

1. JOINT VENTURES

1.1 Nature of a Joint Venture

Articles

Ryan G.L.J. “Joint Venture Agreements” (1982) 4(2) *Australian Mining and Petroleum Law Journal* 101

Ryan considers there is now sufficient uniformity in the operation of jointly undertaken resource projects to be able to distinguish a “typical” joint venture agreement. He looks at the nature of the relationship between parties to a “typical” joint venture, to determine whether such an agreement should be considered a separate legal concept, or whether it creates a form of partnership. Ryan examines the legal history of joint ventures in Australia, and concludes that to date there is very little case law that recognises the joint ventures as distinct from a partnership. However, as relationships that do not fit the category of a partnership continually present themselves, Australian courts may in the future recognise the concept of a joint venture as something outside a partnership, although the precise nature of that concept will take some time to emerge. In so doing, the author believes courts should give effect to the express intention of the parties, and that the application of partnership principles should be selective.

Merralls J.D. “Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts” (1988) 62 *Australian Law Journal* 907

Merrill examines the different types of ventures and how they differ from orthodox partnerships. In canvassing the nature of a joint venture, he covers the range of obligations and liabilities that will be imposed by law and in equity, and the effect of contractual provisions on those rights.

The second part of Merrall’s article steps through all the elements of a typical joint venture agreement, and thoroughly analyses the nature and implications of the interaction of contractually agreed rights and legal principles that may operate on those rights. Discussion covers: interests of participants; assignment of interests; management and control; the nature of the operating committee, operator, default procedures, and the potential remedies available.

Cases:

Mount Isa Mines Ltd v Seltrust Mining Corp. Pty Ltd (1985) Unreported, Supreme Court of Western Australia (Rowland J.)

Pritchard R.L. “Unincorporated Joint Ventures” in R.P. Austin and R.J. Vann, (eds) *The Law of Public Company Finance*, Law Book Company, Sydney, 1986, Chapter 18

In this chapter, Pritchard sets out the fundamental characteristics of an unincorporated joint venture, where the venture does not constitute a partnership. He considers the contractual nature of such a joint venture (with regard to commencement and termination), and describes typical

examples of joint venture agreements, including: joint bidding agreements; production sharing agreements; joint exploration agreements; joint operating agreements; tolling agreements; real-estate development agreements; financing agreements; and pre-incorporation agreements. An overview of the distinction between an unincorporated joint venture and a partnership is covered, the fundamental question being “what are the real intentions of the parties as elicited from the terms agreed between them and from their course of dealing?” The basis for liability of the venturers to third parties is discussed before considering the obligations and rights of joint venturers *inter se*, with respect to fiduciary duties, duty of confidentiality, and contractual obligations. The final part of Pritchard’s paper gives a concise overview of the nature of proprietary interests of joint venturers, assignment of interests, and charges over interests of joint venturers.

Ladbury R.A. “Mining Joint Ventures” (1984) 12 *Australian Business Law Review* 312

Ladbury provides a clear and detailed overview of the nature of a mining and petroleum joint ventures under Australian law. He describes the features of the typical unincorporated joint venture, that is not a partnership, discussing the reasons for seeking to avoid a partnership structure and the legal, taxation and financial implications of such a distinction. Ladbury then considers the main features of a typical joint venture agreement with respect to: purpose and scope; ownership of assets; size of interests; forms of management and operation of the venture; calls and expenditure; default; and assignment, and compares these features with those of a partnership under both Australian and United States law.

Dennis G. “Joint Ventures: How to Select the Right Joint Venture Vehicle for your Project” *Institute for International Research Conferences*, 21 March 1993

Dennis gives a practical overview of the reasons to use a joint venture vehicle (sharing of risk and resources, foreign investment rules, and private sector involvement in public projects). He then provides a convenient list describing the more common venture risks and some of the methods by which those risks can be overcome. The greater part of Dennis’ paper then identifies the key characteristics of the different types of joint venture vehicles setting out the description, tax consequences, advantages and disadvantages for each of (i) a company; (ii) a unit trust (iii) a common law partnership; (iv) a limited liability partnership; and (v) a participation consortium.

Millhouse A.M. “Joint Ventures - Problems for Financiers?” Paper presented at *Continuing Legal Education Seminar* 5 August 1992, Queensland Law Society Incorporated, 1992

Millhouse begins the first part of his paper with a description of the concept of a joint venture, giving illustrations of the most common forms in which the concept has manifested itself in Australia.

Doran R.J.P. “Commentary on Joint Venture Accounting Procedures” [1985] *Australian Mining and Petroleum Law Association Yearbook* 68

Doran’s paper begins with a description of the practical and procedural characteristics that distinguish an Australian oil and gas joint venture (diversity of participants, paucity of legal precedents, absence of pro-forma documentation, strict implementation of joint venture principles, and predominance of explorationists at key decision making levels) from its counterpart in other

parts of the world, noting however, that the reasons for these distinctions are related to the relative 'youth' of the oil and gas industry in Australia, which may be expected to change as the number and experience of participants in Australian joint ventures grows.

Waite J.H. "Australian Resources Joint Ventures: Some Legal Pointers for Investors", Paper presented at *LAWASIA (Energy Section), International Symposium on Energy Law, Jakarta, 7 November 1985*

Waite begins with an outline of the principal characteristics of an unincorporated (mining or petroleum) joint venture and an incorporated form, before setting out a list of the major advantages of the unincorporated form. He considers various definitions of joint venture, explaining the reasons why the concept of a joint venture in an Australian context is generic, and can encompass many forms of legal relationship, including partnership.

The third part of Waite's paper discusses the typical provisions in Australian resources joint venture agreements that deal with the situation in which participants are in default in making their financial contribution to the project. A descriptive overview of various deadlock breaking mechanisms is given including: expert adjudication or arbitration; non-consent and sole risk; mandatory transfer of interest; Russian roulette; and the possible application of partnership dissolution rules. Waite provides a description of the role of an operator or manager of a resources joint venture, outlining the capacity of the operator as a participant; powers and functions; funding; third party contracts; operating standards and liability; and personnel matters. His overview continues with a brief discussion of a number of financial issues arising for an unincorporated joint venture and the implications for the drafting of financial documents and the joint venture agreement itself.

Merralls J.D. "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1980) 3(1) *Australian Mining and Petroleum Law Journal* 1

Considered to be one of the first pre-eminent articles dealing specifically with the nature of joint ventures in the Australian mining and petroleum context, Merrall's paper also argues the case for recognising Australian resources joint ventures as a distinct category of structure requiring different treatment at law, in the author's words "that it is significant for what it is not, as well as what it is." Although such joint venture arrangements have not become so stereotyped as to be able to be treated universally, the significant differences between mining and petroleum joint ventures and other structures, require that their treatment under the various areas of law applicable to them, be flexible to the evolving needs of this structure, or as Merralls describes it, "the law of joint ventures is not being made in the courts or the statute books, but in the voluminous documents which order the complex exploration, development and financing activities that mining and exploration operations involve." Merralls discusses the common features of a mining and petroleum joint venture, emphasising the contractual basis of the relationship and distinguishing the incidents of partnership. Further fundamental differences between a joint venture and a partnership are evident in respect to the nature of the interests held by joint venture participants and the assignability of those interests, and Merralls describes how the joint venture agreements treat those interests.

A major feature of resource joint ventures is the presence of an operating or management committee that oversees the management of the operations conducted by an operator/manager.

The second part of Merrall's paper describes the activities of the operator/manager regarding funding, third party contracts, property, employment, indemnity and duties of good faith owed by the operator to the other participants, highlighting the importance of the joint venture agreement itself in defining the scope of these activities and obligations.

Merralls then considers the major procedures utilised in cases of default under the joint venture agreement. He considers in particular, whether the operation of such default clauses have any implications with respect to the creation of charges or abatement of interest provisions of the *Companies Act* 1961 (Cth). He also discusses briefly, the potential for default mechanisms to be considered a penalty. Merralls notes the distinction between default by breach and default by non-performance, observing the equity will view the first less favourably, and advising that any abnormally high rates on outstanding contributions or large premiums for reinstatement, may need to be justified by the circumstances.

Legislation:

Companies Act 1961 (Cth) sections 100,293(1), and 227(1)

Crommelin M. "Mining and Petroleum Titles" (1988) 62 ALJ 863

Australian mining and petroleum joint ventures are subject to specific statutory regimes governing exploration for and production of mineral and petroleum resources. As a leading author on the nature and operation of petroleum titles, Crommelin sets out in comprehensive detail, the proprietary rights to mineral and petroleum resources, both onshore and offshore. He begins with an historical and legal analysis of the two major types of titles to minerals namely "possessory titles" and "administrative titles" including discussion of the operation of the various State Mining Acts; the processes for challenging possessory title claims; the proprietary status of prospecting licences; and the procedural requirements for obtaining administrative titles.

In the second part of his paper, Crommelin explains the scope for dealing with interests in titles. Although statutes contain indirect evidence of legislative intention to permit dealings, the nature and effect of such dealings is less certain. Through a close examination of case law, Crommelin elucidates the principles applied by courts in determining the proprietary status of mineral and petroleum titles. Also considered is the nature of proprietary rights to production titles created by mineral or petroleum royalties.

Cases:

Hunter Resources Ltd v Melville (1988) 62 ALJR 88

ICI Alkali (Australia) Pty Ltd (in Vol Liq) v FCT (1979) 53 ALJR 220

Saskatchewan Minerals v Keyes [1972] SCR 703

Australian Energy Ltd v Lennard Oil NL [1986] 2 Qd R 216

BHP Petroleum Pty Ltd v Oil Basins Ltd [1985] VR 725

National Executors and Trustees Co of Tasmania Ltd v Edwards [1957] Tas SR 182

Fabri N. “The Legal Nature of Petroleum Agreements: A Comparative Analysis”
[1986] *Australian Mining and Petroleum Law Association Yearbook 1*

Fabri’s paper considers the legal nature and effects of the petroleum agreement. It explores first the legal framework and the wide range of different forms of arrangements, which have been developed in different countries. Next, he analyses the legal status of the agreement, whether it is contractual or otherwise and what incidents attach to this status. An examination of the representative legal systems in which the agreement operates forms the subject of the next section. In considering the various issues involved, Fabri discusses in turn the extent to which rules of particular municipal systems protect from alteration or abrogation rights of the kind that the petroleum regime confers. The paper closes with an evaluative appraisal of the various theories advanced which purport either to municipalise the petroleum regime to the extent of giving an absolute right to the state to alter or revise the terms of the arrangement in exercise of its legislative competence or to “internationalise” or “delocalise” the arrangement by subjecting it to a supra-national body of law with the aim of insulating the host country-company relationship from the operation of national law.

Books

Taylor M.P.G., Winsor T.P. and Tyne S.M. *The Joint Operating Agreement*, Longman, London, 1989

In the context of the UK system of petroleum licensing, the authors set out in complete detail over the course of this book, the practical and legal workings of a typical UK Continental Shelf Joint Operating Agreement (JOA). Chapter one looks at the legal nature of UK petroleum licences, and the function and development of the UK form of JOA. Other documents related to the JOA are defined and discussed, namely: bidding agreements; transportation agreements; abandonment agreements; unit operating agreements; financing and marketing agreements; state participation, and “illustrative” agreements. Other chapters are dedicated to: the operator, authorisations and accounting procedures; sole risk and non-consent; default; assignment and withdrawal; unit operating agreements; JOAs for Onshore Operations; and abandonment. The appendix contains a model Joint Operating Agreement for a Petroleum Production Licence, as used in the UK for oil and gas licences on the Continental Shelf.

Thompson N. “The Nature of the Joint Venture” in W.D. Duncan (ed), *Joint Venture Law in Australia*, The Federation Press, Sydney, 1994, Chapter 2

Thompson gives a comprehensive and detailed account of the history and development of joint ventures, highlighting the similarity between the typical unincorporated joint venture of today and the early cost book company, a sui generis type of mining partnership originating in Cornwall. He then compares the typical Australian unincorporated joint venture with its US counterpart, and sets out the features of relationships commonly described as an unincorporated joint ventures, giving examples of structures that fall into this general description.

The second part of Thompson's paper offers an extensive comparative examination of the concept (and history) of partnerships and the attributes of a modern contractual joint venture. He notes that the US and Scotland have subsumed joint ventures under the heading of partnership, and that some Australian judges advocate that joint ventures can adequately be addressed by the established body of partnership law. Thompson strongly argues however, that there are sufficiently valid practical and historical bases for distinguishing the two concepts, to warrant the continuation of "joint ventures" as a separate category.

Thompson examines in detail the case law and statutes dealing with the joint ventures and partnerships, to discern the commonly accepted basis for distinguishing partnerships from joint ventures, namely:

- "several" rather than "joint activity";
- "sharing of profit";
- obtaining a "product" or "benefit" as distinct from "profit";
- undertaking of a "single" activity;

and questions whether Australian commercial exigencies necessitate the recognition of a joint venture as a separate structure - that partnerships are not necessarily suitable vehicles for commercial change. Thompson proceeds to consider the obligations implicit in a joint venture relationship which resemble a partnership, which may still attract obligations and rights under partnership law principles, notwithstanding a separate category is recognised, including: the obligation to share losses; equal division of gains; obligations arising under contract; and obligations arising by law.

Eddey P.H. *Accounting for Interests in Joint Arrangements*, Australian Accounting Research Foundation, Melbourne, 1985

The first chapter in this small book by Eddey, sets out the nature of joint ventures and the principal legal and accounting differences between incorporated and unincorporated joint arrangements. An overview is given of the nature, legal characteristics, and advantages of a joint venture structure. Eddey discusses the accounting distinctions between partnerships and unincorporated joint ventures, and provides a table of the major legal and accounting distinctions between the two.

1.2 Structure

Articles

Greiner C. and Barnett A. "Introduction to the Basics—Choice of Structure and Information Gathering" Paper presented at BLEC Seminar in May 1998, *Annual Joint Ventures Seminar*, Business Law Education Centre, Sydney, 2000

Greiner and Barnett briefly discuss particular issues arising out of the choice of joint venture structure. These issues include: discussion of *Whywait Pty Limited v Davison* as to when a 'relationship' may be considered a partnership; appointment of directors in a joint venture