JOINT VENTURE AGREEMENTS: TRANSITION FROM INFORMALITY TO FORMALITY

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This paper was originally intended to deal only with preliminary arrangements, or pre-joint venture agreements. However, it has grown to include a discussion of a number of related issues arising from preliminary arrangements which may be either informal or formal. The term 'preliminary agreements' is, in any event, often misleading. Such documents may be no more than expressions of intent whose legal status is a matter of doubt. On the other hand, binding, contractual arrangements are frequently and deliberately entered into either:

— in a preliminary manner — *i.e.* with the intention of subsequent replacement; or

— to deal with matters requiring immediate prescription in anticipation of a comprehensive agreement being concluded, perhaps upon the happening of a particular event, such as the granting of a petroleum exploration permit.

This paper deals with each category as well as with related topics.

INFORMAL PRELIMINARY AGREEMENTS — HEADS OF AGREEMENT AND LETTERS OF INTENT

The expressions 'Heads of Agreement' and 'Letter of Intent' are both misunderstood and abused, despite wide use in the mineral and petroleum exploration industries. Neither is a term of legal art; each means different things to different persons; and frequently, different things on different occasions. The basic issue when confronted with an intended Heads of Agreement or Letter of Intent is to ascertain precisely the parties' intentions. These may be:

— to be bound in contract; or

— not to be bound in contract.

If the former, there are two further alternatives:

— that contractual obligations are intended to take immediate effect notwithstanding the further intention that a brief or informal document be replaced by one of greater detail and/or formality; or

— that binding contractual obligations are intended to be suspended, pending the preparation of the more detailed and/or formal document.

This categorisation derives from the judgment of Dixon C.J., McTiernan and Kitto JJ. in *Masters v. Cameron*[1] in which, dealing with whether an alleged agreement was binding, the High Court noted that although all of the essentials of a contract were contained in the document

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1 (1954) 91 CLR 353.

in question, whether there was a contract depended entirely upon the meaning of the phrase: 'subject to the preparation of a formal contract of sale . . . acceptable to . . . solicitors'. The Court's statement on the point is of fundamental importance in any case where the intention of the parties to be bound, or not to be bound, is to be considered:

> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of the three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
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> In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.[2]
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> Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect on their own.[3]

And further:

> . . . it has been recognised throughout the cases on the topic that . . . words [such as 'subject to contract', 'subject to the preparation of a formal contract'] prima facie create an overriding condition, so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract.[4]

The dividing line between cases where a court might hold that the preliminary arrangement is binding and those where it is not, is frequently fine; ultimately it is a matter of what the parties intended. It seems likely that the more detailed the preliminary document, the more likely it is to be found that there was an intention to be bound, but the question cannot in any event be certain. A cautious practitioner therefore has two choices:

— To dissuade his client from entering into Heads of Agreement or Letters of Intent unless the document quite clearly and unambiguously states the parties' intentions. The use of the precise words used in *Masters v. Cameron* applicable to that intention is recommended rather than words such as 'subject to contract'.

— To persuade the parties that it is preferable to enter immediately into a full scale agreement. In this context the development of standard form, joint venture or joint operating agreements is to be encouraged.[5]

2 *Ibid.* 360.
3 *Ibid.* 361.
4 *Ibid.* 363.
5 See n. 44 below.

Inadvertent Agreements

Correspondence during the course of negotiations leading to a joint venture, can easily, despite the correspondents' contrary intentions, lead to the making of an offer and its acceptance. This may occur in circumstances where the author or authors of the fatal letter(s) or telexes lacked the actual authority to contract but whose ostensible authority is beyond question; or in circumstances where one or the other or both of the parties considered the matter to be one still of negotiation; or, which is most frequently the case, out of an incomplete knowledge of, or failure to consider, the law of offer and acceptance.

Oral Agreements

It is desirable to consider briefly the question of the enforceability of oral agreements concerning interests in mining and petroleum titles. To the layman, it is often surprising that there is no general rule requiring contracts to be in writing; such rules arise only out of statutes of limited application. The Statute of Frauds (and its various re-enactments in some of the Australian States) for example, has the effect of rendering unenforceable contracts required to be, but not in fact, evidenced in writing. It should be emphasised that a contract to which the statute applies is not invalid or void — it is merely unenforceable.

To relieve against harsh application of this rule the courts developed the doctrine of part performance. This doctrine is not limited to contracts dealing with land although it may be limited in its scope to cases in which a decree of specific performance might be made or if not so limited, it has not been relied upon, except in cases for the administration of that remedy.[6]

The mining and petroleum legislation in Australia sometimes requires writing for the creation of interests in titles. For example, section 106(1) of the New South Wales Mining Act 1973 states:

> a legal or equitable interest in, or affecting, an authority is not capable of being created, assigned, affected or dealt with, whether directly or indirectly except by instrument in writing.

Section 74 of the Petroleum Act of Western Australia is in materially the same terms as was section 80 of the Petroleum (Submerged Lands) Acts. The latter was omitted in the 1985 amendments with the curious result that whilst there is no prohibition on the oral creation *etc.* of interests in titles the purported dealing is in any event 'of no force' until the prescribed procedures of:

— written application for approval;[7]
— accompanied by the instrument evidencing the dealing;[8] and
— approval and registration,[9]

have all been exhausted.

6 *Per* Dixon CJ *J. C. Williamson Ltd. v. Lukey and Mulholland* (1931) 45 CLR 282, 297, followed by the N.S.W. Ct. of Appeal *O'Rourke v. Hoeven* [1974] 1 NSWLR 622, 626.
7 S.81(3).
8 S.81(4).
9 S.81(2).

Statutory provisions (other than those derived from the Statute of Frauds) requiring writing may not, where the requirement is not met, have similar consequences.

For example, provisions such as those in section 107 of the New South Wales Mining Act (which are considered below) appear to go further than the Statute of Frauds in that, absent writing, the creation, assignment, affecting of or dealing with an interest, whether legal or equitable, in a title is invalid as opposed to merely unenforceable. In such cases there seems to be little, if any, scope for the application of the doctrine of part performance. The Petroleum (Submerged Lands) Acts create an implied necessity for writing but it seems possible that a court, dealing with an oral agreement relating to an offshore title, and without the need to resort to the doctrine of part performance, will enforce the agreement to the extent of requiring its reduction into writing to permit the procedures in sub-sections 81(3) and (4) to be followed.

Statutory Considerations

A matter frequently overlooked by those who enter into preliminary arrangements which are binding, whether by design or inadvertence, is the application to the arrangements of those provisions of the mining and petroleum legislation which render either the instrument itself or the whole or part of the transaction embodied therein, 'of no force', 'void' or otherwise ineffective pending Ministerial approval and registration.[10] The perceived advantage of time saved by resorting to a preliminary agreement may well be lost if that agreement, although binding and acted upon, is not lodged for the necessary approval. It is difficult to understand the frequently encountered reluctance to act on formal documents until approval in the face of apparent, widespread alacrity to act upon preliminary agreements whether or not approved.

Similar considerations arise under the Stamp Duties Acts of the various states and territories. The fact that a document is binding is generally sufficient to render it liable for duty.[11] Stamping is, in any event, usually a prerequisite for Ministerial approval and registration.[12]

It is beyond the scope of this paper to examine stamp duty questions in any depth. It is proposed therefore to do no more than identify two stamp duty issues relevant to preliminary agreements.

10 For extracts of the relevant provisions as at May 1987 & comments thereon see L.G. McLennan, G.P. Gedeon & M. Sharwood 'A Comparison of the "of no force" provisions of Mining and Petroleum Acts in Australia' (1987) 6(4) *AMPLA Bulletin* 113.

11 S.25 of the Stamp Duties Act 1920 (N.S.W.) makes it mandatory for any instrument chargeable with duty to be duly stamped within six months after first execution and imposes a monetary penalty for failure. The place of execution is not material. Analogous provisions can be found in the corresponding Acts of the other Australian jurisdictions. (S.A. Stamp Duties Act 1923, s.20; Tas. Stamp Duties Act 1931 s.15; W.A. Stamp Act 1921 s.20; Qld. Stamp Act 1894 s.26; Vic. Stamps Act 1958 s.28; N.T. Stamp Duty Act 1978 s.9(1A)). However, in some cases (Tas., N.T.) the obligation to stamp only arises after receipt of the instrument within the jurisidiction. It is at least open to argument that s.4 of the Qld. Act is inadequate to compel production and stamping in that State of an instrument executed outside the State.

12 S.24 of the Stamp Duties Act 1920 (N.S.W.) makes it an offence for any person whose office it is to register any instrument chargeable with duty to do so if the instrument is

— If a preliminary agreement is executed outside the state or territory in which the subject property is located, can production and stamping in that state or territory be compelled?[13]
— When *ad valorem* duty has been paid on the preliminary agreement, care should be taken in preparing the formal document to ensure that no new transaction is thereby constituted, or new parties introduced, resulting in either case in a fresh liability for *ad valorem* duty.

FORMAL PRELIMINARY AGREEMENTS

It is not uncommon for explorers to bind themselves in contract in circumstances where a joint venture may be anticipated on the happening of some event beyond their control. Most commonly, this will occur amongst joint applicants for an exploration title where the success of the application may depend, for example, on:
— negotiation of a compensation agreement with a Land Council under Part III of the Aboriginal Land Rights (Northern Territory) Act, 1976;[14] or
— the outcome of competitive bidding.

The validity of such agreements, may be open to question under those of the 'of no force' provisions of applicable mining and petroleum legislation[15] which deal not only with existing titles, but also with applications for titles or with 'future permits'.

Bidding Agreements

A bidding agreement in respect of a future permit governed by one of the 'of no force' provisions must await the necessary Ministerial approval before it can be enforceable. Practical difficulties may arise from anomalous legislative drafting. The Petroleum Act of Western Australia, for example requires the Minister, under section 70, to keep a register of permits, licences and access authorities. No mention is made of 'future permits' which nevertheless, by operation of section 75 are of no force

unstamped or insufficiently stamped. Analogous provisions can be found in the other Australian jurisdictions. (S.A. s.27; Tas. s.29; W.A. s.28; Qld. s.30; Vic. s.37; N.T. s.9A). Note however that the Petroleum Act of W.A. & the Petroleum (Submerged Lands) Acts exempt from stamp duty instruments to which they apply. Instead, registration fees are imposed.

13 See n.11.

14 S.40 of the Aboriginal Land Rights (N.T.) Act 1976 (Cth.) states, in effect, that a mining interest (being a lease or other interest in land, including an exploration licence, granted under a law of the Northern Territory relating to mining for minerals) shall not be granted unless both the Minister and the relevant Land Council have given their written consent or the Governor-General has declared that the national interest requires that the grant be made. A pre-requisite to any such consent or proclamation is the conclusion of a compensation agreement between the applicants & the relevant Land Council.

15 *E.g.* W.A. Petroleum Act 1967 s.75; N.T. Petroleum Act 1984 s.96; Qld. Mining Act 1968–1983 s.37; Vic. Mines Act 1958 s.70; Tas. Mining Act 1926 s.15J. See generally McLennan, Gedeon & Sharwood above.

until approved and registered on the section 70 register.[16] It is at least arguable that there is no legislative authority for the inclusion of future permits on the register. This anomaly was addressed in the 1985 amendments to the Petroleum (Submerged Lands) Acts. The Commonwealth Act now provides relevantly in section 81A (with corresponding provisions in the State Acts)[17] as follows:

> 81A. (1) Where 2 or more persons enter into a dealing relating to a title that may come into existence in the future and that dealing would, if the title came into existence, become a dealing to which section 81 applies, a person who is a party to the dealing may, during the prescribed period in relation to the title, lodge with the Designated Authority —
>
> (a) in a case where the dealing relates to only one title that may come into existence in the future, a provisional application in writing for approval by the Joint Authority of the dealing; or
>
> (b) in any other case, a separate provisional application in writing for approval by the Joint Authority of the dealing in relation to each title that may come into existence in the future and to which the dealing relates.
>
> (2) Sub-sections 81(4), (7) and (8) apply to a provisional application lodged under sub-section (1) of this section as if that provisional application were an application lodged under sub-section 81(3).[18]
>
> (3) Where —
>
> (a) the title to which a dealing referred to in sub-section (1) relates comes into existence; and
>
> (b) upon that title coming into existence, the dealing becomes a dealing to which section 81 applies,
>
> the provisional application lodged under sub-section (1) in relation to the dealing shall be treated as if it were an application lodged under sub-section 81(3) on the day on which that title came into existence.
>
> (4) A reference in sub-section (1) to the prescribed period, in relation to a title, is a reference to the period —
>
> (a) commencing —
>
> (i) in the case of a permit, lease, licence or pipeline licence — on the day of service of an instrument informing the applicant for the permit, lease, licence or pipeline licence that the Joint Authority is prepared to grant the permit, lease, licence or pipeline licence; or
>
> (ii) in the case of an access authority — on the day on which the application for the grant of the access authority is made; and
>
> (b) ending on the day on which the title comes into existence.

This solution is less than satisfactory. What it achieves is to permit enforceability of an instrument affecting a future title; but upon title being granted, the instrument is rendered of no force until the necessary approval of the Minister is granted and registration effected. Whilst it may overcome the difficulty inherent in, for example, the Western Australian onshore Act with respect to bidding agreements the effect on a joint operating agreement intended to become operative upon grant of

16 See also s.90 of the N.T. Act under which the Registrar is obliged to establish and maintain a register of 'permits and licences *granted* under' the Act and *cf* s.96 which renders instruments dealing, *inter alia*, with future permits ineffective until approved and registered. Once again, there is lack of statutory authority to establish and maintain a register of future permits notwithstanding that instruments dealing with them require approval and registration.

17 S.A. s.80a; Vic. s.81A; N.S.W. s.81A; N.T. s.81A; Qld., Tas. & W.A. not yet amended.

18 The sub-sections referred to deal with procedural aspects of applications for approval.

title will be negative unless administrative procedures allow rapid, or preferably, contemporaneous approval and registration.

Area of Mutual Interest Agreements (A.M.I. Agreements)

Many farm-in, and joint venture agreements include provision for properties acquired within a specified geographical area to be subject to the agreement. Less frequently, but not uncommonly (especially in the oil industry) a group of companies may reach agreement to conduct regional studies leading to the joint acquisition of exploration acreage by application, farm-in and/or otherwise[19]. Such acquisitions, if made by application, may be preceded by bidding agreements.

A number of issues arise out of A.M.I. Agreements of the latter type. These issues include consideration of the misuse of confidential information and the rule against perpetuities. In approaching these questions, it is helpful to characterise the nature of A.M.I. Agreements, although the ultimate resolution of such disputes as may arise will depend substantially, and in some cases, wholly, on the agreement itself.

A useful overview of A.M.I. Agreements is found in an American article by Dante L. Zarlengo[20]. Dealing with purpose, the author notes:

> The purpose of an area of mutual interest clause is to provide that the parties jointly funding the exploration of the area will own the benefits of the exploration activities jointly and proportionately. If several parties agree to contribute funds and/or leases and/or expertise to the evaluation of oil and gas potential in a particular area, *none of those parties should use the technical data obtained to acquire oil and gas leases or properties in the area explored for its own account.*[21] [Emphasis added]

The obligation of confidence indirectly referred to in this extract is discussed below.

Zarlengo chooses to characterise A.M.I. Agreements as creating options amongst the participants, each to sell an interest in properties acquired within the specified area to the others[22]. The mutual obligations will usually constitute sufficient consideration for the options. A party failing to exercise the option in the prescribed manner and within the prescribed time whether as a result of default or otherwise, should arguably lose his rights: whether or not he in fact does so should be determinable by the governing agreement. For example, the A.M.I. Agreement may give a participant the right not to join in any bidding agreement, application entered into or acquisition made in consequence of the A.M.I. Agreement. An election not to participate should deprive the party so electing of all rights of participation in ensuing titles. But by contrast, the non-participating party who possesses confidential information gained as

19 See Vanderploeg 'Particular Problems in the Structuring of Broad Area Exploration Contracts' 5 *Eastern Min. L. Rev.* 14–1 (1984). This article, although of general interest, deals specifically with considerations arising out of the American system of titles. It is therefore of little relevance in Australia.

20 D.L. Zarlengo 'Area of Mutual Interest Clauses regarding oil and gas properties: Analysis, drafting and procedure' (1982) 28 *Rocky Mt. Min. L. Inst.* 837.

21 *Ibid.* 839.

22 *Ibid.* 840–842.

a result of being party to the A.M.I. Agreement will be subject to the fiduciary obligation not to misuse that confidential information. The consequences of such misuse are discussed below under the heading 'The Fiduciary Obligation'.

It is arguable that A.M.I. Agreements, whether or not characterised as mutual options, attract the operation of the rule against perpetuities. This rule of course, is to the effect that in order to be validly created, an interest in property if not vested at its creation, must vest, if it vests at all, within the perpetuity period (now 80 years in New South Wales, Victoria, Queensland and Western Australia). The rule is a doctrine of the law of property, not of the law of contract.[23] It follows that contracts dealing with contingent obligations are valid without reference to the time when the contingency may occur. Furthermore:

> The rule does not apply to contracts creating mere personal obligations, as for example to pay mining royalties... But a contract which confers an interest in some specific property is subject to the rule, so that an option to purchase land exercisable within 25 years infringes the rule and would not be specifically enforceable, although damages might be awarded for breach of contract. What the rule applies to is not the contract, which in itself is not illegal, but the right of property or limitation which arises from the contract.[24]

Thus, an A.M.I. Agreement dealing with mutual obligations to share in future exploration titles within a specified geographical area should not offend the rule. This has been the approach (at least until 1986) of American courts, for reasons, including:[25]

— that the Rule does not affect purely contractual obligations;
— that the contract in question created no rights in real property;
— that, in the case of a gas purchase option, the interest granted to the purchaser had vested immediately.

It would be different if the A.M.I. Agreement dealt with specified titles for, as pointed out by Morris and Leach:

> There is no reason to suppose that this doctrine is limited to options to purchase land: it is no doubt applicable to options to purchase unique chattels ... if specific performance would be given.[26]

The test seems therefore to be whether the obligation is one susceptible of a remedy of specific performance. If it is not, the A.M.I. Agreement will probably not offend the rule against perpetuities.

PRE-INCORPORATION CONTRACTS

The incorporated joint venture is relatively rare in the mining and oil industries, but it is not unknown. Corporate participants in unincorporated joint ventures are, by contrast, more common than not. In either case, issues arise as to the capacity of a corporation not yet formed to enter into binding contractual arrangements. At common law a company is

23 J.H.C. Morris & W. Barton Leach *The Rule Against Perpetuities* (2nd ed. 1962) 219.
24 R.P. Meagher & W.M.C. Gummow *Jacobs' Law of Trusts in Australia* (5th ed. 1986), 152.
25 J. Hovey Kemp & J. Forbes Newman 'Hidden Rule Against Perpetuities Problems in Oil & Gas Transactions' (1986) 32 *Rocky Mt. Min. L. Inst.* 16-1, 16-11, 16-12.
26 *Op. cit.* 220.

unable to enter into a contract before it is incorporated. Because it lacks legal personality it cannot perform the act itself, nor appoint an agent to do so on its behalf. Furthermore, it cannot ratify the act after incorporation since under the law of agency ratification relates back to the date of performance of the act — a date when there was in existence no principal to appoint the agent.

Section 81 of the Companies Act 1981 (Cth.) (and corresponding provisions in the State Codes) was introduced to meet inadequacies in the common law. Section 81 is directed towards two cases:

— a person executing a contract in the name of a company where no company exists;[27] and
— a person purporting to enter into a contract as agent or trustee for a proposed company[28].

The first is confined to written contracts; it is directed towards overcoming doubts which existed in the common law as to whether, in such a case, the person signing the contract was liable as principal or agent or not at all. The second case could deal also with verbal as well as written contracts.

However, section 81 does not cover the case where personal liability is assumed by a principal for a company to be formed as was the case in *Kelner v. Baxter.*[29]

Furthermore, if a person purports to enter into a contract as agent for a company which he believes to exist when it does not, he cannot be said to have done so as agent for a *proposed* company. In such a case, the common law would appear still to apply.

Whereas at common law a promoter was personally liable if he contracted for a company to be formed, his liability is now governed by section 81 and may arise in the following cases:

— Where, in effect there is no ratification.[30]
— Where, despite ratification, the contract is discharged by breach constituted by refusal or failure of performance.[31]

THE FIDUCIARY OBLIGATION

It seems now to be reasonably well accepted that even if the relationships of partnership and joint venture are legally distinguishable the principles applicable to the former apply also to the latter.[32] By exten-

27 S.81(1)(a)(i).
28 S.81(1)(a)(ii).
29 (1886) LR 2 CP 174.
30 S.81(4).
31 S.81(7).
32 See generally the Hon. Mr. Justice J.A. Dowsett 'Operator of a Joint Venture — Principal or Agent?' [1987] *AMPLA Yearbook* 269. For a thorough analysis of the problem of joint venture as against partnership, see J.G. Jackson 'Joint Ventures in the Mining and Petroleum Industries — Partnerships or Not.' (1985) *University of Dundee, Centre for Petroleum and Mineral Law Studies.* Jackson prefers the view (acknowledging the wide scope for exception) that in a typical joint venture agreement the operator is not necessarily the agent of the participants; but even if he is, it does not follow that the co-venturers stand as the mutual agents of each other. The significance of this lies in the importance attached in various judicial decisions to the law of agency in determining

sion, if fiduciary obligations extend to persons negotiating for partnership, they should extend also to persons negotiating for a joint venture. This conclusion is supportable by an analysis of *United Dominions Corporation Limited v. Brian Pty. Limited*[33] in which Gibb C.J., noting the fiduciary obligations of company promoters, indicated that their position is analogous to that of persons who invite others to join in partnership. In *Bell v. Lever Bros. Ltd.*, cited by Gibb C.J. in *Brian's* case, Lord Atkin stated:

> There are certain contracts expressed by the law to be contracts of the utmost good faith, where material facts must be disclosed; if not, the contract is voidable. Apart from special fiduciary relationships, contracts for partnership and contracts of insurance are the leading instances. In such cases the duty does not arise out of contract; the duty of a person proposing an insurance arises before a contract is made, so of an intending partner.[34]

So also, it is submitted, of an intending joint venturer, notwithstanding that on one view of *Brian's* case the High Court concluded no more than that whether or not the relationship between joint venturers is fiduciary will depend upon the form of the particular joint venture and upon the actual obligations undertaken by the parties to it. Despite the limited authority in Australia of American decisions the logic behind the view expressed in *Sturm v. Ulrich*[35] is persuasive.

> In working out the legal rights and liabilities arising from novel legal relationships courts wisely strive to assimilate such to other long established and defined relationships to which the one in question is most similar.

partnership. It is useful to extract here, parts of Jackson's concluding paragraph, headed 'How Will the Courts React'.

> It would be a grave over generalisation to assume that joint operating agreements are structured in an artificial manner specifically to deny partnership. The agreements have evolved into (a) reasonably standard pattern ... for many reasons ... which include United States Revenue and Anti-Trust Laws and ... oil industry access to product ... Access to oil is vital to the activities of the [oil] corporation ... Pragmatic reasons such as these have led to a particular form of business association which should not be seen by the courts as a 'sham' or a 'cloak' for partnership ... To the extent that the characteristics of the operating agreements are used to any degree to deny liability to third parties, there is every chance that the courts will use the partnership trust or agency concepts to ensure liability ... If the choice (between the desirability of paying creditors and the desirability of structuring the relationship of high risk venturers to best suit those venturers) is put to the courts in this manner there is little doubt ... that the interests of creditors will prevail ... The inappropriateness of partnership law as a basis for controlling the legal relationship cannot be over emphasised. Such law, based on 18th and 19th century case law particularly suitable to the regulation of small business and notions of trust and mutuality is not well equipped to deal with enormous investments based ... rather on contractual and commercial independence ... One could expect [an emerging law of joint ventures] to borrow much from partnership law including a form of unlimited liability and fiduciary obligation. The challenge for the courts will be to develop a body of applicable law best meeting the policy objectives discussed above, but which is separate from partnership law ... This paper suggests that in theory [joint ventures] are not partnerships, though courts might not reach this conclusion easily, particularly if third party rights are at issue.

33 (1985) 60 ALR 741.
34 [1932] AC 161, 227.
35 10.F.2d 9, 11.

This view lends support to the contention that fiduciary obligations extend to joint venturers as well as to partners. It is likely to be followed in Australia after *Brian's* case.

It is little, if at all, different also from the thrust of the remarks of his Honour Mr. Justice Dowsett in his paper at the 1987 AMPLA Conference. Discussing the nature of legal relationships and the bodies of law relevant to them, his Honour said:

> In subjecting the resulting [legal] relationship to judicial consideration, a court will not assume that one body of law or the other should be applied, but will rather look to a broader body of principles underlying the law as it has been exemplified in cases concerning such relationships with a view to applying these broader principles to the case. It follows that the draftsman creating the relationship or the adviser considering its implications after its creation must follow a similar course.[36]

The same reasoning was adopted, if perhaps in broader terms, in *Brian's* case by Mason, Brennan and Deane JJ. who note:

> A fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms which are to govern the arrangement between them. In particular a fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners . . .[37]

The partnership example is but a specific application of the general proposition. It can be argued that the ultimate determinant of whether fiduciary obligations are owed by persons negotiating a joint venture is the nature or degree of the relationship of confidence. As Dawson J. stated in *Brian's* case:

> Although the relationship between participants in a joint venture which is not a partnership will be governed by the particular contract rather than extrinsic principles of law, the relationship may nevertheless be a fiduciary one if the necessary confidence is reposed by the participants in one another. Of course, in a partnership the parties are agents for each other and this may constitute a separate reason for the fiduciary character of a partnership. There may be no such agency between participants in a joint venture but, as Dixon J. pointed out in *Birtchnell* v. *Equity Trustees, Executors and Agency Co. Ltd.* (1929) 42 C.L.R. 384, at pp. 407, 408, even in a partnership it is really the mutual confidence between partners which imposes fiduciary duties upon them and the same confidence may, in appropriate circumstances, be found to exist between participants in a joint venture.
>
> The only other thing which I wish to add is that, in my view, it is quite clear that a fiduciary relationship may arise during negotiations for a partnership or, for that matter, a joint venture before any partnership or joint venture agreement has been finally concluded if the parties have acted upon the proposed agreement as they had in this case. Whilst a concluded agreement may establish a relationship of confidence, it is nevertheless the relationship itself which gives rise to fiduciary obligations. That relationship may arise from the circumstances leading to the final agreement as much as from the fact of final agreement itself. This is the view expressed in Lindley on Partnership, 15th ed. (1984), at p. 480, and it seems to me that as a matter of principle it must be correct.[38]

The point of all this is simply that parties to informal arrangements intended (but not necessarily destined) to crystallise into a joint venture, or persons merely in the course of negotiations intended (but not necess-

36 Dowsett, above 271.
37 Above 747.
38 Above 750–751.

arily destined) to lead to a joint venture must exercise the utmost caution in understanding and, if thought fit, defining or limiting (in for example, an undertaking as to confidentiality) the mutual rights and obligations which would otherwise be imposed by the law.

A dramatic example may be found in the decision of the Supreme Court of Ontario in *International Corona Resources Ltd. v. Lac Minerals Ltd.*[39] upheld by that court's Court of Appeal[40] and currently on appeal to the Supreme Court of Canada. The facts are noteworthy. Lac Minerals Ltd. (Lac) had become aware of encouraging results of exploration conducted by International Corona Resources Ltd. (Corona) in the Hemlo district of Northern Ontario. This interest led to a field visit, followed in turn by correspondence and meetings with a view to Lac participating in joint exploration with Corona on claims controlled by Corona. During the course of the field inspection, plans, assays and drill cores were examined and some claims (the Williams Property) located to the west of Corona's ground were discussed in terms, *inter alia*, that Lac regarded the same as worthy of acquisition. In the event, Lac itself acquired the Williams Property, having approached the owner direct, and in competition with Corona. Subsequent exploration led to a significant gold discovery within the Williams Property and ultimately to the development of a gold mine.

The court found that Lac was in breach of its fiduciary obligation not to use the confidential information it acquired from Corona for its own use while negotiating towards a joint venture. Because the result was that Lac, by its actions, deprived Corona of the opportunity of acquiring the Williams Property, Lac was obliged to return the Williams Property to Corona on payment by Corona of an amount by which its value had been enhanced by Lac — namely CDN$153,978,000 (with interest and certain other sums). The trial judge found that the site visit and the confidential information disclosed to Lac was of assistance not only in assessing the Corona property but also in assessing other property in the area and in making an offer for the Williams Property; that there is a practice in the mining industry in Canada that imposes an obligation when parties are negotiating not to act to the detriment of each other; and that Lac made unauthorised use of the information to the detriment of Corona. The court therefore concluded that a fiduciary duty exists between partners and joint venturers and, relying on *Brian's* case that it exists also between *intending* joint venturers. The later conclusion was based on the statement of Mason, Brennan and Deane JJ. extracted above. The appeal court supported this conclusion by noting, in rather more general terms.

> that the law of fiduciary relationships can apply to parties involved, at least initially, in arm's length commercial discussions (even though final agreement may never be reached.)

However, fiduciary obligations will

> . . . not arise in every case of intending joint ventures who are negotiating the terms of a joint venture or partnership. It will depend on the facts of each case.

39 (1986) 25 DLR 504. See also (1986) 5(4) *AMPLA Bulletin* 82.

40 *International Corona Resources Ltd. v. Lac Minerals Ltd.* Ontario Judgments (1987) O.J. No. 883 (The judgment of the Ontario Court of Appeal was, as of 26 Feb. 1988, unreported). See also (1988) 7(1) *AMPLA Bulletin* 25–27, 58–60.

In *Surveys & Mining Limited v. Morrison*[41] the plaintiff succeeded in securing injunctive relief against the defendant who had been its consulting geologist and who was found to have made application for mining leases using confidential information which had been imparted to him in circumstances importing an obligation of confidence. This, on the facts, amounted to improper use of confidential information in a manner detrimental to the plaintiff. The defendant was therefore restrained from acting in breach of his duty not to make unauthorised use of confidential information and from competing with the plaintiff in breach of his fiduciary obligation. The facts of this case are broadly similar to those in *Lac.* It is therefore likely, particularly in the light of *Brian's* case, that if similar facts were again brought before the Australian courts there would be little difficulty in following *Lac.*

There lies here a word of warning to those whose joint venture negotiations necessitate the receipt of confidential information. Fortunately, the recipients of such information are frequently given a measure of protection by the confidentiality provision of underlying agreements governing the property in which an interest is sought to be acquired which often require an express assumption of confidentiality by those to whom confidential information is released. Such a reminder is especially important to non-lawyers, who are more likely to be alert to obligations assumed in writing than to those arising under the general law.

THE ROLE OF THE OPERATOR PRE-JOINT VENTURE

The role of the operator in joint venture agreements has been well canvassed[42], and it is not intended to repeat what has previously been written. If on the one hand, the preliminary document does not amount to a binding agreement, there can be no question of agency. Any exercise by the intended operator of power as an agent, where none exists, will expose him to personal liability. But, if on the other hand, as discussed above, there is a binding agreement, then the mere fact of informality does not alter the conclusions reached by Jackson, that:

> Express denials of an agency relationship in an agreement will clearly not prevent such a relationship arising at law where the facts clearly point in that direction. A review of a number of different [joint operating] agreements . . . suggests that agency generally exists between the operator and non-operators.[43]

Jackson adds in relation to the question of ostensible authority:

> Non-operators cannot be certain that their liability to third parties will be limited to their actual grant of contracting power to the operator. They will need to continually monitor both their own activities and those of the operator to ensure that nothing done by themselves or the operator can be seen as a representation to third parties that the operator has power to contract when this is not the case.[44]

41 (1969) Qld. R. 470.

42 Dowsett; H.K. McCann 'The Role of the Operator under a Joint Venture Agreement' (1982) 4 *AMPLJ* 256; J.G. Jackson 'Agency in Operating Agreements and Joint Ventures' [1986] *AMPLA Yearbook* 239.

43 Jackson above n.42 above 262. See also Jackson above n.32.

44 Jackson above n.42 above 262–263.

This caveat is particularly relevant to the informal agreement which is silent on the relationship of the operator and non-operators. In such cases, whether or not there is the relationship of agency will be entirely a question of the facts; those may be determinable by reference to the conduct of the parties although difficulty necessarily arises in determining or interpreting the limits of the agent's power.

PRACTICAL CONSIDERATIONS

The designers of this paper instructed the author to give some consideration to a number of practical considerations arising out of 'pre-joint venture agreements' and their transition to 'completeness'. Particularly in the face of the statutory considerations outlined above, just about the only advantage in commencing a joint venture with an informal, but binding, agreement, is speed. That advantage is frequently overwhelmingly lost when the informal agreement, as is frequently the case, is constituted in a letter, or an exchange of letters, unseen by anyone with legal training, and suffering all of the pitfalls of ignorance and/or unskilled drafting.

What is the solution? There are two, or perhaps three approaches:

1. Ensure that preliminary agreements which are not to have the benefit of professional and/or detailed legal review are expressed to fall within the third category of *Masters v. Cameron*[45] *i.e.* that there is no intention to create any binding agreement.
2. If the need to be bound is urgent (whether in reality or in the client's perception), ensure that the informal document at least has the benefit of legal advice and clearly states which of the first or second categories defined in *Masters v. Cameron*[46] is intended to apply.
3. Encourage the use of standard form agreements. This is long-standing practice in the oil and mining industries in both Canada and the United States[47] and a move in that direction has been made in Australia with the publication of the Australian Petroleum Exploration Association's 'Exploration Joint Operating Agreement'. As the Australian resource industries grow in sophistication and familiarity with the standard form, the wider should become its use. The danger of course lies in indiscriminate use — in particular, failure to delete clauses included in alternative versions, or failure to make fundamental amendments.

45 Nn. 2 & 3 above.

46 *Ibid.*

47 Both the American & Canadian Associations of Petroleum Landmen have published model form operating agreements in wide use, respectively known as 'AAPL Form 610–1982' and the '1981 Canadian Association of Petroleum Landmen Operating Procedure'.The Rocky Mountain Mineral Law Institute has published no fewer than 5 model agreements, namely:

(i) Rocky Mountain Unit Operating Agreement — Oil and Gas (Undivided Interest);
(ii) Rocky Mountain Unit Operating Agreement — Oil and Gas (Divided Interest);
(iii) Rocky Mountain Joint Operating Agreement — Oil and Gas;
(iv) Rocky Mountain Mining Joint Operating Agreement;
(v) Mining Venture Agreement Model Form.

For the lawyer confronted with instructions to prepare a simple, binding agreement for immediate signature, the problem becomes one of what to include and what to omit. It is submitted that in any such case brevity is to be preferred; the following is a non-exclusive list of matters whose inclusion is essential:

1. A statement as to the parties' precise legal intentions.
2. A comprehensive statement of the commercial terms.
3. A statement of the nature of the relationship to be created (joint venture) and an outline of the features necessary to ensure that relationship, namely:
   (a) Tenancy in common.
   (b) Obligation to take product in kind.
   (c) Waiver of rights of partition and judicial sale.
   (d) Denial of partnership.
   (e) Liabilities several and not joint, nor joint and several.
4. Denial of mutual agency.
5. Appointment of operator and limitation of his powers.
6. Establishment of joint venture committee.
7. Consequences of default.
8. Statement of intention to replace the agreement by a more formal one and by whom, and by when, it is to be prepared, including a list of topics to be dealt with in the formal document.
9. Confidentiality.
10. Covenant for further assurance.
11. Notice provisions.
12. Payment of costs, including stamp duty.

The foregoing seems like a list of heads for a full agreement; that, in essence, is what it is. Even so, except for items 2. and perhaps 5, each can be dealt with in shorthand form. All practitioners will have encountered, in a wide variety of agreements, a clause in the following terms:

> This Agreement constitutes the entire agreement between the Parties in relation to the subject matter hereof and all other negotiations, discussions, or agreements with regard to that subject matter are superseded by and merged in this Agreement.

Such 'entire agreements' clauses are designed to achieve two purposes:

— To negative any application of the exceptions to the parol evidence rule (although it is doubtful that it will always, if ever, succeed for that purpose in an action for rectification or when mistake is otherwise pleaded); and

— To ensure that, especially in a formal document replacing one less complete, nothing collateral exists to modify, contradict or amend the operation of the agreement.

In the latter context it is particularly desirable to refer expressly to antecedent agreements and to terminate them; or, if for some reason part is to survive, that part should be incorporated expressly, rather than by reference to avoid the danger which always exists of inconsistencies between a preliminary agreement, and the one drawn to replace it.

Acknowledgements

This paper necessarily ranges across wide areas of the law without dealing in depth with any one of them. The writer is indebted for the research assistance given by Diane Staats, Bruce Cooper and Karen Newton without whose help the writer could never have finished in time.