stipulated by the Participant 101.

3.3 Consent of the other Participants

As has been mentioned above, any assignment by a Participant of all or part of its Interest to an independent third party will usually require the consent of the other Participants. It is usual to provide that such consent can be either:

(i) withheld at the absolute unfettered discretion of the other Participants;

(ii) withheld where it is reasonable to do so; or

(iii) withheld only where certain criteria have been satisfied.

The first type of provision is rarely seen in Joint Operating Agreements in this day and age. Apart from other matters which may have
resulted in the fading from the scene of the absolute right of the other Participants to withhold consent to an assignment, by a Participant to an independent third party of an Interest or part thereof, it is suggested that the major reason for this fading is to be found in the reluctance of the courts to enforce provisions that would, in effect, restrain the right of a Participant to alienate all or part of its Interest. This is more the case where proprietary rights are concerned than where contractual rights are concerned. The doctrine of restraint on alienation is discussed later in this chapter.

The Apea proforma provides an example of the second type of provision by stating that such "consent shall not unreasonably be withheld".102

Where the other Participants have a first right of acquisition as well as a right to withhold their consent to any assignment by a Participant of all or part of its Interest, it will be difficult to establish that such consent has been withheld where it is reasonable to do so if the other Participants have failed to exercise the first right of acquisition.103

What is reasonable in a particular case will depend on the surrounding facts and circumstances. There can be little doubt that consent can be withheld where the independent third party cannot demonstrate that it has the knowledge applicable to the activity being or to be undertaken (lack of which may frustrate or restrain the exploration programme) or the financial resources to meet its contributions to an approved programme, budget or otherwise in relation to the activities being or to be undertaken or, where the admission of the independent third party as a Participant would damage the commercial interests of the other Participants.104

The other Participants are not bound to give reasons for refusing consent. However, a court may imply that consent is withheld in circumstances where it is not reasonable to do so if no reasons for a refusal are given.107
The Britoil proforma provides an example of the third type of provision by stating that such:

"consent may only be withheld on grounds of lack of financial responsibility and capability of the proposed assignee to discharge the obligations under this agreement as they relate to the interest to be assigned."

This type of provision considerably restrains the other Participants when considering whether to grant consent to the assignment.

If the Participant is of the opinion that consent has been withheld without satisfying the test of reasonableness in the second type of provision or the criteria in the third type of provision, it can bring an action for a declaration that it is entitled to assign without consent. The onus of establishing that consent has been withheld in such circumstance would be on the Participant which is bringing the action.

Once again, an interesting factor common to most Joint Operating Agreements is that there is no attempt made to control the transfer of ownership or control of a Participant. A transfer of ownership or control of a Participant does not usually require the consent of the other Participants. However, as discussed above, in Great Britain the model clauses do give to the Secretary of State for Energy certain powers in relation to the transfer of ownership or control of a Participant.

4. THE DOCTRINE OF RESTRAINT ON ALIENATION AND THE RULE AGAINST PERPETUITIES

As has been discussed above, the Interest of a Participant is an amalgam of proprietary and contractual rights. In the context of the right of a Participant to assign all or part of its Interest to an independent third party it is necessary to examine the attitude of the courts to restraints on the alienation of proprietary interests and contractual interests. For the purpose of this examination it is presumed that there is no statutory restriction upon the right of a Participant to assign all or part of its Interest to an independent third party and, as such, all that is being examined is any restraint as between the
Participants inter se. Any statutory restraint would, in most cases, overcome the issues discussed below.

4.1 **Proprietary Rights**

4.1.1 **Contractual Restrictions**

The general position of the courts of England on restraints on the alienation of real property is to be found in the judgement of Fry L.J. in *Stogdon v Lee*:

"It must be borne in mind that the Courts have always leaned against a restraint on alienation, and for this very obvious reason, that to give property to a person involves giving him a power to alienate it, and an instrument which, while giving property, takes away that incident to it must always be construed strictly."

In *re Rosher*. *Rosher v Rosher* Pearson J. said:-

"I find that the original rule which says that you cannot annex to a gift in fee simple a condition which is repugnant to that gift is a plain and intelligible rule."

In *re Elliot*. *Kelly v Elliot* Chitty J. held:-

"The owner of property has as an incident of his ownership the right to sell and to receive the whole of the proceeds for his own benefit. But this testator says that if the owner sells a part only of the proceeds shall belong to her, and the residue shall go to other persons. This direction is, I think repugnant and void."

In *re Forder*. *Forder v Forder* Sargant L.J. said:-

"...; it is impossible to give the ownership of property to a person in possession, and at the same time to direct that he shall not have the ordinary rights and incidents of ownership, that he shall not be able to dispose of it, and that it shall not vest in his trustee in bankruptcy."

In *re Dugdale*. *Dugdale v Dugdale* Kay J. said:-

"The general law is that a defeasance, either by condition or by conditional limitation or executory devise, cannot be well limited to take effect in derogation, not merely of the right of alienation, but of any of the natural incidents of the estate which it is intended to divest. ... The events upon which the executory devise in this case is to take effect seem to be, 1. alienation, and 2. bankruptcy, or judgement and execution. The alienation contemplated is any
alienation whatever by the devisee, not limited in any way. This is clearly invalid."

A similar approach has been taken in respect of personal property, as is illustrated by the judgement of the Master of the Rolls (Sir R.P. Arden) in Bradley v Peixoto (where the court was dealing with the disposition of bank stock):-

"I have looked into the cases, that have been mentioned; and find it laid down as a rule long ago established, that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void ... In all these cases the gift stands, and the condition or exception is rejected."

In Metcalfe v Metcalfe Kekewich J. said in relation to absolute gifts of personal property:-

"You cannot limit an estate to a man and his heirs until he shall convey the land to a stranger, because it is of the essence of an estate in fee that it confers free power of alienation, and it has long been settled that the same principle is applicable to gifts of personalty."

It may, therefore, be said that in so far as the courts of England are concerned it is a well established principle that an estate of inheritance in real property or an absolute gift of personal property, cannot be restrained from alienation by its owner. It would appear that the principle applies only to conditions subsequent attached to the estate granted. The general principle is said to be based on the proposition that to attempt to deprive, either directly or indirectly, ownership of real or personal property of its essential incidents, is contrary to public policy and, being contrary to public policy, such an attempt is void.

In view of the general principle of the doctrine of restraint on alienation, whether it be a direct restraint on the right to exercise the power of alienation or an indirect restraint on the same by, say, creating a future interest in property in such a manner as to suspend the power of alienation for an unreasonable period, the question of exceptions to the general principle must be considered to see whether a first right of acquisition amounts to a direct or indirect fetter on the power of alienation. In other words, is it possible to have a partial restraint on
alienation which will not be rendered void?

A consideration of the issue of partial restraints on alienation involves a consideration of three types of restraint:

(i) restraints as to the class of individuals to whom alienation may be made;

(ii) restraints as to the mode of alienation; and

(iii) restraints as to the time at which alienation may be effected.

In In re Macleay Jessel M.R. said:

"Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, ..."

having earlier in his judgement held that it was possible to restrain the power of alienation provided that the restraint was a partial restraint:

"So that, according to Littleton, the test is, does it take away all power of alienation?"

and:

"So that, according to the old books, Sheppard's Touchstone being to the same effect, the test is whether the condition takes away the whole power of alienation substantially: it is a question of substance, and not of mere form."

Although the decision of Jessel M.R. was criticised by Pearson J. in In re Rosher. Rosher v Rosher it would appear that provided the restraint on alienation does not amount to a total restraint, that is, it is a partial restraint, such would not be held to be void as being against public policy. The question of to what extent a restraint on alienation is partial or total is a question of degree in each case. However, from the decision in In re Macleay, it is possible to illustrate what
Jessel M.R. had in mind, particularly in relation to a restraint as to the class of individuals to whom alienation may be effected:

(i) A provision that a proprietor shall not alienate to anyone is void;

(ii) A provision that a proprietor shall not alienate to a stated person or class of persons is not void as it does not take away the power to alienate;

(iii) A provision that a proprietor shall only alienate to a stated person or class of persons with the knowledge that the person or class of persons will not or cannot acquire the property is void as it is achieving indirectly what cannot be achieved directly; a total restraint on alienation. In *Muschamp v Bluet*, Bridgman, J. said:

"... I conceive that the condition is void; for to restrain generally, and that he shall not alien to any but to J.S. is all one: for them the feoffer may restrain him from aliening to any except to himself, or such other person by name, whom he may well know cannot, nor never will, purchase the land: so that this condition shall take away all his power, and shall make a perpetuity in the feoffee, which is quite contrary to law, neither is there any authority to warrant this restraint..."

And in *Attwater v Attwater* the Master of the Rolls said:

"The question is, whether such a condition is a valid one? Notwithstanding the case of *Doe d. Gill v Pearson* (6 East 173), this appears to me to be a condition repugnant to the quality of the estate given. It is obvious, that if the introduction of one person's name, as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created, as complete and perfect as if no person whatever was named; inasmuch as the name of a person, who alone is permitted to purchase, might be so selected, as to render it reasonably certain that he would not buy the property, and that the property could not be aliened at all."

(iv) Subject to (iii) above, a provision that a proprietor shall only alienate to a stated person or class of persons is not void as it does not take away the power to alienate.
As to a restraint on the modes of alienation, it is really a process of working backwards from an absolute prohibition on any assignment, legal or equitable, to a prohibition on one or more of the modes of disposal. Jessel M.R., in In re Macleay, made comment on this issue:

"... in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way."

The implication to be drawn from the judgement is that an absolute restraint as to all of the modes of alienation is void as is a provision which, although appearing to allow a mode or modes of alienation, is, in effect, an absolute restraint as to all of the modes of alienation. However, a prohibition on a mode or modes of alienation that does not amount in theory and in fact to an absolute restrain on alienation will be valid, as was the case in In re Macleay.

Restraint on alienation imposed by time has been mentioned in the context of the discussion above and the issue of the rule against perpetuities will be discussed later in this chapter. As such it is not necessary to state anything further in relation thereto at this juncture other than that a provision that amounts to a restraint on alienation is not made good by being limited in respect of time as to how long the restraint is to be operative. In In re Rosher. Rosher v Rosher, Pearson J. said the question he had to consider was:

"... is it or is it not the law that to a devise in fee simple you may annex a condition that during a limited period the devisee shall not sell at all?"

After severely criticising the judgement of Jessel M.R. in In re Macleay, whilst admitting that much of his criticism was obiter, Pearson J. went on to hold that a condition that restrained the time within which or before which absolute alienation could be made was void.
It is not necessary for the purpose of this thesis to consider the merits of the judicial argument between the judgements of Jessel M.R. and Pearson J. as it is most uncommon for a restraint on alienation of all or part of an Interest to be restricted by a time limitation. It is the restrictions as to class of individuals and mode of alienation that are prevalent in Joint Operating Agreements. It is interesting to note that in In re Dugdale. Dugdale v Dugdale Kay J. referred to the conflicting dicta of the two protagonists on the question of limitation as to time and, whilst accepting that a "total restriction of alienation for a limited time may be good" and "that there is no decision to this effect." and as such the doctrine might be doubtful, made no attempt to decide the issue by adopting in whole or in part the rationale of either judge.

What must be guarded against is the approach which seeks to take each issue in isolation. A court will look at the overall effect of the provision, all of the issues of restraint and, judge whether or not as an amalgam, the issues give rise to a restraint on alienation that is so substantial as to be void as against public policy. There is more likelihood of a partial restraint on alienation being held to be valid if the purpose for the provision is a collateral purpose, such as in the case of a first right of acquisition, which confers a benefit upon both the holder and the grantor of the right.

In arriving at the above conclusion, due cognizance is taken of the dicta in Hall v Busst and the fact that all the members of the High Court of Australia did not reach the same conclusion. This decision is discussed in more detail later in this chapter. It is submitted that it is a fair summary of the provisions under consideration by the High Court to say that what was, in effect, provided was a first right of acquisition. If the participant wished to dispose of the property it had first to be offered to the other participant who had a given time within which to either agree to purchase the property or not. There was concern about the drafting of the various clauses but this does not detract from the rationale of the dicta.
Dixon C.J., by holding the right to be unenforceable per se as it was void for lack of certainty\textsuperscript{140}, did not have to consider whether such a right was a restraint on alienation. However, in holding that the right was of a recurring nature, that is, if not exercised it did not imply consent to a sale to a third party, so that the participant having the benefit of the right, in effect, by not exercising it, retained the right, Dixon C.J. said\textsuperscript{141}:

"The conclusion to be drawn from the foregoing considerations as to the meaning of [the clauses] is that an indefinite prohibition is intended of alienation without consent of the fee simple of the land or any part of it and of the creation of any less estate or interest therein whether legal or equitable."

Other members of the High Court took the view that the right was not of a recurring nature, that is, if the participant failed to exercise it its consent to the sale to the third party was to be implied.

Fullagar J. held that notwithstanding that the right was available only once, it amounted to a restraint on alienation\textsuperscript{142}:

"But I am of opinion that the restriction, even so construed, is void."

Fullagar J.'s reasoning was based on the fact that in Attwater v Attwater\textsuperscript{143} In re Rosher. Rosher v Rosher\textsuperscript{144} and Crofts v Beamish\textsuperscript{145} and notwithstanding In re Elliot. Kelly v Elliot\textsuperscript{146}, provisions of partial restraint were held to be void. In re Macleay\textsuperscript{147} is not distinguished as such, although it is put aside, due to the criticism of the judgement by Pearson J. It is difficult to accept that Fullagar J.'s analysis is correct. The cases are not necessarily clearly in support of the proposition he draws from them. The cases deal with the class to whom alienation may be effected. This is different in degree from what was at issue.

However, if the first right of acquisition is such as to create a restraint on alienation in that it confers no benefit on the grantor, such will be void as a restraint on alienation. This is clearly illustrated by
the decision of Pearson J. in In re Rosher. Rosher v Rosher 148:

"The restriction upon selling is this, that if the son ... is minded to sell during the lifetime of the testator's widow, the estate intended to be sold, whether it is the whole or only part of the devised estates, must be offered to the widow at the price of £3,000 for the whole, or at a proportionate price for a part. It is agreed that the value of the whole estate at the death of the testator was £15,000. It is, therefore, in effect a condition that, if the son desires to sell, he shall offer the estates to the widow, and that she is to be at liberty to buy them at one-fifth of their value. I consider that (and I mean to decide the case upon that conclusion) as an absolute restraint against sale during the life of the widow. I mean to treat it as if it had been, "during the life of the widow you shall not sell," because to compel him, if he does sell, to sell at one-fifth of the value, and to throw away four-fifths of the value of the estate is, to my mind, equivalent to a restraint upon selling at all."

The general position of the courts of Australia on restraints on alienation of property, although encompassing the approach of the courts of England, would seem to be wider than that of the courts of England. It would appear that the law has been widened to apply to contractual covenants in restraint of alienation 149.

Despite some criticism of the decision, the leading Australian case is Hall v Busst 150. This case dealt with the provisions of a contract for the sale and purchase of real estate. Clause 3 of the contract provided that the purchaser:-

"shall not at any time transfer assign set over or lease any part of the said lands (other than by way of mortgage to a banking institution) without the consent in writing of the [vendor] first obtained."

Clause 4 of the contract required one month's notice to be given of any intention to deal with the real estate in the manner provided in clause 3 of the contract, during which notice period:-

"... the [Purchaser] Doth Hereby Give and Grant to the [Vendor] the first option of purchasing the said fee simple ..."

Clause 5 of the contract stated that the purchase price relating to the option was fixed at the sum of £3,157 4s. Od. to which was to be added
the value of all additions and improvements to the real estate since the
date of purchase and from which certain deductions were to be made.

Dixon C.J. held:

"But the question arises whether, considered as an obligation
binding the purchaser ... cl. 3 is not void as an attempt wholly to
restrain alienation. It could not of course bind an alienee once an
alienation was made: for the alienee would not be a party to the
contract: and ex hypothesi we are not concerned with any question of
the effect it might have upon the land in the hands of an alienee not
taking for value without notice. But we are concerned with a
contract always operating upon the defendant and her "estate", that
is, upon her legal personal representatives (upon whom the land may
devolve) until an alienation occurs. The question whether a bond or
covenant or contract purporting to impose a total contractual
restraint upon alienation is void does not seem to be settled. A
condition doing so attached as a condition subsequent to an estate is
of course void. The invalidity may be put on the ground of repugnancy
to the grant or upon public policy or for that matter it may
conceivably be attributed to an indirect effect of Quia Emptores.
That is immaterial, for it is a known rule that the condition is
void. But with contractual restraints there is no fetter upon
alienation which does more than sound in damages, that is, unless a
doctrine of equity intervenes to make it bind the land.

... The ground for denying the validity of a contractual restriction
upon alienation is that it is a principle of law that private
property should be fully alienable. See per Jessel M.R. in In re
Ridley; Buckton v Hay [(1879) 11 Ch. D. 648] and Sweet (1917) 33
L.Q.R. 236. Cruise, 2 Dig. p. 6, in effect expresses a view that a
contractual restriction upon the alienation of an absolute estate is
if unqualified should be considered void and this seems to accord
with modern views of policy. Cruise, after referring to the supposed
distinction between a condition and a covenant or contract, says
this: "This doctrine appears extremely questionable, as it offers an
obvious mode of restraining a person from those rights over an estate
which the common law gives him; consequently of frustrating the
common law, as fully as if a condition of this kind were allowed to
be inserted in a conveyance of land; and in some cases it appears not
to have been allowed." Indeed it is impossible to doubt that a
fetter on alienation may be imposed by covenant which is as effective
over a very long period of time to prevent alienation of land as a
condition subsequent would have been had it been valid. I think
therefore that cl. 3 should be considered void as an independent
restraint on alienation. ..."

Fullagar J. held:

"... the restraint on alienation imposed by cl. 3 of the deed on the
owner of the fee simple is repugnant to the estate and void.
It seems a little strange that, in all the cases in which restrictions of this character have been considered, the restriction has been imposed by way of condition. The restriction in the present case is imposed not by way of condition or conditional limitation but by covenant. I agree, however with the Chief Justice, whose judgement I have had the advantage of reading, that, for the reasons given by him, the principle applicable to a condition or a conditional limitation must be equally applicable to a covenant by a transferee of a fee simple. The outstanding question then is whether the covenant in the present case so restricts alienation that it is void at common law. The first step must be to construe the deed which contains the covenant.

If cl. 3 stood alone, I should say that it would be obviously void, for it is absolute in terms: consent could, of course, be withheld at will - for any reason or no reason at all. . . ."

Kitto J. held

"Whether the clause [clause 3] would be void as against public policy if it were construed as imposing an unqualified prohibition upon alienation by the appellant or her representatives without the consent of the respondent or his representatives, is a question upon which I express no opinion."

Menzies J. held

"Standing along by itself, cl. 3 is certain enough and it seems to me that it is valid unless it is void as an unlawful restraint upon alienation. I agree with the Chief Justice and Fullagar J. that cl. 3 is an unlawful restraint upon alienation, and to the reasons which they give for treating a covenant in restraint of alienation in the same way as a condition in restraint of alienation . . ." 

The final member of the High Court of Australia, Windeyer J., said

"The next question . . . is whether cl. 3 of the deed may not be void as repugnant to the freeholder's right of alienation . . . It is enough for me to say that if I construed the deed as the Chief Justice does I would respectfully agree that it is void for the fundamental reasons that he gives. I have, however, with much hesitation, come to a different conclusion as to the meaning of the deed."

The members of the High Court in Hall v Busst157, except Kitto J. who expressed no opinion, had no difficulty in holding that a contractual covenant which restrained the alienation of property could be void158. The provisions of a Joint Operating Agreement which provide that the prior consent of the other Participants is required before a Participant can assign all or part of its Interest to an independent third party is, therefore, an example of a contractual covenant which seeks to act as a restraint on alienation159.
The question must, therefore, be asked is whether, if the first right of acquisition mechanism discussed above can be construed as a contractual covenant which acts as a restraint on alienation, such could be void.

In Hall v Busst, the minority considered the contract for the sale and purchase of the real estate as a whole and held that the intention of the vendor and purchaser, although somewhat unclear, was to give to the vendor the first right of acquisition over the real estate in the event of the purchaser desiring to sell it. The contract was, in their view, valid and enforceable.

Fullagar J. approached the issues in the same manner as the minority: by considering the contrast as a whole. However, His Honour went on to hold that the first right of acquisition was void for being a restraint on alienation. A prime reason for this view was that the real estate might have been worth a great deal more at the relevant time than the purchase price fixed by the terms of the first right of acquisition.

The other members of the majority did not consider the contract as a whole. Their Honours focused attention on the clause which prohibited the disposal of the real estate without the prior consent of the vendor. They did not view the clause as being a first right of acquisition, but as a contractual restraint on alienation, which was void.

It is arguable that all first rights of acquisition are a restraint on alienation. Nevertheless, not all such rights should be held to be void. If it is accepted that the aim of the doctrine is that the right of the owner of property to freely alienate that property should not be taken away then it is a case of examining the terms of the first right of acquisition to see whether it breaches the doctrine. As was pointed out by Sweet:

"A restraint on alienation may be good, if it is imposed, not for the purpose of making the property inalienable, but in order to effect an object which is itself lawful."
Applying the views expressed in *Hall v Busst*\textsuperscript{168} to the Joint Operating Agreement, it is considered unlikely that the first right of acquisition mechanism discussed above would be construed as a contractual covenant which acts as a restraint on alienation by a Participant of all or part of its Interest so as to be void, provided that the price payable upon exercise of the first right of acquisition does not depart materially from the value of the proprietary rights to be assigned\textsuperscript{169}. A price which departs materially from the value of the proprietary right would indicate that the first right of acquisition was granted to the other Participants for other than a valid collateral purpose. Such a price would be a powerful restraint on alienation and would tend to evidence the purpose of the restraint as being to make the Interest of the Participant inalienable\textsuperscript{170}.

Therefore, setting aside material departure from the value of the proprietary rights to be assigned, it is arguable that the purpose of a first right of acquisition is to ensure the stability, financial or otherwise, of the Participants\textsuperscript{171}. The first right of acquisition is a necessary point of commercial life in so far as a joint venture established to undertake the Exploration Phase is concerned: the identity of the Participants is most important. The aim of the doctrine of restraint on alienation is not breached: the purpose of the first right of acquisition mechanism is not to make the Interest of the Participant unalienable.

One of the difficulties with a first right of acquisition is its enforcement. Such a right may be enforced by injunction before breach\textsuperscript{172}, that is, prior to completion of the assignment by the Participant to an independent third party with notice of the first right of acquisition. In the absence of injunction, an independent third party may acquire all or part of the Interest of a Participant in breach of the first right of acquisition and notwithstanding that the independent third party had notice of that right\textsuperscript{173}, unless there is a restraint which is incidental to the conferring of the interest of the independent third party in all or part of the Interest of the Participant or the acquisition of all or part of the Interest of the Participant by the independent third
party depends upon some form of registration or consent\textsuperscript{174}: as in the case with the petroleum title interest. Even where such a restraint or such dependence does exist, it may be possible to separate beneficial enjoyment of all or part of the Interest of the Participant from legal title and as such have the independent third party obtain an equitable interest in the Interest of the Participant that is assigned to it\textsuperscript{175}. If it is desired by the Participants that a Participant not be in a position to separate beneficial enjoyment of all or part of its Interest from legal title, the prohibition against assignment must be comprehensively drawn and so drawn as to confer an interest on the other Participants that will survive the breach of the prohibition against assignment\textsuperscript{176}.

Assignment in breach of the terms of the Joint Operating Agreement may therefore amount to nothing more than breach of a warranty which will give rise to a claim for damages as against the Participant. The breach will not invalidate the assignment and nor will it give rise to a remedy which would allow the other Participants to exercise a first right of acquisition as against the independent third party\textsuperscript{177}.

4.1.2 Proprietary Restrictions

In In re Ridley, Buckton v Hay\textsuperscript{178} Jessel M.R. said:-

"In the first place, the law of this country says that all property shall be alienable; but there has been one exception to that general law, for restraint on anticipation or alienation was allowed in the case of a married woman.

Then there was another rule, also invented by the Chancellors, in analogy to the common law. That was an invention of a different kind from the other, and was this time in favour of alienation and not against it. The law does not recognise dispositions which would practically make property inalienable for ever ... That is called the rule against perpetuities. This rule, therefore, was established directly in favour of alienation: it merely carried out the principle of law that property is alienable."

A proprietary restriction on the alienation of property by its owner, such as an option to purchase, does not suffer the problems mentioned above in relation to contractual restrictions\textsuperscript{179}. However, in so far as a joint venture established to undertake the Exploration Phase is
concerned, the rule against perpetuities will apply to any proprietary restrictions involving contingent rather than vested rights.  

The rule of perpetuities can be summarised in two propositions as follows:

(i) any future interest in any real or personal property is void from the outset if it may possibly vest after the perpetuity period has lapsed; and

(ii) the perpetuity period consists of any life or lives in being together with a further period of twenty one years and any period of gestation.

This rule, like the doctrine of restraint on alienation, evolved from the common law to ensure that private property remained freely alienable.

4.1.2.1 The rule against perpetuities - common law

The rule against perpetuities applies to interests in real and personal property. If a contract does not create an interest in property, the rule against perpetuities has no application.

The question must, therefore, be asked whether the first right of acquisition mechanism discussed above creates an interest in the property over which it is granted and as such is subject to the rule against perpetuities.

An option granted over property does create an equitable interest in that property. In London and South Western Railway Company v Gomm, Jessel M.R. explained why:

"The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him..."
without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land."

It is the factors mentioned by Jessel M.R. that distinguish an option and the first right of acquisition contained in a Joint Operating Agreement.

The grantee of an option over property acquires a right to call for a conveyance of the property, without any further intervention by the grantor. The obtaining of the property is completely within the grantee's power.

The grantee of a first right of acquisition acquires no right to call for a conveyance of the property. The grantee has:

"a mere spes which the grantor of the right may either frustrate by choosing not to fulfil the necessary conditions or may convert into an option and thus into an equitable interest by fulfilling the conditions."  

This distinction was recognised by Goff L.J. in Pritchard v Briggs. Goff L.J. stated that a first right of acquisition did not create an interest in the property over which it was given because it gave no present right, even a contingent one, to call for a conveyance of the property. The grantor of the right was free to decide for himself whether or not he wished to sell.

The distinction was also recognised by Street J. in Mackay v Wilson:

"Speaking generally, the giving of an option to purchase land prima facie implies that the giver of the option is to be taken as making a continuing offer to sell the land, which may at any moment be converted into a contract by the optionee notifying his acceptance of that offer. The agreement to give the option imposes a positive obligation on the prospective vendor to keep the offer open during the agreed period so that it remains available for acceptance by the optionee at any moment within that period. It is more than a mere contractual operation and confers upon the optionee an equitable interest in the land, the subject of the agreement: see, for example, per Williams J.N. Sharp v Union Trustee Company of Australia Limited."
"But an agreement to give "the first refusal" or "a right of pre-emption" confers no immediate right upon a prospective purchaser. It imposes a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer. It is not an offer and in itself encloses no obligation on the owner of the land to sell the same. He may do so or not as he wishes. But if he does decide to sell, then the holder of the right of first refusal has the right to receive the first offer which he also may accept or not as he wishes. The right is merely contractual and no equitable interest in the land is created by the agreement."

The common law rule against perpetuity applies in the Australian Capital Territory, New South Wales, the Northern Territory, South Australia and Tasmania. It also applies in Western Australia, other than with regard to options granted over property, and in Queensland and Victoria, other than with regard to real property.

It is submitted that, for the reasons discussed, the first right of acquisition mechanism discussed above does not create an interest in property and as such, at common law, the rule against perpetuities has no application to the first right of acquisition contained in a Joint Operating Agreement.

4.1.2.2. Rule against perpetuities - Legislation

Queensland has introduced legislation which deals with options granted over real property and first rights of acquisition. Victoria has introduced very similar legislation. Western Australia has introduced very similar legislation but only in respect of options granted over property.

The legislation applies to make void after twenty-one years from the date of grant, options granted and first rights of acquisition in respect of real property.

It is submitted that where all or part of the Interest of a Participant includes real property, the legislation will apply to a first right of acquisition in respect of that Interest. The mere fact that the first right of acquisition is, in respect of other property, in
addition to real property does not mean that the right loses its character as a first right of acquisition in respect of land.\textsuperscript{201}

It is submitted that to the extent a Permit is not a right in respect of real property for the purpose of the legislation (and it is submitted that it is extremely doubtful whether a Permit is such a right), the first right of acquisition mechanism discussed above will not be subject to the rule against perpetuities as amended by the legislation.

4.2 Contractual Rights

The doctrine of restraint on alienation and the rule against perpetuities aside, where the Joint Operating Agreement seeks to place a restraint upon the capacity of a Participant to assign all or part of its contractual rights, the question is, how effective is such a restraint: if breached, is it enforceable?

The answer to the question would appear to turn upon whether the Joint Operating Agreement calls for personal performance by the Participant. The question of whether the Joint Operating Agreement calls for personal performance by a Participant has been discussed above. From that discussion it would appear that if the Joint Operating Agreement does call for personal performance by the Participant, any purported assignment of all or part of a Participant's contractual rights in breach of the restraint would be void and inoperable unless the Joint Operating Agreement expressly provides for the assignment of such contractual rights.\textsuperscript{202} However, if the Joint Operating Agreement, or the material aspects thereof, does not call for personal performance by the Participant, the restraint may amount to nothing more than a warranty, the breach of which will give rise to a claim for damages as against the Participant but will not invalidate the assignment constituted by the breach.\textsuperscript{203} The breach will not give rise to a remedy which would allow the other Participants to exercise a first right of acquisition as against the independent third party.
5. **GENERAL REQUIREMENTS**

5.1 **Consents and approvals**

Whether a Participant is assigning all or part of its Interest to an affiliate, the other Participants or an independent third party, in so far as the Interest is made up of a petroleum title interest, such assignment requires the consent or approval of, in the case of Great Britain, the Secretary of State for Energy\(^{204}\) or, in the case of Australia, the Joint Authority\(^{205}\). The Joint Operating Agreement will usually make it a condition precedent of any such assignment or transfer that such consent or approval as is necessary be obtained\(^{206}\). This is, in part, because failure to obtain the necessary, consent or approval could jeopardize the entire petroleum title, not only the interest therein of the Participant, who may have purported to assign all or part of its Interest, in so far as the Interest is made up of a petroleum title interest\(^{207}\).

In Great Britain the prohibition against assignment without the consent of the Secretary of State for Energy extends to equitable as well as legal assignments wherever entered into and whether under the law of part of the United Kingdom or of any other country or place\(^{208}\).

Therefore, even if the Joint Operating Agreement does not restrict the equitable assignment by a Participant of all or part of its Interest, such would require the consent of the Secretary of State for Energy\(^{209}\).

Any consent granted by the Secretary of State for Energy may be granted subject to conditions, in which case, any assignment must be effected in accordance with the conditions\(^{210}\).

One of the conditions that the Secretary of State for Energy has imposed in the past\(^{211}\) is a condition which precludes the assignment by a Participant of all or part of its Interest, in return for the assignee agreeing to do work of some kind on the acreage concerned, where the work to be done is the performance of any working obligation under the Licence\(^{212}\). Further, the Secretary of State for Energy has imposed in the past a condition which precludes the assignment, in such circumstances,
taking place until the work obligations under the Licence have actually been performed or, at least, all obligation wells have been spudded-in.

What is more, in Great Britain, the terms of all documents giving effect to the assignment must be approved by the Secretary of State for Energy before entered into by the Participants. The documents involved, in most cases, will be:

(i) the contract between the assignor and assignee to effect the assignment;

(ii) the assignment of the petroleum title interest, which is effected by the existing Participants assigning to themselves (other than the assigning Participant) and the assignee;

(iii) the assignment of the property interest and the Joint Operating Agreement interest; and

(iv) the novation of the Joint Operating Agreement.

Hence, there is a need for the consent of the Secretary of State for Energy to both the transaction and the terms of every document evidencing the transaction. One effect of this is that the Secretary of State for Energy can control the adjustment by the Participants of their Interests inter se after the Licence has been granted.

The Secretary of State for Energy will be keen to be made a party to the document of assignment in respect of the Licence so as to have the assignee enter into direct covenants with him.

It is evident that the need for the consent of the Secretary of State for Energy to the assignment by a Participant of all or part of its Interest is very widely worded. Broad though the power may be, it is not absolute. In such circumstances, where there are no indications as to permissible reasons for withholding consent, it is necessary for the Secretary of State for Energy to properly exercise the
discretionary power in conformity with natural justice and for a proper purpose. It is submitted that if the Secretary of State for Energy were to use the need for consent to satisfy himself as to the good management and financial soundness of an assignee, such would be a valid exercise of the discretionary power.

In Australia, the position is a little more complex. The Petroleum (Submerged Lands) Act 1967 (C'th) distinguishes between the absolute transfer of a Permit and a dealing that would have one or more of the following effects:

(i) the creation or assignment of an interest in a Permit;

(ii) the creation or assignment of a right (conditional or otherwise) to the assignment of an interest in a Permit;

(iii) the determining of the manner in which persons may exercise the rights conferred by, or comply with the obligations imposed by or the conditions of, a Permit;

(iv) the creation or assignment of an interest in relation to a Permit being an interest known as an overriding royalty interest, a production payment, a net profit interest or a carried interest;

(v) (a) the creation or assignment of an option (conditional or otherwise) to enter into a dealing;

(b) the creation or assignment of a right (conditional or otherwise) to enter into a dealing; and

(c) the alteration or termination of a dealing,

each such dealing being a dealing that has one or more of the effects referred to in (i), (ii), (iii), and (iv) above.

Dealings of the nature discussed above are, in effect, dealings with legal or equitable interests in or affecting a Permit.
The transfer of a Permit is deemed to be of no force until it has been:

(i) approved by the Joint Authority; and

(ii) an instrument of transfer has been registered.

What is more, the mere execution of an instrument of transfer of a Permit creates no interest in the Permit. That is, neither a legal nor equitable interest.

To transfer a Permit it is necessary for one of the participants to make written application to the Designated Authority for approval by the Joint Authority to the transfer. The application must be accompanied by:

(i) an instrument of transfer executed by the Participants and by the transferee; and

(ii) if the transferee is not one of the Participants an instrument setting out the technical qualifications of, details of the technical advice that is or will be available to, details of the financial resources that are or will be available to that transferee.

The applications must have been lodged with the Designated Authority within three months after the day on which the last participant to execute, executed the instrument of transfer. Failure to observe the time period will mean that the Joint Authority cannot approve the transfer.

The Joint Authority is required to consider the application for approval of the transfer of the Permit and decide whether to approve the transfer. In addition, the Joint Authority is required to determine whether approval of the transfer should be made subject to security being lodged by the transferee for compliance with the provisions of the
Petroleum (Submerged Lands) Act 1967 (C'th), of the regulations and of any conditions to which the Permit may, from time to time, be subject.

Having considered the application and decided to approve the transfer, the Designated Authority must notify, in writing, to the person whom made the application, the Joint Authority's decision and must set out in the notice details of any security required to be lodged by the transferee. Where security is required to be lodged, once the security has been lodged, the Joint Authority is deemed to have approved the transfer.

Where the Joint Authority approves the transfer of the Permit, upon the entry in the register maintained by the Designated Authority of a memorandum of the transfer of the Permit and of the name of the transferee, the transfer is deemed registered and the transferee becomes the holder of the Permit. Where the transfer is registered, the instrument of transfer, endorsed with the memorandum of approval, must be returned to the person who lodged the application for approval of the transfer.

It is important to note that it is the transfer of the Permit (that is, the transaction) and not the instrument of transfer (that is, the instrument evidencing that transaction) to which the provisions of the Petroleum (Submerged Lands) Act 1967 (C'th) are addressed. This is to be contrasted with the situation in Great Britain where it is both the transfer of the Licence and the instrument of transfer to which model clause 41 of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988 is addressed.

Furthermore, the transfer need not be the absolute transfer of all the Interest of a Participant and as such the Petroleum (Submerged Lands) Act 1967 (C'th) contemplates the possibility of the transfer of a legal interest in the Permit by way of security.

A dealing of the type referred to above in relation to a Permit is deemed to be of no force until it has been 
(i) approved by the Joint Authority; and

(ii) an entry has been made in the register maintained by the Designated Authority in relation to the dealing.

To give effect to a dealing of the type referred to above, it is necessary for one of the participants to the dealing to lodge with the Designated Authority a written application for approval by the Joint Authority to the dealing. The application must be accompanied by the instrument evidencing the dealing and an instrument setting out such particulars (if any) as are prescribed for the purpose of an application for approval of a dealing of that type. There is no requirement that the instrument evidencing the dealing be executed by all the participants of the dealing.

The application must have been lodged with the Designated Authority within three months after the day on which the last participant to execute, executed the instrument evidencing the dealing. Failure to observe the time period will mean that the Joint Authority cannot approve the dealing.

The Joint Authority may approve or refuse to approve a dealing. The Designated Authority must notify in writing, to the person whom made the application for approval of a dealing, the Joint Authority's decision.

Where the Joint Authority approves a dealing, the Designated Authority must enter the approval of the dealing in the register maintained by it, on the memorial relating to the Permit in respect of which the approval was sought, endorse the instrument evidencing the dealing, and return the endorsed instrument to the person whom made the application, for approval.

Once again it is the dealing (that is, the transaction) and not the instrument evidencing the transaction to which the provisions of the Petroleum (Submerged Lands) Act 1967 (C'th) are addressed.
In accordance with the Administrative Appeals Tribunal Act 1975 (C'th) 276 the decisions of the Designated Authority and the Joint Authority are not capable of review by the Administrative Appeals Tribunal.

It would appear that to the extent that there is to be an assignment of all or part of the Interest of a Participant, it would be possible to effect the assignment under either section 78 or section 81 of the Petroleum (Submerged Lands) Act 1967 (C'th). However, if all the Participants do not join in the instrument of transfer, the assignment can only be affected under section 81 of the Petroleum (Submerged Lands) Act 1967 (C'th) 277.

5.2 Acceptance and assumption of obligations

Whether a Participant is assigning all or part of its Interest to an affiliate, the other Participants or an independent third party, such assignment is usually not to be effective unless and until the assignee has executed a covenant in form and content satisfactory to and in favour of the other Participants to accept, assume, observe and perform all the obligations under the petroleum title and the Joint Operating Agreement of the Participant in so far as the Interest or part thereof assigned is concerned 278.

5.3 Costs and expenses

Whether a Participant is assigning all or part of its Interest to an affiliate, the other Participants or an independent third party, the costs, stamp duty, transfer taxes 279 and other expenses of the assignment or transfer are the obligation of either the participants to the transaction 280 or the Participant assigning all or part of its Interest 281. It is clearly the intention of the Joint Operating Agreement that the other Participants shall not be required to bear any part of such costs, stamp duty, transfer taxes and other expenses 282.
5.4 Minimum Interest

The Joint Operating Agreement may prohibit the assignment of part of the Interest of a Participant where to do so would result in a large number of Participants holding relatively small percentage Interests\textsuperscript{283}.

5.5 Assignment of Interest in part only of the area to which the petroleum title relates

The Joint Operating Agreement may only permit the assignment by a Participant of all or part of its Interest in so far as it relates to the whole of the area to which the petroleum title relates. This would prevent a Participant assigning all or part of its Interest in so far as it relates to part only of the area to which the petroleum title relates and, as such, create two joint ventures for the different areas with different Participants holding different percentage Interests\textsuperscript{284}.

6. FURTHER ACTION

The Joint Operating Agreement will usually provide that where a Participant desires to assign all or part of its Interest, and the consent, if necessary, of the other Participants to the assignment has been granted, the other Participants shall join in such reasonable actions as may be necessary or desirable to obtain any consents or approvals, including, in the case of Great Britain, that of the Secretary of State for Energy and, in the case of Australia, that of the Joint Authority\textsuperscript{285}. Furthermore, the other Participants will usually be required to execute and deliver any and all documents reasonably necessary to effect the assignment\textsuperscript{286}.

The action taken by the other Participants are to be at the cost and expense of the participants to the transaction\textsuperscript{287}.

In Offshore Oil N.L. v Gulf Resources N.L.\textsuperscript{288} it was held that such provisions related to matters affecting the Interest itself. They did not extend to private dealings in the Interest in that the provisions could not be invoked to force the consent of the other Participants to an
assignment of all or part of an Interest.

7. CONTINUING OBLIGATIONS

The distinction between assignment and novation has been discussed above in this chapter, as has the issue of assigning the burden of a contract. It is not proposed to repeat that discussion here. However, the issues are of equal application to the matters discussed here.

Notwithstanding that a Participant may assign all or part of its Interest to an affiliate, the other Participants or an independent third party, the Participant will always remain liable to the other Participants under the Joint Operating Agreement, by virtue of privity of contract, unless a specific release is obtained from the other Participants.289 This situation is often reiterated by the Joint Operating Agreement to overcome any suggestion of the Participant being released by implication from all the obligations that arise after the date on which the assignment becomes effective.290 The argument is that most Joint Operating Agreements allow a Participant to assign all or part of its Interest subject to satisfying certain terms and conditions. The Interest of a Participant is usually defined to include the obligations which correspond to the Participants' rights, the result being the Joint Operating Agreement contemplates that contractual obligations owed amongst Participants will be assumed by the assignee, with the consent of the other Participants. This, it has been submitted, raises the presumption that the assigning Participant will be released upon that assumption.291

One of the difficulties that arises in such circumstances is that if the assignee fails to perform its obligations under the Joint Operating Agreement, the assignor may be sued, as a result of the failure, without necessarily having a readily exercisable means of rectifying the breach.292

The Joint Operating Agreement may provide that the assignor shall remain liable for all obligations attaching to all or the part of the Interest that it assigned which were incurred prior to the date on which the assignment became effective.293 Furthermore, the Joint Operating
Agreement may provide that the assignee shall, in addition assume, liability for such obligations notwithstanding that they were incurred prior to the date on which the assignment became effective 294.

Usually, where a Participant is assigning all of its Interest, the Participant will desire a release from all the obligations that arise after the date on which the assignment becomes effective 295. This is effected by a deed of novation and is generally unobjectionable to the other Participants. However, this desire does reinforce the concern of the other Participants as to the financial standing of the assignee and the need for their consent of the Participants to the assignment.

The deed of novation will also amend the Joint Operating Agreement by setting out the post assignment percentage Interests of the Participants 296.

In addition, the deed of novation will require the assignee to assume the obligations attaching to the Interest assigned to it by direct covenant with the other Participants.

The entering into of deed of novation will, in the case of Great Britain, require the prior approval of the Secretary of State for Energy 297; and, in the case of Australia, the prior consent of the Joint Authority 298.

8. THE EFFECTIVE DATE

In Great Britain it is unusual for the Joint Operating Agreement to provide that an assignment is not effective or binding upon the Participants until the date upon which the Participants receive:

(i) a copy of all documents relating to the assignment, together with the necessary consents and approvals of the Secretary of State for Energy 299; and

(ii) a covenant whereby the assignee accepts and assumes all assignor's the obligations under the Licence and the Joint Operating
Agreement in so far as the interest assigned is concerned™. 

In Australia, it is unusual for the Joint Operating Agreement to provide that an assignment is not effective until all necessary governmental consents and approvals have been obtained. This, presumably, addresses the fact that the transfer of a Permit or a dealing of the type mentioned above in relation to a Permit is of no force until:-

(i) approved by the Joint Authority, and

(ii) the relevant entry has been made in the register maintained by the Designated Authority.

This approach follows the view express in Franov v Deposit and Investment Company Limited™ which would hold that approval and registration does not confer upon the transfer or dealing any effectiveness or validity which antedates such approval and registration™

9. SECURITY™

Although the Joint Operating Agreement has shown itself to be compatible with large-scale financings, not every Joint Operating Agreement is designed to do so. The Joint Operating Agreement will usually address the right of a Participant to mortgage, pledge, charge, assign by way of security or otherwise encumber all or part of its Interest. The right will either be unfettered™ or subject to the prior consent of the other Participants™. Where the right is subject to the prior consent of the other Participants it is usually provided that such consent cannot be unreasonably withheld™. In addition, the right may be limited to providing finance for the particular project™.

The right will usually be subject to a number of conditions:-

(i) the creation of the security interest shall be subject to the obtaining of all required governmental consents and approvals™. 

In the case of Great Britain, this means the consent of the Secretary
of State for Energy. In the case of Australia, this means the approval of the Joint Authority and the appropriate entry being made in the register maintained by the Designated Authority in relation to the dealing;

(ii) the Participant creating the security interest over all or part of its Interest shall remain liable for all obligations relating to its Interest;

(iii) the Interests of the other Participants must be in no way affected by the creation of the security interest;

(iv) the rights conferred by the instrument creating the security interest and the security interest itself shall be expressly subordinated to the rights of the other Participants under the Joint Operating Agreement, for example, cross-charges as between the Participants to secure their obligations as between themselves. The person in whose favour the security interest is created may have to enter into an agreement with the other Participants to this effect;

(v) the person in whose favour the security interest is created must agree in writing with the other Participants to be bound by the provisions of the Joint Operating Agreement in realising its security or otherwise exercising any rights in relation to its security. This would include, inter alia, the first right of acquisition mechanism;

(vi) the person in whose favour the security interest is created must agree with the other Participants, in writing, to release its security immediately upon the Participant creating the security interest, ceasing to be a Participant; and

(vii) the Participant creating the security interest paying all costs and expenses incurred in relation to the creation or release of the security.
FOOTNOTES

1. In this chapter the term "assign" includes (unless the context otherwise requires) transfer or otherwise dispose of and the terms "assignment", "assignor" and "assignee" shall have a corresponding meaning. See the judgement of Dixon C.J. in Hall v Busst (1960) 104 C.L.R. 206, 214 where the distinction between "transfer" and "assign" is considered in relation to a particular agreement.


17. Jacob v Larkin (1892) 13 L.R. (N.S.W.) Eq. 62, 67-68.


12, 14; David Jones Ltd. v Lunn (1969) 91 W.N. (N.S.W.) 468, 477-480.


22. In re Griffin. Griffin v Griffin [1899] 1 Ch. 408; Anning v Anning (1907) 4 C.L.R. 1049, 1067.


25. Associated Newspapers Ltd. v Bancks (1951) 83 C.L.R. 322, 336-337.


27. [1977] Ch. 106

29. See also Tolhurst v The Associated Portland Cement Manufacturers (1900) Ltd. [1903] A.C. 414 where the position was that if chalk was taken from the appellant, the taker was bound to take from the appellant all of its requirements of chalk for the manufacture of cement on the particular piece of land; National Carbonising Co. Ltd. v British Coal Distillation Limited (1936) 54 R.P.C. 41, 57-58; Aspden v Seddon (1876) 1 Ex. D. 496, 509-510; Britain & Overseas Trading (Bristles) Ltd. v Brooks Wharf & Bull Wharf Ltd. [1967] 2 Lloyd's Rep. 51, 60.


31. Tito v Waddell (No.2) [1977] Ch. 106, 302.

32. Bagot Pneumatic Tyre Co. v Clipper Pneumatic Tyre Co. [1902] 1 Ch. 146, 156 where the concept of the pure principle of benefit and burden was rejected. However, this decision may have to be reviewed in the light of Tito v Waddell (No. 2) [1977] Ch. 106, 301-302.

33. Tito v Waddell (No. 2) [1977] Ch. 106, 302.

34. Tito v Waddell (No. 2) [1977] Ch. 106, 303.

35. Tito v Waddell (No. 2) [1977] Ch. 106.

36. Tito v Waddell (No. 2) [1977] Ch. 106, 303-304.

37. Tito v Waddell (No. 2) [1977] Ch. 106, 304.

38. Tito v Waddell (No. 2) [1977] Ch. 106, 304-305.

39. Tito v Waddell (No. 2) [1977] Ch. 106, 305.

40. Tito v Waddell (No. 2) [1977] Ch. 106, 306.


43. Hodgson v Anderson (1825) 3 B. & C. 842, 855-856; Wharton v Walker (1825) 4 B. & C. 163, 165; Tatlock v Harris (1789) 3 T.R. 174, 180; In re European Assurance Society: Miller's Case (1876) 3 Ch. D. 391, 393; Cuxon v Chadley (1824) 3 B. & C. 591, 595-596; Wharton v Walker (1825) 4 B. & C. 163, 165; In re United Railways of the Havana and Regla Warehouses Ltd. [1960] 1 Ch. 52, 84 and 86,


45. See for example, Apea 13.3(b).


47. This summary is based on that of Marshall in The Assignment of Choses in Action (1950) p. 70. Cf. Wilson v Lloyd (1873) L.R. 16 Eq. 60, 74.


It is the necessity for the consent of the parties that would distinguish a novation and an assignment. The consent may be implied from conduct - see Hart v Alexander (1837) 2 M. & W. 484, 489; Rolfe v Flower, Salting & Co. (1865) L.R. 1 F.C. 27, 44-45; In re Family Endowment Society (1870) L.R. 5 Ch. App. 118, 132; In re Town's Drainage and Sewage Utilization Co.: Morton's Case (1873) L.R. 16 Eq. 104, 105-106; Bilborough Holmes (1876) 5 Ch. D. 255, 261; Chatsworth Investments Limited v Cussins (Contractors) Ltd. [1969] 1 W.L.R. 1, 4-5.

49. No extinguishment - Israel v Douglas (1789) 1 H. Bl. 239; Hodgson v Anderson (1825) 3 B. & C. 842; Wharton v Walker (1825) 4 B. & C. 163, 165; Wilson v Coupland (1821) 5 B. & Ald. 228, 232; Cuxon v Chadley (1824) 3 B. & C. 591, 596; Liversidge v Broadbent (1859) 4 H. & N. 603, 609-610, 611; Cochrane v Green (1860) 9 C.B.N.S. 448, 467.

50. Liversidge v Broadbent (1859) 4 H. & N. 603, 610 and 611.


52. Hart v Alexander (1837) 2 M. & W. 484; Bilborough v Holmes (1876) 5 Ch. D. 255, 261; Hume v Munro (1942) 42 S.R. (N.S.W.) 218, 224-225; Chatsworth Investments Limited v Cussins (Contractors) Ltd. [1969] 1 W.L.R. 1, 4-5; Tito v Waddell (No. 2) [1977] 1 Ch. 106, 287.


60. The Britoil proforma adopts the Companies Act 1948 (UK) definition of the term "subsidiary"; see Britoil 27 (xxxvii). By Britoil (xlii), in view of the repeal of the relevant section of the Companies Act 1948 (UK), section 736 of the Companies Act 1985 (UK) is now the relevant section which provides the definition of the term "subsidiary".

61. The term "company" includes any body corporate; see Britoil 27(3xxvii) and section 736(6) of the Companies Act 1985 (UK).

62. Britoil 27(v); Apea 1.1(c).

63. Britoil 27(v); Apea 1.1(c).

64. Britoil 27(v); Apea 1.1(c).

65. Britoil 27(3xxvii) and section 736(1)(a) of the Companies Act 1985 (UK); Apea 1.1(c).

66. The Apea proforma refers to "issued share capital"; see Apea 1.1(c).

67. Britoil 27 (xxxvii) and section 736 (1)(a)(ii) of the Companies Act 1985 (UK); Apea 1.1(c).

69. Britoil 27 (xxviii); Apea 1.1 (bb).

70. Model clause 42(3)(b) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.


74. Model clause 42(4) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.


77. Daintith and Willoughby, editors, United Kingdom Oil and Gas Law: 2nd ed. (1984), para. 5-380.

78. Daintith and Willoughby, editors, United Kingdom Oil and Gas Law: 2nd ed. (1984), para. 5-380.


89. Britoil 21.2.2; Apea 13.2 and 13.4. See Waite "Australian Resources Joint Ventures: Some Legal Pointers for Investors" (1985) a paper delivered at the Lawasia Symposium on Energy Law, Jakarta, Indonesia,


97. Britoil 21.2.3(ii); Apea 13.2.

98. Britoil 21.2.3(i); Apea 13.2.


104. See the comments of Bryson J. reported in Newton "Case Note: Noranda Australia Limited v Lachlan Resources N.L. & Ors." (1988) 7 A.M.P.L.A. Bulletin 208, 211. See also cases such as In re: Town Investments Limited Underlease [1954] 1 Ch. 301, 311.

105. For example, in Australia, where the admission of the independent third party would result in a breach of the foreign investment rules. See Apea 13.2.

106. Young v Ashley Gardens Properties Limited [1903] 2 Ch. 112, 115; Goldstein v Sanders [1915] 1 Ch. 549.


108. Britoil 21.2.3(ii).


110. O'Regan and Taylor "Joint ventures and operating agreements" (1984) 14 V.U.W.L.R. 85, 100.

111. [1891] 1 Q.B. 661, 670. The doctrine of restraint on alienation would appear to apply to a restraint on mortgaging or charging properly: see Corbett v Corbett (1888) 14 P.D. 7, 11.

112. (1884) 26 Ch. D. 801, 823.


115. (1888) 38 Ch. D. 176, 181-182.

116. (1797) 3 Ves. 324, 325-326.

117. (1889) 43 Ch. D. 633, 639.


119. In the Estate of Leahy (Deceased) [1975] 1 N.S.W.L.R. 246, 250. See also Allen and Cottee "The Effect of the Rule against


122. (1875) L.R. 20 Eq. 186, 189.

123. (1875) L.R. 20 Eq. 186, 188.

124. (1875) L.R. 20 Eq. 186, 189.

125. (1884) 26 Ch. D. 801, 817-819.

126. (1875) L.R. 20 Eq. 186.

127. Bridgman J. 132, 137.

128. (1853) 18 Beav. 330, 337.

129. See Doe v Pearson (1805) 6 East. 173.

130. (1875) L.R. 20 Eq. 186, 189.

131. (1875) L.R. 20 Eq. 186.

132. (1884) 26 Ch. D. 801, 811.

133. (1875) L.R. 20 Eq. 186.

134. (1884) 26 Ch. D. 801, 820.

135. (1884) 26 Ch. D. 801, 823.


137. (1888) 38 Ch. D. 176, 179.

138. (1888) 38 Ch. D. 176, 179.

139. (1960) 104 C.L.R. 206.

140. (1960) 104 C.L.R. 206, 217.


142. (1960) 104 C.L.R. 206, 224.

143. (1853) 18 Beav. 330.
144. (1884) 26 Ch. D. 801.
145. (1905) 2 Ir. R. 349.
146. (1896) 2 Ch. D. 353.
147. (1875) L.R. 20 Eq. 186.
148. (1884) 26 Ch. D. 801, 810.


151. The provisions of the contract are taken from the judgement of Dixon C.J., (1960) 104 C.L.R. 206, 212.

156. (1960) 104 C.L.R. 206, 245-246.


161. Kitto and Windeyer JJ's.


164. Dixon C.J. and Menzies J.


Waite "Australian Resources Joint Ventures: Some Legal Pointers for Investors" (1985) a paper delivered at the Lawasia Symposium on Energy Law, Jakarta, Indonesia, at pp. 73-74. See also Radnor v Shafto (1805) 11 Ves. 448.


185. See, for example, London and South Western Railway Company v Gomm (1881) 20 Ch. D. 562; Woodall v Clifton [1905] 2 Ch. 257 and Worthing Corporation v Heather [1906] 2 Ch. 532.

186. (1881) 20 Ch. D. 562, 581.


191. [1980] 1 All E.R. 294. The other members of the Court of Appeal agreed with Goff L.J. on this point.


196. Section 218(2) of the Property Law Act 1974 (Qld.).

197. Section 15 of the Perpetuities and Accumulations Act 1968 (Vic).

198. Section 110(2) of the Property Law Act 1969 (WA).

199. Real property includes "tenements and hereditaments, corporeal and incorporeal and every estate and interest therein whether vested or contingent, freehold or leasehold, and whether at law or in equity": Section 4 of the Property Law Act 1974 (Qld).


204. Model clauses 41(1) and 41(5) of Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988.

205. Sections 78 and 81 (10) of the Petroleum (Submerged Lands) Act 1967 (C'th).

206. Britoil 21.2.1, 21.2.3 (i) and 21.3(i); Apea 13.1 and 13.2.


216. This may be covered by the contract between the assignor and assignee.


226. Section 81(1)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th). Section 81 of the Petroleum (Submerged Lands) Act 1967 (C'th) was reenacted in 1985 to address a number of the concerns raised by the

227. Section 81(1)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

228. Section 81(1)(c) of the Petroleum (Submerged Lands) Act 1967 (C'th).


230. Section 81(1)(e) of the Petroleum (Submerged Lands) Act 1967 (C'th).

231. Section 81(1)(f) of the Petroleum (Submerged Lands) Act 1967 (C'th).

232. Section 81(1)(g) of the Petroleum (Submerged Lands) Act 1967 (C'th).


236. Section 78(13) of the Petroleum (Submerged Lands) Act 1967 (C'th).

237. Barry v Heider (1914) 19 C.L.R. 197.

238. Section 78(2) of the Petroleum (Submerged Lands) Act 1967 (C'th).

239. Two copies of the application and two copies of the instrument of transfer and any other instrument; Section 78(3)(c) of the Petroleum (Submerged Lands) Act 1967 (C'th).

240. In the form specified in the Schedule to the Petroleum (Submerged Lands) Regulations.

241. Section 78(3)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).


244. Section 78(3)(b)(iii) of the Petroleum (Submerged Lands) Act 1967 (C'th).

245. The Joint Authority may extend the period in special circumstances; Section 78(4) of the Petroleum (Submerged Lands) Act 1967 (C'th).

246. Section 78(4) of the Petroleum (Submerged Lands) Act 1967 (C'th).

247. Section 78(4) of the Petroleum (Submerged Lands) Act 1967 (C'th).
248. Section 78(6)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

249. To-date no regulations have been made.

250. Section 78(6)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

251. Section 78(7) of the Petroleum (Submerged Lands) Act 1967 (C'th).

252. Section 78(8) of the Petroleum (Submerged Lands) Act 1967 (C'th).

253. The register is a register of, inter alia, Permits granted under the Petroleum (Submerged Lands) Act 1967 (C'th); Section 76(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).

254. In accordance with section 78(9) the Petroleum (Submerged Lands) Act 1967 (C'th).

255. Section 78(10)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th).

256. Section 78(10)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).

257. Section 78(12)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).


262. The register is a register of, inter alia, Permits granted under the Petroleum (Submerged Lands) Act 1967 (C'th); Section 76(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).

263. Section 81(3) of the Petroleum (Submerged Lands) Act 1967 (C'th).

264. Two copies of the application and two copies of the instruments are required to be lodged; Section 81(4)(c) of the Petroleum (Submerged Lands) Act 1967 (C'th). See also section 81(8) of the Petroleum (Submerged Lands) Act 1967 (C'th).

265. Section 81(4)(a) of the Petroleum (Submerged Lands) Act 1967 (C'th). See also section 81(8) of the Petroleum (Submerged Lands) Act 1967 (C'th).

266. Section 81(4)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th). See also regulation 4 of the Petroleum (Submerged Lands) Regulations.


268. The Joint Authority may extend the period in special circumstances; Section 81(5) of the Petroleum (Submerged Lands) Act 1967 (C'th).


270. Section 81(5) of the Petroleum (Submerged Lands) Act 1967 (C'th).

271. Section 81(10) of the Petroleum (Submerged Lands) Act 1967 (C'th).

272. Section 81(11) of the Petroleum (Submerged Lands) Act 1967 (C'th).

273. Section 76(1) of the Petroleum (Submerged Lands) Act 1967 (C'th).

274. Section 81(12) of the Petroleum (Submerged Lands) Act 1967 (C'th).
275. Section 81(13)(b) of the Petroleum (Submerged Lands) Act 1967 (C'th).


280. Apea 13.5.


282. Apea 13.5.


286. Britoil 21.5; Apea 13.6.


298. Section 81 of the Petroleum (Submerged Lands) Act 1967 (C'th).


300. Britoil 21.3(ii).


303. The difficulties of providing security over all or part of the Interest of a Participant under Scottish Law is discussed by Cameron "Security is Scotland" in Proceedings of the Energy Law Seminar organised by the Committee on Energy and Natural Resources (1979) Vol. 2, N4.1, N4.2-N4.3.


308. Britoil 21.7(ii); Apea 13.7(a).


310. Section 81(10) of the Petroleum (Submerged Lands) Act 1967 (C'fh). See also sections 81(2), 81(7), 81(8) and 81(15) of the Petroleum (Submerged Lands) Act 1967 (C'fh).


312. Apea 13.7(b).

313. Britoil 21.7(ii); Apea 13.7(c)(iii). See Ladbury "Mining Joint Ventures" (1984) 12 A.B.L.R. 312, 332 who explains that the person in whose favour the encumbrance is created will seek to have this requirement deleted; Manning "Assignment Clauses in Mining and Petroleum Joint Ventures" [1986] A.M.P.L.A. Yearbook 119, 132.

314. Apea 13.7(c)(i).


316. Apea 13.7(c)(ii).

317. Apea 13.7(d).