return to AMPLA 2003 Table of Contents

"Virtual" Joint Ventures: Issues and Thoughts

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SUMMARY

The classic Australian production joint venture arrangement for the exploitation of resources contemplates two or more parties contributing assets and property to a joint enterprise for the furtherance of common goals, including the production of resource product to be shared severally by the venturers. The classic structure contemplates the sharing of all joint venture risks, costs and product during the course of uncertain future activities. This structure provides venturers with a simple means of diversifying project risk for high risk projects and apportioning costs and product, whilst preserving uniformity of interests and related contractual rights and liabilities.

In recent times, particularly with the investment by risk-averse developing countries (such as China) in Australian resource projects, there has been an increasing trend to modify aspects of the classic joint venture arrangement to better accommodate the investment requirements and agenda of the foreign venturer. Depending on the nature of the foreign investor, the classic joint venture arrangement may be modified in various respects, such as: the term and requirements of separate sales agreements; the responsibilities and liabilities in relation to uncertain aspects of the project for risk averse foreign investors; and increased exposure and direct involvement in upstream production of the resource as a business risk reduction strategy.

Each of the above matters may impact significantly on the even-handedness of the joint venture document and the degree of "mutuality" of the enterprise. This paper looks at the impact of such factors on the classic joint venture model, with particular regard to: contractual issues, commercial issues and statutory issues.

SECTION 1 – INTRODUCTION

The title to this paper is "'Virtual' Joint Venturers: Issues and Thoughts". The reference to "virtual" is not intended to suggest any connection to any cyber

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phenomenon. Rather, it is intended to suggest that in recent times (and in particular with reference to recent deals involving Chinese investors) the exploitation of Australian resources through joint venture arrangements with local players has demonstrated the modification of, and departure from, some of the usual features of what can loosely be called the "classic" joint venture structure that we have grown accustomed to in Australia. These modifications are largely driven by the commercial need to attract foreign investors in the current economic climate and to better accommodate the interests of the foreign investor. As many of the developed economies are somewhat stagnant in their growth at present, Australian companies have looked increasingly to China and other developing economies, eager for resources to fuel their industrial development, to "kick-start" the development of local resource projects.

As the involvement of the foreign investor is becoming increasingly critical to the development of local resource projects, then obviously the specific requirements and idiosyncrasies of the foreign investor will be given greater weight in the commercial negotiations and resulting contractual arrangements.

It is not being suggested that these modifications undermine the status of the business arrangement from one which may properly be described as a joint venture (as opposed to a partnership or some other relationship). Rather, the suggestion is that the modifications are sufficiently significant so that the resulting arrangement challenges our usual conceptions of joint venture arrangements concerned with the exploitation of Australian resources.

The focus of this paper is on three (potential) basic drivers of "modifying stress" on the classic joint venture model which stem from the nature of the foreign investor, namely:

1. *Sales arrangements*: Where the foreign investor's primary business and expertise lies in the consumption or marketing (on-sale) of the relevant resource, rather than its production, then it is likely that the commercial driver of the project will be sale of the resource product of the venture (or a majority of it) to the foreign investor and its customers. In other words, the commercial impetus for the venture lies in the sales arrangements. Where the size of the resource being exploited by the venture is significant relative to the requirements of the market for such resource or the nature of the resource product limits the potential for alternate consumption options (eg due to unique chemical specifications), so that the absence of the sales arrangements or their early termination would undermine the commercial viability of the project, the life of the venture is likely to be tied to the life of the resource product sales agreements. Further, the quantum of joint venture production (subject to reserves) may also be tied to the requirements of the sales arrangements, thereby impacting on the scope and objects of the venture.

2. *Risk-aversion:* Where the foreign investor is, relative to the local participants, particularly risk-averse, then the allocation of risk between the participants is likely to depart from the classic sharing of risk in proportion to participating

interests. Such a foreign investor may also be eager to minimise uncertainty in relation to the development of the project and its obligations to the other participants. This may prompt (amongst other things):

- the "predetermination" of key joint venture decisions and financial obligations, rather than leaving the participants to determine these in the course of the venture at the management committee level; and
- the limiting of managerial discretion.

The foreign investor may be comparatively risk averse for a number of reasons, including that it is subject to a more conservative risk profile as a cultural or business feature, its foreign activities are subject to stringent review by its home government (this is somewhat the case in relation to Chinese companies) or it has simply not acquired sufficient comfort with operating in an unfamiliar jurisdiction such as Australia or in an unfamiliar industry (ie the production of the resource, rather than its consumption).

3. *Upstream business building and ensuring supply:* Where a key aspect of the foreign investor's agenda is to develop expertise in the production of the relevant resource (with a view to diversifying its business from a traditional downstream consumer focus) or to take an equity interest in the upstream project in order to reduce supply risks, then greater than usual access to joint venture information and involvement in managerial decision-making (including day-to-day management) may be expected.

The manner in which these drivers may prompt modifications to a classic joint venture arrangement is considered in Section 3 of this paper and Section 4 considers some commercial consequences of such modifications.

Section 5 considers a number of issues concerning the application of Pt IV of the *Trade Practices Act* 1974 (Cth) to a sales driven structure.

However, the paper begins with a brief overview of the relevant features of what could be regarded as the "classic" joint venture arrangement in the Australian resources context.

SECTION 2 – THE CLASSIC JOINT VENTURE ARRANGEMENT

The unincorporated joint venture arrangement has proven to be the exploration and development vehicle of choice for significant resource projects in Australia.[1] This is generally credited to the following reasons:[2]

[1] In fact, it is clear that the Australian mining and petroleum industries have been pivotal in the juridical development of the joint venture concept in Australia. See *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 59 ALJR 676, per Dawson J and J A Dowsett, "Operator of a Joint Venture-Principal or Agent?" [1987] AMPLA Yearbook 269 at 273-274.

[2] See J D Merralls QC, "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1988) 62 ALJ 907; W D Duncan, "Joint Ventures Law in Australia"

(a) the involvement of a number of participants allows:
   (i) the high costs (including high infrastructure costs due to the remote location of many projects) and high risks associated with resource project development in Australia to be shared between entities. This allows individual entities to spread their investment capital across a portfolio of projects, thereby diversifying their risk and return profiles; and
   (ii) diverse and necessary talent or resources (not necessarily all reposed in a single participant) to be pooled for the pursuit of the objects of the venture;

(b) the fact that the unincorporated structure gives participants greater freedom and flexibility – the majority of legal rights and obligations are determined by the contractual terms of the joint venture agreement (and any ancillary documents); and

(c) the fact that (at least at a practical level) it is accepted that a common undertaking to generate a product to be shared among the participants, as opposed to the sharing of profits or revenues, precludes the characterisation of the undertaking as a partnership for legal and taxation purposes and accordingly allows the individual incidence of taxation.[3]

While there is no generally accepted Australian model for a joint venture concerned with the exploitation of resources, over the last few decades the core features of a basic joint venture structure have emerged with some clarity. However, definitions of the joint venture concept in the resources context have essentially been descriptive,[4] for example:

> "The mineral and petroleum joint venture is an association of persons (natural or corporate) to engage in a common undertaking to generate a product to be shared among the participants. Management of the undertaking is divided: specified activities are to be performed by a designated person (the operator or manager) as agent for the participants; the power to determine certain matters is vested in a committee (the operating or management committee) upon which participants are represented and entitled to vote in accordance with their interests in the venture; and other matters are decided at the outset by the participants as terms of the association. The relationship among participants is both contractual and proprietary: the terms of the association

(Federation Press, 1994), pp 301-302; R A Ladbury, "Mining Joint Ventures" [1984] ABLR 312 and M Crommelin, "The Mineral and Petroleum Joint Venture in Australia" (1986) 4 JENRL 65.

[3] For a succinct and useful discussion of the taxation benefits of non-partnership status of resource joint ventures and the arguments against the characterisation of "classic" Australian joint ventures as partnerships for legal and taxation purposes see R A Ladbury, "Mining Joint Ventures" [1984] ABLR 312.

[4] The term "joint venture" is not a term of art with a generally recognised legal meaning, and as stated by Merralls QC in "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1988) 62 ALJ 907 at 907: " the concept of joint venture is significant for what it is not, as well as for what it is." Accordingly, the tendency in the absence of an accepted legal definition, is to describe the concept by reference to its usual features.

> are fixed by agreement, and property employed in the undertaking is held by the participants as tenants in common."[5]

In the context of this paper, it is useful to flesh out a few other features of typical Australian resource joint ventures:

1. *Sharing of joint venture costs, risks and product in accordance with participating interests:* The percentage participating interests of the venturers will normally determine not only a venturer's share of ownership of venture property, but also its share of product and the relative extent of its voting rights. The natural implication of these benefits, and the typical position under joint venture arrangements, is that the percentage participating interest also determines the relative extent of the venturer's obligation to contribute to the costs of the venture, and thus defines its exposure to the risks of the joint venture. In other words, the typical position will be that each venturer will be exposed to all of the risks confronting the venture to the extent of its participating interest.
2. *Objects of the joint venture will contemplate the potential exploitation of the full resource:* Ordinarily, the objects of a production joint venture will contemplate the production of resource product from a particular geographic area defined by relevant instruments of tenure. The objects will not be expressly or impliedly restricted to the development of a specific quantity of resource product as, in the usual case, on entry into the joint venture, the participants may not fully appreciate the full extent of reserves, the commerciality of exploiting reserves in the future or the potential customers and marketability of the resource product in the future. Further, government authorities will be keen to see participants at least contemplating the full development of resources, rather than partial development.
3. *Management/operating committee voting requirements:* Levels of support to be met for the management committee to be taken to have resolved in favour of a particular proposal are usually dictated by the number and size of the participating interests held by the initial participants in the venture. The appropriate thresholds are usually one of the areas of intense negotiation, particularly for minority participants concerned about of the prospect of having the majority view forced upon them. Thresholds between simple majority to 75 percent are common for "routine" decisions. Higher thresholds and often a unanimous vote are required for key venture decisions such as acquiring expensive property, disposing of significant venture property, disposing or surrendering resource tenure, entering into significant contracts and commencing or expanding resource production operations.
4. *Provision of information to participants:* Most joint venture agreements provide participants with some comfort as to their rights to receive information regarding joint venture activities. The following clause provides an example of usual information entitlements in a mining context:

[5] M Crommelin, "The Mineral and Petroleum Joint Venture in Australia" (1986) 4 JENRL 65.

"The Manager must:

(a) give each Participant a report on operations in the Area during each month within 15 Business Days after the end of that month;
(b) give each Participant a copy of all Exploration results, production and other reports, surveys and data relating to Operations in the Area promptly after it receives any of them;
(c) give each Participant a copy of each approved Operating Program and Budget (with amendments, if any) promptly after approval by the Management Committee;
(d) give a Participant a copy of any report, survey or other data relating to operations in the Area requested by that Participant within a reasonable time of that request;
(e) respond promptly to a party's reasonable request for information or inquiry concerning operations; and
(f) on receiving reasonable notice from a Participant, give that Participant any information relating to the Joint Venture."

5. *Assignment of participating interest:* It is relatively standard for a joint venture agreement to contractually limit assignment of a participant's participating interest to:

- assignment of the interest to a related body corporate or affiliate of the assigning participant;
- assignment of the interest to the continuing participants in accordance with a pre-emptive rights procedure; and
- assignment of the interest to a third party provided that the assigning participant has complied with the requirements of the pre-emptive rights procedure and the continuing participants have elected not to exercise their pre-emptive rights and, sometimes, the continuing participants have given their consent to the proposed assignment to the third party.

In return for an assignee being given the benefit of the assignor's interest in the joint venture property and its contractual rights under the joint venture agreement (and usually ancillary documents), the assignee will be required to covenant in favour of the continuing participants that it will assume all the obligations of the assignor.

6. *Termination rights are restricted:* In the usual case, termination of the joint venture will occur by agreement of all the participants or for a reason of necessity. For example, the following clause would be a typical termination provision in a joint venture agreement:

"This Agreement and the Joint Venture will continue until:

(a) terminated by agreement of all Participants;
(b) terminated [by reason of a Force Majeure Event];
(c) there is only one Participant;
(d) there are no further Objects of the Joint Venture to pursue; or

(e) none of the Participants has any further rights to Explore for, develop or produce Product from the Area,

whichever occurs first, and the activities of the Joint Venture are properly wound up."

A key rationale for a joint venture agreement is the development of a continuous or long-term relationship between participants so as to allow the orderly satisfaction of the objects of the joint venture. The prescription of unilateral rights of termination in the joint venture agreement is commercially inconsistent with such a rationale.

SECTION 3 – POTENTIAL MODIFICATIONS TO USUAL PROVISIONS

This section, considers how the "stress" factors identified in Section 1 may impact on the classic joint venture arrangement outlined in Section 2.

Sales Arrangements as Commercial Drivers

The development of large-scale resource projects in Australia is often underpinned (or perhaps more accurately, underwritten) by long-term sales contracts. In some circumstances, the only real option to progress such projects is by virtue of such "driving" sales arrangements.[6]

The two most significant recent resource deals with China have clearly involved sales driven joint ventures, in the sense that, from a commercial perspective, the joint venture is largely an incident to securing long-term product sales contracts with and for the relevant Chinese investor. However, this is not to say that, in each case, the taking of an equity interest in the project was not of crucial importance to the Chinese investor.

In mid-2002, Shanghai Baosteel Group Corporation, the largest iron ore consumer in China, and Hamersley Iron entered into an iron ore joint venture to develop the Eastern and Western Range iron-ore deposits near Paraburdoo in Western Australia. Under the terms of the deal, Baosteel has agreed to purchase approximately 10 million tonnes of iron ore products per annum over 20 years.

Later in 2002, the publicly listed China National Offshore Oil Corporation (CNOOC) agreed to purchase approximately 3 million tonnes of liquified natural gas (LNG) a year from the North West Shelf consortium over 25 years from 2005. The LNG is to be supplied for the purposes of Guandong Province. A key aspect of the deal involved CNOOC taking a participating interest in the joint venture for the project.

6 Chris Pleatsikas and David Teece, "The Competitive Assessment of Vertical Long-term Contracts" (2001) 29 ABLR 454 at 455.

In the context of sales driven ventures, in particular where the resource product of the venture is principally or completely sold to one of the participants or a related body corporate and the volume of product to be taken is significant in a world market sense, a number of modifications to the classic venture documentation can be expected:

1. *Term of joint venture tied to term of sales arrangements*: The classic formulation that contemplates that the joint venture may be terminated by mutual agreement or for a reason of necessity (such as force majeure or loss of the underlying resource tenure) may be supplemented with an acknowledgment that termination of the sales arrangements (whether early termination or on discharge of the supply obligations) will bring the venture to an end.

   Accordingly, in order to provide sufficient certainty of returns, on what is usually a capital intensive initial investment, so that the transaction can proceed, the parties must obtain sufficient comfort with the integrity and security of the sales arrangements so that they may expect the full term of the venture to be realised.

2. *Objects of joint venture tied to sales arrangements:* It would usually be expected that the objects of the joint venture would contemplate the development or exploitation of the resource within the venture's tenure in an abstract or unrestricted sense. However, where the object of the venture is in essence to produce sufficient product to allow supply obligations contemplated by the sales arrangements to be met, it is likely that the objects of the venture will be restricted to the production of sufficient product to meet a stipulated quantity required under the sales arrangements.

   This will also usually mean that the buyer under the sales arrangements will need to be:

   - satisfied (through independent feasibility studies or expert certification) that reserves are sufficient;
   - provided with appropriate legal protection or avenues of recourse (for example, reserve warranties or indemnities) in the event that there is a short-fall in reserves; or
   - promised alternate reserves or sources of supply.

   The fact that the joint venture may be tied to production of a particular quantity of product may impact on the extent of the tenure contributed by the local participants to the venture. Where the ultimate instrument of resource tenure may afford access to reserves greater than the contemplated requirements of the venture (as determined by the sales arrangements), it may be commercially prudent for the local participant to contribute an appropriate portion of such tenure (through a sublease or partitioning) to the venture, whilst retaining the balance for other commercial opportunities. This approach may also be preferred by governmental authorities keen to see the

efficient exploitation of resources, rather than under-exploitation of tenure due to the limiting requirements of a particular sales arrangement.

3. *Description of joint venture activities referenced to the requirements of the sales arrangements:* The joint venture agreement and related documentation may be more prescriptive than normal as many of the operational parameters that would usually be determined during the course of the venture (even if early in the venture), may have been predetermined by virtue of the sales arrangements and their implicit requirements. For example, the joint venture agreement in a sales driven arrangement may prescribe in some detail:

   - the nature of the joint venture facilities and plant necessary to achieve the requirements of the sales arrangements (both as to volume of production and product specifications), the timing of construction and commissioning of such facilities and, in some cases, the capital contribution of one or more participants to the development of such facilities;
   - the physical and chemical specifications of the product to be produced by the venture for the purposes of the sales arrangements; and
   - the timing of production and the operational levels required to meet the requirements of the sales arrangements.

4. *Limitations on assignment falling short of impermissible restraints:* It is clear that a long-term high value sales relationship offers both parties strategic and business benefits that may not be necessarily reflected in the express terms of the joint venture agreement or the sales arrangements. Such benefits may be of greater value to a participant than the financial margins made on the sale of product, particularly for local participants seeking exposure to, and leverage into, a potentially lucrative foreign market in which the foreign participant or investor operates. In fact, there is a strong view amongst valuers of long-term resource supply contracts that the true value of such contracts lies not in the differential of the contract price to the prevailing market price, but in the value of the relationship between the buyer and seller.[7]

   Accordingly, it may be of considerable strategic importance to the local participants to make assignment of the foreign participants' interest in the joint venture to a third party as unattractive as possible without rendering the mechanism an unlawful or unenforceable restraint. Retention of the foreign purchaser in the joint venture would, as a practical and commercial matter, be intended to strengthen the relationship with the foreign investor in providing the foreign investor with a theoretically distinct return on its joint venture investment whilst enhancing its understanding and connection with the business of the local participants.

[7] For a useful discussion of competing approaches to the expert valuation of long-term iron ore sales contracts see *Peko-Wallsend Operations Ltd v Commissioner of State Taxation (WA)* 89 ATC 4569. See also Chris Pleatsikas and David Teece, "The Competitive Assessment of Vertical Long-term Contracts" (2001) 29 ABLR 454 for a discussion of other economic benefits of long-term sales arrangements.

Clearly, prohibition on assignment of a joint venture interest will not be an available option under Australian law. Accordingly, more subtle mechanisms would be required such as, for example, the inclusion of contractual provisions in the joint venture agreement making clear that certain contractual rights and benefits that the assignor may enjoy under the agreement (such as warranties, indemnities, termination rights etc) are not capable of being enjoyed by any assignee.

Risk-Averse Foreign Participants

As stated earlier, foreign participants in Australian resource projects may be particularly risk-averse relative to local participants familiar with the relevant industry and the local business, tax and regulatory climate. In addition to unfamiliarity with the local jurisdiction, the desire of foreign participants to minimise uncertainty may be due to a number of other reasons, including:

- the foreign investor may simply be risk-averse as a function of its cultural traits and business practices;
- the foreign investor may emanate from a jurisdiction that regulates (to the extent of "approving") outward bound investment – this is the case with China, although its approval regime has recently been reformed so as to reduce the number of approvals required from distinct government agencies and to streamline the approval process;
- the foreign investor may emanate from a jurisdiction where the lingering consequences of "bad" foreign investments may be more reputational, than financial, for the corporations and negotiators involved; or
- natural distrust that may have developed as a result of the foreign investor having previously stood as the buyer of resource product, across the table from the other local participants, in non-sophisticated (more) short-term supply arrangements. In other words, the foreign participant's view of the joint venture relationship may be tainted by its experience of the former, possibly more adversarial relationship of buyer and seller.

How this risk-averseness manifests itself in the joint venture documentation will of course depend on the extent to which the other participants are content to depart from the classic Australian joint venture model in which each participant bears each of the potential risks (including unforeseeable future risks) confronting the project in accordance with its percentage participating interest. The extent of uneven assumption of risk will be driven by, amongst other things, the degree to which the local participants require the investment of the foreign participant to develop the resource project and their degree of comfort with the risk that they are being asked to assume. For example, in a sales driven joint venture, warranties relating to resource reserves may be provided by local participants if they have sufficient familiarity with the relevant tenure or the benefit of high quality expert reserve estimates. Similarly, warranties or indemnities may be provided by the

local participants in relation to local law matters (such as royalty rates and other costs and government charges).

A risk-averse foreign investor may seek to limit its risk profile under the joint venture agreement by a variety of means:

1. *Warranties, indemnities and ring-fencing of project risks:* Obvious options are for the foreign investor to seek contractual representations, warranties, indemnities and, if available, for insurance to be taken out to protect it against certain risks arising in the course of the joint venture. The contractual allocation of project risks to particular participants and "ring-fencing" or limiting a participant's responsibility for particular project risks may also be used to achieve this purpose. These types of contractual devices fetter and modify the classic model of sharing all risks in accordance with percentage participating interests.

   However, it should be appreciated that although the classic model may be departed from as a matter of legal substance, whether the giving of any warranties, indemnities or other assumption of risk by the local participants impacts on the commercial substance of the venture (ie whether responsibility for a truly uncertain risk has been assumed) is another question. It may be that some risks assumed are in essence cosmetic concessions to comfort a relatively uninformed foreign participant (eg warranties given in relation to local law matters).

2. *Predetermination of key venture decisions:* To the extent possible and commercially sensible, a risk-averse participant may seek to agree and document key joint venture decisions, that would ordinarily be determined by the management/operating committee during the venture, prior to commencement of the venture by express stipulation in the joint venture agreement. As a practical matter, such course would be facilitated if the venture is driven by agreed sales arrangements that dictate the capital and operational requirements of the venture.

   The nature of the matters that a risk-averse venturer will seek to predetermine are likely to revolve around the extent of its financial contribution to the capital requirements. Through such predetermination, the "blow-out of costs" risk and "inflation/interest rate" risk associated with uncertain and significant capital expenditure may be shifted to the local participants. The result may be that if the capital works are efficiently managed, the local participants' share of the capital cost may be partially subsidised by the foreign venturer's (excess) contribution, whereas if (as is often the case), the capital cost and complexity of the works is underestimated by the venture, the local participants would bear the extra cost.

3. *Reduction of managerial discretions:* The capacity of the venturer to exert control over the joint venture activities is inversely related to the freedom or extent of managerial discretion accorded to the manager or operator to implement the decisions of the management/operating committee. Similarly,

the degree to which management committee decisions are left for determination by voting thresholds that do not require the support of the risk-averse venturer will be of keen interest to a risk-averse venturer.

Accordingly, it can be expected that the relevant discretions enjoyed by the manager will be contractually minimised and may be subject to consulting and reporting requirements to assist monitoring of remaining discretions. Further, voting thresholds for even relatively mundane decisions may be set at relatively high levels to ensure the risk-averse venturer's involvement.

Upstream Business Building and Ensuring Supply

A potential participant in a resources joint venture, particularly a participant that is a traditional consumer of the relevant resource product, may well be keen to enter into the upstream production of the resource product for the purposes of:

- diversifying its business base and developing competence and knowledge in respect of a key input for its traditional downstream businesses in order to reduce its overall business risk profile through vertical integration – such knowledge and competence may also provide the confidence and capacity for such a participant to lever into horizontal opportunities (ie develop other upstream projects on its own, or in a more commercially dominant capacity (eg as manager/operator and participant)); and
- better securing the steady and regular supply of the resource product to its traditional business through "keeping its finger on the pulse" of the resource venture.

In such circumstances, such a participant may well seek:

- far-ranging and regular access to joint venture information;
- access to, and briefings regarding, the technical operations of the venture;
- participation in joint venture interactions with relevant governmental authorities;
- involvement in the making of all material (and perhaps immaterial) decisions of the joint venture;
- representation on all joint venture committees and sub-committees;
- involvement in the day-to-day management of the joint venture;
- rights to use information generated by the joint venture for the purposes of the activities of its current and future affiliates (ie technology/business practices transfer rights).

However, the business and technological systems by which resource production operations are managed are likely to be regarded by significant resource corporations as key assets, often refined through the correction of efficiencies

observed through the course of a number of resource projects. Further, excessive involvement of participants in the managerial decision-making may result in inefficiencies and unnecessary costs. Accordingly, in joint ventures involving such "knowledge thirsty" participants, a balance will need to be struck between the protection of business management assets and efficient decision-making and a participants' desire to learn and be involved in the venture's business.

SECTION 4 – COMMERCIAL CONSEQUENCES OF SOME POTENTIAL MODIFICATIONS TO USUAL PROVISIONS

This section considers some significant commercial consequences of the potential modifications to the classic joint venture structure considered in Section 3.

Predetermination of Key Joint Venture Decisions Improves Integrity of Financial Modelling

The deliberations of a risk-averse foreign investor considering participation in the development of an Australian resource project will be facilitated by the co-venturers providing the investor with as much comfort as possible regarding the return and risk profile of the project. The acceleration or predetermination of key joint venture decisions, including infrastructure development and resource exploitation timetables (which may well be sourced from the requirements of any underpinning sales arrangements), will obviously remove much of the uncertainty associated with the risks and expected returns of the project.

Accordingly, the usual investment analysis techniques (such as discounted cash flow or net present value analysis and internal rate of return analysis) may be applied with considerable confidence in the integrity of underlying factual assumptions regarding the capital and operational requirements of the investment, as well as the timing of such requirements.

The current world and Australian economic climate has seen a significant relative reduction in investment in resource projects and a general rationalisation of resource players, and accordingly suggests a comparative scarcity of willing investors. In this environment, the capacity to present a potential investment in an attractive manner is particularly important. As net present value based financial modelling remains the investment analysis technique of choice, it is a significant advantage in engaging the interest of (particularly risk-averse) investors to package the investment with the benefit of relative certainty regarding key capital and operational parameters (through predetermination and documentation of key joint venture decisions) so as to facilitate integrity in their financial modelling and investment analysis.

On the other hand, it is inevitable that the negotiation, determination and documentation of the key parameters of the joint venture and ancillary issues

(including any related sales arrangements) will require significant additional commercial and legal effort relative to negotiations and documentation of classic joint venture arrangements. Although, when considered over the time horizon for the joint venture, one may well find that the predetermination of key joint venture decisions is the more efficient in respect of such transaction costs.

Marketability and Valuation of Joint Venture Interests

For a joint venture participant, the marketability of its joint venture interest is a key issue. In a typical resources joint venture, particularly one that straddles the blurry boundary between a profitable and unprofitable investment, it can be expected that during the life of the venture participants will enter and exit the venture as the price of the underlying resource varies over time and the internal investment guidelines and business agenda of each participant changes. Accordingly, participants will generally seek to avoid including provisions in the documentation of the joint venture that will unnecessarily complicate the assignment of their interest or reduce the attractiveness of their interest to a potential assignee. The classic joint venture, which usually implicitly allocates risk exposure in accordance with and to the extent of each participant's participating interest, facilitates the marketability of interests through its relative simplicity and uniformity.

The ease of marketing and valuing a participating interest in a resources joint venture may be complicated by a number of the modifying factors outlined earlier, in particular:

1. *Uneven distribution of risk:* If the parties to the joint venture have negotiated a contractual allocation of risk in an "uneven" manner, then a prospective purchaser of such interests will need to factor such warranties, indemnities, risk "ring-fencing" provisions etc into its analysis. Further, as the risk profile of each interest in such a joint venture may be quite different, the sale price of an interest in that joint venture will not necessarily be a good proxy for extrapolating the value of another interest in the venture. Such comparisons are frequently used in the valuation of resource joint venture interests, even if as a check on financial modelling analyses, but often as the best indicator of the worth of an interest (on the view that in a market free of abnormalities, the price at which property is traded is its "true price").

   Accordingly, the use of contractual provisions to allocate and limit responsibility for joint venture risks in a manner different to that contemplated by a more classic venture arrangement may well result in additional transaction costs in complicating the valuation of joint venture interests and hence their marketability.

2. *Interconnectedness between joint venture and underpinning sales arrangements:* Where the joint venture is essentially underwritten by sales arrangements in favour of a participant or a party related to a participant, the

joint venture agreement (and ancillary documentation) would be expected to contain provisions tailored to ensure that the joint venture operates in accordance with and so as to discharge the requirements of the sales arrangements – this will be particularly so when the joint venture agreement and related sales arrangements are negotiated as a package.

In such circumstances, a number of reasons would suggest that the participating interest of the buyer or its related participant in the joint venture will not be attractive or particularly marketable unless the potential purchaser also assumes the buyer's obligations under the sales arrangements.

(a) *No access to "free" product for vertical integration benefits:* The purchaser of such a participating interest, in not securing access to "free" product of the joint venture (as it is subject to binding sales arrangements) will not derive the degree of strategic benefits (such as vertical integration/supply risk reduction) that may come with access to product (rather than simply joint venture returns). Accordingly, vertically integrated groups (which include most significant resource players) are unlikely to find such a participating interest attractive – this will impact on the price that may be expected as the potential market is likely to be more limited and may not offer any premium for such "vertical integration" benefits.

(b) *Less attractive joint venture terms for an assignee:* The joint venture agreement may well contain provisions aimed at making the interest of an initial participant less attractive to a prospective purchaser so as to entrench the initial participants in the long-term supply relationship. As stated earlier, the fact that the participants will effectively be parties to a long-term sale arrangement in itself may be of very considerable value to the participants.

(c) *Joint venture returns may not reflect normal or market returns as transaction may evidence multiple return points:* The expected return flowing from the joint venture arrangement may not be an accurate reflection of where a competitive market would have set the return (ie if the market was simply determining appropriate returns on the investment in the joint venture) as the commercial relationship between the participants is at least three-tiered (and therefore provides at least two further opportunities for the participants to "redistribute" expected returns). In such a sales driven joint venture, participants may expect to derive returns at the level of the joint venture's business, on the sale and purchase of product under the sales arrangements and, importantly, by virtue of extraneous but significant strategic and commercial benefits and opportunities that may flow from the long-term relationship between the participants. Further, participants may also seek to complicate the return profile of the transaction by making returns on other related activities (such as the provision of services to the joint venture).

    Accordingly, a prospective purchaser of a participating interest in the joint venture may find that the expected return on the interest is

comparatively poor because some of the expected return has been effectively translated into some other aspect of the transaction from which the former owner of the interest benefited. Accordingly, unless the rights relating to such other aspects of the transaction are also to be assigned, the prospective purchaser may not consider the investment attractive.

(d) *Joint venture risk profile for a participant may be affected by risk allocation under sales arrangements:* Similarly, a prospective purchaser of a joint venture interest may find that the risk profile of that interest has been set at a particular level in light of the allocation of risk under other related agreements, such as underpinning sales arrangements.[8]

As the sales arrangements, especially in relation to a significant resources project are likely to be substantial (more than the average consumer of such product would require) and may well be tailored to the specific consumption requirements of the initial buyer (ie contractual prescription of unique physical and/or chemical specifications of the resource product), it may be very difficult to identify a prospective and acceptable purchaser for both the participating interest in the joint venture and the buyer's rights and obligations under the sales arrangements. Accordingly, marketability of the interests of participants in such sales driven ventures may be quite low, although the inherent value of such investments to the initial participants may be particularly high.

[8] "POSMAC Joint Venture for Deposit C of Mining Area C, Pilbara Region, Western Australia" (ACCC Final Determination of BHP Billiton Minerals Pty Ltd's Application for Authorisation: delivered 5 March 2003) provides an illustration of the degree of contractual and economic interconnectedness that may exist between a production joint venture and the underpinning sales arrangements. In the context of this iron ore transaction, Hope Downs Iron Ore Pty Ltd sought to argue that the sale structure adopted in the POSMAC transaction was "not essential" and accordingly the ACCC's evaluation of competition aspects of the transaction should not attribute benefits of the joint venture to provisions of the agreement relating to the sale structure. In rejecting this submission, the ACCC noted:

"In their response the Applicants have submitted that

'The balance of risks assumed between parties to a commercial arrangement is a matter of negotiation between them. The outcomes represent the commercial bargains they make. Hope Downs is in no position to assert that "POSCO is therefore already accepting the risks usually associated with mining activities and operations" or that the risk allocation between the parties is in some way inappropriate.

The Proposed Transactions and the Transaction Documents comprise an inseverable commercial bargain involving a contribution of capital, iron ore purchase obligations and acceptable risk profiles for the parties.'

In all the circumstances, the Commission is minded to accept the position of the Applicant that the terms of proposed agreements are substantially inseverable and that they are likely to reflect a commercial bargain between the parties at a level where they are each comfortable with their contribution of capital, purchase obligations and acceptable risk profiles."

Flexibility and Scope of the Joint Venture

As outlined earlier, it will frequently be the case (if not usual), that the objects of a joint venture will be sufficiently broad and abstract to cater for foreseeable opportunities as well unforeseeable opportunities that may be presented to the venture. Flexibility in the objects of the joint venture and in the basic structure of the venture assists in engendering flexibility in the commercial agendas of the participants and accordingly in their approach to the venture as well as in the contractual capacity of the participants to respond efficiently to an unexpected opportunity.

Where the joint venture documentation suggests that the joint venture:

- is confined to requirements of underpinning sales arrangements (for example, as to the production of a particular quantity and type of resource in a particular operational manner);
- is subject to detailed and specialised risk allocation provisions; or
- decision-making thresholds and managerial discretions have been tightened to ensure and promote unanimity in purpose,

the joint venture structure may not facilitate the efficient capitalisation on unexpected or previously underestimated opportunities.

The modifications that are designed to ensure that particular predetermined outcomes are achieved by the venture on a relatively predetermined basis are, in essence, the hurdles that the participants will need to overcome to use the venture as a vehicle to capitalise on unexpected opportunities.

Accordingly, it needs to be appreciated that specialised joint venture structures and contractual mechanisms may be a two-edged sword in that in promoting the initial stated purpose and agenda of the venture, they may hamper the capacity of the joint venture to adapt to changing circumstances and new opportunities.

SECTION 5 – PART IV OF THE TRADE PRACTICES ACT AND SALES DRIVEN JOINT VENTURES

Background

Part IV of the *Trade Practices Act* 1974 (Cth) (the Act) contains the restrictive trade practices provisions of the Act. These provisions are relevant to the situation where the participants to a resources joint venture agree to sell the resource product of the venture, at an agreed price, to a particular entity, which in the context of a sales driven venture will often be a party related to a participant.

The Act distinguishes between two types of prohibited conduct, namely:

- strictly prohibited conduct (per se breaches), irrespective of the competitive effects of the conduct; and
- conduct which is prohibited only if it can be shown that its purpose or effect is to substantially lessen competition in a market.

The current penalties for prohibited conduct are significant, breaches can result in fines of up to $10 million for corporations and up to $500,000 for individuals (such as the corporation's directors, employees and agents) involved in the contravention.[9] Further, a variety of potent remedies (including damages, injunctions and other remedial orders) are available to persons adversely affected by such conduct.[10] On top of this, the Federal Government has indicated that the Act will be amended to introduce:

- a new maximum civil penalty for contraventions of Pt IV to be the greater of:
  - $10 million or three times the gain from the contravention (where assessable); or
  - 10 percent of the turnover of the group of companies to which the corporation belongs; and
- a prohibition on corporations directly or indirectly indemnifying individuals for civil pecuniary penalties that an individual may incur.

Further, the government is considering the introduction of criminal sanctions for hard-core cartel behaviour.[11]

This section considers some of the Pt IV issues that may arise where corporations (including a foreign investing corporation) come together to develop an Australian resource through a joint venture on the basis that the development will effectively be underwritten by the foreign investor agreeing to purchase the resource product of the joint venture. Accordingly, the basic structure of the transaction will involve a sale agreement(s) between the joint venturers and the foreign buyer. If the joint venture operations conclude on production of the product which then requires transportation to the export point or further processing before export, then a sale agreement may be entered into under which the joint venture agrees to sell the product to a local party (often a party related to a local participant in the joint venture) which then provides the transportation or processing services. This processing/transporting party may then enter into a sale agreement with the foreign venturer.

[9] Section 76, *Trade Practices Act* 1974 (Cth).

[10] Sections 80, 82 and 87, *Trade Practices Act* 1974 (Cth).

[11] For a comprehensive analysis of the desirability of introducing such criminal sanctions, see Julie Clarke and Mirko Bagaric, "The desirability of criminal penalties for breaches of Part IV of the Trade Practices Act" (2003) 31 ABLR 192.

Part IV of the Act – Some Potential Issues

Sales driven joint ventures raise a number of issues for the purposes of Pt IV of the Act, including:

(a) *Is the agreement of the joint venturers to sell all of their product to:*

- *the foreign purchaser; or*
- *to a local corporation (charged with transporting or processing the product)*

an exclusionary provision for the purposes of s 45(2) of the Act?

Exclusionary provisions are prohibited per se by the Act.

Section 45(2)(a) provides that a corporation shall not make a contract or arrangement, or arrive at an understanding if the proposed contract, arrangement or understanding contains an "exclusionary provision".

Section 4D(1) of the Act defines "exclusionary provision" in the following terms:

> "A provision ... shall be taken to be an exclusionary provision ... if:
> (a) [the contract, arrangement or understanding is] ... between persons any 2 or more of whom are competitive with each other; and
> (b) the provision has the purpose of preventing, restricting or limiting:
> (i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; ...
>
> by all or any of the parties to the contract, arrangement or understanding [or their related bodies corporate]"

Accordingly, to establish a breach of s 45(2)(a), three basic elements are required:

- there must be a contract, arrangement or understanding containing an "exclusionary provision";
- at least two parties to the contract, arrangement or understanding must be competitors; and
- the exclusionary provision must have the purpose of preventing, restricting or limiting the supply, or acquisition of goods or services from particular persons or classes of persons.

It would appear that, in the context of the outlined scenario, the real question, as to whether an agreement between joint venturers (contractually entitled to their share of joint venture product and accordingly likely to be found to be "competitors") to sell their share of product to an intermediate entity or the foreign investor will offend s 45(2)(a), is whether the agreement has the *purpose* of preventing, restricting or limiting the supply or acquisition of goods from particular persons or *classes of persons.*

(i) *Purpose*

The Federal Court has grappled with the question of whether the relevant "purpose" referred to in s 4D(1) is:

(A) the immediate purpose (also described as "the means" or "effect" interpretation – which is arguably the restriction itself) or the ultimate objective of the provision ("the end" the parties sought to achieve – the ultimate purpose of the restriction which may in fact be pro-competitive, such as preserving the existence of the competitors in the relevant market);

(B) to be determined in light of the subjective motivations of the parties, or whether a more objective purpose is to be identified.

The Full Federal Court has delivered two recent decisions that provide little certainty on these questions.[12]

(ii) *Class of persons*

The Federal Court has also struggled with the concept of restrictions directed at "particular persons" or "classes of persons". Judicial dicta has gone so far as to suggest that a class of persons may be relevantly defined simply by the fact of exclusion (ie the fact that two competitors agree to sell to A, suggests that they have agreed to exclude the class of persons defined as everyone except for A).[13] The most recent Full Federal Court consideration of the question suggests that this approach to the concept of a "class of persons" is too broad and that there must be some more positive identification of any class that is the intended object of the discrimination.[14]

The High Court should shortly provide some consideration of the "purpose" and "class of persons" concepts in the s 4D(1) definition of "exclusionary provisions".[15]

However, at this stage, there is a remote possibility that a court may form the view that an agreement between two joint venture participants to sell their individual shares of joint venture product to a particular entity amounts to an "exclusionary provision" on the basis that the immediate purpose is to prevent supply of the product to the class of persons comprised by everybody other than the nominated buyer.

The legislative resolution of these issues has been signalled. The Dawson Report,[16] issued earlier this year, made the following relevant recommendations:

[12] *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 and *Rural Press Ltd v ACCC* (2002) 118 FCR 236.

[13] See *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 487-488.

[14] See *Rural Press* at 264-268.

[15] The *South Sydney* case has been appealed to the High Court. The appeal was heard on 6 August 2002 and 7 February 2003 and judgment was reserved. On 11 April 2003, the High Court granted special leave to appeal in respect of *Rural Press*.

[16] The Report of the Trade Practice Act Review Committee, chaired by Sir Daryl Dawson, was delivered to Commonwealth Government on 31 January 2003 and released by the Treasurer on 16 April 2003.

> *(Purpose)* "... section 4D should be reduced in scope so that it does not extend to conduct that is not anti-competitive. ...
>
> ... provision could be made to allow a competition defence to be raised to a prosecution under the per se prohibition. This would allow a party to an alleged collective boycott to establish by way of defence that the conduct in question did not have the purpose, effect or likely effect of substantially lessening competition."
>
> *(Class of Persons)* "The broad construction presently given to section 4D means that there need be little, if anything, to identify the 'particular persons or classes of persons' to which the section refers, other than the fact that they are affected by the collective boycott in question. This gives the section a wider application than is necessary to protect competition. ... [It is recommended that] ... the persons or particular classes of persons referred to should not extend beyond a competitor or competitors, whether potential or actual, of one or more of the parties to the collective boycott."[17]

The Federal Government has indicated that it will sponsor amendments to the Act to implement these recommendations.[18]

The amendments should give joint venturers greater freedom to agree restrictions that do not have the purpose or effect of substantially lessening competition.

(b) *Is the agreement of the joint venturers to sell all of their product at an agreed price to the foreign purchaser or to a local corporation "price fixing" for the purposes of s 45A of the Act?*

Section 45A(1) of the Act deems price fixing contracts, arrangements or understandings to have the purpose, effect or likely effect of substantially lessening competition – accordingly, price fixing is effectively prohibited per se under s 45(2)(a)(ii) as a provision that has the purpose, effect or likely effect of substantially lessening competition.

Section 45A(1) relevantly provides:

> "... a provision of a contract, arrangement or understanding ... shall be deemed for the purposes ... [of section 45] to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition if the provision has the purpose, or has or is likely to have the effect, as the case may be, of fixing, controlling or maintaining ... the price for ... goods or services supplied or acquired or to be supplied or acquired by the parties to the contract, arrangement or understanding ... or by any bodies corporate that are related to any of them, in competition with each other."

Section 45A(2) sets out specific exemptions from a per se breach in respect of "price fixing" for "joint ventures" (which is broadly defined by

[17] The Dawson Report, pp 127-128.

[18] The Federal Government's response to the Dawson Report was released on 16 April 2003 (see http://www.treasurer.gov.au/tsr/content/publications/TPAResponse.asp).

s 4J of the Act). Section 45A(2) relevantly (for the purposes of this paper) exempts provisions for the purposes of a joint venture to the extent the provision relates to:

> "(a) the joint supply by 2 or more parties to the joint venture, or the supply by all the parties to the joint venture in proportion to their respective interests in the joint venture, of goods jointly produced by all the parties in pursuance of the joint venture;"

It would appear that the s 45A(2)(a) exemption would be available to joint venturers[19] who agree to sell joint venture product to a particular buying entity at a particular price (or in accordance with a particular pricing formula) in accordance with their participating interests in the venture where, under the joint venture agreement, the joint venturers take their share of product separately and are entitled to sell that product separately (this will be the usual case under a production joint venture agreement). Although not free from doubt, it would also appear that the exception extends to sale of joint venture product through a marketing vehicle.

The Dawson Report considered this issue and the operation of s 45A(2) generally:

> "It was said by way of example that it is unclear whether the exception would apply where production joint venturers take product separately, but sell product jointly through a marketing joint venture or marketing company.
>
> The Committee accepts that the exemption in section 45A(2) may operate too narrowly to fully achieve its object, but is conscious of the fact that the definition of joint venture in section 4J of the Act is wide enough to extend to practically any joint activity in trade or commerce. It would be difficult to suggest a more restricted definition having regard to the many kinds of joint venture that are evolving. However, a blanket exception from section 45A(1) for joint venture agreements as currently defined would be too wide and be likely to exempt price fixing conduct that ought to be prohibited per se. On the other hand, the current section 45A(2) is unduly prescriptive.
>
> The Committee believes that the problem could be overcome by substituting for section 45A(2) a provision ... to the effect that:
>
> > 'Section 45A(1) does not apply to a provision of a contract or arrangement made, or an understanding arrived at ... if it is proved that the provision is for the purposes of a joint venture and the joint venture does not have the purpose, effect or likely effect of substantially lessening competition.'
>
> Such a provision would provided a statutory defence for joint ventures against the per se prohibition of price fixing ... . Of course, the effect of the statutory defence would be to remove, in the case of competitive joint ventures, the per se prohibition imposed by section 45A(1), but not the prohibition under section 45 of arrangements

[19] Who, for the purposes of the Act, may otherwise be in competition with each other.

having the purpose, effect or likely effect of substantially lessening competition."[20]

The Dawson Report also recommended that the Australian Competition and Consumer Commission (ACCC) should develop and issue guidelines outlining its approach to joint ventures as "[g]uidelines would ... assist both the ACCC and business in achieving the object of the Act in relation to a constantly changing area of trade and commerce."[21]

The Federal Government has also accepted these recommendations regarding s 45A. Accordingly, the section should be amended in due course to provide greater pricing flexibility for joint ventures provided that the joint venturers can prove that the relevant pricing provision does not have the purpose or effect of substantially lessening competition. The foreshadowed ACCC guidelines for joint ventures should provide additional clarity as to the ACCC's approach.

It should also be appreciated that pricing fixing agreements falling within s 45A(2) exceptions must still be considered on normal competition grounds under s 45(2)(a)(ii) as to whether they are provisions having the purpose or likely effect of substantially lessening competition. In this respect, it has been suggested that in the mining sector, "because the markets where the product is sold are often highly oligopolistic, the denial of separate selling [by joint venturers] may rob the market of the only potential source of competition"[22] and, accordingly, despite s 45A(2) exceptions being available to the joint marketing of the product, s 45(2)(a)(ii) may be breached.

(c) *Non-per se prohibited conduct*

The two basic forms of conduct that are prohibited depending on anti-competitive effect are –

- exclusive dealing under s 47 of the Act; and
- arrangements with competitors to substantially lessen competition under s 45(2)(a)(ii).

(i) *Exclusive dealing*

Exclusive dealing essentially involves a corporation forcing a second person not to deal with a third person (in other words, it focuses on the use of restrictions in the chain of distribution of goods from one functional level (say, production) to another (say, processing or consumption) and accordingly is relevant to joint venture sales arrangements). Section 47 specifies a range of conduct which amounts to exclusive dealing, but provides in subs (10) that s 47 does not apply unless engaging in that conduct has the purpose, effect or likely effect of substantially lessening competition.

In terms of sales arrangements that underpin resource joint ventures, one may find minimum tonnage/purchase obligations and

[20] The Dawson Report, p 141.
[21] The Dawson Report, p 142.
[22] J D Heydon, *Trade Practices Law* (LBC, Looseleaf), Vol 1 at [4.130].

prohibitions on resupply. Such provisions may constitute exclusive dealing provisions.

Third line enforcing, a form of exclusive dealing that is per se prohibited by s 47(6) and (7) of the Act, involves a corporation forcing a second person to deal with a third person (for example, a corporation sells goods on condition that the purchaser acquires other goods or services from a third person). Depending on the nature of the underpinning sales arrangements, third line enforcing may also be an issue.

(ii) *Arrangements with competitors to substantially lessen competition*

Section 45(2)(a)(ii) provides that a corporation shall not make a contract or arrangement, or arrive at an understanding if it would have, or be likely to have the effect of substantially lessening competition in an Australian market.

The mere formation of a resources joint venture could result in a breach of s 45(2)(a)(ii) depending on the nature of the participants to the joint venture and the market in which they operate. Consideration of this issue may require, amongst other things, an assessment of the potential power of the joint venture in the relevant market and an appraisal of what the competition in the relevant market would have been if one of the joint venturers had entered into the project on its own.[23]

Further, as discussed above in the context of "price fixing", joint marketing arrangements may also result in a substantial lessening of competition.

Regard should also be given to the effect of any "non-compete" provisions within the project documentation and their impact on competition in a relevant market.

The Export Exemption and Notification

Section 51(2)(g) of the Act relevantly provides that:

> "In determining whether a contravention of a provision of this Part [IV] … has been committed, regard shall not be had to:
>
> …
>
> (g) to any provision of a contract, arrangement or understanding, being a provision that relates exclusively to the export of goods from Australia or the supply of services outside of Australia, if full and accurate particulars of the provision (not including particulars of prices for goods or services but including particulars of any method of fixing, controlling or maintaining such prices) were furnished to the Commission before the expiration of 14 days after the date on which the contract or arrangement was made, or the understanding was arrived at."

[23] See *US v Penn-Olin Chemical Company* 378 US 158 (1964) at 177.

It has been recognised that the scope of this exemption is unclear given the expansive term "relates" is juxtaposed against the restricting term "exclusively".[24] It is generally accepted that s 51(2)(g) will apply to agreements relating to the export of goods from Australia (such as a sale agreement with a foreign buyer). However, it is not clear how much further into the export function the section may operate (for example, whether it applies to an agreement relating to the transport of goods to the delivery point for export).

Authorisations

Part VII of the Act, and in particular s 88, provides that the ACCC (and on review, the Australian Competition Tribunal (Tribunal)) may, in the public interest, authorise certain anti-competitive conduct. A party may seek authorisation for any form of anti-competitive conduct, save for conduct that may constitute a misuse of market power under s 46 of the Act.

The effect of conduct being authorised by the ACCC is for it to be exempted from the relevant prohibitions in Pt IV. The "authorisation mechanism" stems from statutory recognition of the fact that the public benefits of anti-competitive conduct may outweigh its detrimental effect (other than in respect of a misuse of market power).

In order to identify and measure the public benefits and anti-competitive detriment of proposed anti-competitive provisions, the ACCC applies what is known as the "future with-and-without test".[25] Despite the fact that ss 90(6) and 90(8) specify differently framed tests for exclusionary provisions and third-line enforcing as compared to conduct that may have the effect of substantially lessening competition, the ACCC and the Tribunal apply the same test. The ACCC describes the test in the following terms:

> "This test requires the Commission to assess both the public detriment flowing from the anti-competitive aspects of the arrangements and the public benefits arising from the arrangements. The two must be weighed to determine which is the greater. If the public benefit outweighs the public detriment, the Commission may grant the authorisation. If not, authorisation will be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefit or reduce the public detriment."[26]
>
> "This [test] requires a comparison of the public benefit and public detriment that the proposed arrangements would generate in the future if the authorisation is granted with the position if the authorisation is not granted."[27]

[24] See *Refrigerated Express Lines Australasia Pty Ltd v Australian Meat and Live-stock Corp (No 2)* (1980) 29 ALR 333.

[25] See *Re Queensland Independent Wholesalers Ltd* (1995) 132 ALR 225 and *Re Australasian Performing Rights Association* (1999) ATPR 41-701.

[26] POSMAC Determination, p 2.

[27] POSMAC Determination, p 25.

In the case of potential anti-competitive conduct arising from a sales driven joint venture for the development and export of resource product, the ACCC is likely to find the following matters particularly relevant:

- the fact that the resource development will only proceed or be developed in the foreseeable future on the basis of the proposed arrangements – where the joint venture is underwritten by sales arrangements, evidence that the foreign purchaser will only invest on the basis of the proposed arrangements is important;
- whether the development of the resource has the potential to facilitate further developments of that resource type;[28]
- the economic and social impact of the resource development on the relevant region (such as increased regional employment, development of regional infrastructure);
- the general economic effect of the resource development for Australia (such as increased exports, international competitiveness and business efficiency, encouragement of research and capital investment).

On the other hand, in assessing anti-competitive detriment associated with such an export-focused resources joint venture, the ACCC may well conclude that the effect on competition in the domestic or Australian market is likely to be minimal. Further, price fixing concerns will be limited if the relevant resource product is effectively subject to an international benchmark price.[29]

A common complaint with the authorisation process is its cost and inefficiency. The ACCC may take considerable time to determine an application for authorisation. The Federal Government has accepted the recommendations of the Dawson Report to streamline the process and place a limit of six months on the assessment process.

return to AMPLA 2003 Table of Contents

[28] In the POSMAC Determination, the ACCC considered that the international acceptance of Marra Mamba iron ore would be facilitated by the proposed arrangements.

[29] POSMAC Determination, pp 25-26.