around town give their services pro bono, which is something that is often overlooked by the public. They assume that somebody is paying these people to come along and give them help, but actually they are not getting paid. So that's an aspect of law which I think is very important," she said.

Ms Jacob also hopes to get involved in law reform, and she has plenty of other plans for the "next 30 years."

"Initially I have to get through the two years with a restricted practising certificate," she said.

At present, Ms Jacob is writing a paper on the issue of communication (which you may read in an upcoming edition of *Balance*).

"One of the things I am becoming aware of in clients that I have had dealings with here, is the problems of language usage where people are presumed to have understood, or to be able to understand - when that assumption is not well placed.

"Either because the person has English as a second language, or because you're expecting them to understand aspects of the law in which they are not well enough educated," Ms Jacob said.

Although she laughs when asked about her 'spare time', Ms Jacob said she managed to fit her studies in with her active social life, "I still had a very active social life, which is why I didn't get one high distinction!"

She enjoys freestyle dancing, and was back on the dance floor for the first time this month, since her hip replacement last May.

Even a hip replacement can't slow this inspirational 'young' lawyer down! Congratulations Rosemary.

Rosemary Jacob and her family at the admission ceremony on 5 February 2008

Random thoughts on joint venture agreements in the mineral industry

By Geoff Witham, Solicitor, Noonans Lawyers

Geoff Witham worked in the legal department of (what was then) Western Mining, for nearly 20 years.

This paper is designed to give an outline of some of the issues which need to be considered in drafting a Joint Venture agreement in an Australian context, the reasons why certain provisions are made in the documents which constitute or create the Joint Venture, with some comments on how the Joint Venture operates in a practical way.

It should be recognised, and emphasised, that what is said here is appropriate to the Australian context, and not the same as would apply in say, South East Asian countries or in the United States of America. The reason for this is that the fundamental legal principles which govern and regulate the entity which is known as a Joint Venture, will vary from country to country, and therefore care needs to be taken not to assume that these principles are identical in various countries.

So then, just what is this thing which is called a Joint Venture? It is probably easier to say what a Joint Venture is by saying what it is not. A Joint Venture, when used in the context of an exploration and/or mining project is, in fact, more technically correctly described as an unincorporated Joint Venture. The names incorporated and unincorporated generally refer to whether or not a group of participants have incorporated themselves into a company, whether that is a limited or no liability company, and use of the term un-incorporated means that there is no corporate or company entity involved. Therefore, when we are talking about a Joint Venture we are talking about an un-incorporated Joint Venture.

Joint Ventures have been used as a vehicle or an entity for the undertaking of exploration and/or mining projects and a variety of other commercial activities for a considerable number of years, and in Australia for the past 40 years. Consequently, it might be expected that there is a substantial amount of settled and certain law as to the nature of a Joint Venture. This is not really the case, and most of the information that is available in relation to Joint Ventures comes to us from a reasonably limited number of court decisions and from a series of articles and papers prepared mostly, but not entirely, by lawyers who generally work in the resource areas.

In particular, in Australia there is no specific or general legislation which governs or regulates the creation of Joint Ventures, defines their character or regulates their activities. There have been numerous attempts by various writers and commentators to define what a Joint Venture is, and most of these definitions, whilst similar, do not always coincide.

The following are some examples of definitions or descriptions of a Joint Venture:

The exposure draft of accounting for interests in Joint Ventures issued for professional comment by the Australian Accounting Research Foundation in November 1984 said, "an un-incorporated contractual association between two or more parties, other than a partnership or trust, to undertake a specific business project in which the Venturers meet the costs of the project and receive a share of any resulting output".

'Un-incorporated Joint Ventures - Accounting and Auditing Implications', published by Coopers and Lybrand in 1983 said a Joint Venture is constituted by contractual agreement by the participants. It is not a recognised entity at law in Australia, and so is not governed by specific legislation such as company codes or partnership acts; instead it is governed by its constituent agreements and the general or common law.

W.D. Leslie in a 1970 paper entitled "Joint Ventures and Farmouts" presented at a Law Institute Seminar on Mining said, "a Joint Venture, at least in so far as that term is used in the Australian Mining Industry, is the relation which subsists between persons carrying on an undertaking in common for their individual gain".

M.J. Walsh in Taxation in Australia (1978) said "a Joint Venture is a relationship between two or more parties formed for a particular commercial transaction or transactions, the product of which will be taken by the Joint Venturers in such shares as may be mutually agreed between them and disposed of by them individually at such times as the venturers may individually determine".

C.M. Beeny, in a Paper presented at a course for accountants held by the Leo Cussen Institute for Continuing Legal Education and Institute for Chartered Accountants in Australia on 25 March, 1980 said, "a Joint Venture is the relation which subsists between two or more parties formed for a particular commercial transaction or transactions which transaction or transactions by reason by agreement between the parties or the nature of the subject matter of the transactions, gives rise to a product (whether in cash or kind) which is owned by the parties in severable shares in respect to which each party has sole title".

Michael Sharwood, in a Paper to the Australian Mining and Petroleum Law Association in 1980 said, "a Joint Venture is a type of association designed primarily for its members to operate together for a prescribed and limited purpose, but which differs from partnership in that one of the incidents of partnership will invariably be lacking and which is designed further so as to ensure that its members are not ever jointly in receipt of income".

Argyle, in the Law Society of Western Australia Mining Law Course, Lecture No. five in 1981 said, "I would describe a mining Joint Venture as a combination of persons (usually companies) in unincorporated association, not a partnership either at general law or in terms of the *Income Tax Assessment Act*, the terms and conditions of such relationship being established by contract amongst the parties (normally referred to as "participants") to thereby carry on a mining activity in common for their individual gain".

Of all of these definitions, those by Sharwood and Argyle, which are the final two definitions, are the most helpful from a practical point of view. One of the major reasons why the Joint Venture has been developed and used as the most preferred method of structuring a relationship between two or more participants in a mining or exploration activity in Australia has been as a consequence of the laws relating to Income Tax. There are other, and also very important reasons, why the Joint Venture is the preferred way of doing business.

The definition of what is a Joint Venture is by no means clear and agreed upon by those persons who are familiar with, and work with, such entities, and there is no general legislation or specific legislation which regulates Joint Ventures.

One might then ask why it is that so much time and effort has been devoted to the development of this particular type of business relationship, when the well-known relationship of a partnership has been available for many, many years. One of the reasons why the Joint Venture is the preferred way to set up the relationship between parties wishing to engage in a joint mining or exploration activity is a result of the laws relating to Income Tax in Australia, and there are a number of other reasons as well.

Perhaps it would be useful if we were to look at some of the differences between a Joint Venture and a Partnership which, as well as helping to explain the nature of a Joint Venture, might also assist in understanding why the Joint Venture structure is preferred to the much longer-established partnership arrangement. Some of the distinguishing characteristics of partnerships and Joint Ventures are as follows: -

1. Income

In the case of a partnership, income is received jointly by all the partners, and the profits arising from the partnership are shared equally between the partners, or in such shares as may be provided in the partnership agreement. In the case of a Joint Venture, income is received separately by the individual participants, with no income or profit being earned by the Joint Venture.

2. Funding

A partnership is essentially a self-funding entity, because revenue derived from its business activities is received by the partnership, and profits are generally distributed to partners only if revenue exceeds

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costs - ie. from any surplus. The situation with a Joint Venture is quite different. The output/income in a Joint Venture situation is received separately by the individual participants and therefore the Joint Venture as an entity does not receive any income as a result of its activities, and it is therefore impossible for the Joint Venture to be self-funding. Consequently, all funds must be contributed by the participants in the Joint Venture to meet the ongoing operating costs of the venture, and to also provide any capital funds which are needed.

3. Financial Statements

A partnership will produce, usually on an annual basis, accounts in the form of a balance sheet and profit and loss statement which show a profit or loss from the operations of the partnership and the financial position of the partnership. By contrast, a Joint Venture does not produce a profit and loss statement or a balance sheet. What it will do is to produce a set of accounts which will show the costs of production and the costs of the assets acquired for the Joint Venture, and may even show the value of the participants' interests in the Joint Venture.

4. Income Tax

Under the Australian Taxation system, each partnership must lodge a partnership income tax return. The partnership income tax return will include provisions for depreciation, and it will be based upon the accounting methods which are employed by the partnership, whether or not those accounting methods are the accounting methods which might or might not be used individually by the various partners. The return will then indicate the taxable "income of the partnership," and will then show what amount of that so-called taxable income each partner is entitled to receive. Each partner then submits his own separate taxation return, and his share of the partnership taxable income must be included in the return, of the individual partner. When the individual partner submits his return, no further deductions or allowances for the business activities associated with the partnership are permitted or allowed, as all of these will have been taken into account in the partnership return in arriving at the partnership taxable income amount. By way of contrast, a Joint Venture does not lodge an income tax return. Each participant in the Joint Venture lodges an individual income tax return which, on the income side, will show the income it receives from its share of the production of the Joint Venture. In the individual return, the participant will then include on the deduction side of the return all of the costs which it has expended in relation to its share of the Joint Venture, and in doing so it is able to employ the accounting methods and depreciation schedules which it may use or employ on a corporate-wide basis, whether or not those accounting methods and depreciation schedules are the same as those employed by other participants in the Joint Venture.

5. Ownership of Assets

Whilst each partner owns an interest in all partnership properties, that interest does not carry with it title to specific assets of the partnership prior to dissolution of the partnership. Even then, the entitlement of a partner is limited to his proportion of the surplus, if any, of assets available after all liabilities of the partnership have been discharged. A participant in a Joint Venture owns a defined percentage share of the assets acquired for the purposes of, or contributed to, the Joint Venture. It is fundamental to the nature of the Joint Venture that the participants own the assets as tenants in common.

6. Charging of Assets

Partnership assets can only be charged by the entire partnership. An individual partner may charge or mortgage his interest in the partnership, but it follows from the previous point that since a partner does not hold title to any specific partnership assets, his charging of his interest in the partnership will not entitle the security holder to any specific partnership assets until such time as the partnership is dissolved and the individual partner becomes entitled to a share of the assets after all of the partnership liabilities have been satisfied. Conversely, individual participants in a Joint Venture (because they own the property as tenants in common, which carries with it the right to deal individually and separately with their interest in the asset) may charge their interest in the assets of the Joint Venture and this will enable the charge holder to take security over the interest in the particular assets. It is worth noting that Joint Venture Agreements, which constitute the Joint Venture, will often contain limitations to a greater or lesser degree on the rights of an individual participant to charge their interest in the Joint Venture.

7. Agreement

An agreement is not necessary to create the legal relationship of a partnership, because the legislation of each of the Australian States provides that a partnership relationship is created if parties carry on business in common with a view to making a profit together. Whilst it is not essential for there to be an agreement to create the partnership relationship, obviously many partnership agreements are signed because the partners may wish to regulate the arrangements between them in a particular fashion. The point to be made, is that whilst an agreement can be made, it is not essential for the creation of the legal relationship. Because a Joint Venture is entirely a creature of

contract, a Joint Venture Agreement is in practical terms essential for the creation of a viable commercial Joint Venture relationship. The agreement will invariably cover issues such as the percentage interest of the various participants, the ownership of assets, the sharing of costs of production of the Joint Venture, the term of the Joint Venture and various other essential matters including a denial of partnership.

8. Management

One of the results of the existence of a partnership, is that each partner is the agent of all of the others for the purpose of any partnership business. This can, of course, be varied by the provisions of the partnership agreement, but it is a general principle of partnership law that any partner may legally bind all of the other partners. The creation of a Joint Venture relationship does not in itself give any one participant the authority to act on behalf of the others, and indeed this right is usually specifically denied in the Joint Venture Agreement which creates the relationship. The usual arrangement is that the participants in the Joint Venture agree to appoint a manager - who can either be a participant in the Joint Venture or a third party - and often a separate management agreement is entered into by the participants in the Joint Venture, and the manager, and that agreement lays down the powers, authorities, duties, obligations and liabilities of the manager. The point to be understood, is that the right to act on behalf of, and represent the Joint Venture, is entirely a matter of contract, and does not arise simply by the creation of the Joint Venture relationship.

9. Liability to Third Parties

The Partnership Acts of the various States each have as a general rule that each partner is jointly and severally liable for all partnership debts. So far as a Joint Venture is concerned, the general rule is that each participant is only liable for an act which has been undertaken with that participant's authority. This is not the occasion to enter into a discussion about the various forms of authority and third parties rights, and the general statement is sufficient for present purposes. Invariably, a Joint Venture agreement will provide that each participant is liable for debts incurred in relation to the Joint Venture's activities only, to the extent of its participating interest in the Joint Venture. A participant's interest in the assets of the Joint Venture is also limited by the percentage interest that it has in the Joint Venture, and in this way a participant's rights in the assets of the Joint Venture, its rights to share in the production of the Joint Venture, and its obligations to meet a percentage of the Joint Ventures liabilities are all equal.

10. Termination

Generally, a partnership is terminable by any partner at any time, unless the partnership has been constituted for a specific period of time. Even so, a partnership can be terminated by a court before that specific term has expired, if the partnership arrangements and agreements have been breached by one of the partners, or if a court considers it is just and equitable to do so in the particular circumstances. Generally speaking, Joint Venture arrangements contain detailed provisions regarding termination. They are usually expressed to terminate once the particular project for which they were formed has been completed, and various other rights of termination or withdrawal are granted to or conferred upon the participants in the event of certain circumstances occurring. Because the Joint Venture is a creature of contract, breaches of the agreement will permit usual contractual remedies of injunction or damages. As a general rule, a Joint Venture cannot be dissolved or terminated by the Court. Rights of withdrawal, which is one form of termination, are often permitted only at particular times during a Joint Venture, because of the commercial consequences which may result to the non-withdrawing parties.

Mr. R. Ladbury in a Paper entitled 'Mining Joint Ventures - Australian Commentary' published in 1984 by the Practising Law Institute in its book 'Legal Aspects of doing Business with Australia', made this comment, "The essential character of an un-incorporated Joint Venture is that it should not constitute a partnership either for the purposes of the Partnership Acts of the Australian States or Territories or for the purposes of the *Income Tax Assessment Act 1936 (Cth)*". Why is this essential? First, from an income tax point of view, the main reason for seeking to avoid a partnership is directed to the optimum use of available tax provisions, and in particular is directed to –

a. avoiding the obligation to lodge a partnership return;

b. enabling each venturer to offset deductions from one project against income from another project;

c. enabling each venturer to make its own elections under the *Income Tax Assessment Act*;

d. ensuring that each venturer is carrying on any required prescribed mining operations or prescribed petroleum operations and thereby qualifying for any special tax treatment; and

e. enabling each venturer to deal with disposition of its product separately so that it can account for its ultimate profit or loss in its own way, rather than in uniform manner as would be required in the case of a partnership.

From an income tax viewpoint, the definition of partnership is wider than the *Partnership Act* definition of partnership. For income tax purposes, "partnership" means "an association of persons carrying on

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business as partners or in receipt of income jointly, but does not include a company". To avoid being partners, it is thus important that the joint venturers are not in receipt of income jointly. This emphasises the importance of each joint venturer taking its share of product and disposing of it separately.

One way of trying to draw together these various points, is to go through a check list of the sorts of issues which need to be considered when preparing to negotiate a Joint Venture agreement. This is not, in any way a complete or exhaustive list of the issues which would need to be considered, but should be sufficient to give an idea of what sorts of things are taken into account, and hopefully some of the reasoning which is applied in looking at these topics.

1. Objects and Scope

1.1 Which commodities are being sought:

one or more specified metals or minerals;

all metals (none emphasised);

all metals (but especially silver, lead, zinc say);

are any metals or minerals to be specifically excluded (possibly because of conflicts with other ventures or because of corporate policy)?

1.2 What are the geographic limits if any which will apply to the Joint Venture:

will we be dealing with specifically defined areas, only such as a particular area over which exploration and/or mining rights have been granted by the relevant authority?

specific areas, plus any other areas whether adjoining or some distance away, which become available for exploration and which are considered to be prospective;

all available areas with no specific areas of interest at this time?

are there any spatial interests with other past or present ventures. It may be necessary to check now defunct ventures, because they may contain an obligation to offer clause. An obligation to offer clause is sometimes contained in Joint Venture, and says that once the Joint Venture is terminated, if either or any participant returns to the area, within a period of say three years, then they are obliged to offer to the other venturers an interest in that area?

is there to be a fringe area around the defined margins of the current exploration area in which will exist obligations to inform other venturers of any future activities carried out as an independent party?

1.3 It is essential to recognise that venturers may be very closely involved for many years, especially if the venture is successful. One of the questions to be asked is whether you are satisfied with the other venturer's bona fides with their financial standing, with their ability to provide the technical expertise or other special attributes which they are bringing to the Joint Venture.

1.4 What is the nature of the arrangement? Is it an option (for cash)? A farmin (on the basis of a work commitment or cash expenditure)? Or a full Joint Venture, with all costs shared from the beginning of the Joint Venture? A farmin is the name given in the mining and petroleum industries, in which a new participant earns a share or a participating interest in a Joint Venture. For example, if my company were to be the sole holder of exploration rights over an area covering say 2,000 sq kms, it may be prepared to enter into a Joint Venture with another company to complete an exploration programme, and hopefully develop a mine.

If, however, my company has already spent a considerable amount of money on exploration to date, then we would not want to allow some other company to come and take a share of the assets which we hold without making any payment. This payment is sometimes made by way of cash, but is quite frequently made by carrying out at the incoming participant's sole expense, a specified work programme, or by the incoming participant funding all of the work up to a specified amount. From the incoming participant's point of view, they are farming in to that particular project, and from my company's point of view we would be farming out an interest in the project.

2. Duration

2.1 Is it the intention for this arrangement to last more or less indefinitely (unless terminated by some specific event) right through exploration, discovery, evaluation, construction and mining stages?

2.2 Will there be some upper time limit (say five years) on the arrangement. If exploration has not been successful after that time will the Joint Venture terminate?

2.3 When will the venture formally commence? In the case of a farmin, it is sometimes the case that the participant who is farming in or earning an interest does not have any interest at all, and the Joint Venture does not formally commence until the entire obligation has been satisfied.

2.4 Is commencement of the venture conditional upon receiving any Government or other regulatory consents? If consents are required, will any activities proceed before these consents are given?

2.5 Is there to be a "lingering on" period after the formal termination of the venture in which an obligation to offer situation exists. A clause of this nature was mentioned under item 1.2.

3. Staging of the venture.

3.1 It is convenient to split a successful mining project into three stages:

exploration which covers the exploration and discovery phases, and possibly an initial evaluation to determine the extent of the discovery;

evaluation during which infill drilling, economic analysis and a major bankable feasibility study will be conducted, which leads to a decision to proceed to developing a mining project;

mining, which encompasses the construction, development, mining and delivery of product to the participants in the Joint Venture. Please note that I talk only of delivery of the product to the joint venturers, and not to the sale of product. Going back to what was said previously, each joint venturer takes its share of the product and separately disposes of it. It is not a function of the Joint Venture to arrange for the sale of the product. However, joint marketing arrangements under separate contractual arrangements are not unusual, and in the petroleum industry (subject to offtake arrangements) are practically universal.

3.2 The transition from one stage to the next needs to be the subject of a clearly defined and well understood mechanism. Will the decision be made by a majority vote on the management committee, or must there be a unanimous agreement by all of the parties concerned?

3.3 Recognise that other participants' money or expertise may be needed in the evaluation and mining phases, and this may require some rearrangement of the participating interests of the participants.

3.4 Are there to be different rules and procedures for the exploration stage, compared with the evaluation and mining stages. An agreement will often provide that a participant may withdraw from the exploration stage on the giving of a certain period of notice. Whilst this may be permissible during the exploration stage, many agreements absolutely prohibit withdrawal during what may be defined as the construction part of the mining phase. The reason for this is quite simple; parties will commit to the development because they know what their particular liability for the development costs will be. For example, if I hold a 40% interest and the development costs are going to be $100.00, then my maximum obligation, and therefore my maximum financial exposure, will be $40.00. If, however, once the construction is commenced the other participant that holds a 60% interest suddenly withdraws, I may find myself in a situation where I wish to proceed with the project, but simply do not have the financial strength or capability to find the additional $60.00 required to complete the development.

3.5 Within these formal stages, there is often provision made for a further division with different rules applying. For example, during the exploration phase, if I am farming in and earning an interest in a particular project, and I am liable for all of the costs associated with the next one year's programme of exploration, then I would probably insist that I have the ultimate decision making authority to decide what that exploration programme will be, and I would not be prepared to subject that decision to a majority vote. However, once I have earned my interest and I no longer bear the sole financial responsibility, then it is more than likely that a majority vote decision making process would be appropriate.

3.6 Some attention needs to be given to the question of whether each of the three stages mentioned will be governed by the same agreement, or whether different agreements will be required for each stage or for different stages because some of the commercial considerations that apply to the different stages may be better addressed by having different agreements for the different situations. It is, however, perfectly possible, and indeed, not at all unusual, to have one agreement which covers the entire project and covers all three stages. One of the reasons for this is that if a new agreement will be required to be negotiated after the exploration phase had been completed, but before the evaluation phase commences, it is unlikely that any of the participants would want to proceed with the evaluation process (which can be very expensive) without all the terms and conditions of the agreement between the parties clearly defined and agreed and the document signed. Reaching agreement on complex documents can be a very time-consuming process, and the result could be that work on the project would be effectively stopped for possibly a considerable period of time until the documentation appropriate to that stage is completed and signed. Similar considerations apply to the commencement of the mining stage - if a feasibility study has been completed which indicates that a project is financially viable, the parties will generally wish to proceed as soon as possible and will not want to be delayed whilst an agreement appropriate to this stage of the project is negotiated and completed. For this reason, many organisations prefer to enter into an agreement at the very outset, which will be sufficient to carry the project through all stages so that the potential for delay to the project at critical stages is removed.

4. Management Structure

4.1 Because a Joint Venture may comprise more than two participants, commercial reality requires that an administratively convenient and cost effective method of management is required to operate or to undertake the activities of the Joint Venture.

4.2 Because each of the participants

Continued page 30

contributes to the costs of the Joint Venture in proportion to its participating interest, then each of them will wish to have some involvement in the decision-making process. This is a reasonable requirement and is generally accommodated by the Joint Venture agreement constituting what is often known as a management committee, which is comprised of a representative of each participant in the Joint Venture. All policy and financial issues are generally determined by the management committee.

4.3 To provide the administratively convenient system required to operate or implement the functions and activities of the Joint Venture, it is usual to appoint a manager to undertake and implement the decisions reached by the management committee. In many cases, but not always, the manager is one of the participants in the Joint Venture.

5. Constitution of the Management Committee

5.1 Flexibility is a major consideration here relevant to the saving of time and expense on unnecessary meetings. Flexibility can be achieved by:

permitting cancellation of meetings by written consent of members;

regarding proposals signed by all members as equivalent in force to a decision of a meeting.

5.2 How often should the committee be expected to meet to review the Joint Venture? There should be a minimum of one or two meetings per year, whilst the Joint Venture is active, which cannot be cancelled.

5.3 Will any mechanisms need to be detailed to provide for major questions to be referred to the respective boards of directors of the participants? If so, what time limits would be appropriate?

5.4 Careful consideration must be given to the voting arrangements:

How many voting representatives will there be?

Will voting rights be suspended if a participant is in default?

Should the chairman have casting vote?

Are decisions unanimous or made by majority vote?

Are alternate representatives allowed?

What is the quorum requirement?

5.5 Are non-voting observers permitted to attend meetings, and if so, at whose cost, and is there any limit on the numbers?

5.6 The following issues arise for the resolution of disagreements:

Initially unanimous agreement should be the aim;

if unanimous agreement cannot be reached, is the meeting to be adjourned and reconvened after a period of not more than 30 days?

if unanimous agreement is not obtained at the reconvened meeting, will a majority vote be sufficient for a positive decision? If a majority decision is to be regarded as a positive decision, is the majority to be simply more than 50%, or must it be a minimum of say 66 2/3rds%?

5.7 The records of committee meetings must be well maintained:

minutes must be kept accurately and up to date;

failure to disagree with circulated minutes may well be deemed acceptance of the minutes as circulated;

5.8 Who has the right to call a meeting, what time limits are required and what notices must be given?

5.9 Where will meetings normally be held?

5.10 Will travel and associated costs of attendance at meetings be charged to the Joint Venture as a Joint Venture cost, or will they be individually borne by the participants as their own individual costs?

5.11 It is important to provide that the management committee does not have the power to change any of the provisions of a Joint Venture agreement.

6. Manager

6.1 Who will be appointed as the initial manager of the Joint Venture? Will it be one of the participants or will it be a third party?

6.2 It needs to be remembered that it is possible that, at some time in the future, the initial manager may wish to resign or alternatively the participants in the Joint Venture may wish to dismiss the manager and appoint another in his place. Do there need to be any grounds for dismissal? What time periods, if any, should be involved, and what arrangements need to be provided to ensure a smooth handover from one manager to a replacement so that the continued operation of a Joint Venture is not adversely affected.

6.3 Among the functions, powers and responsibilities of the Manager are:

preparation of draft budgets and programmes for consideration by the management committee;

keeping participants fully informed with regular reports;

keeping proper records, including financial records of the Joint Venture;

maintaining an appropriate bank account for the Joint Venture;

allowing inspection of all data, records and properties by participants in the Joint Venture;

keeping all tenements (i.e. exploration and mining authorities)

in good standing;

complying with all conditions of tenements and applying for necessary exemptions where applicable;

disposing of Joint Venture assets no longer required;

maintaining all insurances;

undertaking all other activities required by a direction of the management committee.

6.4 Prohibitions on the manager need to be considered and issues which arise include:

expenditure on commodities or in areas other than as specified;

acting without the knowledge and consent of the management committee;

acting as manager if no longer a participant in the Joint Venture, a related corporation of a participant in the Joint Venture, if in default, if in receivership, or after termination.

6.5 If the manager, by virtue of its possession of special beneficial skills, knowledge of local laws, procedures, geology and so on bestows a premium on each dollar it expends in the name of the Joint Venture then this added efficiency factor may be reflected in the payment to the manager of a management fee. If a management fee is to be charged, how should the fee be calculated, and will the fee be calculated in the same way throughout the various stages and phases of the Joint Venture?

7. Programmes and Budgets

7.1 For each budget period, the manager should prepare in advance a draft programme and budget, and submit it to the management committee for approval.

7.2 What will be the period of time in a budget period? Sometimes this budget period will vary during the different phases of the Joint Venture. For example, during the exploration phase, field work may not be possible if there is a prolonged wet season, and, accordingly, it may be convenient or appropriate that the budget period during exploration will be for a period of six months. However, once you move into the construction phase of a project, which may take several years to complete, it is simply not practicable to be approving a programme and budget every six months, as some of the contracts involved will obviously run for a considerable period of time, and it will be necessary to have budgetary approval for the entire contract period. Whatever period is determined as being appropriate for the particular phase of the Joint Venture, it is important to clearly specify the date of commencement of each budget period.

7.3 Are any minimum or maximum commitments to be written into each budget period? For example, no more than $250,000 worth of exploration in any budget period. In practice, this does not necessarily mean that more than $250,000 dollars cannot be spent, but it is a convenient way of introducing a series of checks into the system to ensure that the amount of money cannot be agreed to when it should not be. Budgets and programmes are approved by the management committee, and that the management committee should not have the power to change the terms of the Joint Venture agreement. Consequently, if a limitation of this sort appears in the Joint Venture agreement, then both the manager and management committee will be bound to observe it, and it can only be changed by amending the Joint Venture agreement, which in most instances will require approval from the board of directors of the participants in the Joint Venture. In this way, it is possible to ensure that particular corporate policies are protected and cannot be overridden by a majority vote.

7.4 Because budgeting is not an exact science, and budget overruns are fairly common, will the manager be permitted a certain percentage overrun on an approved budget before he has to seek approval for further expenditure? Is he permitted to exceed the amount budgeted by 5% or 10% to take account of overruns in budget estimates? Mining Joint Venture agreements often contain a provision which authorises the manager to expend money, notwithstanding that there is no budget in the case of an emergency, where there is a danger to life or the threat of destruction of an asset.

7.5 The management committee must have the power to approve a draft budget, to approve it subject to changes or conditions or to reject it.

7.6 Decisions need to be made for the following time periods:

the notice period before the end of a budget period by which time a draft programme and budget has to be sent to the management committee;

the period of time after receipt of the draft programme and budget by which the management committee has to have met and approved, rejected or partially approved the draft programme and budget.

7.7 What procedures will govern the case if a budget and programme is not approved by the time a new budget period commences? This can be provided for by permitting the manager to continue with the draft programme and budget, or alternatively, continuing the programme and budget which has now expired until a new programme and budget is finally approved.

7.8 Each programme and budget should set out the following in reasonable detail:

an outline of proposed activities;

the estimated costs of such activities;

a cash flow schedule;

the contribution each participant is required to make, taking into

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account the staging of the venture and the respective participating interests.

7.9 Are there to be any different procedures for approval of work programmes and budgets in certain stages of the Joint Venture?

8. Contribution and Calculation of Interests.

8.1 How are participating interests in the Joint Venture to be calculated? Will interests be related to contributions such as:

the simple ratio rule, i.e. P1(A)= A X 100

A + B

some modified ratio rule with for example penalty factors (C) or deemed initial expenditures i.e. P1(A) = A X 100

A + B + C

some other method.

8.2 If more than one party is contributing know-how or tenements or some other asset to the Joint Venture, and it is desired to retain the non-equality of these contributions, than the following scheme allows a form of carried interest to be incorporated into the ratio rule:

A=3%

B=7%

then P1(A) = 3 +(A X 90)

(A + B)

and P1 (B) - 7 +(B X 90)

(A + B)

8.3 Note that assigning value to a previous work, or to the prospect itself, via a deemed initial lump sum will have this value decrease in time as expenditure increasingly dilutes it in the ratio formula. Is this desired?

8.4 Is there to be a scheme whereby the participating interests are set at the beginning, but one participant actually contributes less than it would if contributions were made strictly in proportion to participating interests on the condition that it repays this deficiency (at some premium?) out of any future income which results from a successful discovery?

8.5 Will sole risk provisions be permitted within the Joint Venture scheme, or are they to be prohibited? If they are to be permitted upon what conditions and what is the back-in premium for the non-riskers to regain an interest in any discovery by the sole risker? How is the sole risk expenditure taken into account in continuing assessment of respective participating interests in the venture? Is it to be included at face value, included at a discount, or excluded from future valuations?

8.6 In the case of a farmin, is there to be a minimum level of expenditure within a certain time limit before any interest is gained by the participant farming in?

8.7 Will there be a minimum level of expenditure reached by each participant before that participant is entitled to withdraw from the venture?

8.8 Is a participant to be given the right to elect to cease contributions to the funding of the Joint Venture, and if so will that party's participating interest dilute, and in accordance with what formula? Is there to be a minimum percentage interest to continue as a participant in the venture, and if that minimum level is breached, what are the consequences? For example, does the party whose interest drops below the minimum permissible retire to a royalty situation or is it obliged to sell its interest to the other Joint Venturers.

9. Ownership of Property

9.1 It is the usual case that the participants in a Joint Venture own the assets of the Joint Venture in the same proportion as their respective participating interests. Is this general principle to be applied, or will the proportions in which the assets are owned differ from the participating interests, and therefore differ from the proportion in which costs are funded and product is distributed to the participants?

9.2 If farming into a previously existing Joint Venture which has several participants with varying participating interests, how will the farming in effect the previous ownership ratios. Will pre farmin property stay in the ratio it was or will all property now be distributed according to the new ratios?

9.3 Does any bank or financial institution or any other third party have any kind of mortgage, or charge, or security on any of the property of a venture into which you are contemplating a farmin?

10. Factors Involving a Feasibility Study

10.1 Often the manager may carry out preliminary feasibility studies without any formality other than the knowledge and approval of the management committee.

10.2 Once the management committee (if that is one of the authorities to be vested in it) has taken the decision to proceed to the evaluation stage:

can any of the venturers propose that a feasibility study be commissioned or is even this right to propose qualified by a certain required level of participation?

how is the feasibility study to be funded? Is it to be by a separate budget?

what guidelines need to be laid down for the content of the feasibility study and also for its quality? What degree of accuracy are the estimates to have, are they to be +/-20% or +/-10%?

who is to actually carry out the feasibility study? Is there to be provision for having the feasibility study undertaken by consultants? The manager may not always be the best one to do the feasibility study;

under what circumstances can an inadequate feasibility study be rejected?

10.3 How long after the final feasibility study is submitted to the management committee, will each participant have to make up its mind about proceeding to the mining stage?

11. Factors Involving Development and Mining

11.1 Withdrawing from development. If one of the participants does not intend to proceed to the development and mining stage, mechanisms to deal with disposal of interests and ancillary matters are necessary. Consider the following points:

Is there to be a period (for example one year) during which those intending to proceed refrain from doing so, to give the withdrawer time to reconsider?

Is the withdrawer to be given a period of time within which, if it pays its proportion of its development expenditure, it can rejoin the venture?

After any such period of grace, those participants wishing to proceed may have the freely assignable option to purchase all of the withdrawing parties' interest.

If the withdrawing party has had its interest purchased but the participants who are proceeding within a certain time have not commenced development, or have not achieved a certain specified level of production, will the withdrawing party regain a right to back in?

Will the withdrawing party receive a royalty out of the eventual production, in recognition for its part in the discovery? If so, how much and on what basis?

Recognise that withdrawing from the development or mining phase of the Joint Venture does not necessarily mean that the participant wishes to withdraw from continuing exploration in the remainder of the Joint Venture area. For example, a company may be optimistic about another commodity or simply at a later date.

If the withdrawing party's interest is to be acquired by those participants wishing to continue, how is the value of that interest to be determined and is an arbitrator to be used?

Will the participants wishing to proceed be given a prior right to purchase the withdrawing participants interests? If so, will each participant be entitled to a share proportional to its own participating interest unless the others decline?

If the proceeding participants do not wish to purchase the withdrawing participants interests, will there be any restrictions on third parties who may wish to purchase that interest.

11.2 Separate production entities. It is possible that whilst a Joint Venture may be the preferred vehicle or entity for exploration and evaluation stages, there may be good commercial reasons (for example a change in the taxation laws) why a different form of entity, such as a company, would be more appropriate for the mining and production phase of the enterprise. If this is so, then appropriate provisions will need to be made for the creation of this separate entity, and the existing Joint Venture agreement should continue in force until the new arrangements are completed. Some consideration will also need to be given as to whether the Joint Venture should be retained to continue exploration in the remainder of the Joint Venture area.

12. Dealing with Disputes and Defaults

12.1 Disputes. In general terms, disputes can arise at two levels. Firstly, they can arise within the management committee but, if the management committee works on the basis that a majority vote is binding on the Joint Venture, then this is in practice generally the way in which these disputes will be resolved.

If the disputes are more at a participant level and outside the scope of the authority of the management committee, then the options are to provide for resolution of those disputes by arbitration or by appropriate court action or to leave these options open and not exclude any of them so that a decision on what might be the most appropriate method of dispute resolution can be determined to suit the particular circumstances which comprise the dispute.

12.2 Default. The types of default which may occur will largely be determined by the provisions of the Joint Venture agreement, but in general terms you will find that particular attention is paid to a default to pay money and more specifically to contribute to the costs of the Joint Venture. Generally,

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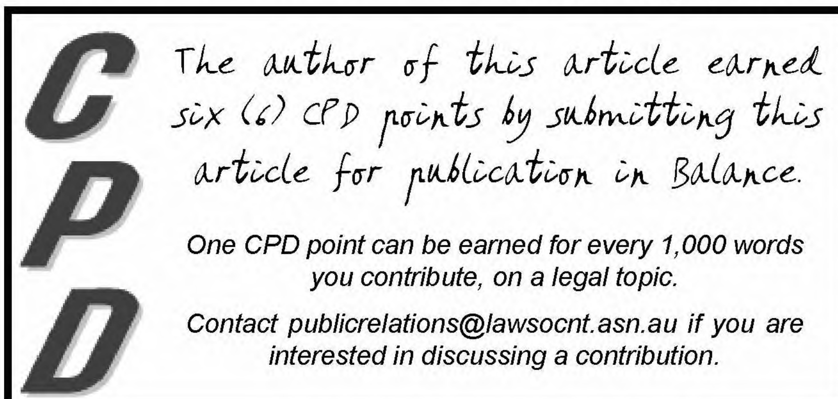

defaults of this kind are separately treated during the exploration phase from the way they are treated during the evaluation, construction or mining phase.

During the exploration phase, the usual remedies for default of monetary payments are to suspend the defaulters voting rights on the management committee during the period of default, and, if the default continues for a specified period of time, say 60 days, then the defaulters participating interest is diluted, generally in accordance with a specified formula and the interest which the defaulter loses is distributed equally to the other participants and, if more than one, then in proportion to their participating interests.

A different approach is, however, taken during the evaluation, construction and mining stages where the amounts of money involved are likely to be quite large, and default by one party can have quite serious commercial consequences for the non-defaulting participants. During the evaluation phase, again the voting rights are suspended, and sometimes the dilution rate which applies to the defaulters participating interest is escalated.

During the mining phase, and more particularly, during the construction phase when large amounts of money are being spent and contracts have to be paid on time, particular provisions are required. Again voting rights (and sometimes the right to take product) are suspended. Instead of a dilution provision there may be a situation in which the defaulter is deemed to have withdrawn from the Joint Venture, and the non-defaulting parties automatically acquire the defaulters participating interest which is often at value less some percentage to recognise the inconvenience and potential damage which the nondefaulters have suffered and to compensate them for this.

Once the project has been constructed, commissioned and is in operation, the usual remedies are the suspension of voting rights and the distribution of the defaulters' share of product amongst the non-defaulters until such time as the default is remedied.

For defaults other than in regard to the obligation to contribute to costs, quite often the parties or participants in the Joint Venture are satisfied to rely upon the usual rights and remedies which are available to them under the law relating to contract.

13. Assignment of Interests

13.1 Assignments are often broken into three classifications:

an assignment to an existing participant;

an assignment to a related corporation of an existing participant;

an assignment to an unrelated third party.

13.2 Consider whether assignment is to be permitted during all stages of the venture. For example, is assignment to be excluded during the first year, until the first $250,000 has been spent, during all of the exploration stage, during the construction and commissioning stage?

13.3 Common conditions required for assignments are:

a requirement for the written consent of all other participants in advance of the assignment;

a requirement of adequate notice of intention to assign being given to the non-assigning participants;

that the assigning participant will continue to be liable for the obligations except to the extent that they are performed by the assignee.

13.4 Where the assignee is a related corporation it is often the case that the consent of the other participants is not required to the assignment, but the assignor must provide a guarantee that the assignee will perform all of the obligations which attach to the participating interest being assigned. Additionally, if the assignee ceases to be a related corporation then it is often the case that it must reassign the interest back to the original participant.

13.5 Where the assignee is an unrelated third-party, it is usual to provide that the consent of the other participants must be obtained as a precondition to a valid assignment. Additionally, you will often find that a Joint Venture agreement will provide that there is a preferential option to purchase in favour of the existing participants or a right of first refusal available to the other participants. Attached to the right of first refusal are generally provisions, which require that an offer must be made for cash and for the whole and not a part only of the participating interest concerned. The reason for the requirement of a cash price is that if an offer by a third party were received, being partly cash and partly an issue of shares, or even entirely an issue of shares, it is not very practicable for the other participants to be able to match that offer.

13.6 Consider the problem of fragmentation. Is only the whole of a participant's interest allowed to be assigned to third parties? If a part assignment is permitted, will this result in a participant's interest falling below the minimum permitted, and what will be the consequences of that?

These are only some of the issues which need to be considered in negotiating or drafting a Joint Venture agreement. The agreement should reflect the commercial requirements of the parties and not require the parties to conduct their affairs on the basis of some precedent.