Joint Ventures

Overview of joint ventures

[220,010] Why enter into a joint venture?

[220,030] ***What is a joint venture?***

Mining and energy projects throughout Australia are frequently conducted through joint ventures. Despite the prevalence of joint ventures, there is no single body of regulation that applies to this type of legal relationship, nor are there settled legal rules that determine the rights and obligations of parties to a joint venture relationship.

The term "joint venture" does not have a technical legal meaning and it is used to describe a variety of business arrangements involving two or more parties pursuing a joint undertaking with a view to mutual benefit (see Halsbury's at [305-1035]–[305-1040]). An unincorporated joint venture is essentially a business relationship in which the participants hold the joint venture property as tenants in common rather than through ownership of a corporate entity which owns the joint venture property. An incorporated joint venture is a joint venture in which a special purpose company owned by the joint venture participants holds the joint venture property and conducts joint venture operations.

The majority of mining industry joint ventures in Australia are unincorporated joint ventures and all references in this guide card to joint ventures are to unincorporated joint ventures, except where otherwise indicated.

Joint ventures are distinguished from partnerships for a number of reasons (see [1.1.3]). Some of the key distinguishing characteristics of a typical mining joint venture are:

(a) participants hold the property of the joint venture as tenants-in-common;
(b) participants contribute money, property or skill to the joint venture, but their contributions are not necessarily equal;
(c) the liability of the participants to third parties for debts of the joint venture is several rather than joint[1] and the extent of liability is usually determined by reference to their respective ownership shares of joint venture property;
(d) participants exercise joint control over the joint venture activity;
(e) a manager or operator is appointed by the participants to conduct joint venture activities; and
(f) the product of the joint venture is taken by the participants separately and in kind, rather than the participants taking a share of profits.

See also Halsbury's at [305-1037].

The joint venture is a legal relationship to which the law of contract applies. It can be created by conduct, verbally, or in any number of documents, but the key terms and conditions of the joint venture relationship should be set out in a written agreement. In this guide card, the parties to the joint venture will be described as "participants".

Where the joint venture is unincorporated the relationship between the participants is usually documented in the form of a joint venture agreement. In the case of an incorporated joint venture, the key relationship document is the shareholders agreement, supported by the company's constitution.

Life cycle of a joint venture

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The typical phases of a joint venture are:

(a) Initial stage — parties meet to discuss the possibility of undertaking a joint venture, and enter into a preliminary agreement (see [1.2.1]). At this stage the joint venture is not underway.
(b) Farm-in — during this phase one party (called the "farminee") earns an interest in tenements (or an option to acquire the interest) by sole funding an exploration program, typically at its discretion but with a commitment to expend a minimum amount over an agreed period. Commonly parties will be finalising the terms of the formal joint venture agreement during this time, with the initial agreement forming the basis of the relationship until the joint venture agreement is in place (see [1.2.8]).
(c) Exploration joint venture — once the farminee has farmed-in and earned its interest, an exploration joint venture is formed. The goal of an exploration joint venture is to produce feasibility studies, based on which, the participants can determine whether it is appropriate to proceed to mining.
(d) Mining or production joint venture — this is the stage at which mining begins. It may be preceded by a development phase in which the tenements are prepared for mining to take place.

[220,050] ***Advantages of joint ventures***

The joint venture is flexible structure, without the detailed regulation applicable to corporations and partnerships, giving joint venture participants a great deal of flexibility in structuring their arrangements and determining their contractual rights and obligations (see [2.2.1]).

Exploring for resources is an expensive undertaking with relatively low prospects of success and developing resources is also expensive, with profitability dependent on commodity prices and other factors outside the miner's control. The joint venture structure spreads the high risks and substantial costs of exploration and development in a mutually advantageous way for parties and enables them to mutually benefit from each other's knowledge, skill and expertise.

Small companies in possession of exploration licences may lack the funds to carry out exploration, whilst larger companies with the means to conduct exploration will often seek to diversify their risk profile by having a joint venture interest in a greater number of projects, rather than sole-funding exploration on a smaller number of projects. The joint venture structure also enables a party in possession of an exploration licence to benefit from the technical expertise and knowhow that another party may have gained exploring similar areas, as illustrated in the case study below.

Case study

Company A, a substantial ASX-listed company, has conducted exploration over its exploration licences and the results of its exploration program have been disclosed to the ASX. Company B, a much smaller company, owns an exploration licence that is contiguous with the boundaries of Company A's exploration licences. Based on its drilling results, Company A believes that mineralisation may extend into the area of the licence owned by Company B.

Company A approaches Company B and proposes that it conduct further drilling over Company B's exploration licence, giving it a right to earn a 50% beneficial interest in the licence. They agree the terms of Company A's expenditure on Company B's exploration licence over an agreed period. Company A complies with this obligation, and exercises its option to acquire a 50% interest in Company B's exploration licence, at which point a joint venture is formed between the companies. Company A negotiates a further option to

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acquire an additional 20% interest (bringing its total interest to 70%) on completion of a feasibility study within a further agreed period.

There are various benefits which flow from this arrangement for each party, as set out below.

Company B:

(a) avoids incurring the cost of an exploration program and the risk that the results of the program may not warrant further investigation or expenditure;
(b) retains ownership of the exploration licence until Company A has completed its farm-in work;
(c) regardless of whether Company A elects to exercise its option to acquire an interest in Company B's exploration licence, Company B will have an ownership interest in all of the mining information produced by Company A from its exploration, which it may be able to use to its own commercial advantage. Company A may decide not to exercise its option for reasons unconnected with the economic prospectivity of Company B's property; and
(d) avoids the cost of the feasibility study and the risks of wasted expenditure if the outcome is negative.

Company A:

(a) can undertake exploration over tenements with which it has some familiarity, based on the exploration work it has conducted on its own adjacent tenements;
(b) can legally protect its prospective interest in Company B's exploration licence by registering a caveat; and
(c) if satisfied with the results of its exploration, can sole fund a feasibility study. If it elects to proceed with development based on the results of the feasibility study, it can acquire a controlling interest in the project.

[220,070] *Joint ventures compared to partnerships*

Advantages of joint ventures compared to partnerships

Joint ventures are distinguished from partnerships so as to avoid the application of the Partnership Acts of the various states and territories. Joint ventures may also provide greater flexibility from a tax perspective than partnerships.

The advantages of avoiding a partnership include the following:

(a) Each partner is jointly and severally liable for the debts of the partnership and for the acts of other partners done in the course of the partnership, whereas joint venture participants will stipulate in their agreement that their liability for the debts of the joint venture is several. Joint venture participants may however be subject to joint liability in some circumstances, including tortious liability to the public for acts or omissions by the manager of joint venture operations.
(b) Joint venture participants can claim their own tax deductions and make their own tax elections (see [2.2.1]).
(c) Joint venture participants can adopt their own accounting treatment of their joint venture interest.
(d) Partners can bind other partners where they act within their apparent authority under the partnership, whereas joint venture participants do not have this power (unless they agree otherwise).
(e) Joint venture participants can enter into their own financing arrangements in respect of their joint venture interest (see [2.4]).
(f) Partners owe each other fiduciary obligations; whereas joint venture participants can avoid creating fiduciary obligations towards each other (see [3.2.1]).

(g) Joint venture participants have more flexibility than partners to structure their arrangements and are not subject to regulation under the Partnership Acts of the various states.

See also Halsbury's [305-1054]–[305-1060].

How to distinguish a joint venture from a partnership

The various Partnership Acts define partnership as "the relationship which exists between persons carrying on a business in common with a view of profit"[5] (see Halsbury's [305-1045]).

Participants will seek to establish that their arrangements do not fall within this definition (or within the definition of partnership for the purposes of the Income Tax Assessment Act 1936 (Cth)) principally by:

(a) not selling product or receiving income jointly, so that there is no joint profit; and
(b) otherwise carrying on business severally rather than jointly, such as engaging in separate tax and accounting treatment of their interest in the joint venture; stipulating that their liability to third parties is several rather than joint; and severally appointing the manager of the joint venture operations as agent.

The participants will also not have rights to bind each other, as is the case with partners.

A written joint venture agreement will also usually contain an express statement that the parties have not formed a partnership, although this is not, of itself, conclusive.

Notes

1 Joint venture participants may have joint liability in some circumstances, such as liability to the public for tortious acts of the manager of the joint venture operations. See [1.1.3].

5
- Partnership Act 1892 (NSW) s 1(1)
- Partnership Act 1958 (VIC) s 5(1)
- Partnership Act 1891 (QLD) s 5(1)
- Partnership Act 1895 (WA) s 7(1)
- Partnership Act 1891 (SA) s 1(1)
- Partnership Act 1891 (TAS) s 6(1)
- Partnership Act 1997 (NT) s 5(1)
- Partnership Act 1963 (ACT) s 6(1).

[220,270] Planning the joint venture

[220,290] *Preliminary documentation*

It is highly unlikely that parties considering a joint venture relationship will immediately proceed to negotiate and execute a formal joint venture agreement. In most cases, the parties will reach agreement about the key terms of their relationship progressively through correspondence and meetings and a form of preliminary agreement.

Whilst the term "joint venture" is commonly used to describe the relationship of the parties to that agreement from inception, it is important to note that where the agreement provides for one party to earn an interest in a tenement (by sole funding an exploration program typically at its discretion but with a commitment to expend a minimum amount) the joint venture relationship does not exist unless and until that interest has been earned. Typically these types of agreements are referred to as "farm-in and exploration joint ventures". During the period of the farm-in, the contract between the parties is in essence a contract for the acquisition of property with tax and stamp duty consequences.

Aside from ensuring that the terms of the preliminary agreement are clear, unambiguous and correct, the parties will need to consider whether they intend it to be binding, so that failure by one of the parties to fulfil its obligations will give rise to an

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enforceable right on the part of the other. In the very early stages of negotiation, parties may wish to avoid triggering disclosure obligations (eg, obligations under ASX Listing Rule 3.1 or third party pre-emptive rights) by avoiding entering into a binding agreement. ASX Listing Rule 3.1 does not require disclosure of information where a reasonable person would not expect the information to be disclosed; the information is (and remains) confidential; and the information concerns an "incomplete proposal or negotiation"[10].

It will generally be in the interests of the parties to enter into a binding agreement before substantive work is done by any of them in connection with the joint venture.

The most common forms of preliminary agreement are:

(a) letters of intent;
(b) heads of agreement;
(c) memoranda of understanding; and
(d) term sheets.

See Halsburys at [110-472].

Any of these document types can be made into a legally binding agreement, provided the terms are sufficiently certain and complete: see Halsburys [110-205].

Whether or not the parties intend to create a legal relationship in their preliminary agreement, the key commercial terms should be set out in a clear and unambiguous manner to aid the parties in developing their relationship into a formal joint venture.

Preliminary agreement road map

In preparing the preliminary agreement the drafter should consider the following matters:

(a) The identity of the participants, including providing for nominees to be the ultimate contracting entities, if needed.
(b) The area of land the subject of the joint venture, usually by reference to a tenement number or map, as well as any other assets that will be used for joint venture purposes, including any geological or mining information in the possession of a participant.
(c) The structure of the joint venture, that is, whether it is to be incorporated or unincorporated.
(d) The terms of any farm-in arrangement, that is the arrangement by which one of the parties to the agreement will earn an interest in the tenement the subject of the agreement. In particular, the parties should consider the obligations that must be complied with by the farminee (the party earning the farm-in interest) to earn the interest, at which time the joint venture relationship will commence (see [4.2]).
(e) Any other conditions that need to be satisfied before the joint venture is formed. This will typically include satisfactory completion of due diligence (see [1.2.2]), obtaining any applicable regulatory approvals (see [1.2.6]) and any applicable third party approvals (see [1.2.7]). It may also include the provision of financing on satisfactory terms (see [1.2.5] and [2.4]).
(f) The participating interests of the participants at the commencement of the joint venture, which will typically determine:
    - the participants' obligations to contribute to joint venture expenditure;
    - their voting rights on joint venture matters considered in a management or operating committee comprised of representatives of the participants; and
    - the extent of their liability to third parties and their share of product.
(g) The key rights and obligations of the participants during exploration and mining. The participants may not wish to expend effort in producing a detailed set of terms and conditions for the purposes of the preliminary agreement, however it

is prudent to agree at least the key rights and obligations to reduce the risk of the parties being unable to reach agreement at a later stage. In a farm-in arrangement the obligations of the holder of the tenement are usually confined to maintaining title and complying with third party arrangements whilst the farminee expends its funds on exploration in a program that is usually, but not always, of its making (see [1.3] for the key rights and obligations that should be considered).

(h) The timetable for entering into a formal joint venture agreement.

(i) Warranties by the parties, which will usually include:
- warranties about the parties;
- the absence of litigation;
- the tenements;
- the absence of any third party rights with respect to the tenements or any other joint venture property; and
- accuracy of information provided.

[220,310] ***Due diligence***

Key due diligence enquires will include the following:

(a) Title to and the "good standing" of the tenements (including compliance with the terms and conditions of the tenements, particularly the expenditure and reporting obligations imposed on the holder).

(b) The existence of third party rights which may interfere with or need to be taken into account in the conduct of farm-in or joint venture activities (eg split commodity arrangements (see [1.3.1]), or impact on the economics of a future project (eg royalty rights).

(c) Compliance issues (eg native title rights; environmental liabilities and authorisations). It is possible to conduct searches of tenements in all states and territories and to ascertain whether the area of the tenements in question is the subject of native title claim. It is strongly recommended that searches are conducted in respect of each tenement when preparing any form of preliminary agreement.

(d) Regulatory approvals required by either party to conduct joint venture activities (including Foreign Acquisitions and Takeovers Act 1975 (Cth) clearance for any foreign parties — see [1.2.6]).

(e) The solvency or good standing of the parties.

(f) The nature of any encumbrances or securities over joint venture assets, including the tenements.

(g) The absence of litigation affecting the parties.

[220,330] ***Choosing the structure of the joint venture***

Generally the key consideration for parties in choosing whether to use an incorporated or an unincorporated joint venture structure is the taxation consequences (see [2.2] and [6.6]).

In Australia the unincorporated joint venture is the standard model but in some foreign jurisdictions the legislation stipulates that only a company incorporated in that jurisdiction is a "qualified" applicant for a tenement or may prohibit multiple holders of a tenement in which case an incorporated joint venture is obligatory.

Whilst the parties may choose to establish an unincorporated joint venture as the vehicle for their commercial relationship they may decide that certain operational aspects of that relationship will be conducted by an incorporated entity in which the participants have ownership and voting interests consistent with their participating interests. An

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example of this is a company whose role is to provide management services to the joint venture or to act as each participant's marketing and sales agent in the sale of their respective shares of product.

If the joint venture is to be incorporated (see [6]), a proprietary limited company will be incorporated by the parties as a special purpose vehicle to own the joint venture property and conduct joint venture operations. The term "special purpose vehicle" or SPV indicates that the company will have one commercial object and no other, unless and until the shareholders decide otherwise.

If it is proposed to use an existing corporate vehicle for the joint venture (which may be the case if that company is the holder of the tenements in question) the steps needed to prepare that company to act as the SPV will need to be agreed. These steps may include divesting it of other assets, altering its constitution and restructuring the composition of the board. A due diligence program should be undertaken to ensure that the company is "clean" and suitable to own the joint venture property and conduct joint venture operations.

[220,350] ***Tax planning***

The participants should obtain tax advice about their participation in and the structure of the joint venture. As a threshold issue participants should satisfy themselves that the terms of their commercial relationship in fact constitute a joint venture for tax law purposes and not a partnership.

It is important to note that the definition of "partnership" for tax purposes is broader than at general law (see [1.1.3]). The tax definition of partnership includes persons who are in receipt of income jointly, ie parties do not have to be in business together to be a partnership for tax purposes. This is a particularly important concept where joint venture operations include the production of a saleable product and the participants are proposing to use the same marketing entity to sell that product. The marketing entity must be engaged by each of the participants individually to sell its share of product rather than by the joint venture collectively in order to maintain joint venture tax status.

[220,370] ***Financing***

Participants should consider the financial requirements of their joint venture and how these will be met.

In a farm-in arrangement the farminee will typically be liable for all expenditure, including reimbursing the holder for its costs in maintaining the tenements. Only once the participating interest has been earned and the joint venture formed will expenditure become a joint responsibility in proportion to the respective participating interests of the participants.

The joint venture agreement will typically prohibit a participant from granting security over its joint venture interest without the consent of the other participant. Participants should ensure that the joint venture agreement caters for any existing or proposed securities that will be granted over their interests in the joint venture property. For example, if a participant has previously granted a security to a lender which extends to all property acquired in the future by that participant, that security would extend to the participating interest acquired by the participant when it joins the joint venture.

A participant will typically require consent from the other participants to the creation of a security over its participating interest. A condition of that consent will usually be that the financier executes a deed of covenant, or priority deed, agreeing to be bound by the rights of pre-emption granted in favour of the other participants, on the exercise of its rights under its security (see [2.4]).

[220,390] ***Regulatory approvals and issues***

Transferring title to tenements

The establishment of a joint venture, in which two or more participants own joint venture property in proportion to their respective participating interests, will involve the transfer of a corresponding interest in the relevant tenements. Participants should be aware of the requirements for prior ministerial (or equivalent) consent when transferring interests in mining tenements for the purposes of a joint venture.

For example, in Western Australia, prior ministerial approval is required for the transfer of a mining lease and for the transfer of an exploration licence during the first year of its term.[1] Similar restrictions apply to the transfer of mining tenements in the other states and territories.[5]

There are no published guidelines in any of the states and territories for the exercise of the minister's discretion to grant consent, however in Western Australia at least, it appears that the application is likely to be successful if the applicant has added value to the tenement by carrying out work on it, rather than, for example, attempting to trade in tenements in order to generate a profit.

Listing Rules

Participants that are listed companies or subsidiaries of listed companies must consider their obligations under the ASX Listing Rules. Chapter 5 of the ASX Listing Rules establishes additional reporting obligations on mining and exploration activities. Importantly, the information that must be disclosed has to comply with the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (commonly known as the JORC Code which is published as Appendix 5A to the ASX Listing Rules) in the case of mineral resources or be compiled by a suitably qualified person in the case of oil or gas (ASX Listing Rule 5.11).

ASX Listing Rule 5.18 provides that a listed company or a subsidiary of a listed company may not enter a joint venture agreement to investigate or explore a mining tenement unless the agreement provides that:

(a) if required, the operator/manager of the joint venture will provide to the listed company all the information it requires to comply with the ASX Listing Rules; and

(b) that information may be released to the ASX to comply with its disclosure obligations.

Chapter 11 of the ASX Listing Rules may also need to be considered if entry into the joint venture represents a significant change to the nature or scale of the activities of the listed company. This may mean that entry into the joint venture agreement will be subject to that company's shareholders approving it in a general meeting.

Competition law

Joint venture participants who are competitors should be aware of the cartel provisions of The Competition and Consumer Act 2010 (Cth). In particular, arrangements relating to the price or marketing of product, or who participants may supply to, may fall within the cartel provisions of the Act. Participants should seek advice to ensure that their arrangements fall within the joint venture exception to the cartel prohibitions or are authorised (see Halsbury's [305-1085]).

Personal Property Securities regime

From October 2011, participants will need to understand the impact of the Personal Property Securities Act 2009 (Cth) on their arrangements (see [2.4.3]).

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Foreign entities

Foreign entities seeking to enter into resource joint venture arrangements in Australia will need to understand their notification obligations to the Foreign Investment Review Board (FIRB) pursuant to the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and applicable government policy announcements. Notification obligations apply to the acquisition by foreign entities of interests in "Australian urban land" (which will include land used for mining but not exploration purposes) and to the acquisition of interests in Australian companies that hold interests in Australian urban land, where certain threshold conditions are met (see Halsbury's [420-3660]–[420-3775]).

Other reporting requirements

Participants should consider any obligations applicable to their joint venture activities under the National Greenhouse Energy Reporting Act 2007 (Cth). This act imposes annual reporting obligations on the ultimate Australian holding company of any company that has operational control of a facility that meets certain thresholds for the production of greenhouse gas emissions, energy production or consumption.

[220,410] ***Third party approvals***

Third party approvals to enable the joint venture to proceed should be identified and be the subject of due diligence. Agreements registered against the tenements should be investigated to establish whether a third party's consent is required or a process undertaken, as a condition precedent to the establishment of the joint venture.

[220,430] ***Joint venture documentation***

The parties should agree in the preliminary agreement their expectations as to the form of, and timing for, a formal and complete document.

In a farm-in situation the establishment of a joint venture will depend on whether the farminee completes its farm-in obligations. However, the farminee faced with the obligation to expend its funds to earn its participating interest will want to know at the commencement of the relationship the terms and conditions of the joint venture that will commence on the completion of its farm-in obligations. For this reason the preliminary agreement should anticipate that the more formal agreement will deal with both the farm-in and the joint venture relationship that may result.

The participants may not wish (or be able) to anticipate the terms and conditions they will want to apply to them once the joint venture contemplates production, given the uncertainty as to if and how any future production may occur. The formal joint venture agreement will typically include an obligation to negotiate in good faith and agree the terms of a production joint venture agreement once the feasibility studies are complete and a decision to mine has been made or is imminent. The participants should be aware of the issues with enforcing agreements to agree (see Halsbury's [110-505]).

To avoid problems of uncertainty and enforceability, a typical fallback position is for the terms of the current agreement to apply until the replacement joint venture agreement is executed and for differences of opinion as to drafting issues to be referred for expert determination (see Halsbury's [110-505]).

A useful and current guide to the contents and terms of exploration and mining joint ventures can be found in the model documents produced by AMPLA (www.ampla.org).

In addition to the joint venture agreement itself, other agreements may be entered into, particularly once production is contemplated, including deeds of cross charge over each participant's joint venture interest and agency sale agreements for the sale of product. Usually a separate management agreement is not required where the manager or operator

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is one of the joint venture participants, but if a third party (which might, for example, be a subsidiary of a participant) is appointed as manager of joint venture operations, a separate management agreement may be necessary.

Notes

10 See Listing Rule 3.1A.3

1 See ss 82(1)(d) and 64(1)(b) Mining Act 1978 (WA).

5 • Mining Act 1992 (NSW) ss 120, 200
- Mineral Resources (Sustainable Development) Act 1990 (VIC) ss 33(2), 77N(1)
- Mineral Resources Act 1989 (QLD) ss 141(e), 151(1), 194(1)(e), 198(1), 198(4), 96, 300
- Mining Act 1971 (SA) s 83(1)
- Mineral Resources Development Act 1995 (TAS) ss 33(3)(a), 62, 63, 95(3)(a). See also s 176(1).
- Mineral Titles Act 2010 (NT) s 123(1)
- Planning and Development Act 2007 (ACT) s 251(6).

Note that some tenements are not transferrable. For example, in Victoria, an exploration licence can not be transferred during the first year of its term: Mineral Resources (Sustainable Development) Act 1990 (VIC) s 33(1). In Queensland, a prospecting permit is not transferable: Mineral Resources Act 1989 (QLD) s 33 and in Tasmania there is no provision in the Mineral Resources Development Act 1995 (TAS) for the transfer of a prospecting licence.

[220,630] Big picture issues in drafting the joint venture agreement

[220,650] *Objects and scope of the joint venture*

The parties should consider:

(a) The objects of the joint venture. In an exploration joint venture, the purpose will usually be to explore and evaluate an area of interest which may be very general in nature, usually for a specific mineral or group of minerals. In a production joint venture, the purpose is more tightly defined to describe an agreed development plan (usually referenced to a feasibility study) in relation to a specific mineral in a specific area or areas of identified tenements.

(b) What tenements and what resources will be covered by the proposed joint venture.

(c) What their rights will be in respect of any minerals identified in the joint venture area that are not included in the joint venture. The key question is whether the owner of the tenements will be free to exploit those minerals for its own account, or whether the parties will be given the opportunity to form a separate joint venture in respect of those minerals.

One way of dealing with this situation is to provide for a "split commodity agreement", which is an agreement that anticipates that several parties may conduct their own exploration and production activities for different minerals over the same area. A split commodity agreement is a complex document that should at a minimum identify whose activities take precedence in the case of an overlap, and how a party wishing to go into production in respect of a particular mineral will go about acquiring the statutory rights to mine that mineral.

(d) Ore bodies are not confined to the boundaries established by the relevant government department. Joint venture exploration activities may identify an ore body that extends beyond the boundaries of the joint venture tenements. Parties should consider whether a participant who acquires a tenement that is contiguous to the joint venture tenements should be obliged to allow the participants in that joint venture to extend the joint venture to those areas. If so, the size and description of the "area of influence" to which these rights and obligations should apply should be agreed.

[220,670] ***Ownership***

A participant's ownership of joint venture property is usually determined by the size of its participating interest in the joint venture, expressed as a percentage (see [3.2]).

Interests in a joint venture are usually acquired as a consequence of a party:

(a) farming in (or earning in) and completing those obligations resulting in joint venture;
(b) acquiring an interest in an existing joint venture from a participant; or
(c) purchasing an interest in a tenement from the holder.

The ways in which a participating interest can be changed (once acquired) are summarised in [1.3.6].

[220,690] ***Joint venture activities***

Farm-in

The parties will need to agree the scope of the farm-in obligations, including the amount to be expended and by whom, the duration of the farm-in period and the participating interest that will be earned on completion of the farm-in exploration programme or other qualifying work. The parties should also decide whether the farminee is able to undertake this work at its discretion and what, if any, is the minimum sum to be expended. The minimum sum should be adequate to meet the expenditure requirements and other outgoings of the relevant tenements (see [4.2]).

Exploration

On the establishment of the exploration joint venture agreement the following matters relevant to the conduct of exploration activities will be agreed:

(a) the manner in which the management committee may make a decision to explore;
(b) the procedure for preparing, approving and implementing exploration programmes and budgets;
(c) policies and procedures with respect to exploration activities;
(d) the procedure and scope for preparation of feasibility studies; and
(e) the terms upon and manner in which the management committee may make a decision to mine.

Mining

The mining joint venture agreement will deal with the following matters relevant to the conduct of mining activities:

(a) the manner in which the management committee may make a decision to mine;
(b) the procedure for preparing, approving and implementing mining programmes and budgets; and
(c) the procedure and scope for preparation of feasibility studies.

[220,710] ***Joint venture expenditure***

Participants are free to agree the manner in which each of them will contribute to the capital and operating costs of the joint venture. In general terms, a participant's obligation to contribute to costs will be in proportion to its participating interest.

The joint venture agreement will provide a mechanism for the preparation, approval and implementation of budgets to meet the capital and operating costs of the joint venture. Typically the manager will prepare draft programmes and budgets for submission to the participants (via their representatives on a management committee). Once these are approved, the manager is empowered to require the participants to contribute their

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respective percentage shares of the costs incurred by the manager in accordance with the budget by issuing "cash calls" on a periodic basis (see [3.3]).

[220,730] ***Joint venture product***

One of the unique features of a joint venture is that the participants take the product of the joint venture separately and in kind, in proportion to their participating interests. The participants may choose to agree joint marketing or sales arrangements in relation to their respective shares of product, whether in the joint venture agreement or in a separate agreement.

[220,750] ***Changes to participating interests***

The parties will need to agree the circumstances in which the participating interests of the parties can be changed over the term of the joint venture.

Typically these circumstances include where a participant:

(a) Meets an additional farm-in expenditure obligation (eg a participant sole-funding exploration or evaluation work, or completing a feasibility study) that results in an increase in its participating interest; or

(b) Fails to meet an expenditure requirement or otherwise defaults, which commonly results in a lessening of the defaulting participant's interest with a corresponding increase in the non-defaulting participant's interest.

See [4.6] for exploration joint ventures and [5.4] for production joint ventures.

[220,770] ***Assignment of participating interests and withdrawal***

The joint venture agreement should set out the mechanisms by which a participant can assign its participating interest. Usually the agreement will qualify a participant's ability to assign all or part of its participating interest to a third party, by granting rights of pre-emption to the continuing participants in proportion to their participating interests (see [5.5]).

Participants may wish to have the right to voluntarily withdraw from the joint venture to avoid on-going financial obligations, for example, where a participant has been unable to sell its interest. Usually the withdrawing participant will not receive consideration on its withdrawal, but will be relieved of future obligations and liabilities, although participants should consider any obligations that should be placed on the withdrawing participant with respect to mine rehabilitation and abandonment costs.

Where a participant's participating interest falls below an agreed minimum percentage that participant may be required to withdraw in exchange for the continuing participants agreeing to pay a royalty to it.

[220,790] ***Decision-making and disputes***

The joint venture agreement (and any preliminary agreement) should include robust and effective mechanisms for dealing with disagreements and disputes between the participants, relating to both their capacities as participants and the conduct of the manager's role.

Overall control of the joint venture is in the hands of the participants but is usually delegated to their representatives comprising a committee, usually called a management or operating committee. In this guide card it will be called the management committee. The joint venture agreement should provide for the governance of the management committee and how its decisions will be made. Decisions can be made by a simple majority (usually for operational matters) or a higher majority (for more important strategic matters) and some decisions may require unanimity. (See [3.3] and [3.4]).

The joint venture agreement should anticipate, and have a regime for breaking, deadlocks, particularly where the participant's percentage interests are equal. Given the

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nature of a joint venture, the deadlock-breaking mechanism should allow for the continued maintenance of the tenements in good standing whilst deadlock is being resolved (see [3.4.2]).

[220,810] ***Default***

The joint venture agreement should set out detailed provisions dealing with the consequences of a participant's failure to pay cash calls and of other breaches of the agreement.

In the case of a financial default there are various mechanisms that the participants can adopt, ranging from the other participants funding the defaulting participant's cash call (in return for a proportionate increase in their participating interests) to the instigation of a default procedure leading to termination. Termination is usually a remedy of last resort, and damages alone are an inadequate remedy in the joint venture context, as it will often be in the participants' interests for the joint venture to be maintained as a going concern if there is a default by another participant.

It is important that the tenements are maintained in good standing whilst default mechanisms are being implemented. Typically the non-defaulting participants will be required to or will have the option of meeting the minimum expenditure obligations.

See [4.6] in relation to exploration joint ventures and [5.4] in relation to production joint ventures.

[220,830] ***Term and termination***

Joint venture agreements typically do not have a term that is expressed as a specific period of time, but rather continue until the occurrence of a specified termination event. These can include:

(a) the parties terminating the joint venture by agreement, if all the participating interests are held by one participant; or

(b) if a non-defaulting participant terminates the agreement in accordance with a default clause.

Terminating the joint venture by agreement will generally require the consent of all participants (see [5.6]).

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