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The Application of the Rule Against Perpetuities to Natural Resources Agreements

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SUMMARY

At common law, the modern Rule against Perpetuities provides that an interest in real or personal property is void if it vests later than 21 years after the death of a life in being alive at the creation of the interest. The rule applies to contingent remainders and executory interests but not to vested interests.

All State and Territory jurisdictions in Australia, except South Australia, have retained the Rule but have modified it in different ways by statute, mostly providing for specification of a maximum perpetuity period of 80 years.

Traditionally the Rule was thought to have little bearing on Natural Resources Agreements, partly because most did not have a long life. But normally there is no fixed term of these agreements. There are different rules in different States about the application of the statutory modifications to interests in land, and these different rules may apply potentially to pre-emption, sole risk, non-consent and dilution clauses in Joint Venture Agreements applicable to Mining Licences and Leases, and to other contingent property interests of indeterminate length, such as royalties payable on commencement of production, if any.

The Exposure Draft AMPLA Model Joint Venture Agreement addresses this issue in cl 4.7 as follows (clause references in the Exposure Draft may change as the draft document is refined):

> *"Perpetuity period*
> *If any interest of a Joint Venturer in any Joint Venture Property violates the rule against perpetuities, then that interest terminates [80][1] years from the Commencement Date."*

A footnote to this clause notes that the different treatments of the rule depending on the applicable State or Territory law as follows:

> *"[1] 80 years applicable for WA, NSW, NT and ACT; for Vic. and Qld., the period should be 21 years; for Tas., the period should be 6 years; for SA, clause 4.7, is not necessary and can be deleted."*

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This paper will discuss whether this is an appropriate treatment of the potential impact of the modern Rule against Perpetuities on the Exposure Draft Model JVA, and whether the rule has any application to other types of contingent mining property interests, such as royalties and production payment interests.

THE RULE AGAINST PERPETUITIES AT COMMON LAW

This paper concerns what is sometimes called the modern rule against perpetuities.[1] The rule is as modern as the end of the seventeenth century. It is more accurately described as the rule against remoteness of vesting for it is not a rule against interests that last too long but one directed against interests that vest too late. Vesting, for the purposes of the rule, is vesting in interest not in possession, that is to say the taker or takers must be known, any contingencies to their taking must have been satisfied at the appropriate time, and, in the case of a class gift, the fractional share of each beneficiary must be known within the perpetuity period.

A clear statement of the common law rule is found in *In re Thompson*:[2]

> "A grant or other limitation of any estate or interest to take effect in possession or enjoyment at a future time, and which is not, from the time of its creation, a vested estate or interest, will be void ab initio if, at the time when the limitation takes effect, there is a possibility that the estate or interest limited will not vest within the period of a life or lives then in being, or within a further period of twenty-one years thereafter."

The rule was devised for English landed estates. The intention was to set a boundary upon the period within which future interests in land might be limited to commence while enabling land-owning families to secure the retention of land for several generations.[3] Though originally confined to estates in real property, the rule came to be applied first to leasehold interests and then to interests in personal property. It applies to equitable estates and interests as well as to legal, and it has

[1] The most authoritative text about the rule is Gray, *Perpetuities* (4th ed 1942) (Gray). The best modern text is Morris & Leach, *The Rule Against Perpetuities* (2nd ed 1962) (Morris & Leach). Megarry & Wade, *The Law of Real Property* (7th ed 2000) (Megarry & Wade), contains an excellent summary in Ch 7, Part 3, Section 2. Recent Australian statutory modifications of the rule are examined in Bradbrook, MacCallum & Moore, *Australian Real Property Law* (4th ed 2007), Ch 8, Butt, *Land Law* (5th ed 2006) (Butt), Ch 12, Sappideen & Butt, *The Perpetuities Act 1984* (1986) (Sappideen & Butt), D E Allan, "The Rule Against Perpetuities Restated" (1964) 6 UWALR 27, L R McCredie & D G Doane, "Perpetuities Law Reform in Victoria" (1969) 43 ALJ 366, and P W Hogg & H A J Ford, "Victorian Perpetuities Law in a Nutshell" (1969) 7 MULR 155.

[2] [1906] 2 Ch 199 at 202. The development of the common law rule, which began with the decision of Lord Nottingham LC in *Duke of Norfolk's Case* (1682) 3 Ch Cas 1; 1 Vern 163 [22 ER 931], was completed by the House of Lords in *Cadell v Palmer* (1833) 1 Cl & F 372 [6 ER 956].

[3] For accounts of the history of the rule, see Gray op cit n 1, ss 123-200.1; Holdsworth, *History of English Law*, vol 7, at 81-144, 193-238, summarised by Morris & Leach op cit n 1, at 3-18; Megarry & Wade op cit n 1, at 240-241.

been said to be capable of applying "to new and ever-varying states of fact and circumstances".[4]

The common law perpetuity period of lives in being and 21 years was derived by analogy from a common law rule specifying the period in which an entail could not be barred. The lives were originally those relevant to the estate or interest. But by the beginning of the 19th century it was accepted that lives could be selected arbitrarily for the purpose.[5] A device was adopted of specifying the lives of the last survivor of all the lineal descendants of a monarch, at first Queen Victoria, living at the date when the instrument creating the future estate or interest commenced. Twenty-five years after the death of Queen Victoria she had about 120 lineal descendants. But it was held that they could be ascertained and the perpetuity period could be calculated, though it would be difficult and expensive to do so.[6] Hence royal lives clauses became conventional devices in wills and settlements creating successory interests.[7] Even so, fanciful devices such as the specification of "21 years from the death of the last survivor of all persons who shall be living at my death" have been held void for uncertainty.[8]

STATUTORY MODIFICATIONS OF THE RULE AGAINST PERPETUITIES

Statutory Perpetuity Periods

The obsolescence and impracticality of many features of the common law rule led to its modification by statute in many jurisdictions in the third quarter of the 20th century. Western Australia led the way in this country in 1962. Other States and Territories followed. But their approaches differed. None of the Acts codifies the rule. Save for South Australia they modify it, but in several different ways.

South Australia has effectively abolished the rule.[9] But it has conferred power on the Supreme Court, upon application, to vary the terms of a disposition under which interests remain that have not vested within 80 years of the date of disposition so that those interests will vest immediately or, where interests cannot vest or are unlikely to vest within 80 years after that date, to vary the terms of the disposition so that they will vest within that period.[10]

No other State or Territory has made so drastic a change. The approach has been to replace or permit the replacement of the common law perpetuity period with a fixed period of years and to introduce a "wait and see" approach to

4 *In re Hollis' Hospital and Hague's Contract* [1899] 2 Ch 540 at 552.
5 See *Thelluson v Woodford* (1805) 11 Ves 112 [32 ER 1030]; [1803-13] All ER Rep 30.
6 *In re Villar* [1929] 1 Ch 243.
7 The warning of the Lords Justices in *In re Villar* that a time might come at which it was not possible for testimony to be applied to determine when the last survivor of the royal lives dropped, so that the gift was void for uncertainty, has been heeded and the named monarch has been moved forward by steps to Queen Elizabeth II.
8 *In re Moore* [1901] 1 Ch 936.
9 *Law of Property Act* 1936 (SA), s 61.
10 *Law of Property Act* 1936 (SA), s 62(1), (2).

invalidity which takes account of events occurring after the creation of the interest.[11]

New South Wales[12] and the Australian Capital Territory[13] have substituted a statutory perpetuity period of 80 years for the common law period. The statutory period is stated to be applicable to an interest created by a settlement. But "settlement" is defined to include any instrument, transaction or dealing whereby a person makes a disposition and "disposition", to include any alienation of property. Victoria,[14] Western Australia,[15] Queensland[16] and Tasmania[17] allow a period not exceeding 80 years to be substituted for the common law perpetuity period in an instrument. Otherwise the common law period is to apply. A statutory period may be selected for a particular disposition or for all dispositions made by the instrument. The Northern Territory[18] allows the instrument to specify either the common law period or 80 years from the date the settlement takes effect. If no period is specified the perpetuity period is taken to be 80 years.

The other major change has been to abolish the requirement that whether the rule against perpetuities is satisfied by a disposition must be determined when the period begins to run. That requirement could lead to absurdities such as in *In re Wood*[19] where land containing gravel pits was devised upon trust to use and when exhausted to sell and distribute the proceeds of sale amongst the testator's issue then living. The perpetuity period was 21 years, but the pits were exhausted in six. Yet under the strict common law rule the devise was held to be invalid. The new statutory rule is that the disposition by which an interest is created is treated as if it is not subject to the rule until it is established that the interest cannot vest within the appropriate perpetuity period.[20] If the interest vests in possession during the period it is valid. If it does not, it is invalid. But it is also invalid if it becomes certain at any time during the period that it cannot vest within the period. Some State Acts permit a trustee or any person interested under, or on the invalidity of, a

[11] The amending Acts in all Australian jurisdictions other than the Northern Territory and South Australia apply only to instruments that took effect after a stipulated date. The relevant dates differ: Australian Capital Territory, 19 December 1985; New South Wales, 31 October 1984; Queensland, 1 December 1975; Tasmania, 1 December 1992; Victoria, 10 December 1968; Western Australia, 6 December 1962. The Northern Territory Act applies to settlements taking effect before or after 1 August 1994. The South Australian Act applies to dispositions made, or rights and powers granted or conferred, before or after 1 May 1996.

[12] *Perpetuities Act 1984* (NSW), s 7(1).

[13] *Perpetuities and Accumulations Act 1985* (ACT), s 8(1).

[14] *Perpetuities and Accumulations Act 1968* (Vic), s 5(1).

[15] *Property Law Act 1969* (WA), s 101.

[16] *Property Law Act 1974* (Qld), s 209(1).

[17] *Perpetuities and Accumulations Act 1992* (Tas), s 6(1).

[18] *Law of Property Act* (NT), s 187(1), (2).

[19] [1894] 2 Ch 310; affd [1894] 3 Ch 381.

[20] *Perpetuities and Accumulations Act 1985* (ACT), s 9; *Perpetuities Act 1984* (NSW), s 8; *Law of Property Act* (NT), s 190; *Property Law Act 1974* (Qld), s 210; *Perpetuities and Accumulations Act 1992* (Tas), s 9; *Perpetuities and Accumulations Act 1968* (Vic), s 6; *Property Law Act 1969* (WA), s 103.

disposition of property to apply to the court for a declaration as to the validity, in respect of the rule against perpetuities, of a disposition of that property.[21]

The Application of the Rule to Options and Pre-emptive Rights

The statutes have also affected the application of the rule to options. The position at common law was eccentric. Options are usually granted by contract. The two most common kinds of option are those to purchase property and those to renew leases. It was settled by the case of *London & South Western Railway Co v Gomm*[22] that a covenant to sell certain land at any time it should be required for railway purposes created an equitable interest in that land and hence was subject to the rule against perpetuities. It was held not to be "a bare or mere personal contract" and to be enforceable by specific performance against a purchaser from the original covenantor. The interest was contingent upon the optionee's election to exercise the option, and that might occur beyond the perpetuity period. Jessel MR, giving the principal judgment, said that "so 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".[23] But an option to renew a lease was excepted from the rule, it has been suggested on the ground that it was "annexed to the land" and hence created an interest in the land which reduced the interest granted by the lease.[24]

Where specific performance was denied because the option was too remote, damages could be recovered from the original grantor for breach of contract.[25] The contract was said not to be void on the ground that it infringed the rule, but the limitation it created, being specifically enforceable, created an interest which might vest beyond the perpetuity period. In *Hutton v Watling*,[26] however, it was held that an option agreement unlimited in time was specifically enforceable against the original grantor, notwithstanding the rule against perpetuities, because

> "the jurisdiction to grant specific performance of a contract for the sale of land [was] founded not on the equitable interest in the land which the contract is regarded as conferring upon the purchaser, but on the simple

[21] *Property Law Act 1974* (Qld), s 211; *Perpetuities and Accumulations Act 1968* (Vic), s 7; *Property Law Act 1969* (WA), s 104.

[22] (1881) 20 Ch D 562 at 579. The judgment by Gibbs J in *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57 at 75-76, though not in the context of the rule against perpetuities, confirms for Australia the analysis of the Court of Appeal in *Gomm's Case* leading to the conclusion that a contractual option to purchase creates an equitable interest in the land to which it relates. See also *Barba v Gas & Fuel Corporation* (1976) 136 CLR 120 at 137.

[23] (1882) 20 Ch D at 581.

[24] *Muller v Trafford* [1901] 1 Ch 54 at 61; *Weg Motors Ltd v Hales* [1960] Ch 176. In *Woodall v Clifton* [1905] 2 Ch 257 at 268, Romer LJ said that he had always understood that the exception of covenants to renew a lease from the rule against perpetuities could not be justified in principle, but only by a long series of decisions.

[25] *Worthing Corporation v Heather* [1906] 2 Ch 532; *McMahon v Swan* [1924] VLR 397 at 404-405.

[26] [1948] Ch 26 at 35-36.

ground that damages will not afford an adequate remedy; in other words, specific performance is merely an equitable mode of enforcing a personal obligation with which the rule against perpetuities has nothing to do".

The judge referred to *South Eastern Railway Co v Associated Portland Cement Manufacturers (1900) Ltd*[27] as providing clear authority

> "to the effect that an option to purchase land without limit as regards time is specifically enforceable as a matter of personal contract against the original grantor of the option, and that the rule against perpetuities has no relevance to such a case, as distinct from a case in which such an option is sought to be enforced against some successor in title of the original grantor, not by virtue of any contractual obligation on the part of the successor in title, but by virtue of the equitable interest in the land conferred on the grantee by the option agreement".[28]

The conclusion of *Hutton v Watling* that the rule against perpetuities provided no bar in proceedings upon an unlimited option between the original parties was accepted in the High Court case of *Trustees Executors & Agency Co Ltd v Peters*.[29] The *South Eastern Railway Co Case*, upon which the decision in *Hutton v Watling* so much depended, has been much criticised[30] but never overruled. In a note on *Hutton v Watling* in the *Law Quarterly Review*,[31] Sir Robert Megarry said that its effect

> "appears to be that any person whose claim to enforce an option depends upon the option creating an interest in property will fail if the option is too remote, whereas he who can enforce an option in its aspect of a mere contract may do so either at law or in equity, unhampered by questions of perpetuity; in the latter case the fact that the option also operates to create interests in property which are subject to the rule no more destroys remedies in equity than it destroys remedies at law".

Hutton v Watling has been applied by single judges in Australia.[32] The Supreme Court of Canada, however, has refused to accept the incongruity of a proprietary right being void under the rule yet the contract which created it being enforceable not only at law but also by specific performance in equity on the ground that damages provided an inadequate remedy.[33] It was said that in all cases it was a question of construction whether a contract was intended to create a limitation of property only or a personal obligation only or both. The judgment suggested that it would only be in an exceptional case that a contract would be held to create only a personal obligation.[34]

[27] [1910] 1 Ch 12 esp at 28, 29, 32, 33 in which *Gomm's Case* was distinguished.

[28] [1948] Ch at 36.

[29] (1960) 102 CLR 537 at 546, per Kitto J.

[30] See, eg, notes in (1911) 27 LQR 150; (1916) 32 LQR 70. *Hutton v Watling* itself was trenchantly criticised by E Walford, "Options of Purchase and Perpetuities" (1948) 12 *Conveyancer & Property Lawyer* (NS) 258.

[31] (1948) 64 LQR 183 at 185.

[32] *Consolidated Development Pty Ltd v Holt* (1986) 6 NSWLR 607 (Young J) and *Forster v Swain* (1992) 57 SASR 309 (Mullighan J).

[33] *Harris v Minister of National Revenue* [1966] SCR 489 at 498-499, followed *Politzer v Metropolitan Homes Ltd* [1976] 1 SCR 363 at 373-375.

[34] [1966] SCR at 499. At 501 it was said that the crucial passage of the judgment in *Hutton v Watling* [1948] Ch at 35-36 was not a correct statement of the law.

The cases I have mentioned concerned conventional options, that is to say rights to acquire an interest in the future at the election of the grantee. It is not clear whether contractual pre-emptive rights are a species of option or whether they should be classified separately. Such a right entitles the grantee to be offered the property only if the owner decides to dispose of it or some other event occurs. It is contended by Megarry & Wade[35] that this is merely an additional condition which ought not to prevent the holder's acquiring an immediate interest in the land since he has secured a specifically enforceable though contingent right to obtain it under a contract of sale. The case law is unclear. Problems have arisen from differences of opinion in the judgments in the English case of *Pritchard v Briggs*.[36] That case concerned a covenant by the vendors of land that so long as the purchaser should live and the vendors should also be alive the vendors would not sell any part of certain lands adjoining the land sold by the contract without giving the purchaser the option of purchasing the adjoining lands for a stipulated price. At first instance it was held that there was no essential difference, from the point of view of creating an interest in land, between an option and a right of pre-emption. The fact that the condition for the exercise of a right of pre-emption was controllable by the owner of the land was said to make no difference.[37] It was that factor that had been critical in the decision to the contrary of Oliver J in *Imperial Chemical Industries Ltd v Sussman*.[38] A second factor was identified there that there is no contract for sale until an offer is made by the person with the right of pre-emption and all that is capable of being enforced is the right to make the offer. The majority in *Pritchard v Briggs* considered that the right of pre-emption created a mere spes or expectation which the grantor might either frustrate by choosing not to fulfil the necessary conditions or might convert into an option and thus into an equitable interest by fulfilling the conditions.[39] Thus, a right of pre-emption could be an interest in land but only from the time when it became exercisable. R W Goff LJ, adopting a passage from the judgment of K W Street J in a decision of the Full Court of the Supreme Court of New South Wales,[40] concluded that a right of pre-emption must from the start and throughout be either an interest in land capable of binding a successor in title or a mere personal contract, not so capable.[41] English academic opinion has tended to reject both views in *Pritchard v Briggs* in favour of the Megarry & Wade approach.[42] But the leading Australian text has supported Goff LJ.[43] Australian case law, though not consistent, has taken a middle line. The

[35] (7th ed 2000) at 683.
[36] [1980] Ch 338.
[37] [1980] Ch at 361-362, per Walton J.
[38] Unreported; 28 May 1961 (Chancery Division), a substantial part of the judgment in which is reproduced in *Pritchard v Briggs* [1980] Ch at 363.
[39] [1980] Ch at 418, per Templeman LJ, 423, per Stephenson LJ.
[40] *Mackay v Wilson* (1947) 47 SR (NSW) 315 at 325.
[41] [1980] Ch at 389, 396.
[42] See, eg, Wade (1980) 96 LQR 488; Martin (1980) 44 *Conveyancer & Property Lawyer* (NS) 433; cf Jones & Goodhart, *Specific Performance* (2nd ed 1996), at 204-205. Support for the Megarry & Wade approach is also found, obiter, in *Dear v Reeves* [2002] Ch 1 at 8[32-33], 10[43] (CA).
[43] Butt op cit n 1, at 194 [1279]. See also Sappideen & Butt op cit n 1, at 138.

main cases have been decisions of single judges of the Supreme Court of New South Wales. In *Walker Corporation Pty Ltd v W R Pateman Pty Ltd*,[44] the minority view of Goff LJ in *Pritchard v Briggs* was preferred. In *Sterns Trading Pty Ltd v Shteinman,*[45] *Transfield Properties (Kent Street) Pty Ltd v Amos Aked Swift Pty Ltd*,[46] *Beneficial Finance Corporation Ltd v Multiplex Constructions Pty Ltd*[47] and *Sahade v BP Australia Pty Ltd*,[48] the view of the majority in that case was adopted. In none of those cases does it appear to have been contended that the Megarry & Wade approach should be adopted that a contractual pre-emptive right is but a species of option, conferring a contingent interest in land; but in the *Beneficial Finance Case*,[49] Young J said that if it had not been for the Court of Appeal's decision in *Pritchard v Briggs* and the authorities which bound him, he would have concurred with Walton J in *Pritchard v Briggs* who adopted that view. There is no decision of the High Court or an intermediate court of appeal in Australia directly upon the point.[50] The position remains unclear in New Zealand. The weight of authority is in favour of the majority view in *Pritchard v Briggs,* but that is not to say that the High Court may not prefer that of Walton J and Megarry & Wade or, at the other extreme, that expressed by Pettit in *Halsbury's Laws of England*[51] that an option destructible at will by the grantor or holder for the time being should be treated no differently from an ordinary offer which can be withdrawn at any time before acceptance.

All the State and Territory perpetuities statutes deal with options but some only with options contained in leases. In all jurisdictions the statutes confirm the common law position that options to renew leases and options to acquire reversions are not subject to the rule.[52] There are some differences of detail in the Queensland and Western Australian Acts.

Some Acts apply also to any options to acquire an interest in land. Under the Western Australian Act the rule against perpetuities does not apply to such an option but an option which is or may be exercisable more than 21 years from its grant becomes void on the expiry of 21 years from the date of its grant, as between the original parties and all persons claiming through them.[53]

[44] (1990) 20 NSWLR 624 (Brownie J).
[45] [1988] NSW Conv R para 55-414 (Kearney J).
[46] (1994) 36 NSWLR 321 (Santow J).
[47] (1995) 36 NSWLR 510 (Young J).
[48] (2004) 12 BPR 22, 149 at [41]-[43]; [2005] NSW Conv R para 56-113 (Campbell J).
[49] (1995) 36 NSWLR at 526.
[50] Observations in *Pata Nominees Pty Ltd v Durnsford Pty Ltd* [1988] WAR 365 at 372 tend to support the majority view in *Pritchard v Briggs* but emphasise the importance of the precise terms of an arrangement.
[51] 4th ed (Reissue 1994), vol 35, "The Rule Against Perpetuities", para 1037, fn 8, referring to the judgment of Goff LJ [1980] Ch at 391.
[52] *Perpetuities and Accumulations Act 1985* (ACT), s 10(1); *Perpetuities Act 1984* (NSW), s 15(a), (b); *Law of Property Act* (NT), s 197; *Property Law Act 1974* (Qld), s 218(1); *Perpetuities and Accumulations Act 1992* (Tas), s 15(1); *Perpetuities and Accumulations Act 1968* (Vic), s 15(1); *Property Law Act 1969* (WA), s 110 (which does not apply to options to renew).
[53] *Property Law Act 1969* (WA), s 110(1)(B), (2).

The New South Wales, Queensland, Victorian and Tasmanian Acts deal with both options and pre-emptive rights. The draftsmen of the Queensland, Victorian and Tasmanian Acts seem to have assumed that the common law rule against perpetuities was capable of applying to both since it does not appear to have been stated when the statutes were enacted that they broke new ground by imposing a perpetuity period on the exercise of rights to which the common law rule did not apply. Whether or not that assumption was correct, the statutes must be applied according to their terms, not by reference to the common law rule.

The Tasmanian Act provides that an option to acquire an interest in land (other than an option to acquire the reversionary interest under a lease) and a right of pre-emption in respect of land is void if it is or may be exercisable, in the case of an instrument providing for the price to be regulated by reference to the market price at the date of the exercise of the option or right, at a date more than 21 years after its grant and, in the case of any other instrument, more than six years after its grant.[54] That Act also provides that an option to acquire an interest in personal property that is capable of being enforced by specific performance, and a right of pre-emption in respect of any such property, is void if the option or right is or may be exercisable at a date more than 21 years after its grant.[55]

The New South Wales Act states simply that the rule against perpetuities shall not apply to any right of pre-emption given for valuable consideration or by will in respect of any interest in real or personal property or to any other option given for valuable consideration or by will to acquire an interest in such property.[56]

The Queensland and Victorian Acts provide that an option to acquire an interest in land or a right of pre-emption in respect of land which is or may be exercisable at a date more than 21 years after its grant shall at the expiration of 21 years from the date of its grant be void and not exercisable by any person and no remedy shall lie in contract or otherwise for giving effect to it or making restitution for its lack of effect.[57] The Queensland Act defines "land" to include "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".[58] The Victorian Act depends upon the definition of "land" in the *Interpretation of Legislation Act* which includes "buildings and other structures permanently affixed to land, land covered with water, and any estate, interest, easement, servitude, privilege or right in or over land".[59] Both Acts also declare, for removing doubts, that "the rule of law relating to perpetuities" does not apply and shall be deemed never to have applied to certain things which include "any grant, exception or reservation of and right of entry on, or user of, the surface of land or of any easements, rights or privileges over or under land" for the purpose of "winning, working, inspecting, measuring, converting,

[54] *Perpetuities and Accumulations Act 1992* (Tas), s 15(2).
[55] *Perpetuities and Accumulations Act 1992* (Tas), s 15(4).
[56] *Perpetuities Act 1984* (NSW), 15(c), (d) (definitions s 3(1)).
[57] *Property Law* Act *1974* (Qld), s 218(2); *Perpetuities and Accumulations Act 1968* (Vic), s 15(2).
[58] *Property Law Act* 1974 (Qld), s 4.
[59] *Interpretation of Legislation Act 1986* (Vic), s 38.

manufacturing, carrying away and disposing of mines and minerals".[60] It has been suggested that these provisions do not affect s 218(2) of the Queensland Act or s 15(2) of the Victorian Act since they exclude only the rule of law relating to perpetuities, that is the common law rule, and not statutory provisions regulating perpetuities.[61] Moreover they are drawn so as to apply only to the creation of primary rights.

APPLICATION OF PERPETUITIES STATUTES TO EXPLORATION AND PRODUCTION JOINT VENTURE AGREEMENTS

This diverse set of provisions gives rise to problems concerning mining and petroleum exploration and production joint venture agreements and other natural resources contracts. It is easy to agree with Morris & Leach that to derive from a rule designed to prevent excessively long family settlements a general concept applicable to commercial transactions was a step of doubtful wisdom.[62] But the step was taken at common law and many of the statutes have not retreated from it.

Governing Law

The first question concerns the applicability of particular statutes. Joint venture agreements and other natural resources contracts usually contain governing law terms.[63] There is no problem about the application of the perpetuities statute of a particular State or Territory where the agreement is confined to activities within a single political area and the law of that polity is stipulated as the governing law. But problems may occur if the governing law is not that of the polity within whose area relevant activities are conducted or property is located or if they are conducted, or property is located, within more than one political area. The common law rule against perpetuities is a rule of property, not of contract, relating to the disposition of interests in property. The validity of the disposition of interests in immovable property is governed by the law of the polity in which the immovables are situated (the lex situs).[64] Chattels are regarded as being situated in the area of the polity where they are at a relevant time.[65] The new statutory provisions will apply to their subject matter, however classified for the purposes of

[60] *Property Law Act 1974* (Qld), s 217(1)(d)(i); *Perpetuities and Accumulations Act 1968* (Vic), s 13(1)(d)(i).

[61] P J Allen and R I Cottee, "The Effect of the Rule Against Perpetuities on Pre-emptive Rights in Joint Ventures" (Allen & Cottee) (1982) 4 AMPLJ 190 at 196.

[62] Morris & Leach op cit n 1, at 224.

[63] For example, AMPLA Exposure Draft Model Exploration Joint Venture Agreement (Minerals), cl 22.6(a).

[64] *Freke v Lord Carbery* (1873) LR 16 Eq 461. See Dicey & Morris, *The Conflict of Laws* (13th ed 2000) (Dicey & Morris), at 935, para 22-052; 958 paras 23R-058, 23-059, 23-070; 1039 para 27-052.

[65] Dicey & Morris ibid at 935, para 22-053.

private international law, within the territorial jurisdiction of the respective legislatures. A governing law clause cannot avoid their so applying.[66]

Pre-emptive Rights

The Queensland, Victorian and Tasmanian Acts apply a specified perpetuity period to certain rights of pre-emption and render them void in so far as they are capable of being exercised beyond that period. The provisions apply to contractual rights between the original contracting parties as well as to those who acquire them by assignment or succession. If the common law rule does not apply to rights of pre-emption or to contractual rights between original parties these provisions extend the perpetuity concept rather than modify it.

Rights of pre-emption are usually given under joint venture agreements to the other participants when a joint venturer wishes to dispose of its interest. Pre-emptive rights clauses differ in terms but they do have what one commentator has called common structural and content characteristics.[67]

The Queensland and Victorian provisions invalidate only options to acquire an interest in land or rights of pre-emption in respect of land which may be exercised beyond the statutory perpetuity period of 21 years. The pre-emptive rights provisions of joint venture agreements – which are elements of assignment provisions – invariably relate to the whole or a proportionate part of a participant's interest in the venture. Such interests are both proprietary and contractual. The proprietary interests are usually an interest as a tenant in common in all the assets committed to the joint venture. Some of those assets may be choses in action. But there may also be rights comprising mutual covenants between the venturers relating to the conduct of the venture. The assets committed to the venture will usually include interests in land in the strict sense, interests in exploration or other tenements which perhaps are not classified as rights or interests in land, removable improvements, plant and equipment and choses in action. A question arises, if the validity of a pre-emptive right in respect of land is regulated by statute, of whether the validity of a composite right is affected in respect of assets other than land. Since the right is a composite right, but its validity is affected if at all only in

[66] *Kay's Leasing Corporation Pty Ltd v Fletcher* (1964) 116 CLR 124 at 142-144; *Douglas Financial Consultants Pty Ltd v Price* [1992] 1 Qd R 243 esp at 248-254.

[67] Clauses 11.3 and 11.4 of the AMPLA draft model Exploration Joint Venture Agreement (Minerals) is a typical provision. The legal incidents of pre-emptive rights provisions in joint venture agreements were examined in detail in AMPLA Conference papers delivered by W F Manning, "Assignment Clauses in Mining and Petroleum Joint Ventures" [1986] AMPLA Yearbook 119, H K McCann, "Pre-emptive Rights in Resource Joint Venture Agreements" [1990] AMPLA Yearbook 445, Erin Feros, "Joint Venture Issues" [1998] AMPLA Yearbook 384 at 384-397, and John Kelly, "Rights to Acquire" [2006] *AMPLA Yearbook* 59. A schedule to Mr McCann's paper at 467-470 sets out an elaborate disposal clause which contains pre-emptive rights provisions. See also the draft clause appended to a commentary on McCann's paper by B C Hung [1990] AMPLA Yearbook 477 at 486-487, and a paper by Alan Murray, "Pre-emptive Rights: Updating Your Precedent" [2006] *AMPLA Yearbook* 119.

relation to land, as defined, the answer appears to be that it would be implied that if it were void in respect of land it would be unenforceable in respect of the other joint venture to which it applied assets or, if there is a difference, that the term would be frustrated so far as it was not rendered void.[68] It is unlikely that separate elements of the composite right would be severable.

In New South Wales and South Australia pre-emptive rights do not raise perpetuity problems. In Western Australia they do not raise perpetuity problems unless, contrary to accepted wisdom, they are a species of option. If a pre-emptive right is an option, it is capable of being exercised only within 21 years of its date of creation. In the Australian Capital Territory and the Northern Territory pre-emptive rights do not raise perpetuity problems unless they are a species of option and then only if the rule against perpetuities applies to options to purchase. If so, they are capable of being exercised only within 80 years of their date of creation.

Sole Risk and Non-consent Provisions

The possible application of the common law rule and the statutes to sole risk and non-consent provisions also has to be considered.[69] These provisions are designed to allow some participants to undertake certain activities with which other participants do not wish to be involved. They are found more often in petroleum joint venture and joint operating agreements than those for other minerals. Activities within the scope of the agreement undertaken by a minority which are not supported by the majority of the management or operating committee of the venture are commonly known as sole risk activities. Those undertaken by a majority of the operating committee with which the minority do not wish to be involved are commonly known as non-consent activities. In both cases the joint venture or joint operating agreement must allow the activity to proceed without unanimous support.[70] The difference between the two types of provision has been said to be only that with non-consent that the management or operating committee has decided to do something and with sole risk it has decided not to do it. In each case the dissenters from the decision are permitted, in general terms, to ignore it and do what they wanted.[71]

[68] See, further, Allen & Cottee op cit n 61, at 196-197, where other possibilities are considered.

[69] The forms these provisions may take were examined in AMPLA papers by R C Nicholls, "Some Practical Problems of Joint Venture Agreements – Independent Operations" (1981) 3 AMPLJ 41, G L J Ryan, "Sole Risk and Non-Consent for Oil and Gas Exploration" [1983] AMPLA Yearbook 272, J H Waite, "Sole Risk in Mining and Petroleum Ventures – The Australian Position" [1986] AMPLA Yearbook 185, the commentary to that paper by K R Saville [1986] AMPLA Yearbook 224, and Barry Irwin and Ewan Vickery, "A Discussion of Selected Aspects of Clawbacks in Australian Mining Joint Ventures" [2006] *AMPLA Yearbook* 310. See also Taylor & Winsor, *The Joint Operating Agreement* (1989), Ch 3 "Sole Risk and Non-Consent" (Taylor & Winsor).

[70] The AMPLA Exposure Draft Exploration Joint Venture Agreement (Minerals) contains neither sole risk nor non-consent terms. Examples of sole risk and non-consent clauses that were used in North Sea petroleum joint operating agreements are found in Taylor & Winsor ibid, at 122-125.

[71] Taylor & Winsor ibid, at 34.

It is unnecessary for the purposes of this paper to examine the details of conventional sole risk and non-consent terms. For perpetuity purposes it is the consequences of the exercise of sole risk and non-consent rights that are significant. In his comprehensive paper delivered at the 1986 AMPLA Conference Mr Waite identified eight broad categories of what he called "the most common types of penalties"[72] that have been devised to prevent non-sole risk and non-consent parties from enjoying the fruits of the efforts and expenditure of parties who have participated in activities at their sole cost and risk. They are acreage penalties; relinquishment of participating interest in the joint venture; dilution of participating interest in the joint venture; conversion of participating interest to a non-participating financial interest; mandatory sale of participating interest in the joint venture to other joint venturers; a carried interest in lieu of a working interest; production penalties; and cash penalties. It is not uncommon for agreements to permit non-participating parties to buy their way back if the sole risk or non-consent activity is successful.[73]

It is only with the transfer of property interests that the rule against perpetuities, common law or statutory, is concerned in connection with these forms of "penalty". Contracts to pay money are not subject to the rule.[74] Where interests are to be transferred to a sole risk party or by a non-consent party, the transfer of, or obligation to transfer, the interest would not be subject to the rule if the sole risk or non-consent term was a contractual provision for the adjustment of interests to take account of disproportionate expenditure for which the agreement provided which was enforceable between the original contracting parties and those who became bound by adhesion or novation. *Hutton v Watling*[75] supports this approach. Moreover the adoption of the wait and see principle[76] has reduced the perils of invalidity of property transfer provisions in sole risk and non-consent terms since it is possible for the perpetuity period to be 80 years in all Australian jurisdictions that have retained the rule.

Production Royalties

The right to receive a royalty on production which may commence at an indefinite time is also unlikely to offend the rule. It was held that the rule had no application to such a right in an important decision of the House of Lords which is reported only in an appendix to *Challis's Law of Real Property*.[77] The right there was held to be purely contractual. Much depends upon the terms in which the

[72] The term penalty is used in a non-technical sense.

[73] See Ryan, "Sole Risk and Non-Consent for Oil and Gas Exploration" [1983] AMPLA Yearbook, at 277-279.

[74] *Walsh v Secretary of State for India* (1863) 10 HLC 367.

[75] [1948] Ch at 35-36; see also *Trustees Executors & Agency Co Ltd v Peters* (1960) 102 CLR at 546. But see nn 33 and 34 above.

[76] See the statutes referred to in n 20 above.

[77] *Witham v Vane* (1883), *Challis's Law of Real Property* (3rd ed 1911), Appendix V, 440 at 446, 451-452, per the Earl of Selborne LC (with whom Lords Blackburn, Bramwell and Fitzgerald agreed). See also *Ellison v Vukicevic* (1986) 7 NSWLR 104.

right is created. A paper delivered by Mr Ryan at the 1985 AMPLA Conference[78] contains a close analysis of various methods that have been employed to create rights in petroleum royalty agreements, some conferring purely contractual rights and others, proprietary interests of various kinds. If a royalty provision were to confer proprietary interests, the applicability of the rule against perpetuities would depend upon application of *Hutton v Watling*. To avoid the risk that the rule would apply privity of contract should be ensured.

AVOIDANCE PROVISIONS

The AMPLA Exposure Draft Exploration Joint Venture Agreement (Minerals) seeks to avoid adverse effects of the rule against perpetuities on interests created by the Agreement by providing that if any interest of any joint venturer in any joint venture property violates the rule against perpetuities, that interest terminates 80 years from the commencement date.[79] The term refers only to the rule against perpetuities. Since some of the statutory rules are sui generis it would be preferable to insert words such as "at common law (if applicable) or under any statute imposing perpetuity periods" after "rule against perpetuities". It would also be preferable to insert the words "the vesting of" before "any interest" and to substitute "would be void" for "violates". Another criticism of the draft term is that it appears to be directed particularly at pre-emptive rights. A shorter period than 80 years is applicable in three States only to such rights. Otherwise a perpetuity period of 80 years may be designated.

CONCLUSION

The common law rule against perpetuities and the statutory modifications and extensions of the rule have little impact on conventional joint venture and joint operating arrangements. Between original contracting parties, and their successors by adhesion or novation, agreements under which an interest may vest beyond a perpetuity period are probably specifically enforceable. The validity of such agreements between other parties will depend upon whether the interests actually vest within the appropriate period not upon whether they must vest within it. Pre-emptive rights occupy a special position in Queensland, Victoria and Tasmania where the common law has been altered by statute to subject even original contracting parties to a perpetuity period shorter than the permissible period for the occurrence of events that vest other interests.

[78] G L J Ryan, "Petroleum Royalties" [1985] AMPLA Yearbook 328. See esp at 338-357.

[79] Clause 4.7. A note to the clause states that the period of 80 years is applicable for Western Australia, New South Wales, the Northern Territory and the Australian Capital Territory but that for Victoria and Queensland the period should be 21 years and for Tasmania, six years.

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