ARTICLE

AUSTRALIAN OFFSHORE PETROLEUM REGULATION: DEFINING AND PROTECTING THE NATIONAL INTEREST

Henry Cooney

I am indebted to John Chandler for his insightful comments on an earlier version of this article. I am also grateful to the reviewer for their feedback. Any errors are my own.

The notion that a nation owes the benefit of its natural resources to the nation's people has survived the advent of capitalism. This apparently simple concept, however, belies a host of complex issues. Nowhere is this more apparent than in the regulation of offshore petroleum exploitation in Australia. This article argues that the national interest in offshore petroleum regulation is not sufficiently protected by the current Australian regulatory framework. This is troubling, as failure to protect the national interest in offshore petroleum regulation can result in the loss of economic value to Australia. This article considers the current offshore petroleum regulatory regime, and proposes the first steps necessary to define and protect Australia's national interest in offshore petroleum regulation.

1 Introduction

In 1967, when the then Minister for National Development, David Fairbairn, introduced the first iteration of Commonwealth offshore petroleum legislation to the House of Representatives, he said that one of the goals of the arrangement was ensuring "that the interests of the nation are secured".[1] In 1990, Prime Minister Bob Hawke's government policy objective for offshore petroleum regulation was "to maintain and enhance the contribution of the offshore petroleum industry to rising national prosperity".[2] In 2018, the Minister for Resources and Northern Australia, Senator Canavan, listed one of the core functions of the National Offshore Petroleum Titles Administrator (NOPTA) as "implementing … strategies in order to secure the optimum petroleum recovery for the benefit of the Australian community".[3] These quotes share an emphasis upon securing benefit to Australia from the exploitation of Australia's offshore petroleum stores. It may then come as a surprise that, despite more than fifty years of government emphasis upon the national importance of offshore petroleum regulation, the national interest is not defined or adequately protected in the current regulatory scheme.

This article considers Australia's national interest in regulating the exploitation of Australia's offshore petroleum stores. As this article will argue, the regulatory scheme created by the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)[4] (OPGGSA) does not make the Australian national interest a sufficiently important consideration when power is exercised under it. This is due at least in part to a lack of clarity surrounding the meaning of the national interest in offshore petroleum regulation. This article aims to clarify the nature of Australia's national interest in petroleum exploitation for the purposes of reform to the OPGGSA.

Part 2 of this article explains the Australian offshore petroleum regulatory framework and explores how objectives are used within the OPGGSA scheme. While a lack of a national interest protection is not a problem unique to the regulation of offshore petroleum exploitation, this article focuses only upon offshore regulation. Part 2 explains why that focus is warranted. Part 2 also examines the resource management problems that arise when regulating offshore petroleum exploitation and explains why these issues warrant regulatory focus upon the Australian national interest.

Part 3 explores the concept of a "national interest" in offshore petroleum regulation. The focus at this stage is not on identifying or defining Australia's national interest in petroleum regulation. Rather, Part 3 is concerned to explore the theoretical and economic basis of the concept of a

national interest in petroleum regulation. This attention is important, as any proposal for national interest objective reform must have a coherent and convincing motivation that accords with Australian resource policy. Part 3 also examines the relationship between the national interest and private commercial interests. It is submitted that there is a danger of incorrectly treating these two concepts as synonymous.

In Part 4, the article proposes an overarching national interest objective that could be expressly incorporated within the OPGGSA regulatory framework. The article examines the approach to national interest protection taken in the National Gas Law, and argues that a similar approach could be taken to protecting the national interest in offshore petroleum regulation. Ways in which a national interest objective could be appropriately implemented within the OPGGSA regulatory scheme are also considered.

2 Offshore Petroleum Regulation and the National Interest

2.1 The Regulatory Framework

The regulation of petroleum exploitation in Australia is not a simple affair. Petroleum respects neither State nor land-water boundaries and this, combined with an Australian Constitution which does not refer to petroleum or natural resources, has created complicated questions of jurisdiction which have complicated answers. Fortunately, these complex issues can be largely avoided by excluding onshore petroleum regulation from the scope of this article. The reason this article focuses upon offshore petroleum regulation and not petroleum regulation generally, is that beyond three nautical miles seaward from the Australian low-water mark, petroleum exploitation is regulated entirely by the Commonwealth OPGGSA regulatory scheme.[5] Within that offshore area lies around 90% of Australia's conventional petroleum reserves.[6] Thus, while reform would be welcome across all facets of Australian petroleum regulation, onshore petroleum regulation is comparatively less important and, at the same time, more complex.[7]

The OPGGSA creates a licence-based system for the regulation of offshore petroleum exploitation in Australia. Applicants apply for OPGGSA titles which, for our purposes, include exploration permits,[8] production licenses[9] and retention leases.[10] An OPGGSA title confers rights that correspond to the nature of the title granted: an exploration permit, for example, confers the right to explore for petroleum but not the right to recover petroleum (other than on an appraisal basis).[11] Herein lies the permissive nature of the OPGGSA scheme: a relevant title permits the corresponding activity, and undertaking petroleum activities without a corresponding title is an offence.[12] Thus, a title under the OPGGSA can be conceived of as an "authorisation". This concept will be returned to in Part 3.

Broadly, the OPGGSA (and associated regulations[13]) confer specific statutory powers upon either the Joint Authority,[14] NOPTA,[15] or the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).[16] The power to grant titles is vested in the Joint Authority,[17] which in turn allows the Commonwealth Executive to exercise final power over the granting of petroleum authorisations.[18] Most of the functions of the Joint Authority are exercised pursuant to advice from NOPTA and, as a matter of practice, the Joint Authority appears to defer to NOPTA on many issues. This includes assessing work-bid exploration permit applications and setting the conditions attached to petroleum titles.

While the OPGGSA is a prescriptive Act, the regulatory scheme under the Act incorporates elements of "objective-based" regulation. Objective-based regulation refers to the practice of:

> [moving] away from prescribing specific standards or procedures and, instead, [emphasising] achievement of the objectives of legislation, leaving it to businesses to determine how objectives are to be achieved.[19]

This is not the same as *laissez-fair* regulation, and objective-based regulatory schemes do not inherently involve a relaxed or uninvolved regulator. In an objective-based scheme, the regulator or legislation sets objectives, and behaviour or proposals are assessed against those objectives. The work-bid exploration permit assessment process illustrates this point. Under the OPGGSA, competing work-bid exploration permit applications are assessed against publicly available

criteria.[20] Created by NOPTA, those criteria establish an overriding criterion for the assessment of a permit application, namely, the degree to which:

> an applicant … proposes an exploration strategy and work program that will significantly advance the assessment and understanding of the petroleum potential of the area … .[21]

Thus, while the OPGGSA requires certain information to accompany a petroleum exploration permit application (such as financial and technical details[22]), NOPTA does not require or prescribe any specific activities that a work-bid applicant must propose to undertake. Whether an applicant will be successful in their application will depend upon the degree to which their application meets the objective set out above.

Despite moves toward objective-based regulation, the OPGGSA does not itself contain any meaningful overarching objective.[23] Within the OPGGSA there is no reference to a national interest in, or goal for, the regulation of Australian offshore petroleum. Indeed, the national interest in offshore petroleum regulation does not appear to have been clearly defined anywhere, a fact that has led to both criticism and calls for reform.[24] The *Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration*) *Regulations 2011* (RMA Regulations), made under the OPGGSA, do contain a detailed objects clause, which defines the objects of parts of the regulations as including:

> to ensure that operations in an offshore area are:
>
> (a) carried out in accordance with good oilfield practice; and
>
> (b) compatible with the optimum long-term recovery of petroleum.[25]

However, the meaning of these objectives is unclear.[26] If they are intended to represent the national interest in offshore petroleum regulation, their ambiguous nature has prevented that purpose from being achieved.

When expressed generally, the notion of "national interest" is an abstract one. A national interest objective is a device used to align the motivations of a regulator with the interests of a nation.[27] But there is no formula or principle that neatly determines the interest of Australia in the regulation of its offshore petroleum. For this reason, some might dismiss the importance of building a national interest objective into the OPGGSA regulatory framework. This article submits that such dismissal would be misguided. The importance of defining and protecting the national interest is illustrated by the following examination of the resource management issues that are encountered in offshore petroleum regulation. These issues have the potential to reduce the value returned to a nation from allowing its petroleum stores to be exploited.

2.2 Why the National Interest Matters

Different nations protect the national interest within their petroleum regulatory schemes in different ways. At one extreme are nations which place a core national objective at the forefront of all petroleum activities and regulation – the United Kingdom, for example, requires both the regulator and the petroleum industry to act in accordance with the *Maximising Economic Recovery Strategy for the UK* (MERUKS).[28] At the other extreme are nations such as Australia where the national interest is either undefined or poorly defined. Despite these differences, all nations have dealt with similar issues when regulating offshore petroleum exploitation. These issues, and the relevance of the concept of "national interest" to these issues, are considered here. The goal of this part of the article is to show that there are issues surrounding petroleum exploitation that can have implications for Australia as a nation.

2.2.1 Value Erosion

Petroleum regulation has been beleaguered by problems of wasted value since oil was first recovered in the 19th century. In 1914, for example, excessive and inefficient drilling practices caused $US50 million worth of losses in the United States[29] – this amounted to 25% of the entire US petroleum production value.[30] Additionally, millions of dollars' worth of natural gas by-product was flared into the atmosphere.[31] Reservoir energy was dissipated so uneconomically that, in 1980, the US accounted for almost 90% of the world's oil wells yet only 14% of worldwide oil

production.[32] This unnecessary waste causes a permanent loss of value and thus can be termed "value erosion".

While the issue of value erosion is not as dramatic in 21st century Australia as it was in 20th century America, value erosion remains a problem for Australian petroleum regulation. Australian offshore basins can contain connected, overlying and overlapping pools.[33] These pools vary in size and economic feasibility, and pools containing petroleum will often contain substantial gas legs.[34] This creates the potential for value to be eroded if recovery is not efficient. Suppose an OPGGSA titleholder makes a discovery of a commercial pool with a substantial gas leg and a small petroleum leg. The titleholder's commercial interest may be in recovering the gas only, and that decision may be defensible and reasonable. But recovery of only the gas is likely to render the remaining petroleum unrecoverable (at least without expensive repressurisation operations).[35] This leads to a "stranded"[36] petroleum reserve – the petroleum will not be economic to recover and the value of that petroleum to Australia will be lost.

Value erosion can also occur when infrastructure is not used efficiently. Despite more than 50,000 oil fields having been discovered in the last 150 years,[37] at the turn of the 21st century approximately 95% of the total discovered oil had been found within the 1331 largest fields.[38] The practical consequence is that most oil fields that are yet to be developed contain smaller petroleum reservoirs. This gives rise to a high proportion of "marginal" fields—fields that are unlikely to generate enough profit to make production worthwhile. One way that the value within these marginal fields can be unlocked is by reducing the cost of development through infrastructure sharing and tie-ins.[39] Unfortunately, the interests of infrastructure owners and operators do not always align with the interests of the parties seeking access to the infrastructure—particularly when those parties are competitors. This leads to value erosion when a marginal field remains undeveloped. Neither Australia nor the private party can benefit from recovery of the petroleum within that marginal field.

Value erosion is common when production licensees do not perform adequately. There are a variety of ways in which poor licensee performance can reduce the recoverable value of a petroleum pool. One way relates to reservoir "overproduction":

> For each reservoir there is a maximum rate of production … consistent with the fullest use of reservoir energy. A higher rate will result in … reduction in overall recovery.[40]

Thus, the overproduction of a reservoir may result in the destruction of value by reducing the amount of petroleum that can be recovered from the reservoir. The potential for overproduction provides one explanation for the requirement that OPGGSA titleholders receive approval of a rate of recovery before beginning petroleum production.[41] However, the decision of the Joint Authority with regard to a proposed rate of recovery is not guided by any national interest objective. A proposed rate of recovery could be commercially optimal for a private operator, yet still result in some unnecessary reduction in overall recovery (and thus, in erosion of value).[42] That reduction in recovery is value that Australia can no longer benefit from.

A similar type of value erosion occurs when petroleum fields are abandoned before the maximum amount of recoverable petroleum has been recovered. Generally, private operators cease recovering petroleum when the profitability of a petroleum field has reached marginal levels.[43] At this point, a greater return on private investment can be achieved by abandoning a drill site and commencing operations elsewhere. Once again, this behaviour results in stranded petroleum pools. If enough petroleum has been recovered from a pool to render recovery operations of the remaining petroleum unprofitable, there is little incentive for future recovery of the remaining petroleum. To Australia, the remaining petroleum is economically "locked" – unless the cost of recovery is drastically reduced, the leftover petroleum will remain unrecovered.

The examples given above demonstrate the risk of value erosion when petroleum stores are exploited. The fact that this article has not yet suggested a national interest objective should not prevent the reader from concluding that the value erosion discussed above could be contrary to Australia's national interest. However the national interest is defined, the unnecessary destruction of value would likely be contrary to Australia's interest in petroleum exploitation and regulation.

2.2.2 Value Timing and Intergenerational Equity

Petroleum regulation also commonly involves issues surrounding the pace of petroleum exploitation. Perhaps counter-intuitively, history has shown that optimal petroleum regulation sometimes requires deliberately slowing or deferring petroleum recovery operations. In the 1970s, the Norwegian Ministry of Finance decided that:

> After a comprehensive evaluation of its social aspects … Norway should take a moderate pace in the extraction of petroleum resources.[44]

In effect, the Norwegian Government decided that, in line with the Norwegian national interest, a certain proportion of Norwegian petroleum would be left unrecovered until a later time.[45] While Norway and its petroleum industry has flourished, other nations have not grappled with this issue as successfully. In 2007 the Ecuadorian President, Rafael Correa, announced the "Yasuní-ITT initiative", an attempt to halt petroleum activities within the Yasuní National Park in exchange for billions of dollars of compensation from the international community.[46] The initiative was an abject failure. Almost ten years later only $13 million had been collected by Ecuador, the plan had been abandoned and drilling had recommenced.[47] A nation dependent upon oil exports, the development of almost a billion barrels of oil[48] – 20% of Ecuador's reserves – had been set back a decade.

Other petroleum States are facing similar issues right now. Uganda, a nation which has only recently discovered viable petroleum reserves, is currently debating the appropriate management of those newfound resources.[49] Core to that debate is ensuring that:

> the revenues obtained from these resources are managed in a way that maximises benefits to both present and future [Ugandan] generations.[50]

In the United Kingdom, the UK Oil and Gas Authority has recently announced the suspension of the 2020/21 licensing round, to "allow relinquishments to take place so more coherent areas can be reoffered in future…".[51] As these examples demonstrate, adequate control over the speed and timing of petroleum exploitation is a core part of any national petroleum regulatory framework.

The issues surrounding the pace of petroleum exploitation are not issues of value erosion, but of value *timing*. Petroleum is a finite, depletable resource. As a result, if petroleum is exploited rapidly, "the benefits accruing from it could serve the current generations without providing for the needs of future generations".[52] This problem is commonly termed a problem of "intergenerational equity" – the issue Australia faces is determining how to time the recovery of petroleum so as to ensure an equitable distribution of benefits between both present and future generations. Put simply, the question is: how much oil should be recovered now and how much should be left for our successors? As this is a complex normative question, issues of intergenerational equity require a high-level, holistic approach. Conceivably, the national interest in intergenerational equity might require prohibiting petroleum recovery activities that would otherwise be safe, economic and value-accretive. In such a case, the petroleum would simply be left in the ground. Even when petroleum recovery is permitted, issues of intergenerational equity might require limiting an operator to recovering petroleum at a reduced rate. In that case, the regulator would determine a maximum rate of recovery for the relevant petroleum development.[53]

The questions associated with intergenerational equity and value timing are questions that go to the heart of Australia's interest in petroleum exploitation. That is not to say, however, that compliance with a national interest objective would *require* leaving petroleum in the ground. Given certain circumstances, the national interest in petroleum recovery might require *increasing* recovery as much as possible (say, in times of war, where access to petroleum takes on a strategic importance). The point is that decisions regarding petroleum recovery and intergenerational equity cannot be made in line with Australia's interest unless Australia's interest is clearly defined.

2.2.3 How These Issues Relate to National Interest Reform

The problems discussed above are not problems that can be avoided by simply defining the national interest in offshore petroleum exploitation. Indeed, defining the national interest *alone* will do little to avoid *any* of the problems discussed above. What is required is the coherent and

streamlined incorporation of a clear national interest objective within the regulatory framework. As will be discussed in Part 4, a national interest objective must have teeth: the regulatory apparatus should be modified so that regulation occurs in line with the national interest. This may necessitate wholesale reform to much of the OPGGSA. This article takes the position that any such reform cannot occur until the national interest has been sufficiently clarified and defined. It is for that reason that this article proposes a national interest objective in Part 4. Arguably, the management of Australian petroleum resources is more troubled than even this article suggests; Professor John Chandler has recently referred to a "large hole in the regulatory architecture so far as resource management is concerned".[54] Nonetheless, in Part 4 this article takes the first step in improving Australian petroleum resource management by suggesting a national petroleum objective and considering how that objective could be implemented.

3 Petroleum Exploitation and the National Interest

3.1 The Basis of the National Interest

It is submitted throughout this article that the management of Australia's offshore petroleum resources could be improved if an overriding offshore petroleum objective were incorporated within the OPGGSA. Before considering the content of such an objective, the national interest in offshore petroleum must be determined. But to determine this interest it is important to understand the philosophical basis of the interest that Australian people have in Australia's offshore petroleum stores. Understanding that basis is necessary before turning to identifying precisely what the national interest is.

It is often said that the right to benefit from a nation's petroleum stores belongs to the people of that nation.[55] The reference to people having a right to the benefits of petroleum stores – a right that "belongs" to the nation's people as a whole – can be viewed as an abstract, collectivist concept. In this sense, rent generated by petroleum operators is rent owed to the people of the nation, and the government's role is to secure that rent for the people's benefit. Parallels with the "social dividend", a core part of socialist economic theory, are obvious.[56] The petroleum companies, who have profited through the exploitation of community property, must return surplus profits (rent) to the community (the rightful owner of the resource). This view of the collective entitlement to the benefit of natural resources stems from the writings of late renaissance and revolutionary period philosophers like John Stuart Mill,[57] Thomas Paine,[58] Karl Marx[59] and Henry George[60], the latter having directly influenced Norway's 20th century petroleum management policies.[61]

This notion would be neither popular nor convincing motivation for regulatory reform in Australia. Economic liberalism and laissez-faire regulation are singularly popular ideas in Australia, both within and outside Australian resource regulation. Australian petroleum regulation is built on the idea that private operators should be left alone as much as possible,[62] and many of the government reviews of petroleum regulation have been inquiries aimed at reducing regulatory burden and increasing commercial productivity.[63] Indeed, the spectacular failure of the Resources Super Profits Tax in 2010 was arguably the result of the mining industry's effective characterisation of the proposal as "resource nationalism".[64] Accordingly, in order to fit with Australian regulatory policy it is necessary to conceptualise the basis of the national interest in petroleum regulation differently. This can then inform the content of any codified national offshore petroleum objective. This article submits that the simplest way to conceptualise the basis of the national interest is by reference to Australia's position of control over offshore petroleum authorisation.

As a sovereign nation, the control of Australia's offshore petroleum stores is vested exclusively in Australia.[65] No person or body can legally recover petroleum within Australian waters without Australian authorisation.[66] The government[67] offers that authorisation to title applicants in exchange for not only a share of the economic rent obtained through exploitation of petroleum, but also under the condition that the government may regulate conduct associated with petroleum exploitation. It is thus only a short logical step to conclude that the government, consistent with the best interests of Australia, should regulate petroleum exploitation in a way that ensures that the maximum benefit to Australia is realised. The meaning of "maximum benefit" is not important at this

stage – the idea is that regulation of offshore petroleum should be aimed at promoting the best interests of Australia. The government has the power to grant the authorisation needed to exploit petroleum, and thus can (and should) ensure that Australia gets the most out of granting that authorisation. This conclusion is an economic one—Australia has monopolistic control over the supply of petroleum exploitation authorisation and should thus act opportunistically to ensure the greatest net benefit to Australia.

3.2 National and Private Interests

Before considering a national interest objective for Australian offshore petroleum exploitation, it is worth briefly considering the relationship between the national interest and the interests of private commercial parties. In order to maximise profits, private parties are interested in the efficient recovery of petroleum.[68] At the same time, Australian petroleum policy has often emphasised the promotion of efficient petroleum operations.[69] Perhaps for this reason, there has been a widespread belief that Australia's interest in petroleum exploitation can be promoted by intervening in private operations as little as possible and by encouraging international investment in the Australian petroleum sector.[70] Underlying the regulatory framework has been the simple view that "Australia's offshore petroleum resources are best exploited … through commercial development".[71] Private commercial interests have been treated as a proxy for the national interest.

It is likely that this policy position has contributed to the "hole" in the regulatory architecture mentioned in Part 2.2.3. This position relies upon the observation that motivations of private parties are often aligned with the national interest. As discussed in Part 2, in some circumstances these interests will not align – but even notwithstanding those circumstances, care must be taken to avoid inverting the relationship between national and private interests. The role of the government is not to enable private development of Australian petroleum reserves. The role of the government is to, as mentioned in Part 3.1, ensure Australia's petroleum reserves are exploited in line with Australia's national interest. Certainly, this *will involve* enabling private development and encouraging international investment, and nothing in this article should be taken as critical of private development (and subsequent ownership) of petroleum resources. But the private developers are servants, not masters, of the national interest. This is illustrated by a hypothetical: if, for whatever reason, the private development of petroleum reserves were no longer in the national interest, the government would surely be expected to prevent such development. Thus, while the national interest might align with the interests of private commercial parties often, this cannot be blithely assumed nor treated as a rule. The importance of separating the national interest from private commercial interests will inform the following discussion about reform to the OPGGSA.

4 An "Offshore Petroleum Objective"

Part 3 of this article re-conceptualised Australia's national interest in offshore petroleum regulation and explored the appropriate relationship between private commercial interests and the national interest. That discussion provides a foundation for considering the content of Australia's national interest in offshore petroleum regulation. In Part 4.1, this article builds upon the discussion in Part 3 to consider the content of Australia's national interest in offshore petroleum regulation, drawing from the approach to national interest protection within the National Gas Law.[72] In Part 4.2, this article proposes an "Offshore Petroleum Objective" and considers how that objective could be implemented.

4.1 Choosing an Offshore Petroleum Objective

4.1.1 What We Want

When the United States military begins formulating a national strategy for US-involved conflicts, one of the first steps taken is the identification of the desired ends.[73] In other words, the military strategists ask themselves: what is the point of our involvement in this conflict? What are we trying to achieve? The same questions can be asked in the context of Australian petroleum regulation. Regulation is not an end in and of itself. We regulate to achieve some objective, and the

effectiveness of regulation should be assessed against the achievement of that objective.[74] Thus, in order to identify Australia's national interest in offshore petroleum regulation, we must begin by asking: What are we trying to achieve by allowing (and regulating) the exploitation of our petroleum reserves? Why does petroleum exploitation matter?

The answer to these questions begins with an examination of the focus of government resource policy. Australian policy surrounding resource exploitation is often cast in aspirational terms – to deliver "sustained prosperity";[75] to "return to the community";[76] to "drive innovation";[77] to "build stronger communities".[78] However, often there is also a focus on specific outcomes – the creation of jobs,[79] the provision of "clear and consistent" regulation,[80] or the minimisation of commercial risk in order to promote investment.[81] Importantly, some of these objectives are ends in themselves, while others are worthwhile only insofar as they help achieve an end. The promotion of "national prosperity", for example, is an end in and of itself (even if expressed ambiguously). The provision of a clear regulatory framework, on the other hand, is not *inherently* valuable but is worthwhile because it helps achieve the objective of the regulation (whatever that objective may be). This point reminds us that our interest is in identifying the end to be achieved by the exploitation of Australian petroleum.

The examples of policy ideals extracted above share a common focus upon the recovery of economic value from Australia's resource stores. In some cases this is a direct focus: returning to the community, for example, is a direct focus upon the recovery of value from resource exploitation. In other cases the focus is indirect: the promotion of investment in Australian petroleum exploitation, for example, is presumably to achieve other value-connected ends, such as creating jobs and increasing government revenue. This focus upon the recovery of economic value is intuitively convincing in the context of offshore petroleum. Why else would the Australian government regulate the exploitation of petroleum if not to try to ensure the nation benefits from that exploitation? Furthermore, it is not only the creation of *some* value from Australian offshore petroleum stores that interests us as a nation. It is the recovery of the *maximum amount* of value, for the benefit of Australian society, that should motivate regulatory intervention in petroleum exploitation.[82]

It is submitted here that the creation and maximisation of economic value is the end in and of itself of Australian offshore petroleum regulation. As seen above, this goal is consistent with both past and present Australian offshore resources policy. It is also consistent with the increasing importance associated with government resource management objectives.[83] Notably, the creation and maximisation of economic value should not be taken as limited to maximising the number of barrels of oil recovered from the Australian offshore, nor should this goal be understood as relating purely to maximising the dollar value of rent collected by Australia. As will be explored in the remainder of this article, this goal does not represent a formula or equation for determining a "correct" decision in relation to offshore petroleum regulation. What the goal does represent is the basis of an overarching objective that can be used to guide decision-making under the OPGGSA.

Now that the basis of a regulatory objective has been identified, it is necessary to consider how the objective can be constructed. How can a focus upon creating and maximising economic value be translated into a statutory objective? To answer this question it is worth drawing upon experiences in downstream energy regulation – most notably that of the National Gas Law.

4.1.2 Lessons from the National Gas Law

Unlike the State-by-State approach to onshore petroleum regulation mentioned earlier, Australian gas markets and pipelines are regulated by a national, industry specific regime called the National Gas Law. All Australian jurisdictions apply as law the *National Gas (South Australia) Act 2008* (NGL).[84] The NGL governs the downstream section of the Australian gas industry and controls the terms and conditions of access to Australian gas pipelines. Under the NGL, the Australian Energy Market Commission (AEMC) may make and modify the National Gas Rules, which have the force of law and contain the principles and procedures that regulate access to gas pipelines. In addition, the NGL empowers the Australian Energy Regulator (AER) which, in all States other than WA,[85] is responsible for enforcing the NGL and the National Gas Rules. Our interest is not in the content of

the National Gas Rules or in the functions of the AER, but instead in the statutory framework that requires both the AER and the AEMC to act in accordance with the "national gas objective".

Section 23 of the NGL establishes a single, overarching objective called the national gas objective:

> 23—National gas objective
>
> The objective of this Law is to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.

The national gas objective refers to the aspirational notion of protecting the "interests of consumers". In this sense, the national gas objective is similar to the examples of government resource policy set out in Part 4.1.1. However, the national gas objective goes on to define the precise interests that the NGL is intended to protect: price, quality, safety, reliability and security of supply of natural gas. This gives guidance to those considering the national gas objective – a given decision can be assessed against the decision's impact upon any of those five factors. This in turn allows the national gas objective to operate without recourse to a subjective understanding of what the "interests of consumers" are. This contrasts with the examples of existing resource sector policy set out above. Phrases such as "stronger communities", "national prosperity" or "innovation" are vague and have a subjective meaning. The resource industry's understanding of what "prosperity" means, for example, may be different from a regulator's understanding of the same phrase. On the other hand, a gas pipeline operator can reliably gauge how a course of action will affect the "interests of consumers" by considering how the course of action will affect the price, quality, safety, reliability and security of supply of natural gas.

The NGL also includes six "revenue and pricing principles" (RPPs) which sit behind the national gas objective.[86] The RPPs appear to be safeguards that minimise the potential for adverse impact upon service providers from the promotion of the national gas objective. The first RPP, for example, states that:

> (2) A service provider should be provided with a reasonable opportunity to recover at least the efficient costs the service provider incurs in—
>
> (a) providing reference services; and
>
> (b) complying with a regulatory obligation or requirement or making a regulatory payment.[87]

The remaining RPPs have a similar focus upon the economics of the provision of pipeline services. The same approach has been adopted in the United Kingdom, where the obligation to act in accordance with the MERUKS central obligation is subject to explicit safeguards, including:

> No obligation imposed by or under this Strategy requires any person to make an investment of fund an activity (including existing activities) where they will not make a satisfactory expected commercial return on that investment or activity.[88]

This approach to the promotion of a single but "safeguarded" objective is important when considering reform to the OPGGSA. Invariably, decisions made under the OPGGSA will have the potential to negatively affect someone (be it an industry member or a third party). Implementing safeguards and subsidiary principles allows limits to be drawn and the operation of an overarching objective to be controlled. As will be seen in the next section, this approach should be adopted if OPGGSA objective reform occurs.

Finally, lessons can be drawn not only from the *content* of the national gas objective and the RPPs, but also from the *implementation* of the national gas objective and the RPPs. Together, the national gas objective and the RPPs "ensure that economic concepts are the central consideration"[89] when power is exercised under the NGL. This is done by implementing statutory requirements that both the AEMC and the AER act in accordance with the national gas objective and the RPPs. The AER, for example, must:

> (1) … in performing or exercising an AER economic regulatory function or power—
>
> (a) perform or exercise that function or power in a manner that will or is likely to contribute to the achievement of the national gas objective[90]
>
> …

(2) In addition, the AER—

(a) must take into account the revenue and pricing principles—

(i) when exercising a discretion in approving or making those parts of an access arrangement relating to a reference tariff; or

(ii) when making an access determination relating to a rate or charge for a pipeline service[91]

…

Similar provisions can be found throughout the NGL.[92] Together, these provisions make the national gas objective and the RPPs the overarching principles guiding downstream gas regulation in Australia. This contrasts starkly with the OPGGSA which, even given the absence of an overarching objective, does not require decision-making to be guided by any specific objectives or principles. As will be argued shortly, an approach like that of the NGL could be taken when incorporating an Offshore Petroleum Objective within the OPGGSA.

The NGL has been praised for its incorporation of a coherent, consistent objective for downstream gas regulation in Australia.[93] It is submitted in this article that the NGL represents an example of best-practice regulation insofar as the promotion of clear objectives is concerned. It is worth noting, however, that the NGL's focus upon economic welfare (over price, quality, safety, reliability and security of supply) might mean the objective is "so broad as to be immune to measurement".[94] This need not trouble the proposal for reform discussed in this article. As mentioned above, the goal of creating and maximising the economic value recovered from Australian offshore petroleum stores is not an equation or formula that can generate a "correct" answer. It is possible for there to be genuine disagreement over whether a course of action would promote the goal. This is to be expected. An Offshore Petroleum Objective will guide, not replace, decision-making under the OPGGSA. With this in mind, this article turns now to a discussion of a proposed Australian Offshore Petroleum Objective.

4.2 The Offshore Petroleum Objective – Form and Implementation

4.2.1 Form

It has been demonstrated above that the creation and maximisation of economic value is a convincing justification for allowing and regulating the exploitation of Australia's offshore petroleum stores. As discussed, however, when regulating Australian petroleum recovery regard must be had to the importance of intergenerational equity. Thus, the Offshore Petroleum Objective should reflect both a focus on the recovery of value, and an acknowledgement that the goal is to deliver long-term, multi-generational benefit:

> **The Australian National Offshore Petroleum Objective**
>
> The objective of the OPGGSA regulatory scheme is to promote and ensure the recovery of the maximum amount of economic value from Australia's offshore petroleum stores for the long-term benefit of the Australian people.[95]

This formulation has several benefits. First, the focus is on the recovery of value from the whole of "Australia's offshore petroleum stores". This avoids the narrow scope of phrases like "good oilfield practice", which focus on specific fields and not the entire offshore Australia territory.[96] Second, the objective specifies the national interest in *long-term* value recovery. This provides a starting position for considerations of intergenerational equity and value-timing. Third, the objective's core focus is on "economic value". This captures the interest of Australia in converting underground petroleum into something productive and useful – be it government revenue, new jobs, or other economic benefits. Finally, the objective notes that the recovery of offshore petroleum is authorised by the government to secure the return of value to the people of Australia. This helps remind those subject to the objective that the interests of private commercial parties should not be confused with the interests of Australia.

Like the approach taken in the NGL and in the United Kingdom, the Offshore Petroleum Objective would be accompanied by subsidiary principles and safeguards that sit behind the objective. Importantly, the objective should be accompanied by a safeguard that protects commercial parties:

The Offshore Petroleum Objective Safeguard

A decision made under the OPGGSA is not consistent with the Offshore Petroleum Objective if the decision would require any person to make an investment or fund activity (including existing activities) where that person would not make an expected return that is reasonable in the circumstances.[97]

Consistent with the long-term recovery of value, this safeguard ensures that any adverse consequences to private commercial parties are minimised. This is important if the offshore petroleum industry is to grow and international investment is to be encouraged. Other safeguards could be incorporated within the OPGGSA framework as necessary.

The Offshore Petroleum Objective should also be accompanied by subsidiary principles. Here, the approach taken would vary slightly from the approach of the NGL. The national gas objective expresses within the objective the factors that are of relevance (price, quality, safety, reliability and security of supply of natural gas) when considering the "interests of consumers". The proposed Offshore Petroleum Objective need not elaborate on the meaning of "economic value" within the objective, so long as guiding subsidiary principles are used to draw attention to factors that are perceived to be of importance. For example, the Offshore Petroleum Objective could be accompanied by the following principles:

Offshore Petroleum Objective Subsidiary Principles

(1) The reference to the recovery of "economic value" in the Offshore Petroleum Objective is not limited to the recovery of government revenue from petroleum operations.

(2) In applying the Offshore Petroleum Objective, regard should be had to the need to encourage international investment in the Australian offshore petroleum industry.

These principles are not exceptions to the Offshore Petroleum Objective, and giving effect to one of the subsidiary principles would not require acting contrary to the objective. Rather, these principles inform a decision-maker's evaluation of whether a decision would promote or ensure the "recovery of the maximum amount of economic value". It is worth reiterating that the Offshore Petroleum Objective guides, and does not replace, decision-making under the OPGGSA.

It is notable that the proposed national petroleum objective relates only to the recovery of value from *petroleum* stores. This is despite the OPGGSA regulatory scheme covering offshore gas in addition to offshore petroleum. The analysis and proposal for reform within this article may be applicable in the context of offshore gas. However, the issue is one that requires separate and detailed analysis. The regulation of offshore gas exploitation may involve its own unique issues, and care should be taken before assuming that the analysis within this article is neatly transferrable to the offshore gas context.

4.2.2 Implementation

Finally, it is necessary to consider how the National Petroleum Objective would be implemented. Theoretically, the objects clause of the OPGGSA could simply be replaced with the objective set out above. However, the purpose of the reform suggested in this article is to ensure that regulation and OPGGSA decision-making occurs in line with the national interest. For this reason, the objective should be implemented in a way that connects decision-making with the proposed objective. As explained, the NGL does this by requiring decisions to be made in accordance with the National Gas Objective. A similar approach should be taken to reform of the OPGGSA.

As was mentioned in Part 2, decisions of the Joint Authority are typically made pursuant to advice provided by NOPTA. As a result, while final decisions are made by the Joint Authority, the bulk of the administration of offshore petroleum is carried out by NOPTA. NOPTA is created by the OPGGSA[98] and its functions are set out in section 695B. It would be simple enough to amend section 695B to insert the following subsection:

695B Functions of the Titles Administrator

(4) In performing its functions, the Titles Administrator must act in accordance with the Australian National Offshore Petroleum Objective.

Given NOPTA's role as advisor to the Joint Authority, requiring NOPTA to act in accordance with the objective would to some extent flow through to decisions of the Joint Authority. However, if necessary, a similar provision could be inserted into the OPGGSA to require the Joint Authority to act in accordance with the Offshore Petroleum Objective. This would ensure that the management of offshore petroleum resources is guided by a clear overarching objective.

It is beyond the scope of this article to consider changes to the OPGGSA that would enhance the ability of regulators to promote the Offshore Petroleum Objective. As mentioned earlier, the state of offshore petroleum regulation in Australia is troubled and there is reason to suppose that regulatory overhaul will be needed to maximise the recovery of value from offshore petroleum over the long term. As the objective suggested in this article relates to the maximisation of economic value, a logical starting point in any further reform to the OPGGSA would be a requirement that title applicants provide detailed economic data to support their applications.[99] However, even absent further reform, implementing the objective in the manner proposed in this section will go a long way in ensuring that the regulation of Australian offshore petroleum exploitation occurs in line with the Australian national interest.

5 Conclusion

This article has sought to explore the way in which the national interest could be better protected when regulating the exploitation of Australia's offshore petroleum stores. The current regulatory scheme established by the OPGGSA does not sufficiently protect the national interest. This gives rise to the possibility of significant and avoidable decreases in the value returned to Australia through offshore petroleum exploitation. While a great deal of reform to the OPGGSA is needed to adequately protect the national interest, this article has argued that the first step is to establish and implement a single Offshore Petroleum Objective.

The objective proposed in this article seeks to focus decision-making under the OPGGSA on the recovery of economic value from petroleum development. It is not suggested that this is the only formulation of Australia's national interest, nor is it suggested that it is impossible to protect the national interest without implementing a single overarching objective. However, as discussed here, other regulatory schemes have benefited from similar provisions. There is little downside to implementing the objective proposed here.

This article's focus has been the regulation of offshore petroleum. However, the core idea presented – that steps should be taken to codify and protect the national interest – is potentially of wider import. Onshore petroleum, offshore and onshore gas, and the resources sector more generally are all areas in which the analysis in this article may have relevance. The interest of Australia should be identified and kept firmly in mind whenever regulatory reform is considered. In doing so, regulation is more likely to be effective in promoting the interests of the people of Australia.

---

1 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 October 1967, Petroleum (Submerged Lands) Bill 1967, 2nd reading 1941, (David Fairbairn, Minister for National Development).

2 Australian Government Publishing Service, Department of Primary Industries and Energy, *Offshore Strategy: Promoting Petroleum Exploration Offshore Australia* (1990) 1.

3 Matthew Canavan, Minister for Resources and Northern Australia, *National Offshore Petroleum Titles Administrator Statement of Expectations* (30 May 2018) 2.

4 *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).

5 This is the result of the 1979 Offshore Constitutional Settlement (OCS), a Commonwealth-State agreement that followed the High Court's decision in *New South Wales v Commonwealth* [1975] HCA 58,135 CLR 337 (commonly known as the *Seas and Submerged Lands Case*). The OCS was negotiated to establish a jurisdictional agreement between the States and the Commonwealth governing the division of responsibilities over the Australian territorial sea. Section 5(2) of the OPGGSA establishes the relevant effect of the OCS for the purposes of regulating Australia's offshore petroleum industry.

6 Department of Industry, Science, Energy and Resources, *Australian Energy Resources Assessment* (Report, 2nd Edition, 2018) 47.

7 Despite a general agreement to implement a common mining code under the OCS, the onshore and offshore petroleum regulatory regimes of the Australian States are not uniform. The legislative schemes in South Australia and Queensland, for example, share few similarities with the scheme in Western Australia.

8 Above n 4, ch 2, pt 2.2

9 Above n 4, ch 2, pt 2.4.

10 Above n 4, ch 2, pt 2.3.

11 Above n 4, s 98(1).

12 Above n 4, ss 97, 160.

13 There are three pieces of subsidiary legislation under the OPGGSA: the *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009* (Cth) (Safety Regulations), the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations* 2009 (Environment Regulations), and the *Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration*) *Regulations 2011* (RMA Regulations).

14 Above n 4, Pt 1.3, Div 1; see, e.g., the power to impose conditions upon exploration permits under s 99.

15 Above n 4, see, e.g., the power to issue petroleum access authorities under s 243.

16 Above n 13, see, e.g., the power to accept or reject an environment plan under reg 10 of the Environment Regulations.

17 Above n 4, for work-bid exploration permits, see ss 105, 107; for cash-bid exploration permits, see ss 112–113; for special exploration permits, see ss 116–118; for petroleum production licenses, see ss 171, 175; for petroleum retention leases, see ss 142, 144. There are other titles under the OPGGSA however they are not relevant to the remainder of this article.

18 Above n 4, under s 56 the Joint Authority of each State is comprised of the responsible State Minister and responsible Commonwealth Minister. However, under s 58, in the event that the State and Commonwealth Minister disagree, the Commonwealth Minister may decide on behalf of the Joint Authority.

19 Australian Government Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (Research Report, April 2009) 37.

20 Above n 4, s 106(3).

21 National Offshore Petroleum Titles Administrator, *Offshore Petroleum Exploration Guideline: Work-bid* (1 July 2019) 3, 1A.

22 Above n 4, s 104(3)(b)–(d).

23 The OPGGSA (above n 4) does contain an object clause in s 3, which states:

> The object of this Act is to provide an effective regulatory framework for:
>
> (a) petroleum exploration and recovery; and
>
> (b) the injection and storage of greenhouse gas substances;
>
> in offshore areas.

However, the OPGGSA does not further elaborate on the meaning of an "effective regulatory framework".

24 See, e.g., above n 19, 89–91; Petroleum (Submerged Lands) Review Committee, *National Competition Policy Review of The Petroleum (Submerged Lands) Legislation Exposure Draft* (2000) 7–8; John Chandler, "Australia's Offshore Petroleum Resource Management System: How Does It Compare with Norway and the UK?" (2018) 36(3) *Australian Resources and Energy Law Journal* 46, 51.

25 Above n 13, *RMA Regulations,* reg 1.04(1).

26 The Productivity Commission has criticised the ambiguous nature of the phrase "good oilfield practice": see above n 19, 86; above n 24, Chandler, 51–2.

27 John Chandler, *Petroleum Resource Management: How Governments Manage Their Offshore Petroleum Resources* (Edward Elgar, 2018) 22.

28 United Kingdom Oil and Gas Authority, *The Maximising Economic Recovery Strategy for the UK* (2016). MERUKS was implemented following Sir Ian Wood's 2014 *UKCS Maximising Recovery Review*.

Norway is another nation that requires both regulators and industry members to act in accordance with national objectives. For a discussion of the approach to national interest protection in both Norway and the UK, see above n 27, ch 6.

29 John Ise, *The United States Oil Policy* (Yale University Press, 1926) 91, 141.

30 Above n 29.

31 Terence Daintith, *Finders Keepers? How the Law of Capture Shaped the World Oil Industry* (RFF Press, 2010) 9.

32 Gary D Libecap, *Contracting for Property Rights* (Cambridge University Press, 1993) 94.

33 Department of Industry, Innovation and Science, *Offshore Petroleum Resource Management Review* (Interim Report, November 2015) 7.

34 Above n 33.

35 Marcia Neave, "The Conservation of Oil and Gas" (1969) 7(2) *Melbourne University Law Review* 201, 203– 4. In essence, this occurs because the aquifer energy required to bring petroleum to the surface is depleted by the recovery of the natural gas.

36 Tina Hunter, "The Role of Regulatory Frameworks and State Regulation in Optimizing the Extraction of Petroleum Resources: A Study of Australia and Norway" (2014) 1 *The Extractive Industries and Society* 48, 48.

37 Sergey Govorushko, "Environmental Problems of Extraction, Transportation, and Use of Fossil Fuels" in Rakesh Kumar (Ed.), *Fossil Fuels: Sources, Environmental Concerns and Waste Management Practices* (Nova Science Publishers, 2013) 1, 2.

38 LF Ivanhoe and GG Leckie, "Global Oil, Gas Fields, Sizes Tallied, Analyzed" (1993) 91(7) *Oil and Gas Journal* 87, 88.

39 The phrase "tie-in" is usually used in the context of oil and gas pipelines. A tie-in occurs when a pipeline is connected to a different facility or pipeline system.

40 Above n 27, 14.

41 Above n 13, *RMA Regulations*, reg 4.17.

42 For example, recovering 90% of the total petroleum in a reservoir over 5 years may be preferred by an operator to recovering 100% of the total petroleum over 7 years. Sometimes, that decision may also be in the Australian national interest. However, as will be seen later in this article, this is not necessarily the case. It may be the case that the national interest would require recovering 100% of the total petroleum and avoiding leaving a tiny, stranded reservoir.

43 Above n 36, 55.

44 Finansdepartementet [Ministry of Finance], *Petroleumsvirksomhetens plass i det norske samfunnet* [The Role of Petroleum Activities in Norwegian Society] (White Paper No 25, February 1974) 6.

45 In addition to securing benefit to future generations, the Norwegian government was motivated by a desire to manage the risk of "Dutch disease" and a need to avoid overstretching a small economy. Since then, the rate of recovery of Norwegian petroleum has increased considerably.

46 Donald Kingsbury, Teresa Kramarz and Kyle Jacques, "Populism or Petrostate?: The Afterlives of Ecuador's Yasuní-ITT Initiative" (2019) 32(5) *Society & Natural Resources* 530, 530.

47 Benjamin Sovacool and Joseph Scarpaci, "Energy Justice and the Contested Petroleum Politics of Stranded Assets: Policy Insights from the Yasuní-ITT Initiative in Ecuador" (2016) 95 *Energy Policy* 158, 162.

48 Above n 47, 158.

49 Joseph Mawejje and Lawrence Bategeka, "Accelerating Growth and Maintaining Intergenerational Equity Using Oil Resources in Uganda" (Research Paper No. 111, Africa Growth Initiative, September 2013) v.

50 Above n 50.

51 "Britain's Oil and Gas Authority Suspends Licensing in 2020/21", *Reuters* (online at 10 March, 2020).

52 Above n 49, 8.

53 Determining a maximum rate of recovery may also involve complex secondary questions, such as those relating to national energy security and the timing of infrastructure use.

54 Above n 24, 63.

55 See Leif Wenar, et al., *Beyond Blood Oil: Philosophy, Policy, and the Future* (Rowman & Littlefield, 2018) 16–17, where Wenar notes that:

National leaders from Bill Clinton and George W. Bush to the prime ministers of Britain and Australia to the presidents of Brazil, Mexico, and Ghana to the Norwegian parliament and even the Ayatollah Khamenei have publicly proclaimed that "the oil belongs to the people."

56 According to James Yunker in "The Social Dividend Under Market Socialism" (1977) 48(1) *Annals of Public and Cooperative Economics* 91, the "social dividend" is the direct distribution of income produced by publicly owned enterprises, paid to members of society to represent their share of the natural resources owned by society. The term has its origins in early works by Oskar Lange and George Douglas Howard Cole.

57 John Stuart Mill, *Principles of Political Economy* (John W Parker, 1848), in which the author's concept of "unearned increment" was developed.

58 Thomas Paine, *Rights of Man* (J S Jordan, 1971–2).

59 Karl Marx, *Das Kapital* [Capital] (Verlag von Otto Meisner, 1867).

60 Henry George, *Progress and Poverty: An Inquiry into the Cause of Industrial Depressions and of Increase of Want with Increase of Wealth: The Remedy* (D Appleton & Company, 1879).

61 Helge Ryggvik, *The Norwegian Oil Experience: A Toolbox for Managing Resources?* (TIK-Centre, 2010) 14–15.

62 See, e.g., above n 3, 3–4; above n 19, 90–9; Paul Keating, "The Labor approach to petroleum exploration development and pricing" (1980) 20(2) *The APPEA Journal* 16, 16. The Australian approach to petroleum regulation has been described as a laissez-faire approach: above n 27, 197. However, as will be seen in the next section, the notion that private parties should be left alone as much as possible should be treated carefully. The national interest should not be substituted with the interests of private commercial parties.

63 See, e.g., above n 19. Note also the ongoing 2020 Productivity Commission "Resources Sector Regulation" review (the draft report of which was released this year).

64 Michael Gilding, et al., "Media Framing of the Resources Super Profits Tax" (2012) 39(3) *Australian Journal of Communication* 23, 24. The Resources Super Profits Tax was described at its announcement as a way of providing a "fair return to the Australian community". The failure of the Resources Super Profits Tax provides an excellent example of the need to ensure a convincing and popular basis for regulatory change when considering Australian resource regulation.

65 As a matter of international law, this is the result of the *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (UNCLOS"). Article 56 and 77 of UNCLOS grants exclusive "sovereign rights" over natural resources within a nation's "exclusive economic zone" and continental shelf to coastal nations. While "sovereign rights" are not legally equivalent to ownership rights, the functional effect is that a coastal nation controls the exploitation of its offshore petroleum resources. For a detailed look at the rights of coastal States over offshore petroleum, see William Hughes, *Fundamentals of International Oil and Gas Law* (PennWell Publishing, 2016) ch 10.

66 See ss 6 and 10A of the *Seas and Submerged Lands Act 1973* (Cth), which declare Australian sovereignty over Australia's territorial sea and exclusive economic zone.

67 Here "government" refers to both Commonwealth and State governments, as representatives of both comprise the Joint Authority. However, it should be remembered that the Commonwealth exercises final control over decisions of the Joint Authority.

68 For a brief discussion of the profit motive in the context of petroleum recovery, see above n 27, 150–4.

69 See, e.g., above n 2, 1; n 33, 14. Also note at above n 25 the use of the phrase "optimum long-term recovery".

70 Department of Industry, Science and Resources, *Australian Offshore Petroleum Strategy: A Strategy to Promote Petroleum Exploration and Development in Australian Offshore Areas* (1999) 1 (note the focus on encouraging international investment); Minister for Resources and Northern Australia, Resources 2030 Taskforce, *Australian Resources – Providing Prosperity for Future Generations* (Report, 21 September 2018) 11; Department of Industry, Science, Energy and Resources, *Investing in Offshore Petroleum Exploration* (last updated 21 October 2020).

71 Above n 33, 6.

72 The "National Gas Law" refers to a nationwide scheme that governs access to Australian natural gas pipelines. The relevant legislation is the *National Gas (South Australia) Act 2008*, which has been mirrored by application Acts in all other Australian jurisdictions (see below n 84). The Australian Energy Market Commission is responsible for the creation of the National Gas Rules, which are made under the National Gas Law.

73 Stephen Sklenka, "Strategy, National Interests, and Means To An End" (Research Report, Strategic Studies Institute, US Army War College, October 2007) 5.

74 It is established that best practice regulation requires identifying a "case for action" before commencing regulation: see, e.g., Council of Australian Governments, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies* (October 2007) 4.

75 Commonwealth of Australia, *National Resources Statement* (Policy Document, 2019) 3.

76 Department of Mines, Industry Regulation and Safety (WA), *Supporting the Western Australian Resources Sector* (Policy Document, April 2019) 1–2.

77 Above n 70, *Australian Resources — Providing Prosperity for Future Generations* 12.

78 Above n 77.

79 Above n 77, 9; above n 76, 1; above n 75, 20.

80 Department of Mines, Industry Regulation and Safety (WA), *Leading Practice Principles for a Sustainable Resource Sector: A Western Australian Perspective* (Policy Document, September 2018) 1.

81 Above n 80.

82 This point is made in above n 19, 30. See also above n 36, 57, where Professor Hunter discusses the Norwegian national petroleum policies of "maximising the value of petroleum resource development".

83 On this point, see, e.g., above n 24; above n 27; John Chandler, "Stewardship of offshore petroleum: Where is the value?" (2017) 81 *Marine Policy* 54; Odd-Helge Fjeldstad, Donald Mmari and Kendra Dupuy, *Governing Petroleum Resources: Prospects and Challenges for Tanzania* (REPOA, 2019). See also above n 33.

84 See above n 72; *National Gas (Queensland) Act 2008* (Qld); *National Gas (New South Wales) Act 2008* (NSW); *National Gas (ACT) Act 2008* (ACT); *National Gas (Victoria) Act 2008* (Vic); *National Gas (Tasmania) Act 2008* (Tas); *National Gas (Northern Territory) Act 2008* (NT); *National Gas Access (WA) Act 2009* (WA); *Australian Energy Market Act 2004* (Cth).

85 Western Australia retained the Economic Regulation Authority as the NGL regulator.

86 *Natural Gas (South Australia) Act 2008* (SA), s 24(2)–(7).

87 Above n 86, s 24(2).

88 Above n 28, MERUKS, 7.

89 Caroline Brown and Matthew Knox, "The New National Gas Law" (2008) 27(2) *Australian Resources and Energy Law Journal* 243, 244.

90 Above n 86, s 28(1).

91 Above n 86, s 28(2).

92 See, e.g., above n 86, ss 72, 91A(2), 97(1)(b), 100(1)(b)(i), 125(5)(a)(i), 291, 293.

93 Above n 89, 249.

94 Stephen Labson, "Asset Valuation and the Fascination with Efficiency" (2016) 61 *Network ACCC* 1, 6.

95 It is worth noting that, in 2012, a Commonwealth Department of Resources, Energy and Tourism Guideline was released that defined the expression "optimum long-term recovery" for the purposes of the RMA Regulations objects clause discussed earlier. The Guideline defined "optimum long-term recovery" as "the most advantageous recovery of hydrocarbon resources" which "maximises the economic recovery of hydrocarbon resources". However, the Guideline was later withdrawn. See Commonwealth Department of Resources, Energy and Tourism, *Guideline on a Grant of a Production Licence, Grant of an Infrastructure Licence, and Related Matters* (Policy Document, January 2012) 3. See, generally, above n 27, 167–8.

96 Above n 24, 52. See above n 25 for reference to the concept of "good oilfield practice", one of the objectives established by the RMA Regulations.

97 The wording of this proposed safeguard is adapted from the approach in above n 28, MERUKS.

98 Above n 4, s 695A(1). Note that the OPGGSA refers to NOPTA as the "Titles Administrator".

99 On this point, see above n 24, Chandler, 59–60.