GOVERNMENTAL POWERS OVER PETROLEUM RECOVERY RATES – OFFSHORE WESTERN AUSTRALIA

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Introduction

Glut, in the sense of an overstocked market with ongoing supply exceeding demand, is not a situation that has yet faced the petroleum industry in Australia.

The industry may now be facing such a prospect, albeit perhaps in the short term, in the domestic markets for natural gas in Western Australia. The State possesses, or administers, large reserves of natural gas which are now in, or committed to, production. The State's public power and electricity utility has, through contracts made with the major prospective producers, accepted the bulk of the present market risk. The State Energy Commission of Western Australia has concluded long-term gas-purchase contracts with the North West Shelf gas-producers structured on a "take or pay" basis. That is to say, subject possibly to considerations of *force majeure*, the Commission will be required to pay for the minimum contracted quantities regardless of whether it takes delivery or not, which presumably means irrespective of whether it can re-sell the gas or not[1]. Much has been said and written of late concerning this matter and its likely impact upon the State's finances. To the extent that such a problem may in fact arise it provides a measure of focus to the principal issues addressed by this paper, namely, the controls exercisable by government under the legislation covering the recovery of petroleum from areas offshore Western Australia, the interface between the State and Federal powers available to exercise those controls, and the limits of those powers.

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1. In a Discussion Paper (No. 4/82) entitled "North West Shelf Development: Implications and Options" issued by Murdoch University it was stated, in connection with the State Electricity Commission's take or pay gas contract: "Expectations of sales have not eventuated and so far no large contracts for the gas have been signed. An examination of expected usage of this gas leads to a 'worse scenario' where 60% to 70% of it remains unsold and a 'best scenario' where around 25% of it remains unsold in 1986. Most likely scenario is considered to be around 28% unsold or the equivalent of about 40 p.j. of energy."

For a variety of reasons governments in other places, notably the American States and the United Kingdom, have seen fit to legislate to confer upon regulatory bodies powers to control petroleum recovery rates. As this paper will attempt to show, the reasons for these powers include, *inter alia*, maintenance of "good oilfield practices" and the national interest. In the latter category they are usually express powers.

The Propositions

The following propositions summarise the views expressed in this paper: —

- Discretionary powers enabling the exercise of controls over petroleum recovery rates (upwards or downwards) in licence areas offshore Western Australia, conferred by the *Petroleum (Submerged Lands) Act 1967-81* (*Cth*) ("the Commonwealth Act"), are vested in a delegate, namely, a minister of the Government of the State of Western Australia as the "Designated Authority", to the exclusion of the Commonwealth Government.
- There exists no apparent ministerial accountability, in a parliamentary sense, for the exercise of those powers.
- The economic interests of the *Commonwealth* and the economic interests of the State may not always coincide.
- The discretion vested in the Designated Authority under the Commonwealth Act to direct a licensee to increase or reduce the rate at which petroleum is being recovered from a licence area, whilst cast in the widest terms, would be read down by a court of review, in appropriate circumstances, as authorising *only* decisions based upon considerations of good oilfield practice. On a proper construction of the Commonwealth Act, good oilfield practice is an expression limited in its application to methods of operations and the prevention of physical waste or damage and does not extend to consideration of the national interest.
- Limiting production to market demand (say) by application of pro-rationing rules would involve national interest considerations and not merely good oilfield practice.
- A decision by the Designated Authority in exercise of the discretionary power vested in him would, in appropriate circumstances, be open to review by the Federal Court exercising jurisdiction conferred upon it by the *Administrative Decisions (Judicial Review) Act 1977* (*Cth*).

The Legislation

At the Premiers' Conference on 29 June 1979, the Commonwealth and the States completed an agreement of great importance for the settlement of contentious and complex offshore constitutional issues. The agreement marked the solution of a fundamental problem that has bedevilled Commonwealth-State relations, and represents a major achievement of the policy of co-operative federalism.[2]

This so-called "offshore constitutional settlement" led to the enactment of several packages of legislation by the Commonwealth and each State in 1980 and 1981. Those packages effected, for the limited purposes of this paper: —

- the amendment of the Commonwealth Act to provide, *inter alia*, for the limitation of its application to the areas of the continental shelf outside the boundaries of the territorial sea;
- the vesting of title to the seabed of the territorial sea in each adjacent state or territory;
- the repeal by the several States of their former submerged lands legislation and the re-enactment by each of them of new legislation limited to its adjacent territorial sea.

The new legislation took effect from 14 February 1983, thus settling in place, at least for the time being, a comprehensive framework of laws governing the exploration for and exploitation of the petroleum resources of the Australian continental shelf. The details of this legislation and the constitutional issues have been commented upon and explained by others.[3]

It needs to be said, however, that the offshore constitutional settlement represents probably but a further chapter in the saga of the struggle between the Commonwealth and the States for control of the resources of the continental shelf.[4] Notwithstanding that continuing struggle, the position at this time is tolerably clear.

The Commonwealth Act is exclusive and now governs all petroleum activities in those areas adjacent to the States and beyond the three-mile territorial sea.

Joint Authorities consisting of a Commonwealth minister and a State

2. Attorney-General's Department (Cth) "Offshore Constitutional Settlement: A milestone in co-operative federalism" (1980) 1
3. Crommelin "Offshore Mining & Petroleum· Constitutional Issues", (1981) 3 *Australian Mining & Petroleum Law Journal* 191
4. It is unlikely to be the final chapter in light of the Labor Party's firm promise, repeated since it won Government in March 1983, to legislate to vest sovereignty over all offshore territories beyond the low-water mark in the Federal Government, to the exclusion of the States.

minister have been established to administer the adjacent areas in respect of each State.

In the case of Western Australia the Joint Authority is called the "Commonwealth—Western Australia Offshore Petroleum Joint Authority" and its office is in Perth.[5]

At the time of enactment of the legislation to give effect to the Offshore Constitutional Settlement in 1980 and 1981, statements by State and Federal ministers sought to make it plain that:—

- the Joint Authority would have responsibility for "major matters" with the views of the Commonwealth Minister prevailing, whilst day-to-day administration would remain with the State Minister and his department; and
- there was to remain a role for the State Minister who, when acting solely in that capacity, would continue to be referred to as "the Designated Authority". That role was also said to be administrative in a day-to-day sense.

It was said that "the new arrangements will ensure that the national interest in offshore petroleum activities can be legally asserted, while retaining the valuable role that the States currently play"[6].

The reference to "the national interest" was given focus by the terms of the "side-agreement" negotiated by Western Australia with the Commonwealth as part of the constitutional package. The terms of that agreement are now enshrined in Schedule 4 to the Commonwealth Act and given the force of law under and for the purposes of that Act by Section 8D(9).

The terms of that Agreement bear upon the exercise by the Commonwealth Minister of the otherwise overriding powers he possesses to determine decisions required to be made within the functions of the Joint Authority. In essence the Commonwealth Minister is required to show cause in any case of difference with his partner, the State Minister, that the decision proposed by the State Minister would endanger or prejudice the national interest. Ultimately it is the Prime Minister who is to determine whether or not the national interest would be endangered or prejudiced by any proposed decision and it lies within his power to direct the Commonwealth Minister accordingly. Absent prejudice to the national interest, the views of the Western Australian State Minister may ultimately prevail in decisions of the Joint Authority[7].

5. See Part 1A of the Petroleum (Submerged Lands) Act 1967 (Cth).
6 From a statement issued by the then Attorney General, Senator the Hon Peter Durack Q.C , June 1980.
7. See Clause 2(5) of the Agreement.

The powers of the Joint Authority extend to and include the granting of permits, licences or pipeline licences and their renewal and cancellation, determination of rate of royalty where a secondary licence is involved, fixing of the conditions of licence and, in some circumstances, issue of directions as to recovery of petroleum.

Controls on Production

Insofar as Western Australia is concerned, where petroleum is being recovered in a licence-area adjacent to Western Australia and beyond the boundary of the territorial sea, a minister in the Government of Western Australia authorised to perform the functions of the Designated Authority under the Commonwealth Act may, "for reasons he thinks sufficient", direct the licensee to increase or reduce the rate at which petroleum is being recovered to such rate as he may specify.[8]

This power is discretionary and the discretion is cast in the widest terms — sometimes (erroneously, if a literal meaning is implied) referred to as an "unfettered" discretion.

It is proposed to examine this discretion within the context of the legislation with a view to establishing the restraints (if any) which the courts might apply in appropriate circumstances.

Section 58 of the Commonwealth Act addresses two separate and distinct situations and divides the powers. The first situation is where petroleum *is not* being recovered in a licence area and in that case it is the Joint Authority which is vested with the power to issue appropriate directions.[9]

The second situation is where petroleum *is* being recovered in a licence area and in that case it is the Designated Authority who is vested with the powers.[10]

Extent of the Controls — 1967 View

From the inception of the "common mining code" in 1967, as then enshrined in the *Petroleum (Submerged Lands) Act (Cth)*, the terms of Section 58 have caused the petroleum industry concern. In submissions to the Senate Select Committee set up, immediately after enactment of the Commonwealth Act in 1967, to enquire into and report upon the offshore petroleum resources of Australia, Dr G.M. Furnival, the then Managing Director of Western Australian Petroleum Pty Ltd said: —

> These sections (Sections 35 and 58) give the Designated Authority the widest possible powers to direct the permittee to do such things

8 Section 58(3) of the *Petroleum (Submerged Lands) Act* 1967 (Cth)
9. Id., Section 58(1)
10. Id., Section 58(3)

> as the Designated Authority "thinks necessary" or "for reasons that he thinks sufficient". . . . we accept that the Act may require provisions for emergency powers in time of war. Nevertheless the right arbitrarily to control rates of production and thus a company's income and the rate of return on its investment after the initial risks have been taken, by decisions that need not be technically and economically sound, is entirely contrary to principles of competitive free-market enterprise regardless of the confidence the industry may have in the Government.[11]

The breadth and scope of the particular discretions referred to by Dr *Furnival* were recognised by the Select Committee, as also was the fact that decisions in exercise thereof could be arrived at without public hearings or disclosure of reasons to the prejudice of vested rights. The Select Committee recommended, *inter alia*, the insertion in the legislation of objective criteria which the Designated Authority should observe and also that provision should be made for legal redress or appeal where there was arguable ground that there had been a failure to exercise the discretions properly.[12] Needless to say, neither of those recommendations has been adopted.

It is implicit in Dr Furnival's statement that he accepted that the exercise by the Designated Authority of his powers in this connection would not necessarily be constrained by or confined to considerations of "good oilfield practice". He said as much in his acknowledgement that such decisions would not need to be "technically and economically sound". As a leader of the industry at the time he presumably advanced the "industry view".

That also, it seems, was the view of the Federal Government at the time the legislation was first enacted. In his speech on the second reading of the *Petroleum (Submerged Lands) Bill* 1967 Mr Fairbairn (then Minister for National Development) said in reference to Clause 58(3) of the Bill: —

> In a case where petroleum is being recovered, the licensee may be directed to increase or reduce the rate of recovery to a certain specified level. This latter contingency of directing a reduction in the rate of recovery is looking some little distance into the future but in some areas of the world it is a very real problem. For instance, in the Gulf of Mexico, production from oilfields is restricted to specific percentages of the estimated potential production in order to regulate the total volume of petroleum produced and so avoid over-production.

11. Report from the Senate Select Committee on Offshore Petroleum Resources, December 1971 Volume 1 Page 231.
12. Id. at 232-233

> This is not a problem which we expect to have to face in the immediate future, but I am sure that every member of this House would agree that it would be a cause for considerable satisfaction if our discoveries of petroleum continue to the point where such action is necessary.[13]

Pro-Rationing Rules

What the Minister was then referring to were pro-rationing rules as developed in the United States at a fairly early stage of the development of its petroleum industry to avoid economic waste resulting from over-production. The Minister's explanation was not based, by way of contrast, upon the ideals of "good oilfield practice" in any technical sense, such as the M.E.R. concept discussed later in this paper.[14]

In the United States the pro-rationing rules, necessarily State laws, operate to limit production within a State to market demand, determined on a national basis by an interstate commission, by fixing quotas among the fields, pools and individual producers within that State. Because gas can be transported only by pipeline and gas prices in the United States tend to fluctuate from time to time and place to place, the allocation of gas-production is more complex than the allocation of oil-production. A principle of allocation of allowables is to give each lessee an equal opportunity to produce in accordance with allocation formulae.[15] These are general rules incorporating objective criteria which are then applied to each field, pool or well. They are not piecemeal or selective rules which can be applied in a discretionary manner to individual producers by the regulatory authority.

If in fact Section 58(3) was regarded on its enactment by the Government of the day and the industry as conferring a piecemeal, pro-rationing type of power, its exercise could not readily be regarded as a matter of "day-to-day administration". However, as the Designated Authority remains responsible under the new arrangements for that power, it would seem a valid deduction that it is no longer so perceived, at least by the Federal Government.

That it is not a pro-rationing power is supported by the fact that the Section 58(3) discretion is not one of the functions of the Designated Authority listed in Schedule 5 of the Commonwealth Act as a function which may require to be referred to the Joint Authority in terms of Section 8E. There is no apparent Commonwealth influence exercisable over the Designated Authority in deciding such matters. If the power was seen

13. Hansard, House of Representatives, 18 October 1967 Page 1951.
14. See 22-24 infra.
15. Neave "The Conservation of Oil & Gas: Comparative Study of Onshore Legislation in Australia and America"(1969) *Melbourne University Law Review* 218.

as conferring extensive powers to control production rates upwards or downwards, then to leave it with a State Minister would seem at variance with the main thrust of the Commonwealth's decision (*vide* the *Seas and Submerged Lands Act* 1973) to re-assert its ownership and control of the petroleum resources of these areas. Ownership of the petroleum within the seabed is now clearly vested in the Commonwealth to the exclusion of the States: its interests insofar as those resources are concerned may not always coincide with the interests of the adjacent State.

Conflict of Interest

The primary objective of the Commonwealth Government's energy policy, one would assume, remains "in the short term, to maintain a high level of self-sufficiency in liquid fuels and, in the longer term, to move towards a broader energy base".[16] If so, that statement carries clear undertones of resource-management.

One can contemplate a number of situations in which the Commonwealth may see matters differently to the States in matters of petroleum-production. It is, for instance, generally understood that the present oil levy, which applies to producing oilfields discovered prior to September 1975, has resulted in serious distortion of Australia's production levels, caused by a phenomenon known in the industry as the "black hole". The levy can result in a penalty on oil-producers who let oil flow at the maximum levels in that it discriminates against the larger producing fields. The several thresholds of production-levels built into the levy system operate as an encouragement to producers, in appropriate circumstances, to hold levels below the next highest threshold. To force an increase in the rate of production might be within the Commonwealth Government's perception of the national interest or even good oilfield practice in its technical sense, but might be at variance with the interests of the adjacent State. Then there is the matter of conservation and proper utilisation of the resource.

Conservation and the prevention of waste are considerations at the heart of the regulatory controls imposed upon the industry. The conceptions of conservation and prevention of waste extend, at least in other jurisdictions, to prohibitions on the use of petroleum in inferior, inefficient or unimportant processes. For example, it is apparently the position in some American States that the use of natural gas for the generation of electricity could be forbidden when other suitable fuels are available.[17] Such matters are however invariably addressed by specific legislation conferring express powers.

16 From a speech by the then Minister for Industrial Relations, The Hon Ian Viner, to the Second Australian Oil/Gas Conference in Perth, 26 November 1981.

17. Williams "Conservation of Oil & Gas" (1952) 65 *Harvard Law Review* 1155.

Within the scenario outlined in the introduction to this paper this conception of the use of regulatory powers on production must represent a further area of potential difference in view between the Commonwealth and Western Australia when one has regard to the alternative energy sources available, particularly coal, which are more appropriate for (say) electricity generation than natural gas.[18] In that respect, the national interest emay be seen to conflict with the individual interest of the State.

Exercise of Power of the Designated Authority

To restate the power conferred by Section 58(3):—

> The Designated Authority may, for reasons that he thinks sufficient, . . . direct the licensee . . . to increase or reduce the rate at which petroleum is being recovered to such rate as (he) specifies . . .

In what circumstances might the Designated Authority exercise that power? Are there implied legal limits outside of which he might be said to have acted beyond the scope of the power conferred? Must there be a necessary implication that the powers will be used for the purposes for which the Parliament intended them to be used and, if so, for what purposes did the Parliament intend them to be used?

The courts have made it clear that they will interpret such a ministerial power (the so called unfettered discretion) on the basis that Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act in question. The policy and objects of the Act are to be determined by construing the Act as a whole, such construction being a matter of law for the court.[19]

The Commonwealth Act does not provide express assistance; certainly no objective criteria or guidelines are supplied. Accordingly, it is useful to consider industry practices and legislative measures elsewhere and then return to the apparent scheme of this legislation by reference to its implied limits.

Two broad bases for the exercise of such powers emerge — on the one hand specific considerations having the object of applying good oilfield practices, and on the other hand considerations based on perceptions of the national interest.

"Good Oilfield Practice"

Essentially this is an industry term. It has much to do with methods of operations, avoidance of damage to the producing structure, protec-

18. Bureau of Mineral Resources data indicate that the energy content of Australia's proven recoverable resources of natural gas is less than 1/50th of the energy content of its proven recoverable resources of coal.

19. Padfield v. Minister of Agriculture [1968] AC 997 at page 1030C (per Lord Reid)

tion of the environment and the health and safety of those involved. It also has to do with conservation of the resource and the prevention of waste. The definition provided by the Commonwealth Act confines it to good and safe methods in the carrying on of operations.[20]

This is not an occasion to canvass in any depth the development elsewhere of legislative controls aimed at conserving the resource and preventing waste. It has been done most adequately by others.[21] As those works will show, the perceived need for conservation of the resource and the prevention of waste was central to early regulatory powers over production in the United States. In that country, waste came to be understood as comprehending both physical waste and economic waste — extending to waste incident to the production of petroleum in excess of transportation facilities or market demand.

Economic waste results from over-production. It was found that when production was allowed to continue unchecked in glut conditions (that is beyond reasonable market demand) prices became depressed, production-methods were compromised, wells which were expensive to operate were abandoned and recoverable petroleum lost and the resource diverted to uses the requirements of which could be better met by substitutes. Physical waste, on the other hand, centres upon inefficient use of reservoir energy, resulting in a lesser amount of the identified "petroleum in the ground" being recovered than might otherwise have been the case.[22]

Control of the rate of production has been found to be necessary to ensure maximum recovery of the petroleum in place. Natural reservoir energy (constituted by the presence of water and/or gas under pressure), which provides the drive necessary to force oil or gas to the surface, eventually declines. It may be maintained by the injection of water or gas into the reservoir by an operation known as "pressure maintenance". Ultimately secondary recovery-techniques may have to be applied.

Concern as to the need to maintain reservoir energy led to the development in the United States of the concept of M.E.R. or *maximum efficient rate*. The M.E.R. of a reservoir is the maximum rate at which it can be exploited without excessive decline or loss of reservoir energy — that is without reducing unduly the ultimate amount of oil and gas recoverable. The word "recoverable" is important and is used in a relative sense: it is not synonymous with "original oil in place". M.E.R. varies from reservoir to reservoir. It is not necessarily the *most* economic rate or the *most* efficient rate of recovery, which could be lower still. It is an optimum

20. Petroleum (Submerged Lands) Act 1967-81 (Cth) Section 5(1).
21. See Neave supra n.15 at 201 and the various publications there cited.
22. For a detailed explanation of the importance of reservoir energy in petroleum production see Neave Supra n.15 at 202.

rate of production. To operate in terms of the M.E.R. of a particular petroleum pool or well is to conform, it may be said, to "good oilfield practice" and hence, indirectly, to be a requirement of a licensee in or off-shore Western Australia.[23]

The National Interest

As mentioned earlier, it was central to the Federal Government's arguments during debate on the 1980 Bills that, whilst transferring powers and rights in relation to the territorial sea to the States, the Commonwealth retained effective control over all important matters affecting the national interest within the offshore adjacent areas. Senator Durack said in the Senate: –

> As far as the Joint Authorities on mining are concerned, the Commonwealth's ultimate powers and responsibilities are clearly defined in the legislation. The national interest is clearly protected by the provisions of this legislation. The arrangements that are entered into here are made in recognition of the important role the States must play in the administration of these areas.[24]

Direct references to the national interest are found in two places only in the Commonwealth Act. First, in Schedule 4, in the context of the special arrangements made with Western Australia previously alluded to, and secondly, and more importantly, in the new Section 103A which was introduced into the Commonwealth Act with the 1980 amendments.

Section 103A(1) provides: –

> Where the Joint Authority is satisfied that it is necessary to do so in the national interest, it shall, by instrument in writing served on the *permittee*, suspend, either for a specified period or indefinitely, all or any of the rights conferred by the permit.

Doubts exist as to the Commonwealth's intentions in enacting Section 103A. Some argue that it was inserted to protect the Great Barrier Reef. The section relates to an exploration permit, not a production licence, and whilst it speaks of suspending rights it is silent on the concomitant obligations. Of interest in the context of the issues currently being canvassed is a recognition that, if an exercise of the powers results in an acquisition of property, compensation may be payable pursuant to Section 51(xxxi) of the *Constitution*. If by exercise of a power vested in the Joint

23. Petroleum (Submerged Lands) Act 1967 (Cth) Section 97(1).
24. Hansard, Senate, 21 May 1980 Page 2621.

Authority, the suspension of rights conferred by a permit may result in an "acquisition of property" and an entitlement to compensation, so too might an exercise of the powers expressed in Section 58(3) to enforce a significant curtailment of production, perhaps leading to a down-grading of reserves as a consequence. That however is a matter to be considered on another occasion.

What is the "national interest"?

There is a line of English cases which deals with coal mines and the question of "national interest".[25] It was suggested by McKinnon J. in *Consett Iron Co. Ltd v. Clavering Trustees*[26] that "national interest" may be considered as something which is to be distinguished from the private interest of individuals and that the expression is akin to the economic doctrine of "the greatest good for the greatest number". The learned authors of *Halsbury* submit that the expression is synonymous with "public benefit". They quote from cited judgments: —

> It would not be in the national interest to risk considerable damage to surface works for the sake of getting a negligible quantity of minerals. . . . The fact that the danger may exist of minerals being left permanently unworked is relevant only insofar as it relates to the national interest which is itself a question for the court to decide according to the facts of the case.[27]

These references convey clearly enough the concept of "national interest". It would for instance, it is submitted, be within the national interest to retain petroleum reserves (in the sense of preventing recovery) for defence purposes. That was done in the United States during World War 1 to ensure the availability of supplies of oil for the Navy. Considerations of the national interest arise often in time of war or preparations for war. In those situations emergency powers are normally sought from the Parliament. The question whether a particular thing is in the national interest is "a question of the times and is a question of fact".[28]

Economic Considerations

Matters concerning the economics of the nation, including the market conditions prevailing for its petroleum resources, are, it is submitted, matters to do with the national interest. They are not matters which, on a general reading of the Commonwealth Act, one would expect to find in the hands of the delegate State Minister. He is not the agent of the Joint

25. See *Halsbury's Laws of England* (4th Edition) Volume 31 para. 289 Note 9.
26. [1935] 2 KB 42 (Court of Appeal).
27. Halsbury supra n.25.
28. In Re Application of Amalgamated Anthracite Colleries Limited [1927] 43 TLR 672 per Sankey L.J.

Authority nor is he an officer of the Commonwealth. The subject petroleum is the property of the Commonwealth; the *Seas and Submerged Lands Act* 1973 (Cth), as validated by the High Court, has clearly established that position.

To revert to the aspect of potential conflict between the Commonwealth and the State in terms of interests served by exercise of the recovery rate powers, the situation could arise when it might be apposite to ask whether it would be proper for the Designated Authority to issue a direction to a licensee for reasons associated solely with the financial interests of the State where the "national interest" may have dictated otherwise.

The "national interest" and the Petroleum (Submerged Lands) Act (Cth)

Whilst Section 103A is the only section in the Commonwealth Act which expressly requires the national interest to be considered before a discretionary power is exercised, it is implicit, from the terms of the "side Agreement" between the Commonwealth and Western Australia (Schedule 4 of the Commonwealth Act), that there may be occasions when other decisions within the *ambit* of the Joint Authority may fall for determination by reference to the national interest. The alternative view would necessarily be that matters of disagreement referred to in Clause 2(1) of that Agreement are confined to Section 103A. That does not seem a tenable proposition.

If the former premise, namely that other decisions of the Joint Authority may involve the national interest, is accepted for the reasons stated, then it follows that the powers left to be exercised by the Designated Authority are powers considered by Parliament not to involve considerations of the national interest. Following that line, Section 58(3) can have no national-interest connotation attached to it. As was noted earlier, the discretion there conferred is not one of the functions of the Designated Authority, listed in Schedule 5 of the Commonwealth Act, which may require to be referred to the Joint Authority in terms of Section 8E.

By sharp contrast with Section 58(3), Section 58(1) vests in the Joint Authority the power first to form a view that there is recoverable petroleum available within a licence area which is not being recovered and secondly to direct the licensee to initiate recovery operations. That, it is submitted, is a power consistent with the national interest. If petroleum is located it is to be recovered if the recovery is economical. If a licensee cannot or will not recover it, then it should be open to an authority, acting in the national interest, to direct its recovery.

In the circumstances of Section 58(1) the scheme of the Commonwealth Act works to permit the Commonwealth, through the overriding powers

vested in its minister in the Joint Authority, to exercise power over *its* resource. Insofar as Western Australia is concerned, there is further logic for this argument in that in terms of the "side agreement" the Commonwealth view would ultimately prevail, by a ruling of the Prime Minister that the recovery of that petroleum was a matter of the national interest. From a practical standpoint, however, it would be difficult to exclude considerations of good oilfield practice when considering the economies of the necessary recovery operations. (Compare the United Kingdom provisions discussed later in this paper.)[29]

To revert to the central argument: the fact that the Section 58(3) power was left vested in the Designated Authority and that the function was excluded from Schedule 5 lends considerable weight to the conclusion that a court would construe Parliament's intention, in leaving the Designated Authority in control of Section 58(3), as providing a day-to-day administrative power exercisable to avoid harmful methods of working and to enforce good methods of working, and not as granting a power to apply measures protective of the national interest such as prevention of economic waste of the resource through sub-economic utilisation as a consequence of a temporary glut in the market.

The Role of Specific Statutory Controls on Production

(a) Generally

The general range of controls imposed by the Commonwealth Act and the Directions issued thereunder upon a licensee follow a common enough pattern for legislation of this type, as in force in all of the Australian States and in foreign jurisdictions including the United States, Canada and the United Kingdom.

There are negative controls which prevent a licensee from drilling a well, abandoning a well or commencing development without the consent of the Minister concerned. There are positive controls which require a licensee to use methods and practices customarily used in good oilfield practice for preventing the escape or waste of petroleum, to maintain apparatus and appliances and wells in the licence area in good repair and condition, to execute operations in a proper and workmanlike manner, to notify the responsible Minister in the event of a certain occurrence and, above all, to comply with directions issued by the Designated Authority pursuant to Section 101 and, specifically, in the case of production, pursuant to Section 58(3).

The common thread which runs through all these controls is that they are directed at aspects of the operations themselves and are designed to avoid harmful methods of working. It is submitted that it is in this light

29. See 28-29 infra.

that one must consider the question of limits on the scope of the discretions given. There must be a necessary implication that the powers will be used for the purposes for which Parliament intended them to be used and any purported exercise for another purpose, however well intended, would, it is submitted, be *ultra vires* and ineffective.

The preamble to the Commonwealth Act provides that it is "an Act relating to the . . . exploitation of the petroleum resources . . . of the continental shelf" and the scheme of the Act is clearly one of regulating the finding and getting of the resource in a manner protective of the resource itself, the environment and the safety, health and welfare of the people involved. Powers to increase or reduce recovery rates for reasons associated with market demand or maximum recovery of total oil in place are, it is submitted, to be distinguished from powers resting on a premise to do with the necessity for observing good oilfield practices.

(b) The United Kingdom Experience

The United Kingdom found it necessary to tighten considerably its legislative controls to achieve the former ends. At first, with the discovery of oil in its North Sea areas, the United Kingdom government policies were directed to the encouragement of early production to a level to meet the nation's oil-needs in terms of self-sufficiency. Initially neither the legislation covering these activities nor the terms of the production-licences reserved any powers over production to the government. As the extent of the finds became apparent and attainment of the self-sufficiency goal a reality, concerns were expressed as to the lack of production-controls. Amongst substantial amendments made in 1975 to the United Kingdom offshore legislation there were specific provisions to achieve this end.[30]

Ostensibly the depletion control provisions were explained in terms of future conservation through reduction of recovery rates. In fact the Department of Energy in the United Kingdom has tended to take an independent view of the oil companies' proposals in terms of recovery rates and the production facilities to be provided. The Department has sought to influence, through these controls, what might be termed full recovery or maximum recovery of the resource in place and to discourage proposals calculated to "cream" the lowest recovery cost resource.[31]

Briefly the position in the United Kingdom is that a licensee before commencing production must submit and have approved a development programme which fixes the maximum and minimum quantities to be produced each year. Such development programmes are staged to recognise

30. Petroleum (Production) Regulations 1976, (Schedule 5) Clauses 15 and 16

31. For an academic thesis in support of the contention that government has an obligation to ensure maximum recovery of the petroleum in place even if that means enforcing optimum investment in production facilities, see Odell and Rosing *Optimal Development of the Northsea's Oilfields* (1976).

an initial, relatively short period of production, a second stage (requiring a further approval to be obtained before the expiry of the first stage) covering the plateau production period and a third stage (also requiring a separate approval) covering the remaining life of the field over its declining years.

The responsible minister in that country (the Secretary of State for Energy) may on any of those occasions when an approval is required *or at other times* call upon a licensee to submit a revised programme which he may approve or disapprove and, it the latter, either on the grounds that to implement it would in his opinion, be contrary to good oilfield practice or on the grounds that the proposals would in his opinion not be in the national interest. In any case where the national interest is invoked the Minister is required to specify the rate at which he considers, in the national interest, petroleum should be got from the area to which the programme relates and that is binding upon the licensee. The regulations provide specifically for arbitration of differences between the Minister and the licensee where good oilfield practice is invoked by the Minister as a ground for his disapproval, but in the case of the national interest arbitration is denied and the Minister's determination final.

(c) The South Australian Experience

The *Petroleum Act* 1940 (S.A.) (*Onshore*) specifically addresses the matter of over-production and includes provisions going to conservation and the prevention of waste. That State now has a definition of "wasteful operations" which includes considerations both of good oilfield practice and "production of petroleum in a quantity in excess of that which can be stored and sold in an orderly manner".

Provisions introduced into South Australia in 1981, which are somewhat similar to those in the United Kingdom, require that a licensee must submit a development-plan before commencing production and a programme of drilling, including a schedule specifying the estimated rates of recovery. The Minister has a discretion to approve a programme and schedule wholly or in part.[32]

No provisions similar to the South Australian experience appear in the Commonwealth Act. Accordingly it is submitted that the Commonwealth Act does not provide those powers.

Review of Decisions

A number of means have been developed for ensuring that the organs of the state act only according to the power conferred on them. Two which have obvious application are ministerial accountability and judicial review.

32. See Petroleum Act 1940-1981 (S.A) and in particular Section 35a and Section 36.

(a) Ministerial Accountability

Whilst it was claimed by the Federal Government, when introducing the 1980 legislation, that an alleged lack of adequate safeguards for ministerial responsibility inherent in the original Act had been overcome by a new Part 1A, this clearly cannot be said of the powers to control recovery rates; they remain solely vested in the Designated Authority. Possible constitutional validity issues aside;[33] there remains in respect of that power a valid criticism that one of the important means by which the rights and interests of persons affected by administrative decisions may be protected, namely by the relevant minister being called to account in Parliament, is unavailable. It is a parliamentary convention that a minister is accountable to the Parliament for all matters within his administrative responsibility. Attention may be drawn to adverse administrative decisions during question time and debates such as the adjournment and grievance debates. The relevant minister may even be the subject of a motion of no-confidence in respect of the decision. Whilst ministerial accountability is essentially a political concept and does not provide a systematic or independent means of reviewing administrative decisions, it is, nevertheless, potentially an important means of review. The decisions of the Designated Authority pursuant to the discretions vested in him, in terms of Section 58(3) of the Commonwealth Act, are not matters for which the Commonwealth Minister is accountable in the Federal Parliament nor matters for which the State Minister is accountable in the State Parliament.

(b) Judicial Review

Administrative decisions made pursuant to discretionary statutory powers may fall for judicial review on two main grounds, first jurisdictional error and secondly *ultra vires*.[34]

The doctrine of *ultra vires* in its most basic form is concerned with the question whether or not a decision-maker has exceeded an express power. A particular aspect of *ultra vires*, the so-called doctrine of "extended *ultra vires*", has been developed primarily for the purpose of controlling the abuse or wrongful exercise of powers, particularly wide discretionary powers. Under the doctrine of extended *ultra vires*, the exercise of a discretionary power may be reviewed in order to ensure that it has been exercised in accordance with certain implied legal limits and not in an arbitrary or prejudicial manner. A decision may be impugned by judicial review if the power was exercised for an improper purpose (a purpose

33. Richardson "The Executive Power of the Commonwealth" in Zines (ed.) *Commentaries on the Australian Constitution* (1977) 50.
Cf. Crommelin "Petroleum (Submerged Lands) Act: Nature and Security of Offshore Titles" (1979) 2 *Australian Mining and Petroleum LJ* 135 at 137

34. See generally Whitmore and Aronson *Review of Administrative Action* (1978).

other than one for which it was granted) or on the ground that it was reached in bad faith or for an improper motive.[35]

Further, a decision may be reviewed if the decision-maker has failed to take into account relevant considerations or has taken into account irrelevant considerations. The considerations which are relevant to a decision may be expressly stated in the statute or implied from its terms or purposes. Unless the statute so requires, the express provision of factors to be taken into account is not conclusive and other factors may be implied.[36]

A number of English cases suggest that unreasonableness may of itself constitute a further ground for review; in Australia however there appear to be doubts that this would constitute a separate ground of review.

In cases of the exercise of powers in terms of the Commonwealth Act, decisions of the Joint Authority and, presumably, the Designated Authority, would fall for review by the High Court in terms of its inherent jurisdiction and by the Federal Court in terms of the specific jurisdiction vested in it by the *Administrative Decisions (Judicial Review) Act* 1977 *(Cth)* ("the *ADJR Act*"). It is submitted that an exercise of the power conferred by Section 58(3) of the Commonwealth Act could be open to review by the Federal Court on a number of the possible grounds specified in Section 5(1) of the *ADJR Act.* Such grounds, depending upon the facts, could include a breach of the rules of natural justice in connection with the making of the decision (if indeed there had been no consultation or proper opportunity for the licensee to be heard), that the Designated Authority did not have jurisdiction to make the decision, that the making of the decision was an improper exercise of the power conferred by the enactment and that there was no evidence or other material to justify the decision.

The State Supreme Court does not have jurisdiction to review a decision of a Designated Authority made under the Commonwealth Act.[37]

That seems clearly to be the effect of the *ADJR Act,* notwithstanding that a Designated Authority is not, it is submitted, "an officer of the Commonwealth".[38]

An applicant for review would no doubt require strong facts in his favour. Clearly the Parliamentary purpose behind the words "for reasons that he thinks sufficient" was to confer a wide discretion on the Minister to act in the public interest as he sees best. Given that purpose, there nevertheless remain the implied legal limits as adverted to in the paper, in particular that it is an "operations" only power.

35. BOC v. Minister of Technology [1971] AC 610.
36. Andrews v. Diprose (1937) 58 CLR 299; also Padfield v. Minister of Agriculture, Fisheries and Food [1968] AC 997
37. Administrative Decisions (Judicial Review) Act 1977 (Cth) Section 9
38. R v Anderson (1978) 21 ALR 56 and R v. Murray (1916) 22 CLR 439.

Conclusion

This analysis and review of the recovery-rate power as vested in the Designated Authority by the Commonwealth Act began on the premise that the two bases for exercise of the power were, on the one hand, good oilfield practice and, on the other, national interest considerations which might have to do with maximising total recovery or reducing recovery to reflect market demand, particularly where the resource may be being used for sub-economic purposes. The analysis has sought to question the propriety of these second-mentioned considerations in exercise of the conferred powers.

Put shortly, the submission is that Section 58(3) confers a relatively minor power; it is to do with day-to-day matters or operations. A recasting of the subsection to include the words implied would read as follows:

> (I) . . . the Designated Authority may, for reasons that he thinks sufficient [where it is necessary to ensure adherence to good *oilfield* practice], direct the licensee to take all necessary and practicable steps to increase or reduce the rate at which petroleum is being recovered [from his licence area (but not otherwise)] . . .

They are "Commonwealth powers" exercisable by a delegate to regulate, by application of good oilfield practice, exploitation of the nation's resource. The delegate must be cognisant of and act within the lawful limits of those powers. An order of review by the Federal Court is the most likely remedy to be sought by an aggrieved licensee or other person with standing, such as the Commonwealth.