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Pre-emptive Rights: Updating Your Precedent

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SUMMARY

While there have been no new issues since AMLPA published a Model clause in 1990 recent cases and commercial developments in resource joint venture agreements mean that earlier precedent must be constantly refined to remain effective.

This paper reviews that Model clause in light of cases referred to in the previous paper by John Kelly in order to illustrate some of the issues which arise in drafting and implementing pre-emption provisions.

INTRODUCTION

At the AMPLA Conference in 1990, H K McCann presented a paper entitled "Pre-emptive Rights in Resource Joint Venture Agreements"[1] which, amongst other things, outlined some common forms of pre-emption clauses in Australian resource joint venture agreements, analysed the rights conferred by those clauses and then considered difficulties which often arise in practice when seeking to apply and enforce the clauses.

The paper concluded by setting out a model pre-emption clause (1990 Model) in the schedule which sought to overcome some of the practical problems discussed in the paper. The 1990 Model is set out in the second schedule to this paper for ease of reference.

The task I have been set by the AMPLA National Board is, taking into account the cases and developments in the past 16 years, to look back at the 1990 Model and see what changes might be made to it. In his paper, also published in this Yearbook, John Kelly discussed a number of recent cases dealing with pre-emptive rights in the resources joint venture business environment. My paper

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1 H K McCann [1990] AMPLA Yearbook 445.

expands on John Kelly's paper by looking at how those cases affect the 1990 Model in order to illustrate some of the issues which arise in drafting and implementing pre-emption provisions. I have included a modified version of the 1990 Model in the first schedule to this paper.

TOWARDS A WORKABLE ASSIGNMENT CLAUSE

The first observation to make is that the substantive issues haven't really changed. Discussion continues as to whether and in what form pre-emption rights should be included in joint venture agreements.

The search goes on for that perfect formula which provides watertight protection for a continuing venturer, a workable mechanism by which a selling venturer can dispose of its interest at an acceptable price and the capacity to do those things in the myriad shades and circumstances which the commercial world (and inventive lawyers) throw up.

One fundamental issue that certainly hasn't changed, and is worth remembering at the outset, is something that W F Manning noted in his 1986 paper[2] on the subject. Manning sets out some considerations in the drafting of assignment clauses and begins with this observation:

> "The draftsman when faced with the task of drafting an assignment clause in a joint venture agreement needs above all to take clear and full instructions from his client. To do this, he must canvass the various provisions which are available… and he must explain in detail the various advantages and disadvantages of the different types of provisions."

That remains the case. The provision set out in schedule 1 to this paper should be used as a model to work from and not as a "one size fits all" solution to every scenario. The changes I have discussed in this paper and made to the 1990 Model are designed to illustrate some of the issues and possible approaches to assignment clauses, rather than to create the definitive provision.

The first question when thinking about your assignment provisions should be whether to include a pre-emption provision at all! In his commentary[3] to McCann's 1990 paper, B C Hung advocated that pre-emption provisions should not be included, and I have certainly seen joint venture agreements without them. John Kelly discussed the reasons "for" and "against" in his paper and it is worth considering those issues in the context of your particular deal.

A possibility, discussed by Hung, is just to use a consent clause to deal with the issue of ensuring appropriate incoming joint venturers. There is often a requirement to obtain consent to a disposal of interests, such consent not to be unreasonably withheld. The 1990 Model contains such a consent requirement but does not

[2] W F Manning, "Assignment clauses in mining and petroleum joint ventures" [1986] AMPLA Yearbook 119 at 139.

[3] B C Hung, "Commentary on pre-emptive rights" [1990] AMPLA Yearbook 476 at 477.

elucidate what are reasonable grounds for withholding consent. Whether a withholding of consent is unreasonable would therefore depend on "all the facts of the case"[4] and "whether on the basis of the facts as they objectively exist, and not only on the facts as perceived by the other party, the withholding was unreasonable".[5] Considerations will include the technical experience, financial status and commercial reputation of the proposed purchaser and the prospects of the joint venture project.[6] This is discussed further below in a slightly different context.

Regardless of whether there is a pre-emption provision, there is also usually a requirement that the disponee executes documents whereby it becomes bound by all the relevant joint venture obligations (and often the outgoing joint venturer is released from obligations arising after the disposal). This is obviously important and is also discussed further below.

I would also advocate a limit on the minimum participating interest that may be sold or retained simply to limit the potential for creating large and unwieldy joint ventures. At very least, there needs to be consideration of appropriate controls on the voting and some other rights of holders of small participating interests.

But assuming you have decided that a comprehensive pre-emption provision is required and the 1990 Model is taken as a starting point, how does it stack-up after 16 years? The general answer is "pretty well", as you will see as I run through.

CLAUSE 1.1 – PROHIBITION ON "DISPOSAL"

This is obviously the starting point as the prohibition triggers the whole pre-emption process. As McCann noted, the category of prohibited transactions needs to be "comprehensively drafted to include the widest possible range of transactions which may involve an alienation of the Participating Interest."[7]

I note that the 1990 Model does not include a "change of control" clause and it is beyond the scope of this paper to deal with such provisions and the issues they raise. Suffice to say that the cases clearly show that the sale of all the shares in a company will be effective to circumvent pre-emption obligations on the company itself unless expressly caught by the agreement. You must therefore give careful consideration to whether or not to include a "change of control" clause in your particular case taking account of the status, size, assets and other circumstances of your joint venturers.

The prohibition in cl 1.1 of the 1990 Model is drafted broadly. This is done by prohibiting Disposals and then defining "Dispose" as meaning: "in relation to any

[4] *Secured Finance Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596.

[5] *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1, per Bryson J at 21.

[6] *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1, per Bryson J at 21.

[7] H K McCann, "Pre-emptive rights in resource joint venture agreements" [1990] AMPLA Yearbook 445 at 447.

property… to sell, transfer, assign, part with the benefit of, declare oneself a trustee of, encumber or deal with the whole or any part of that property."

John Kelly's paper looks at several ways in which people have sought to "structure around" a prohibition, and it is illustrative to see how the 1990 Model might have applied in the circumstances of those cases.

Turning first to *Lend Lease Real Estate Investments Ltd v GPT RE Ltd*.[8] The *Lend Lease* case has been covered in John Kelly's paper and so I will not set out all the facts and discussion again here. The important drafting point for present purposes was whether the definition of "deal with" caught the grant by GPT of an option to purchase which was "subject to and conditional upon" satisfaction of a number of conditions, including that Lend Lease not exercise its pre-emptive rights under the applicable Joint Ownership Agreement.

In the *Lend Lease* case, the term "deal with" in the relevant provision was defined to mean:

> "any sale, assignment, transfer, disposition, declaration of trust, assumption of obligations or other alienation (other than leasing, licensing or granting occupation rights) or granting other like rights and whether affecting legal or equitable interests."

Ironically, White J at first instance noted in obiter that, in his view, the grant of the option would have fallen within the natural meaning of "deal with", had the phrase not been specifically defined:

> "[B]y entering into the Put and Call Option Deed…GPT dealt with its interests in the Property according to the ordinary conception of dealing, which includes bargains or arrangements for mutual advantage (Re Stayte [1997] 1 Qd R 99 at 101)."[9]

However the option did not effect a "sale, assignment, transfer or declaration of trust" within the meaning of the definition and the question came down to whether there had been "an assumption of obligations or other alienation". The court at both first instance and on appeal held that there had not.

At first instance, White J found that only transactions which amount to an alienation of the *whole or part* of an owner's interest fell within that particular definition of "dealing". GPT remained the owner of its interest and had not parted with the beneficial ownership and did not, therefore, "deal with" its interest in the defined sense.[10]

White J accepted that "mortgaging, charging or encumbering" an interest in property can be regarded a disposition, assumption of obligations, or other alienation of part of an owner's interest.[11] However, his Honour was of the view that an assumption of obligations, although often amounting to an alienation, did

[8] [2006] NSWCA 207.
[9] *GPT RE Ltd v Lead Lease Real Estate Investments Ltd* [2005] NSWSC 964, at para 41.
[10] *GPT RE Ltd v Lead Lease Real Estate Investments Ltd* [2005] NSWSC 964, at para 45-50.
[11] *GPT RE Ltd v Lead Lease Real Estate Investments Ltd* [2005] NSWSC 964, at para 45.

not always amount to a disposal of, or parting with, an interest in land.[12] In this instance, a contractual dealing would only amount to a dealing in the defined sense if it was a disposition of, or a parting with, a proprietary interest.[13] Although GPT assumed obligations to Westfield by entering into the option (ie Westfield acquired an equitable interest in the property by the grant of the option), it did not alienate or dispose of the whole, or part, of its interest.[14]

On appeal, Spigelman CJ agreed with White J's reasoning, finding that the definition of "deal with" in the relevant clause was intended to apply only to transactions which constituted an alienation.[15] The creation of the option was an imposition on the title and not a subtraction from it. Consequently, it was not an alienation and, therefore, was not a "dealing" under the particular pre-emptive rights clause.[16]

So what does this mean for the definition of "Dispose" in the 1990 Model? The definition includes the words "encumber or deal with" and there is no reference to actual alienation. If White J's obiter was followed, the words "deal with" (without further definition) would have been enough to catch the grant of the option.

In my view, there is also an argument that the grant of the option was an encumbrance that would fall within the definition of "Dispose". Although the court concluded that there was no alienation of interest by GPT, it did "encumber" its interest by accepting an imposition on the title.

So, I think the definition of "Dispose" in the 1990 Model would have been broad enough to reverse the decision in the *Lend Lease* case had cl 1.1 been applicable there. But query whether that would necessarily be a positive outcome when tested against the reasons usually given for inclusion of pre-emption provisions? The continuing venturer in Lend Lease's position hasn't had an unwanted new joint venture partner foisted on it. If the option was exercised, the opportunity to pre-empt would arise then. It would be frustrating, and not necessarily conducive to good a joint venture relationship, to have the option "hanging" but it is arguably no worse than a situation where one joint venturer simply tells the other that it wants to sell out of the joint venture but only if the other waives its pre-emption rights (ie "I would want to sell if I didn't have to sell to you").

The case of *THL Robina Pty Ltd v Glades Golf Club Pty Ltd*,[17] which is also discussed in John Kelly's paper, gave a broad meaning to "sell" as including "dispose of" or "alienate". The court considered the construction of a right of first refusal clause in a contract for the sale of a property which provided that, if Glades intended to sell the property during a development period, it must first offer to sell it to Robina. The court had to decide whether Glades had evinced an intention to

[12] *GPT RE Ltd v Lead Lease Real Estate Investments Ltd* [2005] NSWSC 964, at para 50.
[13] *GPT RE Ltd v Lead Lease Real Estate Investments Ltd* [2005] NSWSC 964, at para 50.
[14] *GPT RE Ltd v Lead Lease Real Estate Investments Ltd* [2005] NSWSC 964, at para 63.
[15] *Lend Lease Real Estate Investments Ltd v GPT RE Ltd* [2006] NSWCA 207, at para 28.
[16] *Lend Lease Real Estate Investments Ltd v GPT RE Ltd* [2006] NSWCA 207, at para 35.
[17] [2004] QSC 461.

sell the property by negotiating a call option agreement with a third party. Unlike the *Lend Lease* case, the deal was not conditional on waiver of pre-emption rights. The call option agreement was not a sale of, nor a contract for sale of the property, although such a contract would follow from the performance of the call option agreement. The court held that an "intention to sell" relates to any disposition of property.[18] By negotiating the unconditional call option agreement Glades had evinced an intention to sell, within the meaning of the right of first refusal clause.[19] In any event, I think that the circumstances of the *Robina* case would have been a "Disposal" which would have triggered the prohibition in the 1990 Model.

McLachlan v Mercury Geotherm Ltd[20] is another case discussed in John Kelly's paper. The second pre-emption right granted there to Contact Energy only applied after the McLachlan's pre-emption rights had expired. That grant might well have been caught by "deal with" and/or "encumber" in the definition of "Dispose" in the 1990 Model. In any event, the pre-emption issue in the McLachlan case would not be relevant if there is no time limit on the pre-emption rights and so it's not something that would usually need to be guarded against in a resources joint venture. Careful thought would be required if you did face a time limit in a particular case.

So, in my view, none of the *Lend Lease, Robina or McLachlan* cases necessarily require a change to the definition of "Dispose". While not strictly necessary, the following could be added to the definition of "Dispose" to clearly address the issue of options: *"create an option to do any of the foregoing"*, and the position should be revisited if your pre-emption rights are limited to a particular period.

As I mentioned above, it is possible to conclude that no great evil was done in the *Lend Lease* case. The position would be different (and this isn't discussed in the case) if GPT had agreed with the option-holder that, while the option was on foot, it would exercise its joint venture rights in a certain way or consult with the option-holder about how to exercise its voting rights. That has the obvious potential to adversely affect the smooth workings of the joint venture where a joint venturer is constrained in its ability to make decisions and, at worst, is just a "messenger" for an absent third party. There would be several potential fetters on this in cl 1.1 of the 1990 Model. The first is again the word "encumber" in the definition of "Dispose" – agreeing to restrictions on how voting power is exercised could at least amount to an encumbrance. Depending on the degree of power given, the arrangement could also be "parting with the benefit of" or even a declaration of trust in respect of the voting rights and would be caught by the definition of "Dispose" accordingly.

This point is also illustrated in *Mount Isa Mines v Seltrust Mining Corporation*.[21] That case involved a careful assignment of offtake rights coupled with "back-to-back" arrangements that were held not to be caught by the pre-emption provisions. For reasons which have been discussed in McCann's

[18] *THL Robina Pty Ltd v Glades Golf Club Pty Ltd* [2004] QSC 461 at para 29, 34-39.
[19] *THL Robina Pty Ltd v Glades Golf Club Pty Ltd* [2004] QSC 461 at para 38-39, 53.
[20] [2006] UKPC 27.
[21] Unreported, Supreme Court of Western Australia, 5 July 1985, Rowland J.

paper,[22] it is difficult and probably undesirable to attempt to capture a sale of offtake rights in a pre-emption clause. Such an assignment would not necessarily be caught by the 1990 Model and the issue would be whether the "back-to-back" arrangements were caught by "assign", "encumber", "part with the benefit of" or "deal with" in the definition of Dispose. And again, it is arguable that such an arrangement doesn't cause great evil unless the "back-to-back" arrangements get to the point where the joint venturer becomes constrained in its conduct of joint venture business by those arrangements. Indeed, the Court observed that the Seltrust arrangement did not, of itself, cause any detriment to Mount Isa Mines.

So, if an extra measure of protection was required to address what might well be the real evil in many "quasi-sale" cases, you could consider adding to the definition of "Dispose": "undertaking any obligation to a third party [other than by way of bona fide security granted to a bank] concerning the way in which it exercises its voting [or other] rights in the conduct of Joint Venture business." The reference to bank security is a reminder to think whether such security might unwittingly and unnecessarily became a "Disposal" in some cases.

Finally, for completeness I note an even more comprehensive prohibition provision that you could consider but, for the reasons discussed above, you might conclude that it is too restrictive in some circumstances. It is contained in the sample clause in Erin Feros' AMPLA paper "Joint Venture Issues".[23]

CLAUSE 1.2 – RELATED CORPORATIONS

Clause 1.2 of the 1990 Model allows Disposals to a Related Corporation on certain conditions.

"Related Corporation" is not defined in the 1990 Model but that definition is clearly vital. As an example, the recent case of *Beaconsfield Gold NL v Allstate Prospecting Pty Ltd*[24] turned on an interpretation of the word "subsidiary", which was not defined. The court had to decide whether it covered only a company and its immediate parent, or extended to other "upstream" companies. It decided on the latter, but the practical point is that having to go to court to resolve an issue like that creates both cost and uncertainty that could be avoided by a clear definition.

An easy approach is obviously to incorporate the definition of "related body corporate" within the meaning of ss 9 and 50 of the *Corporations Act 2001* (Cth), so long as you've worked through the definition and concluded that it suits your deal. Having taken that trouble, it is worth providing that the definition, as at the date of the agreement, is to apply even if there are subsequent changes to the legislation, so that the working of the agreement is not subsequently altered by something outside the control of the joint venturers.

[22] Op cit n 1, pp 462-464.
[23] E Feros, "Joint Venture Issues" [1998] AMPLA Yearbook 384 at 415.
[24] [2006] VSC 320.

The next issue with cl 1.2 is not one that has arisen from cases since 1990, but was noted by John Slattery in his commentary[25] on McCann's paper.

John Slattery commented as follows:

> "There is one feature of most pre-emptive rights clauses which I have always found unsatisfactory but I see no ready solution to the problem it creates. This is the obligation, where there has been an assignment to a related company and the assignee ceases to be related, for the assignee to re-assign to the assignor. What if the assignor itself has in the meantime completely changed in control or character to a degree unacceptable to one or more of the other participants? In the original transfer document, the assignor will presumably agree with all participants and the assignee to take the interest back if the assignee ceases to be related to it. Could the other participants restrain the re-assignment if they did not like the new guise of the assignor? They may be quite happy with the new parent of the assignee. Perhaps the re-transfer should occur only if one or another number of the other participants so requires and, in case the re-transfer is not compellable, contain an acknowledgment by the assignor that in the event that the re-transfer does not occur for any reason, the assignor will be then deemed to have been a party to the joint venture agreement in lieu of the assignee as from the date of the cessation of the relationship between assignor and assignee. Where the assignor is subsidiary, its parent could be required to assume its obligations so as to guard against the assignor ceasing to exist. (This difficulty is adverted to in Clause 1.2 of the [1990 Model], but not solved in any really satisfactory way.) Perhaps, after all, a transfer to a related company should be subject to consent, not to be unreasonably withheld."

This problem has not gone away[26] but, within the scope and focus of this paper, I have not attempted to deal with it further in my model clause.

CLAUSE 1.3 – OFFEROR'S OFFER

Clause 1.3 begins by making any sales of Participating Interests by a Selling Party subject to the "prior consent of each of the other Parties which is not a Defaulting Party (which consent shall not be unreasonably withheld [sic])".

A small matter first; I would require all consents in pre-emption provisions to be written to avoid possible arguments about whether or not any implied or oral consent had been given.

John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc,[27] discussed by John Kelly in his paper and mentioned further below, is a reminder that the doctrine of

[25] J Slattery, "Comment on pre-emptive rights" [1990] AMPLA Yearbook 471 at 473- 474.
[26] See, eg, *Esso Australian Resources Pty Ltd v Southern Pacific Petroleum NL* (rec and mgrs apptd) (admins apptd) [2005] VSCA 228.
[27] [2004] SASC 128.

restraint on alienation is alive and well and, for that reason at least, I would require as a minimum that consent not be unreasonably withheld. In any event, I would have reservations during negotiations about agreeing to an unfettered right to withhold consent for fear that my client might be on the receiving end.

More importantly, I note the changes suggested by John Slattery in his commentary:[28]

> "In the model clause, the timing for the giving of consent is not clear and I think it should be. The provision for the giving of consent should be separated from Clause 1.3 and there should be a statement in Clause 1.6 that if the Selling Party's Offer is not accepted the Selling Party may accept the Offeror's Offer subject to the consent of the other parties, not to be unreasonably withheld. …As Clause 1.3 stands, it is unclear as to the point of time at which consent must be sought by the Selling Party."

I agree that the provision about consent should be taken out of cl 1.3, but I have moved it to cl 1.1 rather than cl 1.6. Structurally, my reasoning is that a Disposal by consent should be expressly specified as one of the permitted forms of Disposal. If all the parties agree, there is no need to go through the pre-emption process. Unlike consents in other circumstances, it should be able to be withheld or made subject to conditions because the selling venturer has the pre-emption process available as an alternative.

I also have a concern about imposing a requirement for consent over and above a requirement to follow the pre-emption process. If the continuing venturers do not accept the Selling Party's Offer, query why they should still be able to withhold consent to the Disposal to the third party Offeror? My clause does not give them that right. If you were minded to include an additional requirement for consent in the pre-emption process, consider what limits should be placed on discretion to withhold consent. To focus the requirement, you could limit the discretion to some specific issues such as the technical experience, financial status, commercial reputation and market position of the proposed purchaser. This question was discussed by W F Manning[29] in his 1986 paper. Manning noted that if examples of what are reasonable grounds for withholding consent are included in the clause, they should not be exhaustive due to the difficulties in foreseeing all eventualities.[30] That is generally good advice in the context of a general prohibition on assignment without consent, but here a "closed class" of considerations would probably be more appropriate.

I note in passing that the 1990 Model incorporates "Included Assets and Liabilities" into the definition of "Sale Interest". That flags an issue for consideration and negotiation which is reflected in the square-bracketed words in the definitions and also discussed in John Slattery's commentary, but I have not dwelled on it here.

[28] J Slattery, "Comment on pre-emptive rights" [1990] *AMPLA Yearbook* 471 at 474.

[29] W F Manning, "Assignment clauses in mining and petroleum joint ventures" [1986] AMPLA Yearbook 121 at 130.

[30] W F Manning, "Assignment clauses in mining and petroleum joint ventures" [1986] AMPLA Yearbook 121 at 130.

Clause 1.3(a)(i) – Permissible Consideration

Clause 1.3(a)(i) contains the common concept that the Offeror's Offer must be for "a bona fide cash or for some other consideration readily convertible to cash [and if such consideration is not cash consideration, in whole or in part, in addition the reasonable cash equivalent thereof], (and not for any other consideration)".

Several of the cases referred to in John Kelly's paper are relevant to this provision.

Sanrus Pty Ltd v Monto Coal 2 Pty Ltd[31] is of most direct relevance. Again, the facts and details of the case are set out in Kelly's paper. Transfers were not allowed under the relevant pre-emption provision "unless the consideration is cash and, before making the transfer, the transferring Participant first makes an Offer to transfer the Applicable Interest to each of the Non-Transferring Participants for a *specific cash consideration* and on terms and conditions set out in the offer which are consistent with this clause 12 (emphasis added)".

The court found that the offers put to Monto Coal were not for a "specific cash consideration" because changes to the existing joint venture documentation formed part of the offer: the offer consisted partly of cash and was "partly comprised of valuable promises made by the incoming purchaser". A similar result would arise applying the 1990 Model, given that it requires that the Offeror's Offer be "not for any other consideration".

Arguments were also put, but not decided, in *Sanrus v Monto Coal* that provisions for certain conditional and deferred components of the cash consideration were not permitted.

John Kelly concludes, and I agree, that "the requirement for a cash consideration is unlikely to be satisfied where the consideration stated in a pre-emption offer consists partly of cash and partly of other valuable promises that have been offered by a proposed third party purchaser, *even if the promises are ones which are equally capable of being given and fulfilled by the parties who have the benefit of the pre-emption rights*" (emphasis added).

There is a difficult balance to be reached here. On one hand, the requirement for cash or consideration readily convertible to cash makes the offer more easily capable of acceptance by a continuing venturer and resolves the problems which arise if the consideration is something the offeree cannot match. Those problems are illustrated in *Simsmetal Ltd v Wanless Metal Industries Pty Ltd*,[32] and the *Robina* case and *Fimiston Mining NL v Western Reef Ltd and Ors*.[33] But, in my view, there is a question as to whether such a strict requirement is practically and commercially desirable.

The strict approach in *Sanrus v Monto Coal* (and the 1990 Model) at the very least leaves open the possibility of lengthy argument about whether other

[31] [2005] QSC 284.
[32] Unreported, New South Wales Supreme Court, Cohen J, 19 March 1997.
[33] Unreported, Western Australian Supreme Court, Steytler J, 22 November 1995.

contractual terms amount to impermissible "valuable promises". It would assist workability to formulate wording that allows normal and unexceptional contractual provisions which the offeree is equally able to give. It is also worth considering whether it is necessary to exclude royalties (cash or in kind) or deferred payments from permissible consideration. Especially in exploration joint ventures, a purchaser will often wish to offer a royalty or other form of contingent payment rather than all cash up front. One of the objections to pre-emption provisions is that they make it harder to sell an interest, or at least to sell it for full value. It could assist this issue if royalties and deferred payments were permitted.

From the point of view of a continuing venturer, it should be no great problem for it to commit to royalties or deferred payments, at least so long as they are specifically referable to production or events in the project the subject of the joint venture. One potential source of difficulty with this is the question of security for the royalties or deferred payments. If the third party purchaser undertook to provide a mortgage or charge to secure to the vendor payment of the royalty or deferred payment, a continuing joint venturer might have difficulty matching the offer if it had pre-existing finance and security arrangements in place: its financier might well object to allowing a vendor mortgage to have first ranking priority. That in turn makes the potential for needing security an additional risk to a continuing venturer being able to exercise its pre-emption rights.

My revisions to the 1990 Model seek to address these issues by expressly allowing some flexibility to the "cash-only consideration" requirement without letting the pendulum swing too far against the continuing venturers. Although I haven't done so here, you might also want to consider whether other mechanisms like farm-outs should be allowed and, if so, on what basis.

Clause 1.3(a)(ii) – Government Approvals

The 1990 Model requires that the Offeror's Offer be "expressly subject to the condition precedent that all necessary government approvals are obtained". These words are usefully wide.

From the point of view of the continuing venturer, it is important that the Selling Party's Offer allow a reasonable period to obtain these approvals and that completion follow satisfaction of the conditions. Otherwise, it is too easy for the Selling Party's Offer to impose time frames which the continuing venturer can't meet and might therefore preclude the exercise of the pre-emptive rights on the basis of that offer.

Clause 1.3(b) – Non-acceptance

I have slightly recast this provision, but it is not a substantive change and is done only for simplicity. The offer is either accepted in accordance with the process or it isn't, and there is no need to refer to other parties or to time limits in cl 1.3(b).

CLAUSE 1.4 (OLD CL 1.3A) – VALUE OF ALTERNATIVE CONSIDERATION

I have changed the original numbering of the 1990 Model for the purposes of this paper despite my reluctance to alter a longstanding historical idiosyncrasy. This clause is only required if you include the square-bracketed words in cl 1.3(a)(i)(A). I have added some further detail in relation to the timetable and process for referral to an expert for determination.

CLAUSE 1.5 (OLD CL 1.4) – SELLING PARTY'S OFFER

This clause requires that the Selling Party give notices specifying the name and address of the Offeror and attaching a copy of the Offeror's Offer, with a square-bracketed option to require further details. That notice constitutes the Selling Party's Offer which, if accepted, becomes the terms and condition on which the continuing venturer will purchase the Sale Interest.

The potential pitfalls of this approach are discussed in John Kelly's review of *Sanrus v Monto Coal*, where amendments to the joint venture arrangements were not fully disclosed in the offer and so made it non-compliant with the requirements of the applicable agreements.

John Kelly's paper also discusses the *Nitschke v Hahndorf* case[34] where the equivalent of the Selling Party's Offer was more generally expressed and was held to be too uncertain.

An obvious practical issue with requiring a full Offeror's Offer to be presented is that it requires extensive negotiation with the third party purchaser. Such a purchaser may be reluctant to engage in that negotiation when its work will be "wasted" in the event of pre-emption.

Despite these difficulties, the approach in the 1990 Model still has the advantage of enabling everyone to see exactly what terms and conditions are applicable and so removes the potential for argument about uncertainty and alternatives, such as requiring that sales be on terms and conditions that are "no more favourable". I have therefore retained the fulsome Selling Party's Offer, which puts the onus on the Selling Party to carefully draft an Offeror's Offer which complies with cl 1.3 and can be accepted as a Selling Party's Offer.

I have also included an alternative in square brackets contemplating that the Selling Party actually accepts the Offeror's Offer subject to a condition precedent concerning pre-emption. This is designed to allow the Selling Party and Offeror to have their own binding agreement (which the Offeror is likely to want) without prejudicing the pre-emption rights of the continuing venturers. You should think

[34] [2004] SASC 128.

very carefully about the stamp duty implications of this approach as it risks having to pay duty on two contracts in respect of the same participating interest.

CLAUSES 1.6 AND 1.7 (OLD CL 1.5) – ACCEPTANCE

I have some concern, not arising from any particular cases, that cl 1.5 of the 1990 Model does not set out in sufficient detail the process by which a Selling Party's Offer may be taken up where there is more than one continuing venturer. The clause, quite properly, requires that the Selling Party's Offer is not capable of acceptance for less than the whole Sale Interest. But it leaves open the possibility that a continuing venturer must accept the Selling Party's Offer without knowing what part of the Sale Interest the venturer will be required to purchase until it knows which other continuing venturers have also accepted. For example, if a Selling Party was selling a 60 percent Sale Interest and there were four other parties each with a 10 percent Participating Interest, one of those continuing venturers could end up acquiring the whole 60 percent, or 45 percent, or 30 percent or 15 percent depending on what the other three continuing venturers do. That is not likely to be an acceptable scenario for a continuing venturer considering whether to accept a Selling Party's Offer.

Obviously, there is the potential for all the continuing venturers to agree outside the pre-emption process on who will accept and in what proportions, but that may well be subject to "game playing" which prevents an open and cooperative approach.

I have split the provision into two and added a simple form of protection against being allocated an unwanted portion of the Sale Interest. The reason for allowing a 14 day period before the Selling Party's Offer expires is to give the continuing venturers time to organise amongst themselves to make sure the whole Sale Interest is accepted.

CLAUSE 1.9 (OLD CL 1.7) – ASSUMPTION BY DISPONEE

Clause 1.7 requires that the Disponee must agree to be bound by the terms of the joint venture agreement. This is very standard and uncontroversial, and I venture to say is virtually universally done. However, in *Nitschke v Hahndorf*, Besanko J indicates that such a requirement is one of the key indicators of an unacceptable restraint on alienation.

Nitschke v Hahndorf set out the following factors as being relevant to deciding when rights of first refusal may be considered to attract the doctrine of unlawful restraint on the alienation of property:

- the scope of the initial prohibition;

- whether it applied for a limited period or indefinitely;
- whether there is a requirement for a similar promise from subsequent purchasers; and
- whether the right was to be exercised by reference to a fixed price.

The test of whether a contractual obligation amounts to an unacceptable restraint on alienation is to be applied at the time the obligation is created and rests entirely on principles of public policy.

Besanko J concluded that the pre-emption provision was valid, but the requirement to have the purchaser take subject to the pre-emption was void as being an unacceptable restraint on alienation. On its face, this decision could catch and void provisions such as cl 1.9. This aspect of the decision in *Nitschke v Hahndorf* appears to turn to a fair degree on evidence presented as to the effect of the pre-emption provision in that particular case. In essence, the Nitschke interests held a right of pre-emption if the owners of the Hahndorf golf course wished to sell it. Amongst other things, the owners could not sell the course except as a whole. Experts gave evidence that it was very unlikely that the golf course would be purchased as a going concern and it would probably be sub-divided. However, future developers and residential purchasers would be discouraged by having to take subject to the ongoing pre-emption provision and that would cause sales of the land to be at a substantial discount to market value. The court concluded that such a provision amounted to an unacceptable restraint on alienation in those circumstances.

It is difficult to know how best to deal with this issue. Provisions such as cl 1.9 are so common and so important in resources joint ventures that I think there is no alternative but to leave it in and seek to distinguish *Nitschke v Hahndorf* on its facts, if that case was ever cited as authority in a challenge to its validity. Bear in mind that the test is to be applied as at the time the obligation is created. Joint venture pre-emption provisions create mutual obligations on the joint venturers, rather than being one-sided as in *Nitschke v Hahndorf*. Resources joint venture interests would normally be sold as a going concern. Purchasers of joint venture interests are unlikely to be seriously discouraged by having to sign-up to the pre-emption provisions as that is common in the resources industry. Although there is an argument that the pre-emption provisions can make it difficult to get "top dollar" on sale of a joint venture interest in some circumstances, it is difficult to conclude that such sales would suffer a substantial discount to market value because the purchaser had to sign-up to the pre-emption provisions.

One practical piece of "insurance" is to keep the "sign-up" obligation in a separate provision from the other pre-emption provisions and to make sure there is a severance clause in the joint venture agreement. That should mean that the holder of the pre-emption right at least gets one opportunity to pre-empt even if the obligation to get purchasers to sign up is found to be void. I have also included an optional cl 1.10 so that, if cl 1.9 was void and a Disponee did not have to accept the pre-emption obligations, neither would it have the benefit of them.

The good news from *Nitschke v Hahndorf* (and also *Allstate Prospecting Pty Ltd v Posgold Mines*[35]) is that the rights of pre-emption themselves passed the "restraint-on-alienation" test, even though they were complex and onerous.

A second issue with cl 1.9 concerns the wording in square brackets at the end of the clause requiring the Parties to "make whatever changes may be necessary to this Agreement to give effect to the introduction of an additional Party". This covers situations such as where a joint venture agreement has been drafted on the basis that there are only two joint venturers, and then further venturers join. For example, voting thresholds and processes may need to be revisited. This may be easier said than done, but the bracketed words flag the issue and, like the drafters of the 1990 Model, I will leave it at that for the purposes of this paper.

CONCLUSION

In conclusion, the 1990 Model has generally stood up well. My analysis illustrates that there are no new issues, but that the cases and commercial developments mean that constant vigilance is required in the drafting and implementation of pre-emption provisions.

Further, it is important to remember that drafting pre-emption provisions is not necessarily an exercise in creating an impenetrable web of prohibitions. Consider what the holder of the pre-emption rights needs to achieve and make sure the triggers reflect that objective. Do you need pre-emption provisions at all? Do you need to catch every possible dealing, or will a narrower class of triggers be more appropriate? Set up the processes so that they are workable and the parties can use them effectively.

In closing, I note the comments of Chesterman J in *Peppercorn Holdings No 1 Pty Ltd v DDH Graham Ltd*.[36] As an illustration that disputes about these matters are to be determined in the particular circumstances of each case, Chesterman J decided *Robina v Glades* in favour of the holder of the pre-emption rights, but found in *Peppercorn Holdings* that a long lease did not trigger a pre-emption provision. He observed as follows:

> "A party who gives a right of pre-emption should be bound by it and courts should be reluctant to find that promisors may deal with this property to defeat or diminish the right. But this general proposition must give way to the terms of the particular contract in which one finds the right of pre-emption. The parties' bargain must be found in the words they choose to express it."[37]

Happy drafting!

[35] Unreported, Supreme Court of Tasmania, Zeeman J, 27 April 1995.
[36] [2006] QSC 156.
[37] *Peppercorn Holdings No 1 Pty Ltd v DDH Graham Ltd* [2006] QSC 156 at para 60.

SCHEDULE 1 – 2006 MODEL

1.1 A Party shall not (nor shall it attempt to) Dispose of the whole or any part of its Participating Interest except:

(a) in accordance with the subsequent provisions of this Clause; or

(b) as otherwise required or permitted by this Agreement; or

(c) with the prior written consent of each of the other Parties which is not then a Defaulting Party (such consent may be withheld or made subject to conditions as the other Parties see fit).

1.2 Any Party may at any time Dispose of the whole or any part of its Participating Interest to a Related Corporation on condition that the Related Corporation agrees, in a form acceptable to the other Parties, to reassign to the Disponor the Participating Interest Disposed of upon the Disponee ceasing to be a Related Corporation of the Disponor for any reason whatsoever or, if the Disponor has by then ceased to exist [and the holding company of the Disponee is different from the holding company of the former Disponor immediately before it ceased to exist] to offer to assign such Participating Interest to the other Parties which are not Defaulting Parties in proportion to their respective Participating Interests (or in such other proportion as those other Parties may agree), at a price equal to its Fair Value and otherwise on the terms set out in [Default Clause: providing for compulsory purchase of the participating interest of the defaulting party by non-defaulting participants] mutatis mutandis. To the extent that any such offer is not accepted, the Disponee may retain its Participating Interest.

1.3 In addition to its rights under Clause 1.2, a Party ("Selling Party") may from time to time and at any time sell the whole or any part of its Participating Interest and the Included Assets and Liabilities together (the "Sale Interest") at the price and on the terms and conditions of a bona fide offer (an "Offeror's Offer") received from any person ("Offeror") whether or not a Party to this Agreement, if:

(a) the Offeror's Offer is in writing and:

(i) for a bona fide consideration comprised only of some or all of the following:

(A) cash or some other consideration readily convertible to cash, in Australian currency [and if such consideration is not cash or within one of the following permitted categories of consideration, in addition the reasonable cash equivalent thereof];

(B) [unsecured] obligations to make deferred payments in cash or some other consideration readily convertible to cash, in Australian currency, provided that such obligations are conditional only on matters which relate solely to Joint Venture Operations;

(C) [unsecured] obligations to pay royalties, in cash in Australian currency or in kind, calculated solely by reference to Product; and

(D) other incidental and usual contractual commitments, including representations and warranties, which a Party could reasonably be expected to be able to undertake if it accepted a Selling Party's Offer;

(ii) expressly subject to the condition precedent that all necessary government approvals are obtained, with a reasonable period allowed for that purpose and for completion of the sale and purchase thereafter;

(iii) relates only to the Sale Interest; and

(iv) allocates the cash consideration payable among the property and assets comprised in the Sale Interest, and

(b) the Selling Party's Offer is not accepted in accordance with Clauses 1.6 to 1.8 inclusive.

1.4 [Each Party other than the Selling Party may by notice to the Selling Party and the other Parties within 30 days after the receipt of the notice referred to in Clause 1.5 dispute the correctness of any cash equivalent consideration contained in such notice. If such dispute is not resolved by agreement within a further 30 days, the matter may be referred by any Party for determination by the Expert who, in making such determination, shall act as an expert and not an arbitrator. Any such determination shall be final and binding on the Parties. [The Selling Party shall pay one half of the cost of obtaining such determination and the Party giving notice of dispute shall pay the other half of such cost.]

1.5 If a Selling Party receives an Offeror's Offer which complies with Clause 1.3(a) and which it [wishes to accept] [has accepted subject to a condition precedent that the Selling Party's Offer is made but not accepted], it shall give notice to each other Party specifying the name and address of the Offeror and attaching a copy of the Offeror's Offer [together with reasonable details of the technical and financial capacity of the Offeror].

1.6 The giving of a notice under Clause 1.5 shall constitute an offer by the Selling Party (the "Selling Party's Offer") to sell the Sale Interest to the other Parties (other than any Defaulting Party) at the price and on the terms and conditions of the Offeror's Offer. A Selling Party's Offer shall not be capable of acceptance in respect of less than the whole of the Sale Interest and shall be irrevocable during the 60 days allowed for acceptance by Clause 1.8.

1.7 If there is more than one Party other than the Selling Party, the Sale Interest shall be offered to each of them and if more than one accepts they shall be deemed to purchase (severally and not jointly) the whole of the Sale Interest in the proportions that their respective Participating Interests bear to each other or in such other proportions as those Parties agree and notify to the Selling Party PROVIDED THAT no Party shall be required to purchase a further Participating

Interest greater than any maximum interest it specifies in its acceptance of the Selling Party's Offer and notifies to each of the other Parties at least 14 days before the last date on which the Selling Party's Offer may be accepted

1.8 If a Selling Party's Offer is not accepted, by notice to the Selling Party with a copy to each other Party, within 60 days of the date on which notice is given under Clause 1.5, [or in the event of a dispute pursuant to Clause 1. 4, within 14 days after the date of determination made pursuant to that Clause], it shall lapse and the Selling Party may [accept] [complete] the Offeror's Offer within 6 months of the date on which notice was given under Clause 1.5.

1.9 Any Disposal, whether pursuant to this Clause or otherwise pursuant to this Agreement, which is made otherwise than to or in favour of an existing Party shall be conditional upon the Disponee agreeing with the Parties (in a form to their reasonable satisfaction and capable of enforcement by any one or more of them) and with the Selling Party to be bound by the terms and conditions of this Agreement. [In addition, the Parties shall make whatever changes may be necessary to this Agreement to give effect to the introduction of an additional Party.]

1.10 [If, for any reason, a Disponee is not bound by the provisions of this Clause it shall not have any rights under this Clause.]

1.11 Subject to compliance by the Selling Party and the Disponee with Clauses 1.3 to 1.9 inclusive, the other Parties shall accept the Disponee as a member of the Joint Venture, and, unless otherwise agreed by the other Parties:

(a) in the case of a Disposal to or in favour of a Related Corporation, the Selling Party shall remain liable for the performance of the duties, responsibilities and obligations assumed by the Disponee, provided, however, that performance by the Disponee will pro tanto discharge the Selling Party from liability for performance of those duties, responsibilities and obligations insofar as they relate to the Sale Interest and

(b) in the case of a Disposal to or in favour of a person other than a Related Corporation of it, the Selling Party shall be relieved of liability for the performance of the duties, responsibilities and obligations in relation to the Sale Interest which are assumed by the Disponee but without prejudice to all obligations and liabilities of the Selling Party which have by then accrued and remain unsatisfied.

1.12 For the purposes of this Clause, the following terms have the following meanings:

"**Dispose**" means one or more of:

(a) in relation to any property, to sell, transfer, assign, part with the benefit of, declare oneself a trustee of, encumber or deal with the whole or any part of that property;

(b) to undertake any obligation to any person [other than by way of security granted to a bank] concerning the way in which it exercises its voting [and other] rights in the conduct of Joint Venture business; and

(c) [to create an option to do any of the following];

and "**Disposal**", "**Disponor**" and "**Disponee**" have corresponding meanings;

"**Expert**" shall mean the [President for the time being of the …]

"**Fair Value**" of a Participating Interest means the average of two valuations made by independent experts ("**Valuers**") of the fair market value of the Participating Interest, such experts to be selected by agreement between the Parties, or failing agreement within 10 days, by the [President for the time being of the …] at the request of any Party.

"**Included Assets and Liabilities**" means;

(a) [sales contracts];

(b) [outstanding obligations to a fund work programmes and budgets for carried interest parties];

(c) [product stockpiles]; and

(d) [other assets used by the Participants in the Joint Venture but not included in the definition of Joint Venture Property].

"**Joint Venture Property**" means all property of whatever kind now held or hereafter acquired or created by or on behalf of the Parties or any of them for the purposes of the Joint Venture including (without limitation) the Mining Tenements, all Minerals, matter, concentrate and ore prior to their being taken in kind by the Parties, all data and all treatment and other facilities established or acquired by or on behalf of the Parties for the conduct of Joint Venture Operations;

"**Participating Interest**" means the following obligations, benefits and rights of a Party expressed as a percentage and determined in accordance with this Agreement:

(a) the beneficial ownership as a tenant in common of an undivided share in that percentage of all Joint Venture Property;

(b) the benefit of the Party under the Joint Venture Agreement;

(c) the obligation, subject to the terms of this Agreement, to contribute that percentage of all Project Expenditure; and

(d) the ownership of and the right and benefit in accordance with the Joint Venture Agreement to receive in kind and to dispose of for its own account that percentage of Product.

"**Product**" means any [saleable] Minerals or other commodities recovered or produced by the conduct of Joint Venture Operations.

SCHEDULE 2 – 1990 MODEL

1.1 A Party shall not (nor shall it attempt to) Dispose of the whole or any part of its Participating Interest except as provided in the subsequent provisions of this Clause or as otherwise required or permitted by this Agreement.

1.2 Any Party may at any time Dispose of the whole or any part of its Participating Interest to a Related Corporation on condition that the Related Corporation agrees, in a form acceptable to the other Parties, to reassign to the Disponor the Participating Interest Disposed of upon the Disponee ceasing to be a Related Corporation of the Disponor for any reason whatsoever or, if the Disponor has by then ceased to exist [and the holding company of the Disponee is different from the holding company of the former Disponor immediately before it ceased to exist] to offer to assign such Participating Interest to the other Parties which are not Defaulting Parties in proportion to their respective Participating Interests (or in such other proportion as those other Parties may agree), at a price equal to its Fair Value and otherwise on the terms set out in [Default Clause: providing for compulsory purchase of the participating interest of the defaulting party by non defaulting participants] mutatis mutandis. To the extent that any such offer is not accepted the Disponee may retain its Participating Interest.

1.3 In addition to its rights under Clause 1.2, a Party (a "Selling Party") may from time to time with the prior consent of each of the other Parties which is not a Defaulting Party [which consent shall not be unreasonably withheld] sell the whole or any part of its Participating Interest and the Included Assets and Liabilities (the "Sale Interest") at the price and on the terms and conditions of a bona fide offer (an "Offeror's Offer") received from any person (the "Offeror") whether or not a Party to this Agreement, if:

(a) the Offeror's Offer is in writing and:

(i) for a bona fide cash or for some other consideration readily convertible to cash, in Australian currency [and if such consideration is not cash consideration, in whole or in part, in addition the reasonable cash equivalent thereof], (and not for any other consideration);

(ii) expressly subject to the condition precedent that all necessary government approvals are obtained; and

(iii) expressly on the condition that all costs and expenses relating to the acceptance of the Offeror's Offer will be met by a person other than the Offeree; and

(iv) allocates the cash consideration payable among the property and assets comprised in the Sales Interest,

(b) no other Party accepts the Selling Party's offer in accordance with Clause 1.6 within the time limited by that clause.

1.3A Each Party other than the Selling Party may by notice to the Selling Party and the other Parties prior to the expiration of the thirty (30) day period following the receipt of the notice referred to in Clause 1.3 dispute the correctness of any cash equivalent consideration contained in such notice. In the event of such dispute, the matter shall be referred for determination to the Expert who in making such determination shall act as an expert and not an arbitrator and such determination shall be final and binding on the Parties. (The Selling Party shall pay one half of the cost of obtaining such determination and the Party giving notice of dispute shall pay the other half of such cost.)

1.4 Where a Selling Party receives an Offeror's Offer which complies with Clause 1.3(a) and which it wishes to accept, it shall give notice to each other Party specifying the name and address of the Offeror and attaching a copy of the Offeror's Offer.

1.5 The giving of a notice under Clause 1.4 shall constitute an offer by the Selling Party (the "Selling Party's Offer") to sell the Sale Interest to the other Parties (other than any Defaulting Party), at the price and on the terms and conditions of the Offeror's Offer. The offer shall be irrevocable during the time limited by Clause 1.6. If there is more than one such other Party, the Sale Interest shall be offered to each of them and if more than one accepts they shall be deemed to purchase (severally and not jointly) the whole of the Sale Interest in the proportions that their respective Participating Interests bear to each other or in such other proportions as those Parties agree and notify to the Selling Party. A Selling Party's Offer shall not be capable of acceptance in respect of less than the whole of the Sale Interest.

1.6 If a Selling Party's Offer is not accepted, by notice to the Selling Party with a copy to each other Party, within sixty (60) days of the date on which notice is given under Clause 1.4, or in the event of a dispute pursuant to Clause 1. 3A, fourteen (14) days after the date of determination made pursuant to that Clause, it shall lapse and the Selling Party may accept the Offeror's Offer within six (6) months of the date on which notice was given under Clause 1.4.

1.7 Any Disposal, whether pursuant to this Clause or otherwise pursuant to this Agreement, which is made otherwise than to or in favour of an existing Party shall be conditional upon the Disponee agreeing with the Parties (in a form to their reasonable satisfaction and capable of enforcement by any one or more of them) and with the Selling Party to be bound by (mutatis mutandis) the terms and conditions of this Agreement. (In addition, the Parties shall make whatever changes may be necessary to this Agreement to give effect to the introduction of an additional Party.)

1.8 Subject to compliance by the Selling Party and the Disponee with Clauses 1.3 to 1.7 inclusive, the other Parties shall accept the Disponee as a member of the Joint Venture. Unless otherwise agreed by the other Parties:

(a) in the case of a Disposal to or in favour of a Related Corporation, the Selling Party shall remain liable for the performance of the duties,

responsibilities and obligations assumed by the Disponee, provided, however, that performance by the Disponee will pro tanto discharge the Selling Party from liability for performance of those duties, responsibilities and obligations insofar as they relate to the Sale Interest; and

(b) in the case of a Disposal to or in favour of a person other than a Related Corporation of it, the Selling Party shall be relieved of liability for the performance of the duties, responsibilities and obligations in relation to the Sale Interest which are assumed by the Disponee but without prejudice to all obligations and liabilities of the Selling Party which have by then accrued and remain unsatisfied.

1.9 For the purpose of this Clause, the following terms have the following meaning:

to "**Dispose**" in relation to any property means to sell, transfer, assign, part with the benefit of, declare oneself a trustee of, encumber or deal with the whole or any part of that property and "**Disposal**", "**Disponor**" and "**Disponee**" have corresponding meanings;

"**Expert**" (shall mean the President for the time of the) …

"**Fair Value**" of a Participating Interest means the average of two valuations made by independent experts ("**Valuers**") of the fair market value of the Participating Interest, to be selected by agreement between the Parties, or failing agreement within 10 days, by the (President for the time being of the Australian Society of Accountants) at the request of any Party.

"**Joint Venture Property**" means all property of whatever kind now held or hereafter acquired or created by or on behalf of the Parties or any of them for the purposes of the Joint Venture including (without limitation) the Mining Tenements, all Minerals, matter, concentrate and ore prior to their being taken in kind by the Parties, all Data and all treatment and other facilities established or acquired by or on behalf of the Parties for the conduct of Joint Venture Operations;

"**Participating Interest**" means the following obligations, benefits and rights of a Party expressed as a percentage and determined in accordance with this Agreement:

(a) the beneficial ownership as a tenant in common of an undivided share in that percentage of all Joint Venture Property;

(b) the benefit of the Party under the Joint Venture Agreement;

(c) the obligation, subject to the terms of this Agreement, to contribute that percentage of all Project Expenditure; and

(d) the ownership of and the right and benefit in accordance with the Joint Venture Agreement to receive in kind and to dispose of for its own account that percentage of Product.

"**Product**" means any [saleable] Minerals or other commodities recovered or produced by the conduct of Joint Venture Operations.

"**Included Assets and Liabilities**" means [Sales contracts]

[Outstanding obligations to a fund work programs and budgets for carried interest parties]

[Product stockpiles]

[other assets used by the Participants to the Joint Venture not included in the definition of Joint Venture Property].

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