section 368, but a court may decline its discretion if it could be show that the value of the forfeited property significantly exceeds the unpaid calls. As to section 200, while cross-charges and express liens will ordinarily be registrable, forfeiture provisions should be characterised as conditional contracts to assign rather than security arrangements and are likely not to be registrable. If forfeiture provisions are considered a security arrangement, they will only be registrable if some part of the property is comprised in section 200. Where there are cross chargees, the doctrine that equity will not allow any clogging of the chargee's equity of redemption will not prevent the forfeiture of interests under default provisions.

Cases:
Hewitt v Court (1983) 149 CLR 639
Maughan v Elders Finance & Investment Co. Ltd. (1986) 5 ACLC 20

Legislation:
Bankruptcy Act 1966 (Cth) sections 120 and 122
Companies Code sections 200, 368 and 451

4.5 Competition and Trade Practices Restrictions

Articles

Williamson D. "Marketing by Joint Venturers in Mining and Petroleum Projects: Trade Practices Implications" Paper presented at *Australian Mining and Petroleum Law Association Thirteenth Annual Conference*, 12-14 July 1989, Perth, Session 8

Williamson provides an in-depth and comprehensive analysis of issues arising from joint venture marketing in the context of oil and gas joint ventures. He first sets out the legal framework of the *Trade Practices Act* 1974 (Cth) ("TPA") and the operation of section 45A in relation to price fixing. Williamson highlights the significance of section 45A(8) in assessing joint marketing arrangements for joint ventures—the size and scope of most mining and petroleum joint ventures make it unlikely any of the other participants, or any other potential competitor, would have otherwise engaged in similar production, and so could not substantially lessen competition. This initial discussion of the statutory framework includes detailed discussion of the definitions of "competition" under section 45(3) and of "market in Australia" under section 4E.

Following this is a comprehensive discussion on the application of section 45A of the TPA. Williamson argues that the definition of "competition" as used in section 45A(1) confines its operation to price fixing provisions agreed between parties who are in competition with each other in a market in Australia. He then deals with the application of section 45A(1) to export sales, and analyses the case law, to determine whether sales contracts executed overseas would be caught by the provisions of the TPA that refer to "market" in Australia. Williamson also considers the circumstances and factors which may or may not constitute "supply" of a product "in" the market

and the extent to which overseas delivery, payment, and execution of contracts may fall within those provisions, and also whether Part IV of the TPA will apply to a provision even though it relates exclusively to the export of goods from Australia if there is no notification under section 51(2)(g) TPA. The application of section 45A(1) to an overseas agreement, and to market sharing, are also referred to.

Williamson then provides an extensive analysis of the operation of and application of the price fixing provisions, where joint venture participants cooperate in marketing through the appointment of a common agent, or sell to the same purchasers, or charge the same prices. He points out that whether the fixing of prices is express or implied, the existence of such a provision is a matter that may be inferred from all the circumstances. Dealing first with the situation of a common agent or manager, Williamson examines the extent to which section 45(2), section 45A(1), section 47 and section 46 will impact on such an agency arrangement. Williamson argues that whatever the precise details of the arrangement, it is extremely likely that section 45A will be applicable to parallel sales by otherwise competitive participants through a common against. He notes that in regard to section 46, there is no provision for the aggregation of market power, except in the case of related corporations, and that an argument might be made that a joint venture marketing arrangement might have the effect of pooling market power in the hands of the common agent, if it is in a position to exert considerable leverage in a particular market. He also warns of the dangers in refusing to supply a would-be customer—if such a refusal to supply were not caught by section 46 or section 47, then an agreement amongst the participants and their agent to that effect could come back to a competition issue under section 45(2).

Williamson then examines the potential for exception from the statutory requirements for mining and petroleum joint ventures. After dealing with the issue of statutory recognition of joint ventures under section 4J TPA, he examines the statutory operation and effect of the joint venture pricing exception under section 45A(2). He then offers a commentary on the operation of sections 45 and 47, with respect to the "substantial lessening of competition," and considers the case law decisions regarding the meaning of "substantial." Williamson then considers the exceptions contained in section 51(1), in particular, the exception for primary producer marketing organisations, prescribed contracts or conduct pursuant to an agreement between the Government of Australian and the Government of a country outside Australia. He discusses the import of section 51(1) that make those statutory exceptions applicable only to an "act or thing," and only if "done" in the State or Territory, and notes that "specifically authorised or approved" in section 51(1) requires more than Ministerial approval. The final exception considered is the export exception under section 51(2)(g).

The final part of Williamson's paper considers the operation of the notification provisions (section 93) and authorisation provisions in Part VII TPA (section 88). Both the legislation and tests for authorisation are discussed, together with a table setting out each of the types of prohibition, against its associated authorising section and applicable test. A description of the determination procedure follows, with discussion as to the factors commonly considered by the Trade Practices Commission (TPC) in its determinations, namely the nature and source of public benefit. A number of TPC cases are then considered before a comprehensive analysis of the cases of "Delhi No.1," "Santos," "Bridge Oil," "Delhi No. 2" and "Pasminco."

Cases:
Re Queensland Co-operative Milling Association Ltd (1976) 25 FLR 169
Queensland Wire Industries Ltd v The Broken Hill Proprietary Company Limited (1989) 83 ALR 577
Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd (1982) 64 FLR 173
Outboard Marine Australia Pty Ltd v Hecar Investments (No. 6) Pty Ltd (1982) 66 FLR 120
Woodside Petroleum Development Pty Ltd (1977) *ATPR* (Com) 35-200
McIllwraith McEacharn Limited (1980) *ATPR* (Com) 50-100
Port Waratah Coal Services Ltd. (1983) *ATPR* (Com) 50-056
Esso Exploration and Production Australia Inc and Western Mining Corporation Ltd (1977-1978) *ATPR* (Com) 35-340
West Australian Petroleum Pty Ltd (1979) *ATPR* (Com) 35-100
Comalco Ltd (1979) *ATPR* (Com 35-200
Delhi Petroleum Pty Ltd and Santos Ltd (1988) *ATPR* (Com) 50-072 ("Delhi No.1")
Santos Ltd (1988) *ATPR* (Com) 50-074 ("Santos")
Bridge Oil Ltd (1988) *ATPR* (Com) 50-073 ("Bridge Oil")
Delhi Petroleum Pty Ltd and Santos Ltd (1988) *ATPR* (Com) ("Delhi No. 2")
Pasminco Ltd and Australian Mining and Smelting Ltd (1988) *ATPR* (Com) 50-082 ("Pasminco")

Legislation:
Trade Practices Act 1974 (Cth) sections 4E, 4J, 45, 45A, 46, 47, 51, 88, 93

Corones S. "Joint Ventures and the Trade Practices Act" in W.D. Duncan (ed), *Joint Venture Law in Australia*, The Federation Press, Sydney 1994, Chapter 8

Corones analyses the way in which joint venture agreements can fall within the ambit of the *Trade Practices Act* 1974 (Cth) ("TPA") and examines the case law of the courts, Trade Practices Tribunal and Trade Practices Commission in this area. He begins with a discussion of the types of prohibitions related to competition and misuse of power under the TPA. The types of anti-competitive concerns raised in the joint venture context are then considered, including:

- competition between joint venture participants (and issues involved in determining whether participants are actual or potential competitors);
- ancillary restraints (and the extent to which ancillary restraints on competition may be considered reasonable or justified, if they are necessary to give effect to a pro-competitive joint venture);
- bottle-neck monopoly (and whether access to the venture is reasonably necessary to enable outsiders to compete effectively and is unreasonably denied—any refusals to supply may invoke the "essential facilities" provisions especially where the joint venture parents have substantial market power); and
- "spill-over" anti-competitive effects.

Joint venture pricing and exclusionary provisions are then discussed. In relation to exclusionary provisions, Corones argues that there is no good policy reason for automatically condemning and exclusionary provisions in the context of a joint venture. He notes that United States cases have recognised, that unless a joint venture has market power or exclusive access to an element

essential to effective competition, then the joint venture parties should be permitted to restrict third party rights of access. Corones observes that this approach raises questions as to what may be considered "essential to compete". He argues however, that in order to limit "free-riding," access should only be permitted if the joint venture possesses an element essential to effective competition by third parties. But until the TPA treats exclusionary clauses in the same manner as pricing fixing (that it is prohibited only if it has the effect of lessening competition) then where joint venture agreements contain exclusionary clauses, authorisation should be sought.

The second part of Corones' paper examines some of the Trade Practices Commission's significant authorisation determinations, with a view to highlighting the policies adopted by the Commission in granting authorisations. He concludes that the Commission takes a favourable attitude towards joint ventures, especially those involving the exploration and development of natural resources, or which result in the provision of new goods or services, and do not eliminate existing competitions. The Commission has also been tolerant of ancillary restraints that are necessary to give effect to pro-competitive joint ventures or ensure that public benefits are realised—it has not tried to prevent the restriction of production in a joint venture, for example, by requiring that either parent an expand the production of the joint venture independently. Corones notes, however, that applying for an authorisation can have a number of drawbacks from the point of view of the joint venture parties. The authorisation process gives the Trade Practices Commission a measure of control over the terms of the joint venture agreement, and the Commission can pressure the applicants into deleting what it regards as unreasonably or unnecessary anti-competitive aspects of the joint venture before authorising it.

Cases:
Hydrocarbon Products Pty Ltd (1975) 1 *TPRS* 105
Woodside Petroleum Development Pty Ltd (1977) *ATPR* (Com) 35-200
Howard Smith Industries Pty Ltd (1977) *ATPR* 40-123
Comalco Limited (1979) *ATPR* (Com) 35-200
Electric Lam Manufacturers (Australia) Pty Ltd (1982) *ATPR* (Com) 50-033
Koppers Australia Pty Limited (1981) *ATPR* 40-203
Commonwealth Serum Laboratories 1985) *ATPR* (Com) 50-088
BHP Petroleum Pty Ltd (1990) *ATPR* (Com) 50-096
Macadamia Company and Suncoast Gold Pty Ltd (1991) *ATPR* (Com) 50-109
Travel Industries Automated Systems (TIAS) (1992) *ATPR* (Com) 50-117
Sagasco Resources Limited (1992) *ATPR* (Com) 50-118

Legislation:
Trade Practices Act 1974 (Cth) sections 4D, 45, 45A, 88

Oddie C. and McKeown L. "Joint Ventures and Exclusionary provisions: Anti-competitive purpose or unintended effects?" (2002) 10 *Competition and ConsumerLaw Journal* 192

The authors examine the scope and application of the *per se* prohibition on exclusionary provisions in section 45(2)(a) of the *Trade Practices Act* 1974 (Cth) ("TPA"). In light of two recent cases, they argue that the scope of the "purpose" and "classes of person" elements in the definition of an exclusionary provision, contained in section 4D TPA, has been broadened. The

prohibition on this more widely defined exclusionary provision may now catch common restrictions in standard joint venture agreements, including non-compete clauses, or clauses in which the joint venturers (as industry competitors) restrict the persons from whom the joint venture will acquire good or services or the persons to whom it will supply good s or services. They examine in detail, the judgment in *South Sydney Rugby League Football Club Ltd v News Ltd* noting that the majority judgments (of Moore and Merkel JJ) are not consistent in their line of reasoning on defining "purpose" or "class of persons." Turning to the judgment in *Rural Press v ACCC,* they note the Full Federal court declined to follow the majority judgment in *Sydney Rugby League Football Club Ltd v News Ltd*, in their formulation of the tests as to "purpose" and to "class of person." In the authors' view, seeking authorisation for the joint venture agreements that may be affected, is not always a viable option—it is conceptually inappropriate, as the authorisation process begins from an assumption of competitive detriment and looks for public benefit to balance this, and it is commercially unattractive, as third parties can use the process strategically to delay competitors' transaction and can benefit from the information which the parties seeking authorisation are required to make public.

The authors argue that the broader interpretation of exclusionary provision, may affect conduct that is competitively neutral or even pro-competitive, and that the provisions should be amended to conform with similar provision internationally. By way of comparison with the Australian provisions of the TPA with regard to exclusionary provisions, the authors examine the United States position on classic boycotts; the recent New Zealand legislative amendments to its *Commerce Act* 1986 to more clearly target primary boycott behaviour and otherwise reduce the impact of exclusionary provisions so as not to capture pro-competitive arrangement; and the operation in Europe of provisions on restraints of trade flowing from collaboration between competitors under Article 81(1) of the Treaty Establishing the European Community 1957.

Cases:
South Sydney Rugby League Football Club Ltd v News Ltd (2001) 111 FCR 456
Rural Press v ACCC (2002) ATPR 41-883

Legislation:
Trade Practices Act 1974 (Cth) sections 4D, 45(2)

Cottee R.I. "Comment on Assignment Clauses in Mining and Petroleum Joint Ventures" [1986] *Australian Mining and Petroleum Law Association Yearbook* 141

Cottee focuses on trade practices implications of assignment clauses, by analysing the legal requirements of s. 45B *Trade Practices Act* (TPA) to determine if the type of assignment clauses regularly found in oil joint venture agreements will be caught by s. 45B and be deemed "anti-competitive." Cottee first examines whether an assignment clause is a "covenant' within the statutory meaning under the TPA. Observing that the TPA definition of covenant is different from that at common law (where a promise under seal and privity of estate are required) Cottee argues that a wide interpretation of "annexed to" (the interest cannot be "running with the land" as there is no privity of contract) where the assignable interest is a right to surface title or possession of a mining title (a mining tenement may not be an interest in land) will catch these interests contained in assignment clauses.

Examining the other statutory requirements, Cottee notes that "competition" includes competition from imported goods, and that the words "substantially lessening competition" will be interpreted in the negative—the assignment (covenant) will not infringe the test if the lessening of competition is insignificant or trivial in relation to the particular market. It is possible that substantial quantities of product may be considered to lessen the likelihood of competition. Moreover, when the object of an assignment clause is to restrict access to the joint venture, a court would have not difficulty in applying the interpretive provisions of s. 4G TPA (lessening competition includes preventing or hindering competition) to render the clause unenforceable.

The requirement that competition be lessened "in the market" does not include the market for exploration or production leases (although restriction of foreign ownership may bring this result) but is directed to lessening competition in the supply of goods in the market. As the market for oil, gas and condensates is subject to constant changes in consumer demand, various regulatory regimes, changing technologies and pricing, and has limited players, the "anti-competitiveness" of any restriction will depend on the circumstances at the time. The TPA is directed toward supply or acquisition of "goods"—"goods" are defined to include "mineral" and arguably "mineral" includes hydrocarbons (oil, gas, petroleum).

Cottee concludes with a discussion on preventing unauthorised assignment and suggests retention of the title instruments relating to the mining tenements as a practical means to prevent registration of transfer. Where an assignment is undertaken in breach of the assignor's obligation, the status of the interest obtained may be successfully challenged, depending on the knowledge (notice) the assignee had of the breach of contract and of the fiduciary obligations of the assignor.

Legislation:
Trade Practices Act 1974

> Section 45B(1) provides
> *A covenant, ... is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation ... if the covenant has, or is likely to have, the effect of substantially lessening competition in which the corporation, ... supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the covenant, supply or acquire, or be likely to supply or acquire, goods or services.*

Rose P. and Grave D. "Authorisation of Joint Venture Marketing: North West Shelf Project Authorisation" (1998) 17 *Australian Mining and Petroleum Law Journal* 379

This paper examines in detail the determination of the Trade Practices Commission in relation to an application by participants in the North West Shelf Project for authorisation to coordinate the marketing and sale of natural gas pursuant to section 88(1) of the *Trade Practices Act* 1974 (Cth). The applicant joint venturers in the Project argued that their proposal to co-ordinate the marketing and sale of natural would not have the purpose, effect or likely effect of substantially lessening competition in any relevant market, and that it would be likely to result in a benefit to the public and that his benefit would outweigh any detriment to the public constituted by any lessening of the competition that might result. On 29 July 1998, the Commission granted the authorisation subject

to certain conditions, finding that separate marketing was not presently feasible in Western Australia, but that there will need to be a more detailed and quantitative analysis of the public benefits and anti-competitive effects of joint marketing in the future as the market develops. Rose and Grave consider the particular factors relevant to the Commission reaching its decision namely, public benefit, public detriment, relevant markets, and the nature of the co-ordinated marketing proposed. They note that the "joint venture exception" in section 45A of the *Trade Practices Act* that exempts joint supply by joint venture producers of joint venture product from the deemed price fixing provisions in section 45A(1), was not raised in this application. It is concluded that the lengthy list of public benefits argued by the applicants and accepted by the Commission in this case, may not be accepted in future where the relevant market has undergone greater development.

Legislation:
Trade Practices Act 1974 (Cth) sections 88(1) and 45A

Books

Herzfeld E. and Wilson A. *Joint Ventures*, 3rd edition, Jordan Publishing Limited, Bristol, 1996

Written from a European business perspective, this overview of factors relevant to joint ventures across national borders, includes a practical summary on regulatory control and restrictive practice legislation (including European Union Merger Regulation and Articles 85 and 86 of the Treaty of Rome). The appendices include sample clauses and a checklist covering factors to be addressed in a corporate international joint venture.

4.6 International

Articles

Moroney D.F. "Sole Risk in Mining and Petroleum Ventures: An International Perspective" [1986] *Australian Mining and Petroleum Law Association Yearbook* 164

The three different forms of penalty (production, cash and acreage) are discussed, and Moroney advises that penalties need to be considered from the point of view of the particular jurisdictions tax regimes (eg. will penalty payment be liable to income tax, or capital gains tax for the sole risk participant) and legal regimes (how will the local regulatory authority treat change of ownership inherent in varying rights to oil among the licensees.) Moroney describes the two types of oil fiscal regimes which exist in the world, namely royalty and tax regimes (where royalty is charged on a joint and several basis, but taxes are levied on an individual basis) and production sharing regimes (in which a 'contractor' (licensee) is responsible for the conduct and cost of all operations net of all taxes, and the host Government (or its national oil co.) contracts to share oil produced). As sole risk operations were conceived of under royalty and tax regimes, there can be considerable commercial and accounting problems arise when sole risk operations are carried out under a production sharing regime. Moroney outlines the economic issues, and suggests that by providing