TRANSFERS OF, AND DEALINGS IN, TITLES UNDER THE PETROLEUM (SUBMERGED LANDS) ACT 1967 (CTH) WITHIN THE WESTERN AUSTRALIAN ADJACENT AREA

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Under the Petroleum (Submerged Lands) Act 1967 (Cth) transfers of, and certain dealings in, titles have no force until approved by the Joint Authority and registered by the Designated Authority. This paper outlines some of the issues raised by the requirement of approval and registration.

THE REGISTER

Under the *Petroleum (Submerged Lands) Act* 1967 (Cth) ("Act") the Designated Authority must keep a Register of titles granted in respect to the adjacent area.[1] The Register must include details of the holder, the term and the area of each title[2] and must set out "such other matters and things as are required by [Part III] to be entered in the Register". The "other matters" include transfers of and dealings in titles. Any person may inspect the Register and all instruments evidencing an approved and registered dealing.[3]

The Register plays a pivotal part of the law in respect to transfers and dealings in respect of titles. Until approved and registered neither a transfer nor a dealing has any force.[4]

TRANSFERS OF TITLE

Importance of being the registered title holder

There are two main authorisations available under the Act.[5] With limited exception, exploration for petroleum

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1 Section 76(1).

2 Section 76(2).

3 Sections 86, 78(12) and 81(13).

4 Sections 78(1) and 81(2).

5 Apart from the two main authorisations, titles which may be granted under the Act are:

(a) Scientific Exploration Permit: a non-exclusive right to conduct scientific investigations upon conditions specified by the Authority;

(b) Access Authority: authorises the holder of an adjoining exploration permit or production licence to carry on limited exploration or recovery operations outside the permit or licence area;

(c) Special Prospecting Authority: non-exclusive right to conduct limited exploration activities within a defined area;

(d) Retention Lease: entitles a holder of an exploration title to maintain title to and explore an area for five years if recovery of petroleum is not yet commercially viable, but likely to become commercially viable, within 15 years;

(e) Pipeline Licence: authorises the holder to construct and operate a pipeline; and

(f) Infrastructure Licence: authorises the holder to construct and operate infrastructure facilities.

can only be undertaken by a permittee[6] under an exploration permit[7] and extraction can only be undertaken by a licensee[8] under a production licence.[9]

The terms "permittee" and "licensee" are defined by reference to the registered holder of the exploration permit or production licence.[10] The registered holder is the "person whose name is for the time being shown in the Register as being the holder of the permit ...or licence".[11] Thus, with limited exception, only a registered holder or someone acting for and on behalf of the holder[12] may explore for or extract petroleum.

The registered holder is exclusively granted ancillary rights such as the right to transfer the title,[13] apply for a renewal[14] or surrender[15] and, in the case of a permittee, the right to apply for a retention lease[16] or a production licence[17] and, in the case of a licensee, a right to be granted a pipeline licence in respect of the area from which the petroleum is to be carried.[18]

Also, the Joint Authority may cancel the permit or licence due to the failure of the registered holder to comply with a condition of the title, a direction, a regulation, Part III of the Act or failure to pay amounts due within three months of the amount becoming payable.[19] Further, the Joint Authority and the Designated Authority direct all correspondence to, and serve all directions on, the registered holder.[20]

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6 Section 28.

7 Section 19(a). However, as facilitated by s 9(b), there are other sections in Part III that allow exploration otherwise than under an exploration permit. For example, s 38(c) allows a retention lessee to explore for petroleum and s 52(b) allows a production licensee to explore for petroleum.

8 Section 52.

9 Section 39(a). However, as facilitated by s 39(b), there are other sections in Part III that allow extraction otherwise than under a production licence. For example, s 28 allows a permittee to carry out operations and works necessary to explore for petroleum in the permit area. These works may include limited extraction.

10 Section 5(1).

11 Ibid.

12 Nicholls, R.C., *"Comment on Farmouts and Operating Agreements"* [1978] AMPLJ (Part 2) 528-532 at 530, Maloney, D.A.W., *"Recent Changes to the Petroleum (Submerged Lands) Act regarding Dealings and Transfers"*, (1986) AMPLA Yearbook 300 at 303, Forsyth, M., *"Physical Subdivisions of Petroleum Titles"*, (1985) AMPLA Yearbook 286 at 306.

13 The instrument of transfer of a title must be executed by all registered holders and all transferees although any party to the transfer may apply for approval and registration. See ss 76(3)(a) and 78(2).

14 Section 32(H) in respect to a permit and s 54(H) in respect to a licence.

15 Section (104)(1).

16 Section 38AH.

17 Sections 39A to 40. See in particular s 44A which highlights that the right to apply for a production licence under sections 39A to 40 flows with the registered transferee.

18 Section 65(2).

19 Section 105(1). However, the Joint Authority may notify a person other than a registered title holder of its intention to cancel the title (s 105(2)(b)) and if it does so it must consider the submissions against cancellation by that person (s 105(2)(d)(ii)).

20 Section 101(1). Where there are two or more registered holders s 138A provides that they may nominate one of the registered holders to receive all correspondence on all of the registered holders' behalf.

Becoming a registered title holder

A person may become a registered title holder by grant[21] or by an approved and registered transfer.[22] The prescribed form of transfer must be executed by all registered holders and all transferees[23] although any party may apply for approval and registration.[24] The transfer has no effect until approved by the Joint Authority and registered by the Designated Authority. The payment of a prescribed registration fee is a condition precedent to registration.[25] Unless special circumstances exist the transfer must be lodged for approval within three months of the last execution.[26] Thus, if a transfer is to be held in escrow and the escrow period could last for more than three months the last execution should be delayed until after release from escrow.[27]

Although not required by the Act or the prescribed form[28] it is suggested that the transfer should be executed as a deed.[29] Section 83 effectively provides that approval and registration confers no greater effect upon the transfer than would otherwise be the case at general law. Section 9 provides that with respect to the Western Australian adjacent area the law of Western Australia applies. In Western Australia section 33 of the *Property Law Act 1969* provides that "[all] conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed". It is arguable that, at least in the case of a production licence, a title constitutes an interest in land.[30]

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21 Sections 76(1) and (2).

22 Sections 78(9) and (10).

23 Section 76(3)(a). Compare *Offshore Oil NL v Gulf Resources NL* per Mahoney and Priestley JJA (Supreme Court of NSW, 5 December 1984) who considered the position prior to the 1985 amendments.

24 Section 78(2).

25 Section 78(9).

26 Section 78(4) states: "The Joint Authority shall not approve the transfer of a title unless the application was lodged with the Designated Authority within 3 months after the day on which the party who last executed the instrument of transfer so executed the instrument of transfer or within such longer period as the Joint Authority, in special circumstances, allows."

27 Maloney op.cit.n.12 at 302.

28 At least in respect to the prescribed form for the Western Australian designated area.

29 Ordinarily the transfer will be exempted from Western Australian stamp duty by item 2(7) of the third schedule of the *Stamp Act* 1921 (WA) as: "a conveyance or transfer of any estate or interest in any real or personal property locally situated out of Western Australia." If the transfer is executed as a deed it may need to be stamped under item 8(1) of the second schedule for $20.

30 The issue of whether a petroleum title constitutes an interest in land has been considered in only a few cases. In *Australian Energy Limited v Lennard Oil NL* 2 Qd R 216 Connolly J in *obiter dicta* followed the *obiter dicta* of McPherson J at first instance and suggested an onshore Queensland authority to prospect is not an interest in land. In *BHP Petroleum Ltd v Oil Basins* [1985] VR 725 Murray J was inclined to the view that a production licence under the *Commonwealth Petroleum (Submerged Lands) Act*, beyond the limits of the Australian territorial sea, was not a profit à prendre and was not an interest in land. In *The Commonwealth v WMC Resources Ltd* (1998) 72 ALJR 280 at 298 the High Court avoided the issue. The Court was only concerned whether the Commonwealth's conduct constituted a relevant acquisition of property. However, Gaudron J's view was that an offshore exploration permit is not an interest in land.

Given the importance of petroleum titles, a court may strive to afford them the status of a proprietary interest by trying to fit the titles into categories of recognised proprietary interests. The High Court has been willing to

The transfer may be absolute or by way of mortgage.[31] A prospective financier must consider if security by way of legal mortgage or security by way of equitable charge is preferable. If the financier obtains a legal mortgage and becomes the registered holder they are empowered to prevent a transfer of the title. However, the financier will also inherit the statutory obligation to comply with directions and conditions of the title and, at least arguably, a contractual obligation to comply with the work bid program of the title.[32]

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acknowledge that statutory mining rights can create proprietary interests in land: *ICI Alkali (Australia) Pty Ltd (in vol liq) v Federal Commissioner of Taxation* (1979) 22 ALR 465. Courts have been willing to classify private mineral licences and leases as profit à prendre. There is little reason why a statutory grant should not be treated in the same way (but see *Maddalozzo v Commonwealth* (1979) 22 ALR 561).

A production licence confers ownership to petroleum upon extraction and implicitly confers no interest in *in situ* deposits. There is a strong argument that a production licence (at least under the *Petroleum (Submerged Lands) Act* 1967 (Cth), and perhaps under other petroleum acts as well) should be characterised as a profit à prendre; that is, a right to enter land and take away a substance forming part of the land. The holder of a profit à prendre does not own the minerals in land before extraction. Further, a profit à prendre does not confer exclusive possession to the subject land but it merely authorises such possession as necessary to conduct the agreed activities.

It is strongly arguable that the fact that petroleum is a fugaceous substance should not make a difference as a profit à prendre only requires transfer of ownership upon extraction. The issue is more complicated with respect to the continental shelf beyond the territorial sea. In *The Commonwealth v WMC Resources Ltd* Brennan CJ indicated that the Commonwealth's sovereign rights over the continental shelf may be insufficient for the Commonwealth to grant proprietary rights over that area. Gaudron J appears to take the contrary view.

In contrast, the stronger view is that the rights under an exploration permit are not exclusive enough to amount to a lease and the right to extract is too restricted to amount to a profit à prendre.

Given the importance of petroleum titles courts may recognise them as a new form of proprietary interests outside the traditional common law categories: Crommelin, M., *"The Legal Character of Petroleum Licences: A Comparative Study"*, ed. Daintith, T. (1981) at 95. However, Crommelin suggests that to date Australian courts, unlike English courts (*Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233), have been reluctant to accept new forms of proprietary interests and have rejected the proposition that a bare irrevocable licence can constitute an interest in land (*Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605).

31 Prior to 1985 a transfer could not be approved unless it is an absolute transfer of the whole of the transferor's interest (repealed s 78(5)). Where the transfer is by way of mortgage, it is unclear if the mortgagor needs to obtain approval and registration of the mortgagor's equity of redemption. If the equity of redemption is a dealing listed in s 81(1) (a "registrable dealing") it will have no force until approved and registered. On one view, the equity of redemption is a legal incident of a transfer by way of mortgage and, as a transfer to which s 78 applies is not a registrable dealing (see s 81(1)), the equity of redemption has force without approval and registration. The converse view would take a narrower meaning to the s 81(1) exclusion of transfers from the definition of registrable dealings. On this view, only the bare transfer, and not the equitable right of redemption, is quarantined from the requirement of approval and registration. In any case, it would be rare for a mortgage not to contain additional terms which require registration as a dealing. The issue of what is a registrable dealing is considered later in this paper.

32 The stronger view is that the work bid program has no contractual status between the successful applicant and the Crown and the remedies for breach of the work program are limited to cancellation of the permit and other statutory remedies: see Maloney, D.A.W., *"Offshore Mining and Petroleum - Practical Problems"* [1981] AMPLJ 234 at 247. In Western Australia a petroleum title cannot be a purely contractual arrangement as s 3 of the *West Australian Constitution Act* 1890 (UK) places the entire management and control of Crown land and minerals in the legislature. Of course the legislature could authorise a contractual disposal of its interest in petroleum or land. This limitation

Further, as only a permittee/licensee is entitled to explore for and extract petroleum under an exploration permit[33] and a production licence,[34] and to obtain approval of the transfer to the mortgagee,[35] the mortgagor will need to act as the financier's agent when conducting relevant petroleum activities. It may be that the financier is unwilling to undertake this level of involvement in the mortgagor's business.

If the financier relies on a charge, its priority vis-à-vis subsequent transferees will depend upon an argument that somehow the chargee's earlier interest defeats a subsequent transferee's interest. At this stage the priority rules between competing registered interests are unclear.[36]

Given the complications and burdens, rarely, if ever, will a financier take a mortgage rather than a charge over a title.

The effect of an unregistered transfer

Prior to approval and registration the instrument of transfer confers no interest in the title[37] and creates no contractual rights.[38] Thus, a transferee cannot rely on a signed, but unregistered, transfer to obtain an injunction preventing conduct inconsistent with the transfer or an order for specific performance requiring a transferor to apply for approval and registration of the transfer.[39] Accordingly, a transfer should always be accompanied by an agreement which protects the transferee's inchoate interest.[40]

Rights of title holders inter-se

Neither the grant nor a transfer specify the proportionate interest of each registered holder in the rights and obligations under the title. Ordinarily, those proportionate interests will be specified in a registered dealing.

In the absence of a registered or otherwise enforceable dealing, a registered holder may argue that as a matter of statutory interpretation they are entitled to share equally in the exercise of statutory rights under the title such as the right to extract petroleum,[41] property in petroleum,[42] the right of renewal and the right to convert to another title.

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does not arise in the case of the Crown in the right of the Commonwealth, i.e. under the *Petroleum (Submerged Lands) Act* 1967 (Cth). If, as is doubted, the work bid program is a contractual obligation it is a further issue as to whether the assignee assumes the contractual obligations to perform the work bid program.

33 Section 19.

34 Section 39.

35 To obtain approval of the transfer the financier must convince the Joint Authority it has, or has access to, the relevant technical expertise necessary to effectively use the title and comply with its obligations in respect of the title (s 78(3)(b)).

36 See later in this paper.

37 Section 78(13).

38 Section 78(1).

39 Possibly these remedies may arise from an oral agreement. This issue is discussed later in this paper.

40 Similarly, remedies may arise from an oral agreement. This issue is also discussed later in this paper.

41 Section 52.

42 Section 127.

A co-holder who wishes to retain a disproportionate interest in petroleum extracted may argue that the common law of co-ownership applies. At common law a co-owner who takes a disproportionate share of profits of the land is not accountable to the other co-owners.[43] The common law position is modified in Western Australia by the application of s 27 of the *Administration of Justice Act* 1705 (UK) which entitles a co-owner to require account from another co-owner "for receiving more than comes to his just share or proportion".[44] However, in *Henderson v Eason*,[45] Parke B held that section 27 does not allow a co-owner to demand account for income or profits arising from the development and working of the co-owned land. It was considered that, in taking the rewards of development and working of the land, the co-owner receives no more than his just share "[he] receives in truth the return for his own labour and capital, to which his co-tenant has no right". Thus, the *Administration of Justice Act* does not require equal sharing of petroleum extracted from a production licence.

It seems clearer[46] that the co-title holders will each be severally liable for the obligations under the Act but will be entitled to contribution from each other for the shared or co-ordinate obligation.[47]

Obviously the easiest way to resolve the uncertainty and to implement the precise intentions of the parties is to register a dealing.

DEALINGS[48]

The requirement of approval and registration

Section 81(2) provides that dealings listed in s 81(1) are of "no force" in relation to a particular title until the dealing has been approved by the Joint Authority and registered by the Designated Authority in relation to the particular title.[49] Registration fees must be paid prior to registration.[50] Unless special circumstances exist, the application for approval must be lodged within three months after the day of last execution.[51] Although it is not uncommon for parties to argue that "special circumstances" justify late registration, the Act gives no guidance on what constitutes "special circumstances". An example of where the issue may arise, other than by way of inadvertence, is where a borrower grants a charge over its current and future property. If a petroleum title is transferred to the borrower after a three month time limit, the financier has two choices: either apply

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43 Blackstone, Sir W., "*Commentaries on the Laws of England*", 2nd ed, Oxford, 1766, Vol 2, 1766 at 182-3 and 194, as cited in Halsbury's Laws of Australia at 667,321. See also *Henderson v Eason* 117 ER 1451 at 1457 in respect to the application of the rule to tenants in common.

44 As previously discussed, s 9 provides that with respect to the Western Australian adjacent area the law of Western Australia applies.

45 *Henderson v Eason* 117 ER 1451 at 1457.

46 Although again not free from doubt, see Forsyth op.cit.n.12 at 306.

47 *Smith v Cock* [1911] AC 317 at 326 and Meagher, R.P., Gummow, W.M.C., Lehane, J.F.R., "*Equity Doctrines and Remedies*" 3rd ed at [1006] and [1008].

48 The registration of dealings in respect to future petroleum titles (s 81A) will not be discussed.

49 See s 3.7 of this paper.

50 Section 81(12).

51 Section 81(5).

for late registration and argue "special circumstances" or recreate the charge over the title.[52]

Whilst there is no prescribed form for application for approval and registration of a dealing, the Western Australian Designated Authority has issued a standard form.[53] Once completed and lodged by the applicant,[54] the Designated Authority uses the form as the memorandum noting application for[55] and, if approved, registration of[56] the dealing in the Register.

There are no express grounds for the Joint Authority withholding approval and, as far as the writer is aware, no guidelines have been issued. It may be that the approval requirement reflects a perception that there should be government control over the exploitation of a Crown resource which has national economic and security importance.[57]

There is no requirement for the Joint Authority to consider an application expeditiously.[58] Nor is there a requirement for the Designated Authority to register the approved dealing promptly upon receipt of the applicable registration fees.

What is a dealing?

Although s 81(1) defines the types of dealings caught by s 81(2), the term "dealing" is not defined in the Act. Obviously the meaning ascribed to the word "dealing" must be influenced by its context.[59] On the widest view "dealing" would encompass any transaction and the word "dealing" is simply in contra-distinction to the instrument containing the dealing.

It is clear that relevant dealings extend past legal interests in the title and encompass equitable interests. However, the proposition that "dealing" is limited to a distribution, transfer or assignment of some property

52 It may be that recreation of the charge has priority implications or re-exposes the lender to an argument that grant of the charge constitutes a voidable preference. The problem may also arise where an instrument has been held in escrow (see earlier in this paper).

53 It is doubtful whether the Joint Authority would approve a non-standard application form. Whether such a refusal would be lawful is another issue.

54 Any party to the dealing may apply for registration (s 81(3)).

55 Section 81(9).

56 Section 81(12).

57 The sovereign rights of Australia in respect to the continental shelf of Australia, including the right to extract petroleum, are vested in the Commonwealth: Section 11 *Seas and Submerged Lands Act* 1973 (Cth). Title to that petroleum does not pass to the licence holder until extraction: Section 127 *Petroleum (Submerged Lands) Act* 1967 (Cth). Thus dealings concern Commonwealth property. However, whilst this perception may be inferred, it is difficult to find any proof of Parliament's intention in this regard. But see Report from the *Senate Select Committee on Off-shore Petroleum Resources* (1971) at paragraph [1415]. Whatever the justification for the requirement, the line of demarcation between a permissible and impermissible refusal of approval is still to be revealed.

58 A proposal that a time constraint be applied to the approval process was rejected on the basis that the Joint Authority should not be constrained in giving full consideration to such matters. Letter of the Honourable Gareth Evans in AMPLA Bulletin volume 4(3).

59 Compare the use of the expression "Indecent dealing" in s 189(4) of the *Criminal Code* of Western Australia.

right[60] seems unarguable given that the effects specified in s 81(1)(a)-(g) appear to include contractual as well as property rights.[61]

It is at least arguable that some types of constructive trusts do not constitute a "dealing" and thus are quarantined from the invalidating effect of s 81(2). A constructive trust is imposed by operation of law, regardless of the intentions of the parties concerned, whenever equity considers it unconscionable for the party holding title to the property in question to deny the interest claimed by another.[62] A "dealing" may require an element of intention to produce the relevant outcome.[63] Arguably, at least some types of constructive trusts lack the requisite intention.[64]

What types of dealings must be approved and registered to have force?

Prior to 1985, s 81 applied to instruments:

> *by which a legal or equitable interest in or affecting an existing or future permit, licence, pipeline licence or access authority is or may be created, assigned, affected or dealt with, whether directly or indirectly* ....

Despite the wide meaning which could be attributed to the word "affecting", the dominant view was that s 81 only captured instruments which created or assigned proprietary interests. The section did not apply to instruments which created mere contractual right.[65] Accordingly, the Western Australian Designated Authority refused to register joint operating agreements, off-take agreements, product or profit sharing agreements and drilling agreements.

In 1985 amendments expanded the dealings captured by s 81(2) to include certain contractual rights.[66] Section 81(1) states that a dealing having one or more Listed Effect is caught by s 81(2). Since the amendments, joint

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60 See *Butts v O'Dwyer* (1952) 87 CLR 267 for an example of the use of the word "dealing" in this manner.

61 Maloney op.cit.n.12 at 309. Also, see footnote 66.

62 Evans, E., "*Outline of Equity and Trusts*" (2nd ed) at [1701].

63 According to the Concise Oxford Dictionary "deal" means "cause to be received".

64 It is suggested that a *Lysaght v Edwards* (1876) 2 Ch D 499 type constructive trust, that is where the vendor holds property on trust for the purchaser where the purchaser has paid at least part of the purchase price, will involve a transaction registrable as a dealing and will have no force until registered. Such trust is, in reality, "caused" by the intention of the parties. If a court finds that a constructive trust does not constitute a "dealing" the court may facilitate the completeness of the register, and prevent the avoidance of registration fees, by requiring the registration of a dealing replicating the constructive trust. However, difficult issues may arise as to the value of a dealing which replicates a pre-existing constructive trust. It seems likely that minimal registration fees would be payable under the *Petroleum (Submerged Lands) Registration Fees Act* 1967 s 4(5)(a).

65 Maloney op.cit.n.12 at 309.

66 The inclusion of contractual as well as proprietary rights seems to be prompted by the concerns set out in the *Report from the Senate Select Committee on Offshore Petroleum Resources* (1971) Volume 1 paras 14.16 to 14.25. An argument that s 81(1) is still confined to proprietary rights seems difficult in light of section 81(1)(c) and (d). The argument would rely on the proposition that the production and profit interests referred to in s 81(1)(d) are proprietary rights in the title by way of a rent charge or some new proprietary right outside the existing common law categories. It is more difficult to explain s 81(1)(c) in proprietary terms.

operating agreements,[67] unit development agreements,[68] product and profit sharing agreements[69] and possibly some drilling agreements[70] must be approved and registered to have force. Also, an alteration or termination of any specified dealing must be approved and registered to have force.[71] Ordinarily, contracts concerned with refining, transporting, marketing or the sale of petroleum will not constitute registrable dealings.[72]

Understandably, industry practice is to take a conservative view on what constitutes a registrable dealing. However, registration fees and the administrative costs of compliance lead away from this approach.[73] Unfortunately, s 81(1) does not clearly demarcate what constitutes a registrable dealing.[74]

Instruments containing more than one dealing

It is arguable that one instrument may contain more than one dealing and that each dealing in the instrument requires a separate application, separate approval and separate registration.[75] Separate application, registration and approval would take significant time and result in significant costs.[76]

However, the stronger view is, in most cases, the whole instrument is properly characterised as one dealing even though that instrument may have more than one Listed Effect. Section 81(1) expressly contemplates a dealing having "one or more" Listed Effect. This view is consistent with the practice of the Western Australian Designated Authority which advises the applicant that the "instrument" has been approved by the Joint Authority and registered by the Designated Authority. Presumably this means that all "dealings" effected by the instrument have been approved and registered.[77] Further, as far as the writer is aware,

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67 Section 81(1)(c).

68 Section 81(1)(c).

69 Sections 81(1)(d)(i) or (d)(ii).

70 Section 81(1)(c).

71 Section 81(1)(g).

72 See Guidelines for submission of applications for approval and registrations of transfers and dealings relating to titles (86/12/R1) available on *www.isr.gov.au/resources/petr_legislation/index.html.*

73 Whether Western Australian stamp duty is payable will depend on the nature of the instrument containing the dealing. Ordinarily the instrument will be exempt from Western Australian conveyance duty by item 2(7) of the third schedule of the *Stamp Act* 1921 (WA): see footnote 29.

74 For example, it is unclear if a decision of a joint venture management committee meeting, setting production levels, resolving to drill a specific well or resolving to obtain seismic data, constitutes a dealing "determining the manner in which persons may exercise the rights conferred by, or comply with, the obligations imposed by ..., an existing title" (section 81(1)(d)) or alternatively, it constitutes "the alteration ... of a dealing" (s 81(1)(g): that is, a variation of the joint venture agreement). For other examples see Maloney op.cit.n.12 at 309-10.

75 See s 81(3) which provides: "A party to a dealing to which this section applies may lodge with the Designated Authority: (a) an application ... for approval ... of the dealing." See also ss 81(4), 81(4A) and Maloney op.cit.n.12 at 311.

76 For example, registration fees are levied on each registration of an approval of a dealing (s 4(5) *Petroleum (Submerged Land)(Registration Fees) Act* 1967 (Cth)).

77 A cautious practitioner may query whether the Joint Authority's approval of the "instrument" is sufficient to satisfy the s81(2)(a) requirement that "the dealing ... has been approved by the Joint Authority". Whilst s 81(13A) may protect the approval and registration from "any failure to comply, in relation to the application for approval of the dealing, with the requirements of section [81]" it does not oust the argument that the Joint Authority's approval of the

registration fees are only levied once per instrument per title which indicates that the Designated Authority accepts that the entire instrument constitutes one dealing.

Dealing constituted by more than one instrument

As s 81 requires that "dealings" and not "instruments" be approved and registered to have force, it should be irrelevant that a dealing is evidenced by more than one instrument. For example, where there is a sale of numerous titles there may be a sale agreement for all the titles and a separate deed of consent, release and assumption for each title covered by the sale agreement.[78] It is strongly arguable that, with respect to each title, the entire package constitutes one dealing which may have one or more Listed Effect.[79]

Where a document is executed in counterpart the Joint Authority and the Designated Authority allows, it is suggested correctly, the counterparts to be bundled together as one dealing.

Oral dealings

It is clear that oral dealings, as well as written dealings, having an effect listed in section 81(2) have no force until approved and registered. Section 81(2) strikes at dealings not instruments.[80] However, it is unclear whether approval and registration of an oral dealing is possible.

To apply for approval and registration of a dealing[81] an "instrument evidencing the dealing"[82] must be lodged. It is unclear whether a written declaration of an oral agreement will be sufficient to constitute an "instrument evidencing the dealing".[83]

If a written declaration of an oral agreement can be approved and registered, the parties must consider whether

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instrument, rather than the application for approval of the dealing, is ineffective for the purposes of s 81(2)(a). However, it is suggested that approval of the instrument encompasses approval of the dealings within the instrument and therefore the Joint Authority's approval is effective.

78 Such structure may be a practical necessity when the titles cover numerous different joint ventures and consent is required under each joint venture from each joint venturer.

79 Compare *Guideline 86*/12/R1 op.cit.n.72 which states: "A dealing may only be evidenced by more than one instrument where it relates to the issue of a series of debentures relating to a single title (see subs 81(7))".

80 Prior to the 1985 amendments the equivalent section rendered the entire instrument containing a registrable dealing of no force.

81 Section 81.

82 Section 81(4)(a).

83 Section 81(5) may indicate that an oral dealing cannot be approved. That section provides that the Joint Authority shall not approve a dealing unless the application is lodged within three months after the day on which the party who last executed the "instrument evidencing the dealing" so executed the instrument or such longer period as the Joint Authority, in special circumstances, allows. On the other hand, s 81 has no equivalent to s 76(3)(a) which requires a transfer to be signed by all of the parties. If this means the instrument lodged to register a dealing need not be lodged by all parties, this supports the proposition that a statutory declaration reciting the terms of an oral agreement, executed by one party, can be approved and registered.

To apply for approval and registration of a transfer an "instrument of title in the prescribed form" (s 78(3)) must be lodged with the Designated Authority. Thus it is clear that oral transfers of title cannot be registered.

an oral agreement is capable of effecting the relevant transaction. Section 83 effectively provides that approval and registration does not give the dealing any effect it would not have had at general law.[84] Section 9 of the Act effectively provides that Western Australia's laws apply to the Commonwealth adjacent area off Western Australia. In Western Australia:

- Section 4 of the *Statute of Frauds* 1676 (UK) requires a contract for the sale of land be evidenced by "*some [written] memorandum or note*" signed either by the person against whom it is sought to enforce the contract or by that person's agent.

- Section 34(1)(a) of the *Property Law Act* 1969 (WA) provides:

  "*[N]o interest in land is capable of being created or disposed of except by writing signed by the person creating or conveying the interest, or by his agent thereunto lawfully authorised in writing ...*"

Section 4 prescribes the formalities for executory contracts for the sale of land whilst section 34(1)(a) applies to instruments which are intended to actually create or convey an interest in land.[85] Of course, the sections can only have application to titles if those titles are characterised as an interest in land. This issue has been considered earlier.[86]

Oral agreements, like written agreements, will be effective[87] without approval and registration to the extent they do not purport to be a registrable dealing.[88]

Effect of section 81

Pre 1985

Prior to amendments in 1985, section 81(2) effectively provided:

An instrument [by which a legal or equitable interest in or affecting an existing or future permit, licence,

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84 Section 83: "The Joint Authority, the Designated Authority, and any person acting under the direction or authority of the Joint Authority or the Designated Authority, are not concerned with the effect in law of an instrument lodged in pursuance of this Division, nor does the approval of a transfer or dealing give to the transfer or dealing any force, effect or validity that the transfer or dealing would not have had if this Division had not been enacted."

85 *Marist Brothers Community Inc v The Shire of Harvey* (1995) 14 WAR 69 as discussed by Honey, R., "*Marist Brothers Community Inc v The Shire of Harvey: Formalities Relating to Contracts for the Sale of Land*" 25 UWALR (1995) 180.

86 See footnote 30.

87 Subject, of course, to the oral agreement being effective at general law.

88 Effectively, this was the position before the 1985 amendments: see *Terex Resources v Magnet Petroleum* [1988] 1 WAR 144 at 162. Prior to 1985, s 80 provided: "A legal or equitable interest in or affecting an existing [title] is not capable of being created, assigned, affected or dealt with, whether directly or indirectly except by instrument in writing." Section 80 was necessary as the equivalent provision to s 81(2) applied to strike down instruments having a registrable effect rather than dealings having a registrable effect. Under the old provisions, if there was no instrument there was nothing to strike down. Thus, oral agreements were caught in the section 80 catch all requirement that all dealings having a registrable effect must be by way of instrument.

pipeline licence or access authority is or may be created, assigned, affected or dealt with, whether directly or indirectly] is of no force until -

(a) the instrument has been approved by the Designated Authority; and

(b) an entry has been made in the Register by the Joint Authority ....

In *Swan Resources*,[89] Southern Pacific sought an injunction to enforce a covenant that Swan would not "sell, mortgage, encumber, dispose of or otherwise deal with the Permit". On appeal to the Supreme Court of Western Australia the majority held that, until approved and registered, registrable instruments, at least insofar as they affected an interest in the title, were of no force as against the Joint Authority and Designated Authority and no force inter-parties. Since the relevant covenant "affected" the permit, the covenant was of no force and could not support the injunction.

After the decision it remained unclear whether covenants contained in the instrument which did not "affect" the title were of force prior to approval and registration. It remained arguable that despite the instrument being of no force, an oral agreement behind the instrument could be of force insofar as that agreement was not required to be contained in an instrument by the now repealed s 80.[90]

In response to *Swan Resources* some practitioners inserted a clause which expressly provided that those covenants which could have had an effect referred to in section 81(1) had no effect until approved and registered. It was hoped that this would prevent the remaining covenants being rendered of no force by s 81(2).[91] However, it remained unclear what covenants would be regarded as "affecting" a title and thus whether, and if so to what extent, this approach would work.[92]

Since 1985

Since 1985 the registrable dealing, not the whole instrument, is rendered of no force until approved and registered. Section 81(2) now provides:

A dealing to which this section applies is of no force in so far as the dealing would, but for this subsection, have an effect of a kind referred to in subsection (1) in relation to a particular title until—

(a) the dealing, in so far as it relates to that title, has been approved by the Joint Authority; and

(b) an entry has been made in the register in relation to the dealing by the Designated Authority in

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89 *Swan Resources Ltd & Anor v Southern Pacific Hotel Corporation & Others* (1983) WAR 39. The case considered the pre-1985 *Petroleum Act* 1967 (WA) s 75 which was relevantly the same as the pre-1985 *Petroleum (Submerged Lands) Act* 1967 (Cth) s 81.

90 Ibid per Kennedy J at 47 and see earlier in this paper, in particular footnote 86, which recites the old s 80.

91 See Reintals, S.G., "*Petroleum Basic Law and Practice*", (1996) AMPLA Yearbook 284 at 302. On a plain reading of s 81(2), the entire instrument was rendered of no force even if only one of its covenants had an effect listed in s 81.

92 See Ipp, D.A. and Maloney, D.A.W., "*Dealing with Interests in Petroleum Tenements*" (1983) 57 ALJ 513 at 513-514 and Gardner, A., "*Security of Title*", (1990) AMPLA Yearbook, 284 at 291.

accordance with subsection (12).

Since the amendments it is clear that where an instrument contains a registrable dealing and other contractual terms, those other contractual terms have force prior to approval and registration of the registrable dealing.[93]

Ordinarily damages will be available for a breach of those other contractual terms. Further, those contractual terms may be sufficient to obtain an injunction against subsequent inconsistent dealings and transfers and it may be possible to obtain specific performance of a covenant to use all reasonable efforts to obtain approval and registration of a dealing.[94]

Another effect of s 81(2) attacking dealings and not instruments is that the registrable dealing will only be of no force vis-à-vis those titles against which it is not registered. Previously, the failure to register an instrument against just one of many titles rendered the instrument of no force in respect to all titles.

PRIORITIES

Applicable priority rules

In any priority dispute the status of the competing interests as well as their relative priorities must be considered. For example, any priority dispute between transfers or dealings must be between registered transfers or dealings: prior to registration the transfer and the dealing has no force. Further, since approval and registration does not give to the transfer/dealing any force, effect or validity that the transfer or dealing would not have had at general law, the effect of the transfer/dealing at general law must be considered.[95] As no stream can rise higher than its source this will require a review of the relevant chain of dealings and transfers back to the original grant of title.[96]

The Act does not contain any express provisions setting out the rules of priority between competing interests. Whilst it is possible that priority is to be determined solely by reference to time of registration or, alternatively, time of lodgement, it is more likely that a court would refer to the general law priority rules which apply in disputes between competing property interests. It seems almost beyond argument that a title constitutes property.[97]

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93 See Ipp and Maloney op.cit.n.92 at 513-514 and Gardner op.cit.n.92 at 291.

94 Gardner op.cit.n 92 at 310. An injunction (Meagher, Gummow, Lehane op.cit. n 47 at para [2138]) or an order for specific performance (*Wintergarden Theatre (London) Ltd v Millennium Production Ltd* [1948] AC 173 and *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460) may be granted to enforce a mere contractual right. The equitable remedies do not require or necessarily result in an equitable interest in the title.

95 Section 83.

96 Further, as there is no statutory protection for the original grant of title, it is possible that all dealings and transfers will be ineffective due to non-satisfaction of the mandatory preconditions of grant.

97 At first instance and on appeal in the Federal Court in *The Commonwealth v WMC Resources Ltd* (1998) 72 ALJR 280 it was held that a *Petroleum (Submerged Lands) Act* 1967 (Cth) exploration permit is property. Although the issue was not argued before the High Court, the majority of Justices (Brennan CJ at 285, Gummow J at 316, Toohey J at 294, McHugh J at 309 and Kirby J at 328) appear to favour that view. The alternative view is that the extensive

Gardner[98] summarises the general law priority rules as:

- where there are two competing equitable interests, the first in time prevails unless conduct of the person claiming the first equity is such as to forfeit that priority;
- where there is a legal interest[99] competing with a later equitable interest, except where the holder of the legal interest has been involved in certain types of culpable action, the legal interest prevails;
- a holder of a bona fide purchaser of the legal estate without notice of the earlier equitable interest will prevail over the earlier equitable interest.

The application of these priority rules may be affected by ss 78(1) and 81(2) which effectively provide that a transfer and registrable dealing have no force "until" approved and registered. Arguably, this means that, for the purpose of determining priorities, the competing interests are not regarded as being created "until" approved and registered regardless of when the relevant instrument was executed and regardless of when the relevant instrument was lodged for approval.[100] This priority rule, if applied, may operate unfairly. There is no requirement on the Joint Authority to approve, nor the Designated Authority to register, transfers and dealings in accordance with their time of execution or lodgement.[101]

An alternative approach was alluded to by Burt CJ in *Swan Resources*:[102] "the instrument once approved and registered would have 'a kind of retroactive effect making the instrument effective as from its date [of execution]': *Brown v Heffer* ... per Windeyer J at 352". On this view, if the general law priority rules are applied, the relevant date for consideration in priority disputes is the time of execution of the transfer or dealing.[103]

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powers of regulation (including supervision, direction and control) of the Designated Authority are inconsistent with the grant of any property interest. On this view, a title is a bare licence - a bundle of statutory rights and obligations.

98 Gardner op.cit .n 92 at 304-5. Even if the title is not a proprietary interest in land, it is extremely unlikely that the rule in *Dearle v Hall* 38 ER 475 which applies to some priority disputes between equitable interests in personality would vary these priority rules. (See Sykes E.I. and Walker, S., "*The Law of Securities*" (5th ed 1993) at 803.)

99 Presumably the registered holder will hold a legal interest. See Ipp and Maloney op.cit.n 92 at 518.

100 In respect of transfers it is arguable that this approach is supported by s 78(13) which states the mere execution of a transfer creates no interest in the title. Presumably s 78(13) defers the creation of an interest in the title until approval and registration of the transfer. Section 78(13) exists as a response to s 81(2) which excludes transfers from the requirement of approval and registration as a dealing. If s 78(13) did not exist it would be arguable that a beneficial interest in a title could be transferred, by execution of a transfer, without registration and approval.

101 Maloney op.cit.n.12 at 305.

102 *Swan Resources Ltd & Anor v Southern Pacific Hotel Corporation & Ors* (1983) WAR 39.

103 Maloney op.cit.n.12 at 315 suggests, it is submitted correctly, that Burt CJ's citation of *Brown v Heffer* (1967) 116 CLR 344 as authority for this proposition was unfounded. In *Brown v Heffer* the statutory provision stated that the relevant dealing had no force "unless" (rather than "until") the Minister's consent had been obtained. The word "until" was used in the repealed s 75(2) *Petroleum Act* (WA) considered by Burt CJ. Section 81(1) of the *Petroleum (Submerged Lands) Act* 1967 (Cth) also uses the word "until" rather than "unless". In *Franov v Deposit & Investments Company Ltd & Ors* (1962) 108 CLR 460 Owen J states: "The use of the word 'until' undoubtedly suggests that it is only as and from the time when the document is recorded that it takes effect as a valid and operative

Normally, a priority dispute between competing legal interests is simple. As you cannot give what you have not got, the first in time prevails. In respect to completed transfers,[104] the issue depends upon when a registered transfer takes effect. The issue has been discussed above. In summary, it is unclear whether a transfer takes effect only as and from the time of registration or, alternatively, once registered, the transfer takes effect from its execution date. As neither the Joint Authority nor the Designated Authority need be concerned with the effect in law of the transfer[105] it is possible that two competing transfers could be approved and registered.

Given the uncertainty, transfers and dealings should be lodged for approval and registration promptly.[106]

Notice

Given that all instruments lodged to register a dealing[107] are available for inspection upon payment of a fee,[108] and given that the Register contains memorials of all registered transfers and dealings affecting a title, it is strongly arguable that, for the purpose of priority disputes, persons will be deemed to have constructive notice of all registered transfers and dealings. Given the practice of the Joint Authority to approve all dealings contained in an instrument, this may, in some cases, force an interested third party to make an extensive perusal of the terms of each instrument which has been lodged to register a dealing.[109] A search of the Register may also reveal transfers and dealings lodged for approval and registration.[110]

The existence of a Register may also have a secondary priority implication. It may be arguable that a failure to lodge a dealing or transfer promptly, and thus give notice to the world of the inchoate interest promptly,[111] is disentitling conduct which displaces a prima facie priority arising out of priority in time.

Unfortunately, there is only limited assurance that the Register is an up to date record of instruments which, upon approval and registration, may crystallise into a transfer or a dealing with a registrable effect. Parties to an instrument have up to three months, or such longer period as the Joint Authority in special circumstances

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document ... It is difficult to resist the conclusion that if the word 'until' had been used ... [instead of the word "unless"] it would have been held that during the period before registration the deed was void and inoperative and that registration would not have had a retrospective effect". See also Merralls J.D. QC: *"Comment on Recent Changes to the Petroleum (Submerged Lands) Act 1967 (Cth) regarding Dealings and Transfers"*, (1986) AMPLA Yearbook 331 at 333.

104 This is assuming that an instrument of transfer transfers the legal interest in the title. See Ipp and Maloney op.cit.n.92 at 518.

105 Section 83.

106 Also, as payment of registration fees is a condition precedent to registration, these fees, if there is a chance of a priority dispute, need to be paid promptly.

107 Which may be limited to a dealing summary – ss 81(4)(b) and 81(13)(b).

108 Sections 78(12), 81(13) and 86.

109 For example, simple charges are often hidden away in innocuous places in an instrument. It is unclear whether these charges will need to be registered at the ASIC.

110 Sections 78(4) and 81(9).

111 But see the next paragraph which notes there is no express requirement for the Designated Authority to enter a memorandum on the date the application is lodged.

allows, to lodge the instrument for approval and registration.[112] Further, although the Designated Authority is obliged to enter a memorandum in the register "of the date on which the application is lodged"[113] there is no express requirement that the memorandum be entered on the date of lodgement nor is there any requirement for the Joint Authority or the Designated Authority to consider the approval or attend to registration within any time frame.[114]

Contractual rights

In respect to registrable dealings which consist of contractual rights and obligations, it will be a matter of contractual interpretation as to whether the contractual rights and obligations are, once registered, intended to take effect retrospectively. In the interim period up to registration, it may be that a party can be estopped from disregarding the inchoate contractual rights.[115]

CONCLUSION

The obvious conclusion is that, given the harsh consequences of failure to obtain approval and registration of transfers and registrable dealings, it is crucial that those transfers and registrable dealings be lodged as soon as practicable after execution. At this stage it is unclear to what extent, if any, a court will take steps to protect unregistered transfers and unregistered but registrable dealings.

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112 Section 81(5).

113 Sections 78(4) and 81(9).

114 See footnote 58.

115 However, it is suggested that this is unlikely given that this would involve an effective reading down of the effect of s 81(2). Also an estoppel cannot be asserted to restrict the effect of a statute intended to protect a particular party (*Considine v Citicorp Australia Ltd* [1981] 1 NSWLR 657) or the general public (*Beckford Nominees Pty Ltd v Shell Co Australia Ltd*, unreported, 1 October 1986). The purpose of s 81(2) is beyond the scope of this paper.