ARTICLES

THE WORK PROGRAM BIDDING SYSTEM FOR EXPLORATION PERMITS UNDER THE PETROLEUM (SUBMERGED LANDS) ACT 1967 (CTH)

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This paper provides an overview of the work program bidding system for offshore exploration permits for petroleum, and submits that the emphasis on the number of wells together with the availability of the good standing regime creates the potential for the integrity of the system to be undermined. Part 3 of this paper sets out the opportunities available to unsuccessful applicants for challenging the decision to grant a permit to an applicant on grounds of judicial review. Part 4 examines the potential consequences of failing to fulfil a work program contained in a successful bid.

INTRODUCTION AND OVERVIEW

The competitive work program bidding system for the grant of exploration permits has been a part of the Commonwealth petroleum regime, in various forms, since the original enactment of the *Petroleum (Submerged Lands) Act 1967* (Cth) (PSLA). The competitive work program bidding system, as set out in the PSLA, is supplemented by the *Guidance Notes for Applicants*, which the Joint Authority (JA) publishes each year, together with its annual acreage release.[1]

Under the competitive work program bidding system, following an invitation by the JA to apply for an exploration permit in respect of specified blocks, bidders may lodge applications which set out (amongst other things) particulars of the applicant, the applicant's technical assessment of the petroleum potential of the area and a proposed minimum guaranteed work program for the first three years of the permit. Where there is more than one application for an area, the JA may grant the exploration permit to the applicant which "in the Authority's opinion, is most deserving of the grant having regard to criteria made publicly available by the Authority".[2] Broadly put, the application which is "most deserving of the grant" is the application with the proposed guaranteed work program "most likely to achieve the fullest assessment of the petroleum potential within the

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1 In this paper "Guidance Notes" refers to the *Guidance Notes for Applicants* released by the JA in 2007.

2 Section 21A(2) of the PSLA. It is arguable that the JA is not obliged to grant a title due to use of the word "may" in ss 21A(2) and 22(1)(b) of the PSLA.

permit area in the minimum guaranteed period".[3] The application process, and the criteria for assessing permit applications, is discussed in further detail in Parts 1 and 2 of this paper.

Part 3 of this paper explores the avenues available to unsuccessful applicants for challenging the JA's decision to grant a permit to another applicant.

The grant made by the JA will require the applicant to fulfil the minimum guaranteed work program submitted by the applicant. The consequences of failure to comply with a work program are considered in Part 4 of this paper.

OVERVIEW OF ALTERNATIVE METHODS FOR ALLOCATING PETROLEUM LICENCES – CASH BIDDING AND ROYALTY BIDDING

The main alternative to the competitive work program bidding system for the allocation of exploration permits is a cash bidding system. Under a typical cash bidding system, applicants are required to bid on upfront payments for licences.

The JA is empowered to invite cash bids for exploration permits by s 22A of the PSLA. Under the cash bidding system, subject to the satisfaction of minimum hurdle conditions,[4] the exploration permit is generally awarded to the highest bidder, unless the JA is of the view that there was insufficient competition for the area or evidence of collusive bidding.[5]

In contrast to permits awarded under the work program bidding system, exploration permits awarded under the cash bidding system are not subject to annual exploration work program commitments.[6]

Cash bidding was last used in 1993 and it is current Government policy not to use cash bids to allocate acreage.[7] The advantage of cash bidding is that it provides a theoretically efficient and incorruptible method of maximising the price paid for the grant of an exploration licence. The main disadvantage is that the focus on price ignores the overall package offered by bidders and it therefore may not result in the most efficient exploration for and recovery of petroleum from the licensed area. Another disadvantage is that small enterprises, which often comprise local enterprises, may be unable or unwilling to risk upfront payment and therefore, arguably, the system prevents the development of a strong national oil industry.

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3 *2007 Offshore Acreage Release - Guidance Notes for Applicants*, "Criteria for Assessment of Applications": "Assessment Criteria", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_2.html.

4 According to the guidelines issued by the Department of Industry, Tourism and Resources, the JA must be satisfied that the applicant has the financial resources to undertake a program of work, the available technical expertise necessary to explore the area, a satisfactory record of performance in petroleum exploration activities in Australia and elsewhere and, where a number of parties are involved, has or is likely to reach a satisfactory joint operating agreement; Department of Industry, Tourism and Resources (2004) *Cash Bidding System,* p 3. Thus the JA considers the overall package offered by a bidder as a threshold condition and may reject any or all of the applications at this stage; s 22B(2) of the PSLA. Once one or more applicants remain unrejected, the JA may then grant the permit to the applicant with the highest cash bid; s 22B(2)(b) of the PSLA.

5 Department of Industry, Tourism and Resources (2004) *Cash Bidding System*, p 4.

6 Department of Industry, Tourism and Resources (2004) *Cash Bidding System*, p 2.

7 Department of Industry, Tourism and Resources (2004) *Cash Bidding System*, p 1.

Another alternative competitive bidding system is a royalty bidding system,[8] where applicants are required to bid on royalty payments on petroleum production. The advantages and disadvantages of royalty bidding are similar to those described above in relation to cash bidding. An additional problem is that royalty bidding will usually lead to higher royalties, which in turn lead to higher marginal costs of production, which may prevent the development of marginal reserves. Similarly, where exploration licences are issued pursuant to royalty bidding, the decreased probability of locating an economically viable reserve may discourage effective exploration. The problem may be lessened by a regressive royalty system, where lower production volumes are charged lower royalties, or by a discretionary power to lower or waive the royalties on marginal production.

RATIONALE BEHIND THE WORK PROGRAM BIDDING SYSTEM

The key rationale behind the competitive work program bidding system,[9] is to encourage and provide an incentive for companies to effectively explore for petroleum. However, under the current system it is arguable that, in practice, there is undue weight placed on the number of wells included in a work program bid, without adequate consideration of whether the wells are supported by geophysical assessment. If this is the case, the current system could promote wasteful drilling rather than prudent and efficient exploration and shift the focus of competing applicants away from competition in respect of innovation and exploration, to competition in respect of the volume of drilling promised.

1. THE BIDDING PROCESS

1.1 The Steps

The process for the grant of an exploration permit under the PSLA begins with the publication, by the JA, of a note in the *Gazette* inviting applications for exploration permits over specified areas.[10] Applications must be lodged within specified timeframes.[11] The JA ranks the applications (which may occur after further particulars have been provided by the applicant)[12] and may, by instrument, inform an applicant that it is prepared to grant the application.[13] In order to obtain the permit, the successful applicant must, within a period of one month after the date of service of the instrument on them, request the JA to grant the permit to the applicant.[14] The JA is then obliged to grant the permit.[15]

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8 A royalty bidding system may be constituted by pure royalty bidding or royalty bidding used in combination with cash bidding on upfront payments.

9 As referred to in the second reading speech in respect of the *Petroleum (Submerged Lands) Legislation Amendment Act (No 1) 2000* (Cth), which introduced s 21A into the PSLA to deal with competing applications for exploration permits.

10 Section 20 of the PSLA. In practice, an offshore acreage release is published annually on the website of the Department of Industry, Tourism and Resources, at the following link: http://www.industry.gov.au/content/itrinternet/cmscontent.cfm?objectID=1ED1ADED-CB87-F0AA-8263C1F4AAB12B78
and in the June issue of the *Australian Petroleum News*, published by the Department of Industry, Tourism and Resources and the Commonwealth and State *Gazettes*.

11 Section 21 of the PSLA.

12 Section 21A of the PSLA.

13 Section 22(1)(a) of the PSLA. The JA may also refuse to grant a permit to an applicant: s 22(1)(b) of the PSLA.

14 Section 22(3) of the PSLA.

15 Section 22(4) of the PSLA.

1.2 At What Stage May an Applicant Withdraw a Bid?

When deciding on the terms of its proposed work program, the stage at which an applicant may withdraw its bid may become relevant. Of course, withdrawing its bid may have an undesirable effect on the applicant's relations with the relevant government departments.

Section 22AB of the PSLA supports the view that the applicant may withdraw its bid at any time prior to the grant of the permit:

> "The person who has made, or all the persons who have jointly made, an application under section 20 for the grant of a permit may, by written notice served on the Joint Authority, withdraw the application at any time before a permit is granted in respect of the application."

However, the matter is not free from doubt because s 22AB refers to withdrawal of the "application" which is made in response to the initial invitation published in the *Gazette*. The section does not explicitly refer to the withdrawal of the "request" made by the applicant after the JA informs the applicant that it is prepared to make the grant.[16]

It is arguable that, once the "request" is made (at least where there are no other competing bids), there is no turning back. This is because s 22(4) of the PSLA provides that, upon receiving a request, the JA is obliged to grant the Permit:

> "Where an applicant on whom there has been served an instrument under subsection (1) has made a request under subsection (3) within the period applicable under subsection (3), the Joint Authority shall grant to him an exploration permit for petroleum in respect of the block or blocks specified in the instrument."

Further, of course, it is a gamble to request a permit which the JA has advised it is prepared to grant, hoping to withdraw the request before the grant (which could occur without prior notice being given to the applicant). Therefore, it would be prudent to regard the request for the permit as the point of no return.[17]

1.3 May an Applicant Change the Terms of its Bid after the Bid has been Submitted?

On its face, the PSLA appears to set out two opportunities for the bidder to amend its work program bid by the provision of further information:

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16 Compare s 22AC(e) of the PSLA which provides, in the case of a withdrawal of an application where there is more than one applicant for a block:
"if the applicant or one of the applicants whose application had been withdrawn had requested the Joint Authority under subsection 22(3) to grant a permit to the applicant concerned - the request is taken not to have been made…".
Section 22AC tends to indicate that it is possible for an applicant to withdraw its bid after it has made the request for the grant following the JA's notification that it is prepared to grant the permit to the applicant. However, s 22AC only applies in circumstances where there is more than one applicant for the permit. As an applicant will not know whether there are competing bids for the permit, there will always be a risk that s 22AC does not apply.

17 However see comments at 16, above.

- s 21(4) provides that the Designated Authority may request a bidder to furnish further information in respect of an application; and
- s 21A(5) provides that if the JA is of the opinion that two or more applicants are equally deserving of the grant, the JA may invite the applicants to provide particulars of the applicant's proposals for additional work and expenditure in respect of the title.

However, the Guidance Notes indicate that s 21(4) will not allow the bidder to amend the terms of its bid:

> "It should be noted that the composition and timing of the work program proposed in the original application, as part of the competitive bidding process, cannot be amended by the provision of additional information or through the interview process."[18]

The Guidance Notes indicate that s 21A(5) will allow the bidder to submit further information which amends its bid (if that section is triggered), by stating that:

> "In the event that a winning applicant cannot be chosen on the basis of the information contained in the written application and provided during interview, the two or more parties that the Joint Authority considers as equally deserving of the grant of the permit will be invited to submit *supplementary written bids* as a basis for the selection of a successful applicant."[19]

Thus it appears that, once lodged, bids may only be amended where the JA is of the opinion that two or more of the applicants for a permit are equally deserving of the grant and invites those applicants to submit proposals for additional work or expenditure in respect of the blocks specified in the application.

1.4 The Contents of the Application

The Guidance Notes state that applications must contain (among other things) all of the following:[20]

- **Technical Assessment:** The applicant's technical assessment of the petroleum potential of the area, which should include the concepts underlying its proposed work program with sufficient detail to support that program, such as an assessment of relevant data and support for the amount of seismic surveying and the number and conceptual targets of wells to be drilled.
- **Minimum Guaranteed Work Program (Years 1, 2 and 3) (MWP):** The applicant's minimum guaranteed proposal (including indicative minimum expenditure), which should include exploration wells to be drilled, seismic and other work, within the permit area for each year of the first three years of the permit term. The minimum work program proposed in each year of the term of the exploration permit must be stated precisely.

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18 *2007 Offshore Acreage Release - Guidance Notes for Applicants*, "Criteria for Assessment of Applications": "Process for Assessing Applications", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_2.html.
In our view, the additional information being referred to in the quote is only information provided pursuant to s 21(4) (and the quote does not seek to comment on the operation of s 21(5)).

19 *2007 Offshore Acreage Release - Guidance Notes for Applicants*, "Criteria for Assessment of Applications": "Process for Assessing Applications", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_2.html.

20 Guidance Notes, "Applications for an Exploration Permit": "Application Content", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_1.html.

- **Secondary Work Program (Years 4, 5 and 6):** The applicant's proposal (including indicative minimum expenditure), which should include exploration wells to be drilled, seismic and other work, within the permit area for each of the three remaining years of the permit term.
- **Particulars of the applicant:** The technical qualifications of the applicant and of its key employees, the technical advice and financial resources available to the applicant. Significantly in the context of this paper, the applicant must also provide details of any permit cancellations or defaults on work program conditions under the PSLA over the previous five years, why the applicant believes the prior failure is irrelevant to the current application, and details of any relationship that a director of an applicant company had with any company that defaulted over the previous five years.

2. CONSIDERATION OF THE APPLICATION

2.1 The Decision-making Process

Where the JA receives only one bid for a permit, the JA may refuse or accept such bid.[21] The PSLA does not set out any express criteria which must be taken into account by the JA when it makes that decision.

Where there is more than one bid for a permit:

- the JA may exclude from its consideration any applicant that, in the JA's opinion, is not deserving of the grant;[22] and
- s 21A(2) of the PSLA provides:

  > "The Joint Authority may grant the permit to whichever applicant, in the Authority's opinion, is most deserving of the grant of the permit having regard to criteria made publicly available by the Authority."

Applications are assessed by a panel of officials representing the JA. The panel prepares a report for the JA containing recommendations as to the winning bid.

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21 See s 22(1) of the PSLA.

22 Section 21A(3) and (4) of the PSLA provide:
"(3) For the purposes of subsection (2), the Authority may rank the applicants in the order in which they are deserving of the grant, the most deserving applicant being ranked highest.
(4) The Joint Authority may exclude from the ranking any applicant that, in the Authority's opinion, is not deserving of the grant of the permit."
The PSLA does not set out any express criteria which must be taken into account by the JA when it makes such a decision. However, as set out below, the Guidance Notes, "Criteria for Assessment of Applications" indicate that the JA will take into account whether the work program proposed is inferior to that of a competing bid, whether the work program bid is inadequate to significantly advance the exploration status of the area, whether the work program bid is not supported by a sound technical assessment, whether the JA is not satisfied that the applicant possesses the financial or technical capacity to complete the work program bid and whether the JA is not satisfied that, on the basis of past performance, the applicant will comply with permit conditions. In our view, because it is a comparative, rather than absolute, criteria, the question of whether the work program is inferior to that of a competing bid should only be relevant to the issue of which applicant is most deserving of the grant (and should not form part of the threshold test used for excluding unsuitable applications).

Applications are assessed on the basis of the information contained in the written applications, together with any information requested by the JA[23] and any information provided in an interview which the assessment panel may invite the applicant to attend.[24]

2.2 The Assessment Criteria for Determining the Bid "most deserving of the grant"

As stated above, where there is more than one bid for a permit the JA may grant the permit to "whichever applicant, in the Authority's opinion, is most deserving of the grant of the permit having regard to criteria made publicly available by the Authority". The current "criteria made publicly available by the Authority" are contained in the Guidance Notes. The Guidance Notes "Criteria for Assessment of Applications" provides:

> "The basic objective in awarding any exploration permit is to select the work program bid most likely to achieve the fullest assessment of the petroleum potential within the permit area in the minimum guaranteed period, recognising the essential role of wells in the discovery of petroleum." [25]

The number of wells in a MWP is thus a key factor upon which a bid is assessed.

(a) The published assessment criteria

The Guidance Notes, "Criteria for Assessment of Applications" goes on to set out additional criteria for assessing bids:

"
- the number and timing of exploration wells to be drilled, provided there is an adequate supporting program of geological and geophysical work;
- the amount, type and timing of seismic surveying to be carried out;
- other new surveying, data acquisition and reprocessing to be carried out;
- the amount, type and timing of any purchasing or licensing of existing data:
  - pre-purchase of existing non-exclusive data cannot form part of the work program but any interpretation of that data will be taken into account in assessing the relative merits of the work program proposed;
  - existing non-exclusive data proposed to be purchased after the award of a permit may form part of the work program provided that this does not disadvantage a competitor who purchased the data prior to bidding;
- significant appraisal work over any previous petroleum discoveries within the area; and

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23 Section 21A(5) and (6) of the PSLA provide:
"(5) If the Joint Authority is of the opinion that, after considering the information accompanying the applications, 2 or more of the applicants are equally deserving of the grant of the permit, the Authority may, by written notice served on each of those applicants, invite them to give to the Authority, within a period stated in the notice, particulars of the applicant's proposals for additional work and expenditure in respect of the block or blocks specified in the application, being particulars that the Authority considers to be relevant in determining which of the applicants is most deserving of the grant of the permit.
(6) If any particulars are given by applicants to the Joint Authority in accordance with the invitations contained in the notices served under subsection (5), the Authority must have regard to the particulars in determining whichever of the applicants is most deserving of the grant of the permit."

24 Guidance Notes "Criteria for Assessment of Applications": "Process for Assessing Applications", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_2.html.

25 Guidance Notes "Criteria for Assessment of Applications": "Assessment Criteria", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_2.html.

- the extent to which the applicant's technical assessment supports the amount of seismic surveying and the number and conceptual targets of wells proposed in the application."[26]

There is support for the view that, because s 21A(2) of the PSLA requires the JA to make its decision by "having regard to criteria made publicly available by the Authority", the criteria set out in the Guidance Notes (listed above) should be given fundamental weight when the JA makes its decision.

In *R v Hunt; Ex parte Sean Investment Pty Ltd*[27] Mason J (with whom Gibbs J agreed) considered legislation which required a decision-maker to "have regard to" costs incurred in providing nursing home care when making a specified decision. His Honour held that the legislation required the cost be taken "into account" by the decision-maker and given "weight…as [a] fundamental element" in the decision.[28]

In *Tobacco Institute of Australia Ltd and Ors v National Health and Medical Research Council and Ors*[29] (Tobacco Institute Case), Finn J drew a distinction between:

- cases where the particular Act obliges the decision-making body to have regard to a particular matter "as a consideration relevant to the substance of its decision and of which account must be taken for that reason"; and
- cases where the particular Act obliges the decision-making body to "have regard to submissions received irrespective of whether, in the end, they are found to contain matter at all relevant to the decision to be taken".

It is strongly arguable that the terms of s 21A(2) of the PSLA create a duty which falls within the first of these categories, such that the JA must give weight to the criteria made publicly available, being those set out in the Guidance Notes. Departure from the Guidance Notes in the sense of the JA not giving weight to each of the enumerated criteria may open the decision to judicial review. However, there remains scope for substantial discretion in the relative weight given to each of the criteria and the evaluation of criteria as between competing applications which may not be directly comparable.

(b) Other considerations

The Guidance Notes also provide that an applicant may include in its application "such other information as the applicant wishes to be taken into account in consideration of the application".[30] In our view, this further information constitutes information in relation to "criteria made publicly available" and falls within the second category set out by Finn J in the Tobacco Institute Case. In such a case, Finn J states that the decision-maker must give "positive consideration" (rather than "weight") to the matter "as a fundamental element in its decision-making". Finn J goes on to explain that "positive consideration" of a submission:

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26 Guidance Notes "Criteria for Assessment of Applications": "Assessment Criteria", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_2.html.

27 (1979) 180 CLR 322.

28 Quoted and applied in *R v Toohey; Ex Parte Meneling Station Pty* Ltd (1982) 158 CLR 327 and *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615.

29 (1996) 71 FCR 265.

30 Guidance Notes, "Applications for an Exploration Permit": "Other Information", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_1.html.

(i) "would preclude the adoption of an a priori criterion which itself excluded a part or parts of that submission from actual consideration"; and

(ii) would involve "an active intellectual process directed at that… submission".[31]

On this view, the JA must give weight to a relevant factor falling within the published assessment criteria set out in paragraph 2.2(a), whereas the JA must actively consider a factor falling into the category of "such other information as the applicant wishes to be taken into account in consideration of the application", but, having considered the information, the JA need not (but may) give such factor any weight.

A further question arises as to whether the JA may take into account criteria other than the published assessment criteria and the further information provided by the applicants and, if so, what weight can be afforded to such other criteria.

It is arguable that s 21A(2) of the PSLA and the Guidance Notes create a legitimate expectation of applicants that the JA will base its decision solely on the criteria made publicly available and that therefore, were the JA to base its decision to grant or refuse an application on a ground not made publicly available, that decision may be open to challenge. Courts have held that guidelines may create such legitimate expectations, however, have generally held that the relevant authority may depart from the guidelines if the applicant is given the opportunity to make submissions in respect of the new criteria to be taken into account.[32]

2.3 Consideration of Specific Issues

(a) Unrealistically high bids

We are not aware of the JA ever rejecting a work program bid on the grounds that it was unrealistically high or involved unnecessary or imprudent work in light of the block's prospectivity,[33] despite such grounds constituting the final factor in the list of assessment criteria[34] as well as a ground for refusing grant of a bid.[35]

(b) The effect of past performance

Where an applicant has had a permit cancelled or has defaulted on work program conditions (at least where such cancellation or default occurs in the five years prior to an application for another permit), this may be taken into account by the JA at two stages.

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31 *Minister for Aboriginal Affairs & Norvill v Chapman* (1995) 57 FCR 451; (1995) 133 ALR 226 per Black CJ at 238.

32 *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 11 FCR 528; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648.

33 Our view is consistent with a recent industry survey: Terence Daintith, *Discretion in the Administration of Offshore Oil and Gas: A Comparative Study* (AMPLA Ltd, Melbourne, 2006) p 50.

34 See above list at paragraph 2.2(a).

35 The Guidance Notes, at "Criteria for Assessment of Applications": "Refusal to Grant a Permit", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_2.html, state:
"Applicants should note that the Petroleum (Submerged Lands) Act 1967 provides that the Joint Authority may refuse to grant a permit to an applicant. While the Act does not specify the grounds for refusing to grant a permit, they may include: …
the work program bid is not supported by a sound technical assessment".

(i) "not deserving of the grant"[36]

The Guidance Notes indicate that past performance may be taken into account when the JA considers whether a bid is not deserving of the grant pursuant to s 21A(4) of the PSLA.

Past performance is listed in the Guidance Notes as a threshold factor to a successful bid insofar as it demonstrates the lack of capacity of an applicant to undertake its proposed work program.[37] Past performance is also listed as a factor which may be taken into account as a ground for refusal of the grant of a permit insofar as it means that the JA is not satisfied that the applicant would comply with the proposed work program in its current bid if the applicant was granted the permit.[38]

(ii) "most deserving of the grant"

Despite its omission from the published assessment criteria set out in paragraph 2.2(a), the Guidance Notes (and the JA's practice) otherwise indicate that the JA may take into consideration, when the JA considers which bid is "most deserving of the grant" pursuant to s 21A(2) of the PSLA, the applicant's past performance in other petroleum exploration areas in Australia or elsewhere. [39]

Further, the Guidance Notes state that bids will be assessed on the basis of information included in the application. As part of the "particulars of the applicant to be provided", the Guidance Notes provide that applications must contain:[40]

> "Details of any permit cancellations or defaults on work program conditions under the Petroleum (Submerged Lands) Act 1967 of any of the applicant companies over the

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36 In our view, past performance may be taken into account by the JA for the purposes of determining whether an applicant is not deserving of the grant both where there are competing applications and where there is only one applicant (although the Guidance Notes only refer to the first situation - see paragraph 2.1 above).

37 The opening section of the Guidance Notes "Criteria for Assessment of Applications", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_2.html, states:
"An applicant must first satisfy the Joint Authority of its capacity to undertake its proposed work program, particularly: …
the applicant's past performance in other petroleum exploration areas in Australia or, if relevant, elsewhere."

38 Guidance Notes "Criteria for Assessment of Applications": "Refusal to Grant a Permit", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_2.html:
"Applicants should note that the Petroleum (Submerged Lands) Act 1967 provides that the Joint Authority may refuse to grant a permit to an applicant. While the Act does not specify the grounds for refusing to grant a permit, they may include:
- …; or
- the Joint Authority is not satisfied that, on the basis of past performance, the applicant will comply with permit conditions."

39 The Guidance Notes also state, at "Criteria for Assessment of Applications": "Consideration of Past Performance", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_2.html:
"As indicated above, the Joint Authority may take into consideration, amongst other things, the applicant's past performance in other petroleum exploration areas in Australia or, if relevant, elsewhere. This may occur even where the applicant's proposed work program is the highest submitted."

40 Guidance Notes, "Applications for an Exploration Permit", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_1.html.

previous five years, and why the applicant believes the prior failure is irrelevant to the current application, eg participation in the 'good standing' scheme.

Details of any relationship that a director of an applicant company had with any company that had defaulted over the previous five years." [41]

On this basis, we would expect that past performance would be taken into account in determining which application is most deserving of the grant.

Where consideration is given to a prior cancellation as a ground for refusal of a grant, the applicant will be given the opportunity to establish that the earlier failure is irrelevant to the current situation and that default would not occur in the current application.[42]

3. CHALLENGING THE DECISION TO GRANT A PERMIT TO AN APPLICANT

3.1 Overview

Despite the potential for the application of the assessment criteria in a manner that favours applicants who overbid and excludes those who bid more prudently, as far as we are aware, there have been no formal hearings challenging a decision of the JA to award a permit.[43] This part of our paper gives an overview of the grounds for challenging a decision to grant a permit.

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJRA) provides that a decision under the PSLA can be challenged[44] on (inter alia) the following grounds.

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41 Guidance Notes, "Applications for an Exploration Permit": "Particulars of the applicant to be provided", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_1.html. Note that whilst an applicant must disclose past defaults by the company or by a company with common directorship (see "Particulars of the applicant"), there is no general requirement to disclose defaults by a related body corporate. It may be argued by some that this omission in the Guidance Notes has the practical effect of enabling a company to prevent a past failure to perform permit conditions from being taken into consideration in the new application by simply incorporating a subsidiary company. So long as the subsidiary has different directors from the parent company which committed the past default, the default of the parent company is, technically, not required to be disclosed in the application of the subsidiary.

42 Guidance Notes "Criteria for Assessment of Applications": "Consideration of Past Performance", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_2.html.

43 Professor Daintith states, in *Discretion in the Administration of Offshore Oil and Gas: A Comparative Study* (AMPLA Ltd, Melbourne, 2006) pp 50-51, citing information provided in company interviews as his source:
"This issue has been highly contentious in the context of surrenders and cancellations of permits where excessively heavy work commitments were bid, as overbidding followed by non-performance threatens the integrity of the work programme bidding system. The JA's evaluation of the technical soundness of work programmes has been challenged by companies more than once. Two judicial review proceedings in relation to permit awards have been commenced in the last four years, but neither was brought to the stage of a hearing."

44 The ADJRA applies to any
"decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):
(a) under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of enactment…"
which is not a decision included in any of the classes of decisions set out in Sched 1 of the ADJRA (s 3 of the ADJRA). Decisions of the JA to grant permits under the PSLA come within the definition of decisions to which the ADJRA applies. Section 5 of the ADJRA provides:

(a) The JA failed to take into account relevant considerations

In exercising a discretionary power, the JA must have regard to all matters which it is bound by statute, expressly or impliedly, to consider.[45]

(b) The JA took into account irrelevant considerations

In exercising a discretionary power, the JA must not have regard to any matters whether expressly or impliedly, that it is not permitted to consider and are irrelevant (or extraneous) to the exercise of power.

(c) Unreasonableness

An abuse of power occurs where the exercise of power is so unreasonable that no reasonable person could have so exercised the power. The decision must be an extreme one which no reasonable person could comprehend was within the power of the decision-maker.

So long as the JA has given weight to each of the criteria set out in the Guidance Notes as fundamental to its decision, the relative weight given by it to each of the criteria and the consequent decision to make or refuse the grant will not be overturned unless that decision is shown to be "so unreasonable that no reasonable authority could ever have come to it"[46] or if, "looked at objectively, [it is] so devoid of any plausible justification that no reasonable body of persons could have reached [it]".[47] The overarching principle is that courts will be reluctant to second guess the weight a decision-maker has decided to give to a relevant consideration. In *Western Television Ltd v Australian Broadcasting Tribunal*,[48] Pincus J at 434 acknowledged Mason J's statement of the principle in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[49] that administrative decisions should only be set aside where they are "manifestly unreasonable" and the court should not interfere with the merits of administrative decisions, and noted, at 435, that:

> "wrong weighting does not vitiate a decision unless it 'really amounts to a failure to exercise the discretion …' per Latham CJ in *Lovell v Lovell* (1950) 81 CLR 513 at 519; see also per Gibbs CJ in *Mallet v Mallet* (1984) 58 ALJR 248 at 252".

Pincus J set the standard high because in his view "the determination of relative suitability is in the nature of a discretionary judgment".[50]

3.2 How Can Information Relevant to the Decision of the JA be obtained?

In order to challenge the decision of the JA, information relied upon for its decision will need to be obtained.

"A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the decision…"

and sets out the grounds upon which review can be applied for.

45 See discussion at paragraph 2.2 above.

46 *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223 at 230, per Greene MR.

47 *Bromley London Borough City Council v Greater London Council* [1983] 1 AC 768 at 821, per Lord Diplock.

48 (1986) 12 FCR 414.

49 (1986) 162 CLR 24 at 42.

50 *Western Television Ltd v Australian Broadcasting Tribunal* (1986) 12 FCR 414 at 435. See also *Century Metals and Mining NL v Yeomans* (1989) 17 ALD 644 (reversed on appeal on facts in *Century Metals and Mining NL v Yeomans* (1989) 40 FCR 564).

Particulars of work programs of successful bidders are included in the memorial of the permit placed on the Register of Titles.

The *Freedom of Information Act 1982* (Cth) (FOI Act) confers a general right to access information in a documentary form in the possession of a Minister, department or public authority unless the information is exempt from disclosure. Generally, commercial information provided by a third party for the purposes of an enactment is exempt from disclosure.

An applicant under the FOI Act may seek a copy of the successful bid and a copy of the report containing recommendations as to the winning bid prepared by the panel and provided to the JA. If the relevant Minister decides that a document is exempt from disclosure pursuant to the FOI Act, the applicant may apply for judicial review of that decision. However the review function of the Administrative Appeals Tribunal is limited in this instance to considering whether the Minister had reasonable grounds for the decision to exempt the document and the Tribunal does not have the power to conduct a merits review of the Minister's decision.[51]

Section 13 of the ADJRA, provides that an aggrieved party may make a request for the reasons for an administrative decision. A request must be made "within a reasonable time" from the date of the decision and the reasons are to be provided to the aggrieved party within 28 days of the request.

A decision-maker is exempt from providing information that relates to personal or business affairs of a third party. Where the information is not included in the statement of reasons provided under s 13 (or a statement of reasons is not to be provided at all), a notice containing reasons for non compliance with s 13 must be provided to the applicant.[52]

In the Federal Court, where an action for judicial review is commenced under the ADJRA, an applicant is entitled under the normal procedural mechanisms of the court to seek orders for discovery of relevant documentation.[53] These orders are not limited by the operation of s 13 of the ADJRA.[54] A court will generally not order discovery where the applicant is engaging in a "fishing expedition" without reasonable grounds for believing the documents will contain relevant matters.[55] This article does not propose to examine whether an applicant can get an order for discovery prior to lodging a statement of claim.[56]

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51 *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423.

52 Daintith notes that since 2000, there have been at least seven occasions on which companies have obtained formal statements of reasons for the refusal of a permit. Terence Daintith, *Discretion in the Administration of Offshore Oil and Gas: A Comparative Study* (AMPLA Ltd, Melbourne, 2006) p 52.

53 See, eg, *Adams v Minister for Immigration and Multicultural Affairs* (1997) 70 FCR 591; *Canwest Global Communications Corp v Australian Broadcasting Authority* (1997) 71 FCR 485.

54 Sections 13A(4) and 14(4) of the ADJRA provide that nothing in those sections affects the power of the court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the court. However, orders for discovery may be limited on certain grounds which are also prescribed grounds for denying access to information under the FOI Act, such as where disclosure would harm the public interest; see, eg, *Sankey v Whitlam* (1978) 142 CLR 1; *Commonwealth v Northern Land Council* (1993) 176 CLR 604; *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394; *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090; *Aboriginal Sacred Sites Protection Authority v Maurice; Re Warumungu Land Claim* (1986) 10 FCR 104; ss 36(1) and 44(1) of the FOI Act.

55 The use of the phrase "fishing expedition" in the context of discovery means that that process must not be used for the purpose of ascertaining whether a case exists, as distinct from the purpose of compelling the production of documents where there is already some evidence that a case exists; *Trade Practices*

4. FAILURE TO FULFIL A WORK PROGRAM CONTAINED IN A SUCCESSFUL BID

The successful bidder must perform the MWP. After the first three years, the permit holder must perform the obligations accruing during a particular year in the secondary work program unless the permittee has surrendered the title prior to the start of the relevant year in the secondary period.

If the permittee fails to undertake each component of the work program in the designated year or earlier, the consequences are as follows.

4.1 Cancellation of Permit

The permit may be cancelled in accordance with s 105 of the PSLA.[57]

4.2 Surrender of Permit

The title-holder may apply to have the permit surrendered under s 104 of the PSLA.

Unless there are "special circumstances",[58] the JA will not agree to a surrender of a permit unless the conditions of the permit (ie the MWP and thereafter the secondary work program for the designated year) have been complied with. There is no indication in either the PSLA or the Guidance Notes of what constitutes such "special circumstances".

Commission v CC (New South Wales) Pty Ltd (No 4) (1995) 58 FCR 426; *Commissioner for Railways v Small* (1938) 38 SR(NSW) 564; *Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1952) 72 WN(NSW) 250; *Pines Pty Ltd v Bannerman* (1980) 30 ALR 559.

For further definition of what constitutes a "fishing expedition, see, eg, *WA Pines Pty Ltd v Bannerman* (1980) 30 ALR 559; (1980) 41 FLR 175 at 181 per Brennan J; *Associated Dominions Assurance Society Pty Ltd v John Fairfax & Sons Pty Ltd* (1952) 72 WN (NSW) 250 at 254 per Owen J.

56 But see, eg, Order 15A r 6 of the *Federal Court Rules 1979*; Order 34A r 5 of the *Australian Capital Territory Supreme Court Rules*; r 32.05 of the *Supreme Court Rules 1987* (NT); Order 32 r 5 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic); Order 26A r 4 of the *Rules of the Supreme Court 1971* (WA), which provide that a person who, after making reasonable inquiries, does not have sufficient information to enable a decision to be made as to the commencement of a proceeding, may obtain an order requiring the potential defendant to make discovery of documents.

57 Section 105 of the PSLA provides:

"(1) Where a permittee, lessee, licensee, infrastructure licensee or pipeline licensee:

(a) has not complied with a condition to which the permit, lease, licence, infrastructure licence or pipeline licence is subject; …

the Joint Authority may, on that ground, by instrument in writing served on the permittee, lessee, licensee, infrastructure licensee or pipeline licensee, as the case may be:…

(e) in the case of a permit or licence—cancel the permit or licence as to all or some of the blocks in respect of which it is in force; or … "

Section 105 provides that the JA must, prior to cancelling a permit, give at least one month's notice in writing to the permittee of its intention to cancel the permit, specifying a date on or before which the permittee may, by instrument in writing served on the Designated Authority, submit any matters that they wish to be considered. Section 105 also provides that the JA must take into account any action taken by the permittee to remove the ground for cancellation or to prevent the recurrence of similar grounds and any matters submitted on or before the specified date by the permittee.

58 See s 104(3) of the PSLA.

4.3 Revised Work Program

A title holder may submit a revised secondary work program.

Although the MWP cannot be reduced once the permit is awarded, no earlier than six months but no later than three months before the end of the third permit year, the title holder may submit a revised secondary work program. The permittee may seek to renegotiate the secondary work program on an annual basis by "providing substantial and compelling evidence that the work program should be varied on technical grounds".[59]

If the JA does not agree with the proposed changes, the permittee may be able to surrender the permit in "good standing".[60]

4.4 Amendment for Force Majeure

The Guidance Notes provide that a permittee may apply to the JA to have their obligations varied or suspended because of an event of force majeure. This appears to be a specific instance of the JA's general power to suspend obligations pursuant to s 103 of the PSLA. The Guidance Notes indicate that:

- a permittee may apply to have any of their work obligations delayed because of an event of force majeure - even those in the MWP; and
- in exceptional circumstances, the JA may allow a permittee to delay a drilling program.

"Force majeure" is defined in the Guidance Notes to mean:

> "an event or effect that cannot be reasonably anticipated or controlled via experience or care. Commercial circumstances that are common risks in the industry would not normally be considered as a basis for an application on force majeure grounds. Factors such as changes in oil prices … avoidable delays in contracting a rig or vessel would not normally be considered as force majeure. Such factors may influence the perceived commercial viability of an activity, but should not prevent the explorer from adhering to its bid commitment."[61]

Notably, the JA has defined "force majeure" in a manner analogous to that used in commercial contracts, that is, excluding financial hardship as a ground for claiming to be entitled to a suspension of obligations.

4.5 Refusal of Future Permits

The permittee may have future bids for permits refused, due to the JA's consideration of an applicant's past failure to perform MWP attaching to a permit.

As discussed in paragraph 2.3(b) above, the JA may take past performance into account when it considers whether an applicant is "not deserving" of the grant as well as when it considers which applicant is "most deserving" of the grant.

4.6 Applications for Renewal of Permits

The JA may take into account past performance when it considers applications for renewal and conversion of permits.

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[59] Guidance Notes, "Permit Conditions and Administration", point 3, http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_3.html.

[60] See paragraph 4.10 below.

[61] Guidance Notes, "Permit Conditions and Administration", point 4, http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_3.html.

It is arguable that an applicant's past failure to perform MWP attaching to a permit may affect applications for renewal and conversion of currently held permits.

Under s 32(a) of the PSLA, subject to certain exceptions, where an application is made to renew an exploration permit, the JA must accept the renewal if the conditions of the permit and Pt 3 of the PSLA and the *Petroleum (Submerged Lands) Regulations 1985* (Cth) (Regulations) have been complied with.[62] The JA may still grant the renewal if the JA is "satisfied that special circumstances exist that would justify the grant of renewal".[63] If an applicant has previously defaulted under another permit, the JA may be tempted to find that "special circumstances" do not exist to justify the renewal.[64]

Further, the JA may take into account an applicant's past defaults in performing its MWP when it exercises its power to impose conditions on a production licence under s 56 of the PSLA.[65]

4.7 Breach of Contractual Undertaking

It is arguable that a work program, as set out in an exploration permit, is more than just a condition of the permit and constitutes a contractual undertaking, in favour of the JA, to perform the work. However, in our opinion, the stronger view is that the work program does not constitute a contractual obligation. We understand that this view is consistent with the prevalent assumption in the industry. However, the issue has not yet been authoritatively resolved.

4.8 Power to Enforce a Work Program under s 101 of the PSLA

Section 101 of the PSLA arguably confers a wide power on the Designated Authority to enforce a work program, although it has never been used as such. Section 101 confers upon the Designated Authority an extraordinarily wide power to direct the conduct of a title holder with regard to seemingly anything associated with the exploration and exploitation of petroleum and it has been argued that it provides the only means by which the Designated Authority can enforce a work program. A contrary approach suggests that the scope of s 101 does not extend to giving a specific direction to enforce the work program. Certainly, the power has never been used in this way.[66]

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62 In our view, the stronger argument is that s 32(a) only requires Pt 3 of the PSLA and Regulations to have been complied with in so far as they relate to the permit to be renewed. But the matter is not free from argument.

63 Section 32(1)(b) of the PSLA.

64 The *Offshore Petroleum Act 2006* (Cth) (OPA), which we understand, from correspondence with the Commonwealth Department of Resources, Energy and Tourism, is expected to be proclaimed with effect from 1 July 2008 (the delay has been due to the need for all state jurisdictions to first amend their "mirror" legislation which process, we understand, is almost complete and awaiting only the enactment of amendments to the relevant Tasmanian legislation), does not substantively change the processes for applying for renewals and conversions. With respect to renewals, the phrase "sufficient grounds" is used in the OPA (s 103(3) of the OPA) in relation to the JA's decision to renew a permit where conditions of the permit or the legislation have not been complied with, as opposed to the phrase "special circumstances" in the second limb of s 32 of the PSLA. In our view, our comments above apply to the phrasing used in the OPA as they do in relation to s 32(1)(b) of the PSLA.

65 However, the OPA states, in relation to conversions to production licences, that conditions which may apply to production licences may not require the licencee to drill a well, carry out a seismic survey or spend particular amounts of money on the licence area (s 138(7) of the OPA).

66 See Jessica Davies, "Commonwealth directions powers and section 101 of the Petroleum (Submerged Lands) Act (PSLA): Issuing directions to companies" (2005) 24 ARELJ 195.

4.9 Breach of s 52 of the Trade Practices Act 1974 (Cth) (TPA)

An unsuccessful bidder may, arguably, in some cases, have an action in damages for the loss of a commercial opportunity against the permit holder for breach of s 52 of the TPA. A representation by a successful bidder that its MWP is supported by a geophysical assessment or that it will carry out its MWP so as to effectively explore for petroleum on the title may, arguably, form grounds for a claim for damages under s 82 of the TPA, on the basis that the permit holder engaged in misleading or deceptive conduct which caused the unsuccessful bidder the loss of a chance to obtain the permit. Because the number of wells in a MWP is a key factor in the assessment criteria used to rank competing bids,[67] it may be argued, in cases where the number of wells in a MWP is the main distinguishing feature between two work program bids, that the grant of the permit was caused by the misleading representation of the number of wells to be drilled or the misleading justification provided by the applicant for the drilling of the wells.

An unsuccessful bidder would not be barred from recovery under s 82 by the fact that the misleading conduct was directed at the JA, as the entitlement to recover damages under s 82 is not confined to persons who themselves relied upon the misleading conduct.[68] Further, the role of the JA's decision in making the grant and thus causing the loss to the unsuccessful bidder would not in itself preclude recovery, as the conduct which contravenes s 52 of the TPA need not be the only cause of the loss, provided the necessary directness to constitute causation at law is present.[69]

Loss or damage for the purposes of s 82 of the TPA includes the loss of a commercial opportunity.[70] The potential measure of the loss of the opportunity to obtain an exploration permit is clearly significant.

4.10 The "Good Standing" Regime

The "good standing" regime was introduced after a consortium comprising Shell Development (Australia) Pty Ltd (Shell), Chevron Asiatic Limited (Chevron) and Cultus Timor Sea Limited (Cultus) failed to perform a 46-well MWP in respect of two exploration permits granted in 1997. After drilling only one of the obligatory wells, the consortium concluded that the relevant oil and gas reserves were sub-economic. The consortium's application to have the MWP suspended was rejected by the JA on the ground that the circumstances cited (ie that the drilling results had invalidated the geological modelling on which the MWP was based) did not amount to force majeure. The consortium's application for consent to surrender the permits was also rejected by the Designated Authority who proposed cancellation proceedings for the permits be commenced.[71]

Shell and Chevron each reached individual agreements with the Government to maintain their "good standing" despite the cancellation of the permits, by committing to an expenditure designed to be equivalent to each company's share of the MWP, to be spent on areas not taken up in recent

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67 See paragraph 2.2 above.

68 *Janssen-Cilag Pty Ltd v Pfizer Pty Ltd* (1992) 37 FCR 526.

69 *Elna Australia Pty Ltd v International Computers (Australia) Pty Ltd* (1987) 16 FCR 410; *Milner v Delita Pty Ltd* (1985) 9 FCR 299.

70 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; *Talmax Pty Ltd v Telstra Corporation Ltd* [1997] 2 QdR 444.

71 See David A W Maloney, "Australia's Offshore Petroleum Work Programme Bidding System" (2003) 21(2) *Journal of Energy & Natural Resources Law* 136.

acreage releases.[72] The principles underlying these agreements have since been extended to apply generally to all defaulting permit holders who wish to maintain their "good standing" and are outlined in the Guidance Notes.[73]

The "Arrangements to Maintain Good Standing" in the Guidance Notes, "Permit Conditions and Administration" state that, as a threshold to accessing the "good standing" arrangements, a permittee must satisfy government that it has made a significant attempt to assess the petroleum potential of the permit area.[74] The Guidance Notes also provide that the JA may refer to whether the defaulting company has completed work in excess of the second highest bid for the permit area.

The essence of the "good standing" regime is that a permittee can maintain "good standing" by undertaking to spend an amount equal to the agreed monetary value of the outstanding work commitments[75] on qualifying work in permits over re-released acreage.[76] A company will be deemed to be in "good standing" once such an agreement is reached, until such time as it fails to progress with its undertakings within the agreed timeframe.[77] If, after entering into such an agreement, the company does not progress with its undertakings within the agreed timeframe, then it will be considered to be not in "good standing" and any future bids will be assessed against its default and lack of "good standing".

As part of the arrangements to maintain good standing, the permittee must provide to government all documentary and derivative information relating to the cancelled permit, and ensure all former titleholders agree to the data becoming immediately "open file".[78] The permittee must also agree

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72 Cultus accepted that it had a lack of good standing for a five year period. See David A W Maloney, "Australia's Offshore Petroleum Work Programme Bidding System" (2003) 21(2) *Journal of Energy & Natural Resources Law* 137.

73 Guidance Notes, "Permit Conditions and Administration": "Arrangements to Maintain Good Standing", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_3.html.

74 A significant attempt to assess the petroleum potential of the permit area would require at least the completion of seismic surveying commitments; Guidance Notes, "Permit Conditions and Administration": "Arrangements to Maintain Good Standing", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_3.html.

75 The Guidance Notes provide that the JA and the defaulting companies will agree on the monetary value of the outstanding work commitments, failing which agreement independent expert advice will be sought and the defaulting permittees will be liable for the cost of obtaining such advice. Companies may be required to provide audited accounts demonstrating that the required expenditure commitments have been met; Guidance Notes, "Permit Conditions and Administration": "Arrangements to Maintain Good Standing", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_3.html.

76 The Guidance Notes state that the defaulting company will be required to spend its share of the amount of the agreed value of any outstanding commitments on the acquisition and interpretation of new geophysical and geochemical data and/or drilling activities in the minimum guaranteed period (ie the first three years) of the new permit(s) obtained from the re-released areas. Any outstanding commitment remaining at the end of the first three years of the permit term have to be spent on studies of the offshore Australian region for the benefit of the petroleum exploration industry; Guidance Notes, "Permit Conditions and Administration": "Arrangements to Maintain Good Standing", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_3.html.

77 Unless otherwise agreed with the JA, this would normally be expected to be in the two re-releases immediately following the cancellation of the permit.

78 See Charlie Grover and Tim Warman, "Commonwealth PSLA requirements for managing petroleum activity data" (2005) 24(2) *Australian Resources and Energy Law Journal* 231.

in writing to maintain its "good standing" and make a public statement about its undertaking at the time of cancellation of their permit.

The Guidance Notes provide that a defaulting company seeking to maintain "good standing" will be able to bid for re-released areas in any Adjacent Area[79] and, if successful, will be offered a permit.

A defaulting permittee that maintains "good standing" through these arrangements will not have its past performance in the cancelled permit taken into account in the consideration of future applications for exploration permits.

Notably, the "good standing" rules outlined above use the amount of expenditure as a measure of obligations, in contrast to MWPs which are measured in terms of activity, thus creating difficulties for the operation of these rules. An example of the problematic outcome of this inconsistency is the good standing agreement reached with Shell discussed above, whereby Shell's obligations were transformed from a 50% share of the drilling of 46 wells, estimated to cost $3.5 million each in the MWP, to expenditure based upon a 50% share of the cost of drilling the outstanding wells estimated at only $1.7 million per well.[80]

5. CONCLUSION

In some instances the work program bidding system, coupled with the relatively short six year term of permits and the mandatory work requirements, may help promote exploration for, rather than warehousing of, Australia's petroleum resources.

However, the work program bidding system may not work where the title in question has undoubted prospectivity. This is because, if the JA assesses bids according to the exploration potential of work programs, bidders may be encouraged to bid excessive exploration programs. The danger posed by the current decision-making criteria is that it has the potential to shift the focus of competing applicants away from innovation and exploration in favour of volume of drilling or seismic operations . This may result in the refusal to grant permits to the most efficient explorers which could effect an overall loss in economic efficiency, and wastage of, and unnecessary competition for, scarce exploration resources (such as drilling rigs and seismic equipment). The availability of the good standing arrangements described above in paragraph 4.10, may further undermine the integrity of the system, by removing the consequences of overbidding for individual applicants.

Further we note that the work program bidding system has the potential to effect a reduction in the amount of petroleum resource rent tax (PRRT) received by the government. PRRT is levied on the taxpayer's PRRT profits of a petroleum project.[81] The taxable profit of a project for PRRT purposes is the excess of assessable receipts over the sum of deductible expenditure of a project,

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79 The term "Adjacent Area" is used in the Guidance Notes, "Permit Conditions and Administration": "Arrangements to Maintain Good Standing", http://www.industry.gov.au/acreagereleases/2007/html/guidance/guidance_3.html.
In our view, the term "Adjacent Area" should be read in accordance with the definition of "adjacent area" in the PSLA, which means "an adjacent area in respect of a State or Territory ascertained in accordance with section 5A" pursuant to s 5 of the PSLA.

80 See David A W Maloney, "Australia's Offshore Petroleum Work Programme Bidding System" (2003) 21(2) *Journal of Energy & Natural Resources Law* 137.

81 Section 5 of the *Petroleum Resource Rent Tax Act 1987* (Cth).

where deductible expenditure includes exploration expenditure.[82] If, pursuant to the work program bidding process, a taxpayer conducts wasteful drilling for exploration purposes, the expenditure on that drilling may be deducted when calculating PRRT. This may mean a loss of government revenue in respect of amounts spent on wells unnecessarily drilled as a result of an excessive exploration program.

Whether the issues identified above become a substantive problem may depend, in part, on how the JA exercises its broad discretion granted by the PSLA and the Guidance Notes (at least in terms of the relevant weighting given to each factor contained in a bid).

In our view, where a title has undoubted prospectivity, it may be appropriate that an adequate exploration program act as a threshold requirement to a successful bid, which is then supplemented by a cash or royalty bid. Whether this approach to assessing bids can be implemented under the current legislation has not been considered in this paper.

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82 See the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth). Note that this article does not propose to provide an overview of the *Petroleum Resource Rent Tax Assessment Act 1987* (Cth).