THE ROLE OF THE OPERATOR UNDER A JOINT VENTURE AGREEMENT

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General commercial usage of the term Joint Venture draws no distinction between the methods of collaboration envisaged or the legal form which it may take. In this paper I will be considering that form of business organization called the unincorporated venture, an organization the terms and conditions of which largely depend upon the law of contract. While other forms of associations, particularly the joint venture which is accomplished by way of shareholding in a corporation, have been dynamic means of investment in the mining industry in Australia, they are outside the scope of this paper.

Because the relationship of the parties is basically governed by the term of their contract, the form and contents of the joint venture agreement require careful consideration and drafting. The Joint Operating Agreement will adjust the normal common law rights between co-owners of property to meet the intention of the participants; it will set out the way in which the operations of the enterprise will be managed and the products derived from it will be divided among the participants.

While arrangements required for ventures formed to undertake different kinds of mining activity may vary, the legal structure is basically the same at the exploration, development and operation stage of a project. The distinguishing features of a joint venture agreement are that firstly the participants hold their interest in the assets of the venture in common and their liability is several, secondly that an operator is interposed between participants in the venture and the operations conducted thereunder, and thirdly that the participants receive the fruits of the venture separately and in kind.[1]

It is aspects of the relationship between the operator and the participants which will be selectively examined in this paper. The operator considered in this paper is the operator under a Joint Operating Agreement ("JOA"), the form of agreement which is most widely used by companies engaged in the exploration, development and operation of mineral and oil and gas properties in Australia.[2]

CHARACTERIZING THE RELATIONSHIP OF THE OPERATOR AND THE PARTICIPANTS

It is obviously not practical for all participants in a joint venture to manage operations. Accordingly the JOA will designate an operator who is charged with the conduct of operations on behalf of the participants jointly. The operator may be one of the participants, a subsidiary of a participant formed for the purpose of operating a project or a corporation formed to act as operator in which each participant holds a share in proportion to its interest in the project. Occasionally the operator may be a contractor who is not a party with a percentage interest in the joint venture; its sole interest is in the management of the project for a profit. It has been customary until recently for the participant with the largest contributing percentage interest to be designated as operator, on the basis that as it would be incurring the greatest expenditure it may be presumed to be the party most

committed to conduct the operations in a prudent and economic manner. In recent times foreign investment rules imposed by federal and state governments in Australia have required the interest of Australian participants in a project to be greater than or at least equal to the foreign investors. In these circumstances if the foreign participant has experience in mineral or oil and gas operations, the Australian participants may wish it to act as operator even though its interest is in aggregate less than theirs. In recent coal projects there appears to be a trend for the operator to be a company which is jointly owned and managed by the participants. Sometimes the operator is described in the JOA as the agent of the participants in the performance of the functions allocated to it. The JOA will also declare that joint venture assets, being those assets held by the participants in co-ownership and which they dedicate to the venture, are held by the operator as agent of the participants. The basic concept of agency has been described by Bowstead in the following terms

> The mature law recognises that a person need not always do things that changes legal relations himself: he may utilise the services of another to change them, or to do something during the course of which they may be changed. Thus where one person, the principal, requests another, the agent, to act on his behalf, and the other agrees or does so, the law recognises the agent can affect the principal's legal position by certain acts which, though performed by the agent, are not necessarily treated as the agent's own acts, but allowed to be treated in certain respects as if they were acts of principal.[3]

Where the JOA confers functions on the operator which enable it to affect the legal relations of the participants with third parties; by acts which the operator has authority to perform on behalf of the participants, and the parties expressly state that their relationship with the operator is that of principal and agent, then the law will normally give effect to their wishes.

It has been suggested that sometimes the participants will expressly declare in the JOA that the operator is not to be their agent.[4] There does not appear to be a general practice in an Australian JOA to deny the relationship of agency between the operator and the participants except in circumstances where the operator exceeds the authority expressly conferred on it in the JOA. It is also usual when the participants express the nature of their obligation inter se to state that their obligations shall be several and not joint nor joint and several, that the agreement is not be regarded as a partnership and that a participant shall not be deemed to be the agent of any other participant nor to have any authority to act on behalf of another participant. A provision of this kind does not touch on or affect the relations of the participants and the operator.

In many instances the JOA will be silent about the nature of the relationship between the operator and the participants. A typical clause which appoints the operator will be in the following terms

> Subject to and in accordance with the terms and conditions hereinafter contained and of the Joint Venture Agreement the operator is hereby appointed by the Participants acting as joint venturers to manage, supervise and conduct the joint venture on behalf of the participants under the control of and in accordance with the instructions that the operator may from time to time receive from the Operating Committee.

A later subclause will then go on to describe in more detail the functions which the operator is required to perform

> The operator shall either itself or through such agents and independent contractors as it may engage, undertake and carry out on behalf of the Participants the following activities:

(then follows an enumeration of the duties and responsibilities conferred on the Operator).

An appointment made in these terms raises the issue of the legal relationship which exists between the operator and the participants. Merralls has pointed out that in this situation the legal status of the operator will be determined by the nature of his functions and the incidence of his relationship with the participants and third parties with whom he deals.[5] Some commentators suggest that the relationship is not necessarily uniform and that the operator by virtue of its exclusive right to conduct operations may act in the capacity of a principal in its relations with third parties and hence be regarded as an independent contractor, whereas in performance of other duties it may be regarded as an agent for the participants.[6] It would seem that this view, at least in the Australian context, may be based upon a misconception of the agency relationship. Bowstead effectively demolishes the debate about the distinction between the agent, an independent contractor and a servant and the overlap between each of these categories in the following terms

> Much space has been devoted in the books on agency to discussion of the relation between servants, agents and independent contractors. It has been said that all agents are servants or independent contractors: it has also been suggested that there is a class of agents who are neither servants nor independent contractors. It is submitted that the controversy is somewhat sterile. The dichotomy of servants and independent contractors is based on the degree of control exercised by the master or employer, and is principally relevant to determine his liability for torts of physical damage to persons or property caused by others. The terminology of agency is based on the idea that one person may be bound by acts which he has authorised another to do, and is principally relevant to the contract and the disposition of property, although it is sometimes used in analysing tort situations and has many other applications in the law.[7]

An operator who is appointed in terms of the clause mentioned above is in my view properly classified as an agent for the participants. The technique of categorizing relationships, particularly in the case of a JOA, is sometimes criticised on the ground that the principles of the law of agency should not be imported unselectively to negotiate the different and complex relationship of the participants and operator under a JOA. This criticism overlooks the advantage of applying the well settled doctrines of the law of agency to the operator/participant relationship. It is predictable that the Australian courts will categorize the operator/participants relationship as that of principial and agent when a JOA is subject to judicial review. If this relationship is regulated, to the extent it is not displaced by the terms of the JOA, by the law of agency, then the application of the doctrines of that law and the consequences of the relationship can be properly addressed by the participants and their professional advisers when drafting the JOA. Understanding the relationship will assist the parties when they consider whether to exclude or modify the incidents of the general law. A failure to properly characterize the relationship and hence the incidents which will apply may lead to unanticipated and possibly unpalatable consequences for the operator, the participants and third parties dealing with them.

DIVISION OF POWERS AND FUNCTIONS BETWEEN THE PARTICIPANTS AND THE OPERATOR

It is important for the JOA to delimit the powers of the management committee and the operator and to allocate the respective roles which they are to

take in the management of the activities of the joint venture. Typically the clause in the JOA providing for the establishment of a management committee will state that control of the joint venture shall be vested in a committee to be known as the management committee which shall have full power and authority to control the activities of the joint venture. In some cases the JOA will spell out the scope of the functions to be undertaken by the management committee.

Normally each participant will be represented on the management committee but where the interest of a participant is small, say below 5%, it may not have any right of representation and its interest may be voted by another participant. Voting rights usually correspond to the percentage interest of a participant in the venture. The percentage required for decisions on the management committee is an important provision in the section of the JOA relating to management. While this is a matter for negotiation and will vary from venture to venture, the percentage fixed often appears to reflect the number of participants in the venture. If there are four participants in the venture who hold percentage interests of 35:25:20:20 then the percentage selected may be 65% on the basis that three participants must vote in favour of the proposal for it to be adopted. Where a mine or well is in the development stage, the participants usually agree that there are a number of matters which are so important that they require the unanimous consent of all participants. The lower the percentage required in the JOA for making decisions, the greater may be the number of topics reserved by the participants for unanimous approval. The significance of the unanimous reservation of topics in relation to delimitation of powers is that many of these may be matters which relate to the conduct and management of operations by the operator. Typically they will include the following matters in a development joint venture:

the approval of the participants programs and budget to develop and construct a mine;

any variation of the scope of a development program and budget which will result in an increase in the total cost by more than a specified percentage;

a decision to increase or decrease production;

action or failure to take action which leads to cancellation of the tenements on which the mine or well is conducted;

expenditure on a capital item in a budget (after the mine or well is in operation) which exceeds a specified amount;

The functions of the management committee will vary from project to project. The matter of principle for determination when the JOA is under negotiation is whether the management committee will exercise detailed control over the operator or rather be content to set broad policy and outline proposed activity in programs and budgets which it is then left for the operator to implement. In the case of a project which is at the exploration or predevelopment stage, the participants may be prepared to confer on the operator considerable discretion and freedom in the conduct of operations. Once the project moves to the development stage and expenditure on facilities may reach hundreds of millions of dollars, the participants may insist that the operating committee has the right to exercise a high degree of supervision over the activities of the operator. At one extreme the JOA may provide that the operator is bound to obey all the reasonable instructions of the operating committee in relation to the manner in which it carries out its duties. In these circumstances the operator may receive directions and instructions from

the operating committee or a technical committee on technical matters relating to the project.[8]

The kind of matters reserved for consideration by the operating committee may include the following:

methods procedures and techniques relating to transportation treating and storage of product, including design construction and installation of facilities,
selection of a contractor where the contractor exceeds a specified sum,
determination of risks to be covered by insurance,
procedures for calculating recording and reporting financial data.

Some operators are not prepared to concede this degree of control by the operating committee. Where an operator is concerned that the operating committee may seek to "share" the operatorship, it may require the participants to acknowledge in the JOA that it is solely responsible for the conduct of operations undertaken pursuant to programs and budgets. A "sole conduct" clause is often in the following terms

> Subject to the other provisions of this agreement and the instructions from the participants, the operator shall have the exclusive right and shall be obliged to conduct operations and shall conduct and manage such operations itself through its employees or where appropriate and with the approval of the participants when required pursuant to any other provisions hereof, through qualified contractors, consultants or services companies, all in accordance with programmes and budgets provided by the parties as hereinafter provided.

Some participants regard a sole conduct clause of this kind as unacceptably broad and will require a more detailed listing of specific activities within the sole conduct of the operator. These may include such matters as the preparation of feasibility studies for development, negotiations with governments or mining titles and the negotiation of agreements with third parties.

At general law, an agent may not perform vicariously or delegate its duties except with the express or implied authority of the principal.[9] The power to delegate is implied in certain circumstances such as the authority to employ staff to undertake functions on behalf of the agent. It is desirable to ensure that the operator has express power to delegate, and the JOA should provide that the operator may undertake its duties through employees, agents, and independent contractors.

The JOA will expressly provide that the operator is to have exclusive possession, custody and control of all property held by the participants in co-ownership and which they have agreed to dedicate to the project. We have previously observed that participants in the JOA hold the joint venture assets as co-owners, usually as tenants in common, in proportion to their percentage interest in the ventures. Since co-owners, who hold as tenants in common, have unity of possession, it is important to the operators' management role for this right to be excluded in the JOA. The right to custody and control is reinforced by agreement of the participants that they will not seek partition of the assets they hold in co-ownership.[10] Where the participants covenant in this way a court, when a participant seeks statutory partition of its interest, will not permit it to break its contractual obligation by ordering a sale.[11] The right of the operator to dispose of joint venture property is usually strictly controlled in the JOA. In the case of property not exceeding a specified amount, which is surplus or obsolete, the operator may be given authority to dispose of it without reference to the management committee. Participants who give the operator custody and control of joint venture assets and also let it some way appear to be the owner of them may be bound by an unauthorized disposition of those assets by the operator.[12]

The JOA will appoint the operator in general terms to supervise and conduct operations on behalf of the participants and then go on to enumerate in more detail the scope of the activities which the participants require the operator to undertake. Very often the JOA will contain a confused jumble of functions neither considered nor logically arranged rather like the objects clauses found in some Memorandum of Association of a company. The functions usually conferred on the operator will include:

preparation and submittal to the operating committee of exploration programs for approval:

preparation of feasibility studies for development of a mine or oil and gas field;

construction of mines and wells in accordance with programs and budgets approved by the participants;

conduct of operations including mining, extraction, processing, stockpiling and benefication and transport of minerals or hydrocarbons;

maintenance and protection of joint venture assets;

engagement of agents and independent contractors;

effecting and maintaining insurance over joint venture assets and other insurances which the management committee may direct it to take out;

compliance with all laws affecting operations including laws relating to the environment;

doing of acts and things which are necessary or desirable for the efficient and economic activities under the joint venture; any other matters required by the management committee or by the participants;

the right to expend money in the event of danger to life or property outside amounts authorized in a program or budget.

The specification of the detail of the functions has special significance in relation to numerous matters. It is usual for the operator to extensively delegate its functions to independent contractors. At the exploration phase these will include drilling contractors, geophysicists, assayers, and seismic operators in the case of oil and gas exploration. In development the operator will utilize the service of an engineer/contractor to design and construct the facilities and infrastructure which will permit the mine or well to come into production. When the mine or well is in production, the operator will continue to use a wide range of contractors to provide specialist drilling and mining advice, transportation and logistic services. In view of this pattern of activity the power of the operator to delegate its functions to agents and independent contractors is important and accounts for the draftsman's practice of spelling out specific aspects of the right to delegate in the enumeration of functions. The authority granted to the operator in the JOA to incur expenditure outside the authorized programs and budgets in an emergency is more extensive than the power conferred on an agent at general law.[13] Agency of necessity arises where a person is faced with an emergency in which the property or interests of another are in imminent jeopardy and it becomes necessary to act without authority in order to preserve them. The authorities on which the doctrine is based are old and perhaps not apposite to a JOA, and it is not clear whether the doctrine is available in circumstances where the agent is in a position to communicate with its principal. In view of this the operator is normally given express power to include expenditure in an emergency but is required to promptly report its action to the participants or the management committee.

Where the operator is a corporation, the shares in which are owned by the participants in the same proportions as their percentage interest in the venture,

there may be a de facto combination of the functions of the operator and the management committee. The representatives of the participants who act as directors of the operator may determine policy in addition to supervising the implementation of those policies by the executives and employees of the operator.

It is unusual for an operator to charge a profit related fee at the exploration phase of a joint venture. An operator may seek a profit for conducting operations at the development and exploration stages. The fee may comprise two elements, firstly a fee for managing the development stage which is related to cost of constructing the project and secondly a fee when the mine or well is in production which is calculated by reference to the FOB or FOR value of minerals or market value of oil and gas produced and sold by the participants. The significance of whether a profit related fee is received by operator is relevant when considering the duty of care which the operator owes to the participants in the conduct of operations.

DUTY OF CARE OF THE OPERATOR

An agent appointed by a contract has a duty of care to his principal in contract and any claims for a breach of that duty will arise only in contract and not in tort. The duty has been expressed in the following terms

> Every agent acting for reward is bound to exercise such skill, care and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the . . . business in which he is employed, or is reasonably necessary for the proper performance of his duties undertaken by him.[14]

The law of agency draws a distinction between the contractual agent and the gratuitous agent. An operator who is reimbursed by the participants pursuant to the JOA for the costs and expenses it incurs in the performance of its duty, will be a contractual agent. It is irrelevant to this characterization that the operator does not make a profit. In the present context the importance of the distinction for an operator is that some authorities suggest that a lower standard of care will apply to the gratuitous agent than to the contractural agent.[15] An agent is required to exercise good care and skill in the performance of its functions.[16] In order to avoid the uncertainty of the application of the general law the parties usually prescribe in the JOA the standard required of the operator in the performance of its duty. Where a project involves the construction and operation of a mine or well the JOA may prescribe the following standard of care

> The operator shall perform all of its obligations hereunder and conduct all operations in a good, workmanlike and commercially reasonable manner and in accordance with the most suitable engineering mining processing methods and practices and with the standard of diligence and care normally exercised by duly qualified persons in the performance of comparable work.

The expression "good and workmanlike manner" means the work must be carried out with skill. Insofar as the operator is responsible for the construction of the project it may also be liable to ensure that the materials used in construction will be of good quality and that the work and the materials are reasonably fit for the purposes for which they are required. The obligation to use good materials is apparently absolute and independent of fault.[17] The next issue to consider is what consequences arise from a breach of the duty of care. It has been customary for participants to agree to limit that liability of the operator. In view of the extent of the liability which it may incur in a project involving expenditures of hundreds of

millions of dollars, a number of reasons are customarily advanced to justify the limitation of the liability. It has been pointed out by American commentators that a partner cannot sue another partner for damages suffered as a result of the conduct of the venture operations unless there is a breach of fiduciary obligation, wilful misconduct or gross negligence.[18] It is suggested that by analogy with this principle, the participants should not impose a standard of care on an operator, who is either a participant or the subsidiary of a participant, which is more onerous than the standard which partnership law imposes on a partner.

Where an operator is not performing the function for a profit it is suggested that it is clearly inequitable to expect it to act in effect as an insurer by holding the other operators harmless from all liability arising out of its conduct of the joint operations.[19] Another justification for the limitation of the operators liability is that the non-operators seek to minimize risk in a joint venture by selecting their operator with care, but having made the decision they should abide by it to the extent of being prepared to waive indemnification for their share of losses except where the default of the operator is culpable. The limitation of the liability of the operator for a breach of the duty of care in a JOA involving United States participants may often be in the following form

> The operator shall not be responsible for any loss or damage suffered or done by or against any participant in the course of the discharge of its duties hereunder except where this is due to gross negligence or wilful misconduct.

It does not appear to be general to include a definition in the JOA of the meaning of the terms "gross negligence" or "wilful misconduct" and it is left for the general law to determine their meaning. The concept of imposing liability on the operator where it has committed gross negligence imports American notions of the liability of partners into the relations of participants in the joint venture. The appropriateness of importing partnership notions into a joint venture is questionable in view of the significant legal difference between partners and joint venturers under Australian law and the strenuous denials of partnership which are invariably found in a JOA. In English law it has been considered that the gratuitous agent is liable to his principal for a breach of his duty of care only where he has committed gross negligence. While we have previously observed that the operator under a JOA is not a gratuitous agent at general law, there may be a superficial attraction to the assimilation of the duty of an operator who does not receive a profit and the duty of the gratuitous agent to his principal. However the principle that a gratuitous agent has a lower standard of care to his principal has been questioned by Ormerod LJ in *Houghland* v. *R.R. Lowe (Luxury Coaches) Limited*:

> For my part I have always found some difficulty in understanding just what was "gross negligence" because it seems to me that the standard of care required in the case of bailment, or any other type of case, is the standard demanded by the circumstances of that particular case. It seems to me that to try and put bailment, for instance, into a water tight compartment — such as gratuitous bailment on the one hand and bailment for reward on the other — is to overlook the fact that there might be an infinite variety of cases, which might come into one or other categories. The question that we have to consider in a case of this kind, if it is necessary to consider negligence, is whether in the circumstances of this particular case a sufficient standard of care has been observed by the defendants or their servants.[20]

In a JOA which is governed by Australian law it is inappropriate to excuse a breach by the operator of its standard of care except where it has been grossly negligent, unless the participants define the term. In contrast the meaning of the

term "wilful misconduct" may be regarded as well settled when used in a contract. The High Court of Australia considered in *Royal Victorian Aero Club* v. *Commonwealth*[21] that the term had been best defined by Brett LJ in *Lewis* v. *Great Western Railway Co.*

> In a contract where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean that the doing of something, or the omitting to do something, which it is wrong to do or omit, where the person who is guilty of the act or omission knows that the act which he is doing, or that which he is omitting to do, is the wrong thing to do or to omit: and it involves the knowledge of the person the thing which he is doing wrong . . . care must be taken to ascertain that it is not only misconduct but wilful misconduct and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission.[22]

In view of the uncertainty about the meaning of the term gross negligence under Australian law, it has become more common to provide that the limitation of the liability of the operator for a breach of duty of care in a JOA will not apply where the breach occurred as a result of wilful misconduct or bad faith, or alternatively to state it in the positive in the following terms

> Operator shall have no liability as Operator to the other Participants for losses sustained or liability incurred, so long as and in any instance where Operator has acted or refrained from acting or exercised his judgment in the course of a good faith effort to perform the terms of the agreement.

In order to invoke the protection of this exemption the operator will have to establish that it honestly attempted to perform its duties. The law draws a distinction between the person ". . . who was 'honestly blundering and careless' and the case of the person who has not acted honestly, that is not necessarily with the intention to defraud but not with an honest belief that the transaction was a valid one . . ."[23]

So far we have been considering the liability of an operator who agrees to provide services on behalf of the participants on a reimbursable basis but who does not operate at a profit. Where the operator receives a profit related fee for the activities it performs under the JOA, the arguments considered previously for limitation of liability lose some of their validity. Undoubtedly the amount of the fee received by the operator will never be commensurate with the level of liability assumed by the operator for a breach of the standard of care in a major project. There appear to be two ways of dealing with this situation. Firstly the operator may be able to take out professional indemnity insurance to protect itself against the liability it has assumed, so that the fee may reflect the cost of obtaining the insurance. Secondly as the scale of the mining and oil and gas projects undertaken increases in size we have seen how the non-operators through the management committee may undertake more detailed control over the activities of the operator, thereby reducing the area of responsibility of the operator under the JOA and hence the extent of its liability.[24] While it will always be a matter of negotiation, I believe that non-operator participants should require an operator receiving a profit related fee, to accept responsibility for failure to meet the standard of care prescribed in the agreement. A suggested form of clause is on the following lines

> The operator or directors officers and agents and employees shall not be responsible for any costs, losses, claims, damages or liabilities suffered or incurred in the proper discharge of the operator's duties in accordance with this agreement, except as a result of wilful default, or a failure to act in good faith or to comply with this agreement by the operator or its directors, officers or employees.

In this clause the operator has agreed to accept liability for a breach of the standard of care where this is due to a failure to comply with the agreement and this imposes a higher standard of care than operator will usually accept where it manages without profits.

LIABILITY OF THE OPERATOR TO THIRD PARTIES IN CONTRACT

We have listed previously the wide range of activities which the operator will be authorized to conduct on behalf of the participants. In relation to contracts it will include:

acceptance of and entry into contracts for all necessary construction and development works;

acquisition or leasing of materials, plant, machinery, equipment and supplies related to operations;

engagement of independent contractors.

Even in the case of major projects, it does not appear common for the participants to provide in the JOA that the operator must state that when it enters into major contracts it does so as agent for the participants. Nor is it common for an operator, when entering into major contracts for construction of a mine or well infrastructure or facilities or for the purchase of a significant item of equipment, to contract on the basis that it is agent for the participants to the venture. Where an operator enters into a contract in its own name in terms of the authority conferred upon it in the JOA, it is entitled at general law to reimbursement and indemnity from the participants in respect of the expenditure commitments it has incurred.[25] The JOA will provide that the operator may charge the participants with all costs, expenses and liabilities incurred in the performance of its obligations under the agreement. Where the joint venture involves development of or operation of a mine or well the agreement usually confers on the operator the right to require the participants to advance their respective shares of estimated costs and expenses incurred in carrying out approved programs and budgets.[26] During the construction phase of a mine or well it is imperative for the operator to have funds on hand to meet the substantial cash outlays which will be incurred each month. The right of the operator to call for an advance from participants may be subject to the estimate conforming to the approved budget and to it relating to the costs and expenses which the operator expects will become due and payable in the relevant period. Rather than relying on the indemnity conferred on the agent at general law for contractual liability, the operator will usually require the participants in the JOA to expressly indemnify it for expenses and liabilities arising in the course of its duties.

Where the operator enters into contracts in its own name and within the terms of its authority the doctrine of the undisclosed principal will apply. This permits the participants to sue and to be sued on the contract made by the operator when their identity is established.[27] It is now well established that if a third party contracting with the operator obtains judgment against the operator, then it cannot sue the participant even where it has obtained judgment in ignorance of the fact that the operator was acting for the participants and the judgment remains unsatisfied.[28] It is not in the interests of the participants to require the operator to contract as principal, because where the operator contracts in this capacity, the doctrine of undisclosed principal will not apply and neither the participants nor the other party will acquire rights or liabilities against each other.[29] The insouciance with which

contractors and suppliers enter into contracts with an operator is a matter of surprise. It appears that they will commonly contract with an operator without bothering to establish whether the operator is contracting as agent, the precise identity of the participants who may by the principals, nor will they attempt to confirm or obtain a warranty that the operator has authority in terms of the JOA to enter into the contract. In many instances the operator may be a participant whose only significant asset is its interest in the mine or well under construction. Often it is a company which is jointly owned by the participants with no assets held beneficially and only a nominal issued capital. A prudent contractor or supplier should be concerned to ensure that it has access to the assets of the participants before it will enter into a contract with the operator. It appears, however, that contractors and suppliers are prepared to act in the belief that whatever the strict legal position the ultimate commercial responsibility for the commitments of the operator will be assumed by the participants. In doing so they assume the risk firstly that the operator is contracting as principal so that the doctrine of undisclosed principal does not apply and the participants' liability is limited to reimbursement or indemnity under the agreement and at general law, and secondly the participants may not in any event be liable on the contract as undisclosed principals or as indemnifors because the operator has acted outside the terms of the authority conferred on it in the JOA.

The participants usually require the operator to indemnify them in respect of liabilities it has incurred in excess of authority. Even though the operator may have no actual authority to enter into a particular contract, if the participants represent or may be regarded by law as representing that the operator has authority to enter into the contract, then they may be liable to the other contracting party within the authority which the operator appears to have. Where the principal is undisclosed the doctrine of apparent authority does not apply. As Scrutton LJ observed in *Underwood Ltd.* v. *Bank of Liverpool* "... you cannot rely on the apparent authority of an agent who did not in dealing with you profess to act as agent".[30]

Indemnification may take the following form

> The Operator shall not have authority to act for or assume any obligation or liability on behalf of the participants or any of them except such authority as is conferred on the operator by this agreement or by the participants pursuant to this agreement and the operator shall indemnify and hold harmless each of the participants and their respective directors officers employees agents and representatives from and against all and any costs losses claims damages and liabilities arising out of any act or any assumption of any obligation by the operator done or undertaken on behalf of the participants or any of them except pursuant to authorisation conferred as aforesaid.

LIABILITY OF THE OPERATOR FOR INJURY TO THIRD PARTIES

In the course of managing a mine or an oil or gas project it is likely that an operator will cause loss or injury to third parties by a wrongful act or omission. The operator is personally liable to the same extent as if it was acting on its own behalf and irrespective of whether it was acting on behalf of the participants. The JOA will provide that the operator has the right of reimbursement from the operating account where it is acting in terms of its authority and that the participants will indemnify the operator in respect of the liability.[31] The participants will be liable to third parties for loss or injury caused by the operator where the act is authorized by the participants. The operator will normally require the participants to

acknowledge that loss or damage arising in the course of management is to be payable by the participants in proportion of their percentage interest in the venture. The provision in the JOA which permits the operator to recover chargeable costs will contain the following specific provision

> Operator may charge to the Joint Account:
> Damage or loss however caused and all liabilities arising from acts of personnel in the performance of the obligations of the Operator hereunder except where due to bad faith or wilful misconduct of the Operator.

As the operator and the participants will be joint tort feasors, it is in their interest to ensure that they are indemnified against their liability by appropriate insurance.[32] As previously observed the management committee will usually determine the kinds of risk to be insured in connection with the project and will delegate to the operator the duty of securing and maintaining the insurance selected. Normally the insurance coverage will relate to the following matters:
workers compensation, personal accident and common law insurance in connection with employees;
loss and damage to third party property and persons;
insurance in respect of damage to the project assets;
loss of profits, business interruption, cash flow protection.

Where the construction of a mine or well is project financed, the insurance arrangements of the participants will be subjected to detailed review by financiers to the project, and they may require the participants to make substantial additions or variations to the types of insurance maintained by the operator on behalf of the participants.

Liability of the operator to third parties may extend beyond the categories normally identified in a JOA and may be subject of insurance by the management committee. Where for instance the operator furnishes information to financiers through individual participants it may incur liability for any loss caused to the financiers by any negligent mis-statement or failure to inform them of some information material to the proposed loan. In circumstances where the financiers seek information from the operator, the operator is under a duty of care to exercise reasonable care in supplying information to the financier when it is aware that it would be relied upon by them. In any JOAs it is unlikely that this liability can be charged by the operator to the joint account and if it is an insurable risk then the participants may not have identified the risk and required the operator to insure.[33]

LIABILITY OF THE OPERATOR FOR ACTS INVOLVING A BREACH OF LAW

The operator may, in the course of its management of construction development and operation of a mine or well, commit a breach of a statute or regulation. It may for instance commit a breach of regulations providing for the safety of employees engaged in mining activities or those which seek to protect the environment. Many of the standards prescribed in the acts or regulations applying to mines or wells impose a strict liability on the operators. At general law, the operator has a right to indemnity if it has no knowledge of the illegality and the act giving rise to the illegality is not manifestly illegal.[34] An operator may seek the right to charge the participants for reimbursement of any fines or judgments obtained against the operator insofar as they relate to joint venture assets owned by the project. In some cases the JOA will not permit the right of reimbursement where

the fines arise as the result of the negligent failure of the operator to comply with or the wilful violation of applicable laws, rules or regulations.

FOOTNOTES

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1. Operator is an expression derived from the American JOA which is used to describe the entity appointed to undertake management of the joint venture. In some agreements, the draftsman describes the entity as the Manager. It does not appear that the terms describe different functions; in this paper the term "operator" and "manager" are used interchangeably.
2. For a more general discussion of joint ventures see:
   M.J. Walsh "Partnership — Joint Ventures and Taxation" *Taxation in Australia* December, 1978, 478.
   R.E.S. Argyle "Joint Venture in the Mining Industry" Taxation Institute of Australia: Second National Convention 1972.
   Malcolm Smith: "Joint Ventures" Law and Business in Australia. The Australia - Japan Trade Law Foundation 1979.
   J.D. Merralls, Q.C.: Mining and Petroleum Joint Ventures in Australia — Some Basic Legal Concepts [1981] 3 *Australian Mining and Petroleum Law Journal*, 1. ("Merralls").
   For an account of a Canadian JOA see *Midcon Oil & Gas* v. *New British Dominion Oil Company* (1957) 21 WWR 228.
3. Bowstead *On Agency*, 14th edn. 1976, 2.
4. Merralls, 9.
5. Merralls, 9.
6. Adrian D.G. Hill "Joint Operating Agreements" International Bar Association and LAWASIA Research Institute, "*Energy hours in Asia and the Pacific*", Mathew Bender, New York 1982.
7. Bowstead, 12.
8. Royal E. Peterson "Decision-Making in Joint Ventures" 24 *Rocky Mtn. Min L. Inst.* 453,455 (1978).
9. Bowstead, 101.
10. Most Australian states have by statute conferred on co-owners a right by court action to seek partition. See 66G (real estate) s.36 (chattels) Conveyancing Act, 1919 (NSW).
11. *Re Buchanan — Wollaston's Conveyance* [1939] Ch 738.
12. See s.26(1) Sale of Goods Act, 1923 (NSW).
13. Bowstead, 63–66. Bartlett, "Rights and Remedies of an Operator" Vol X *Alberta Law Review*, 228, 292.
14. Bowstead, 115.
15. Bowstead, 116.
16. Bowstead, 115.
17. On the liabilities of a contractor to perform work in a proper and workmanlike manner see generally: Hudson: *Building and Engineering Contracts* (10th ed.) 274 ff.
18. Gerald W. Grandley "Joint Venture Agreements between Coal Companies and other Participant Variation". *C I Mineral Law Institute.*
19. Adrian D.G. Hill, 14.
20. 1962, QB 694, 698.
21. (1954) 92 CLR 236.
22. (1877) 3 QBD 195. See also *Transport Commission (Tas)* v. *Neal Edwards Proprietory Limited* (1954), 92 CLR, 214.
23. Per Denman J *Tatam* v. *Hasler* 23 QBD 345.
24. Hill, 14.10.
25. Bowstead, 355.
26. On the concept of the Operating Fund see Merralls, 10.
27. See Merralls, 10 (section relating to third party contracts) *Curtis* v. *Williamson* (1894) LR 10 QB 57. *Pople* v. *Evans* [1969] 2 Ch. 255, 261.

28. *Kendall* v. *Hamilton* (1879) 4 App Cas 504, 514–515 Bowstead, op cit, 272.
29. Merralls, 10.
30. [1924] 1 KB 775, 792.
31. Bowstead, 408.
32. Joint tortfeasors are those whose common enterprise has led to the casual sequence which results in a single damage. At common law there could be no contribution among tortfeasors and therefore, the plaintiff was able to determine the incidence of loss distribution between co-tortfeasors at his own discretion by deciding which of the tortfeasors to join in the action. But see now Law Reform (Miscellaneous Provisions) (NSW) Act 1946 which permits contribution. It is based on the English Law Reform Act of 1935.
33. See *Shaddock* v. *Parramatta City Council* (1981) 55 ALJR 713.
34. Stoljar: *The Law of Agency* 306. See authorities cited by Stoljar in support of the proposition.