THE NEED FOR A JOINT VENTURE CODE?

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Joint venture arrangements are now very common in Australia, especially in the resources industries. Much has been written about the nature of such arrangements,[1] and about particular problems that they present[2] and there are a few reported cases in which the courts have had occasion to look at the nature of joint ventures and the rights and duties of participants.[3] No doubt the drafting of joint venture agreements has changed in response to all these developments but the question posed for consideration in this paper is whether the law as it relates to joint ventures has reached a point where it should be consolidated and, if necessary, amended by the enactment of a uniform joint venture code. This paper addresses that question on the assumption that it refers only to unincorporated joint ventures.

The question of whether to enact a joint venture code presents a series of subsidiary questions:

— What subjects would be dealt with by such a law?
— What would the content of such a law be?
— Is it desirable to enact such a law?
— What practical problems would there be in seeking to have such a law enacted?

At first sight, the subject matter for such a law may be said to be self-evident. Thus it may be said that a joint venture code should deal with questions of:

— the definition and formation of joint ventures, including the consequences of formation;
— the relations between participants; and
— the relations between participants and third parties.

However, the content of any such law is by no means self-evident. The difficulties about content arise first at the most basic level: what would such a law say about the definition of a joint venture and its formation?

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1 See for example J.D. Merralls, 'Mining and Petroleum Ventures in Australia: Some Basic Legal Concepts' (1981) 3 *AMPLJ* 1; J.D. Merralls, 'Mining and Petroleum Ventures in Australia: Some Basic Legal Concepts' (1988) 62 *Australian Law Journal* 907; B.H. McPherson, 'Joint Ventures' in P.D. Finn, *Equity and Commercial Relationships* (1987) ch. 2 and Commentary by R.A. Ladbury; R.A. Ladbury, 'Mining Joint Ventures' (1984) 12 *Australian Business Law Review* 312 and R.L. Pritchard, 'Unincorporated Joint Ventures' in R.P. Austin and R. Vann, *The Law of Public Company Finance* (1986) ch. 18. Each of these works refers to other works on the topic.

2 See for example J.R.F. Lehane, 'Joint Venture Finance and Some Aspects of Security and Recourse' in Austin and Vann, op. cit., ch. 19 and R.C. Nicholls, 'Problems in Project Finance' in Austin and Vann, op. cit., ch. 20. See also the many papers delivered at AMPLA Conferences which deal with various aspects of joint ventures.

3 *United Dominions Corp. Ltd v. Brian Pty Ltd* (1985) 157 CLR 1; and *Canny Gabriel Castle Jackson Advertising Pty Ltd v. Volume Sales (Finance) Ltd* (1974) 131 CLR 321.

JOINT VENTURE — DEFINITION

The question of how to define a joint venture assumes that a joint venture is 'a distinguishable species of legal association'[4] and that joint ventures 'merit attention as a distinct concept or separate branch of the law'.[5] Those assumptions are still challenged.

Both in his original paper delivered at the 1981 AMPLA Conference,[6] and in the revised article published in 1988,[7] J.D. Merralls said

> Modern joint venture arrangements are the creatures of contract. Though conventional concepts and contractual provisions are emerging, they are not yet so widely accepted that the law governing joint venture arrangements can be expounded in terms peculiar to their special needs. An examination of the legal concepts upon which arrangements are at present based discloses too many areas of doubt for satisfaction. The area is a fruitful one for creative draftsmanship.[8]

If the legal concepts upon which such arrangements are based have significant areas of doubt, how can one set about defining the nature of a joint venture with any certainty?

Despite his conclusion that conventional concepts and contractual arrangements are not so widely accepted that the law in this area can be, as he put it, 'expounded in terms peculiar to their special needs', Merralls considered that certain distinguishing features could be discerned as being common to standard mining and petroleum joint venture agreements. He identified three:

> first that the participants hold their interests in the assets of the venture in common and their liability is several, second that an operator or manager is interposed between the participants and the operation, and third, that the participants receive the fruits of the venture separately and in kind.[9]

Do these features, or do any other features of joint ventures distinguish such arrangements from partnership? If, in truth, joint ventures are partnerships, there would seem to be no need for any new code to deal with them: they are already regulated by the various state Partnership Acts modelled on the Partnership Act 1890 (UK).

A joint venture is an association of two or more persons; it is the creature of, and regulated by, the contract between those participants; it is an association concerned with commercial activities. What is it that distinguishes it from the relationship defined in the partnership legislation as 'the relation which subsists between persons carrying on a business in common with a view of profit'?[10]

The fact that participants may become associated for the purposes of only a single venture does not, of itself, necessarily show that the

4 Pritchard Essay in Austin and Vann, op. cit. 495.
5 McPherson Essay in Finn, op. cit. 19.
6 (1981) 3 *AMPLJ* 1.
7 (1988) 62 *Australian Law Journal* 907.
8 (1981) 3 *AMPLJ* 1, 16; and (1988) 62 *Australian Law Journal* 907, 923–924.
9 (1981) 3 *AMPLJ* 1,2.
10 Partnership Act 1890 (UK), s.1(1). References to the Partnership Act are given to the UK Act. A comparative table of Partnership Acts of the UK, New Zealand, the Australian States and the ACT is to be found in K.L. Fletcher, *Higgins and Fletcher's The Law of Partnership in Australia and New Zealand* (5th ed. 1987), xlv-xlix.

association is not a partnership. As Dawson J said in *United Dominions Corporation Ltd v. Brian Pty Ltd*:

> A single adventure under our law may or may not, depending upon its scope, amount to the carrying on of a business: *Smith v. Anderson*; In *re Griffin; Ex parte Board of Trade*; *Ballantyne v. Raphael.* Whilst the phrase 'carrying on a business' contains an element of continuity or repetition in contrast with an isolated transaction which is not to be repeated, the decision of this Court in *Canny Gabriel Castle Jackson Advertising Pty. Ltd. v. Volume Sales (Finance) Pty. Ltd.* suggests that the emphasis which will be placed upon continuity may not be heavy. Certainly each of the enterprises which were to be undertaken and the enterprise which was finally undertaken in this case [scil. the *United Dominions Corporation* case], was to have an operation which was sufficiently extended to amount to the carrying on of a business and, since the association was with a view to profit, the conclusion is warranted that the parties were either in partnership or were negotiating partnership at the relevant time.[11]

Indeed when regard is had to the fact that some joint ventures in this country such as the Bass Strait oil and gas venture, which might be called single purpose joint ventures, have had lives of well over 20 years and expect to continue for many years to come, the proposition that such activities do not have the necessary element of continuity or repetition of acts to constitute a carrying on of business, is obviously difficult to maintain even if continuity and repetition of activity were to be given greater emphasis than the decision in the *United Dominions Corporation* case would suggest.

Dawson J went on in *United Dominions Corporation Ltd v. Brian Ltd* to say:

> Perhaps in this country, the important distinction between a partnership and a joint venture is, for practical purposes, the distinction between an association of persons who engage in a common undertaking for profit and an association of those who do so in order to generate a product to be shared among the participants. Enterprises of the latter kind are common enough in the exploration for and exploitation of mineral resources and the feature which is most likely to distinguish them from partnerships is the sharing of product rather than profit.[12]

In its terms, this is not intended to offer any theoretical distinction between joint ventures and partnerships, but rather is intended to offer a practical way of distinguishing between the two kinds of relationship. Even as a practical distinction, it is not, and is not intended to be, a criterion of universal application. For example, it is not a criterion that will be useful to determine whether a joint exploration agreement is a partnership or is a joint venture if the parties, by their agreement, expressly leave over the relationship that is to exist in exploiting any resource that is discovered by the exploration activity that is to be undertaken. However, sharing product rather than profit is one important consequence of what may be said to be the fundamental distinction which those who draft joint venture agreements seek to achieve between their creatures and that 'relation which subsists between persons carrying on a business in common with a view of profit', namely the preservation of the several nature of the participation of the venturers.

In the past, commentators have sought to distinguish joint ventures from partnerships on the basis that one of three elements necessary

11 (1985) 157 CLR 1, 15 (case citations omitted).
12 (1985) 157 CLR 1, 15–16.

to show the existence of a partnership is missing,[13] the three elements being first, the carrying on of business, secondly doing so in common, and thirdly doing so with a view of profit.

As has been pointed out above, it is difficult in at least many joint ventures to assert that no business is being conducted. Likewise, since the parties to a joint venture enter the arrangement with a view to their commercial advantage, may it be said that they do so 'with a view of profit'?

Focusing on the elements of the statutory definition of partnership as separate requirements may obscure more than it illuminates, and this is especially so in the case of that part of the definition which speaks of 'a view of profit'. Before the enactment of the Partnership Act 1890 (UK) Lord Lindley, in the fifth edition of his work on partnership, expressed the view that the sharing of profits is an essential aspect of partnership at common law.[14] The editors of the fifteenth edition of *Lindley on Partnership* suggest that the sharing of profits is 'rather an accident than of the essence of the partnership relation'[15] and thus if persons carry on a business in all other respects as if they are partners, but with a view of applying all of the profits derived to some charitable purpose, they are nonetheless partners as defined by the Acts. This view suggests that the expression 'in common' in the statutory definition of partnership refers only to the means of carrying on business and is not to be read as relating to the disposition of the profit which the participants have in view. This would give the expression 'with a view of profit' a purpose only of setting apart the relationship of those who associate, for example as a club, from those who associate as a partnership.

There is little authority which bears on the question of whether the view expressed in the fifteenth edition of *Lindley on Partnership* is right or wrong. The learned editors cite in support of their view the decision of the Privy Council in *Watson v. Haggitt*,[16] but for the reasons given in *Higgins and Fletcher*[17] little support for this view is to be obtained from *Watson*'s case. Moreover, there can be set against the argument advanced in the fifteenth edition of *Lindley* such statements as that of Jessel MR (albeit before the 1890 Act) in *Pooley v. Driver* that 'there could not be a partnership without there was a commercial business to be carried on with a view to profit *and for division of profits*'.[18]

In the absence of binding authority on the point, it must be regarded as one still open to debate. However the statutory definition of partnership must be read as a whole, not as a series of separate elements, and it is at least strongly arguable that read as a whole, the definition was not intended to affect the position at common law that it is of the essence of partnership that there be a sharing of the profit from the activities conducted by those who have associated together.

13 McPherson Essay in Finn, op. cit. 20–21.
14 N.L. Lindley, *A Treatise on the Law of Partnership* (5th ed. 1888) 10.
15 E.H. Scamell and R.C. I'Anson Banks, *Lindley on Partnership* (15th ed. 1984) 15, fn. 27.
16 [1928] AC 127.
17 Fletcher, op. cit. 36–41 esp. at 39–40.
18 (1876) 5 Ch. D. 458, 472 (emphasis added).

The assumption that division of product rather than profit is a distinguishing feature of joint ventures assumes that this argument is right.

It is sometimes assumed that 'joint ventures' are American creatures and that guidance may be obtained from the law of that country. In some respects it may well be possible to obtain assistance in the field of joint ventures from judicial decisions in, and commentaries from the United States, but little or no guidance is to be had from those sources about the nature of a joint venture as that relationship has been developed in this country.

In the Court of Appeal judgment in *Brian Pty Ltd v. United Dominions Corporation Ltd*[19] Samuels JA adopted the definition of joint venture proffered in *Williston on Contracts*:

> A joint venture is an association of persons, natural or corporate, who agree by contract to engage in some common, usually ad hoc undertaking for joint profit by combining their respective resources, without, however, forming a partnership in the legal sense (of creating that status) or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control.[20]

The references in this definition to an undertaking for joint profit, and to each venturer being both principal and agent as to the others, suggest that the distinction in the United States between partnership and joint venture is not to be found by reference to these elements that drafters of joint venture agreements in Australia pay particular attention in seeking to distinguish their creatures from partnership. The view that American law differs from Australian law in its understanding of what is a joint venture is reinforced by statements in recognised encyclopaedias of American Law such as *American Jurisprudence* that:

> It is difficult to distinguish between joint ventures and partnership. The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that it is ordinarily held that their rights, duties and liabilities are to be tested by rules which are closely analogous to and substantially the same, if not exactly the same, as those which govern partnerships. In fact, it has been said that the trend in the law has been to blur the distinctions between a partnership and a joint venture, very little law being found applicable to one that does not apply to the other.[21]

Thus, the distinction in American law between joint venture and partnership is not to be found in the nature of the rights and duties existing between the participants. It is to be found, at least as a general rule, in 'the single or ad hoc nature of a joint venture; the fact that loss sharing is not essential; and the eligibility of corporations for membership'.[22] Of these differences, it would seem that the outstanding difference between a joint venture and a partnership in American law is that a joint venture is entered into to perform a single transaction of a particular kind whereas a

19 [1983] 1 NSWLR 490.

20 W.H.E. Jaeger, *Williston on Contracts* (3rd edn 1959) vol. 2, 555–556 quoted in [1983] 1 NSWLR 490, 560. A similar definition is to be found in other US works e.g. 46 Am.Jur. (2d) para. 1.

21 46 Am.Jur. (2d) para. 4, 24–25; (footnotes omitted).

22 Ibid., para. 4, 26.

partnership ordinarily is formed for the transaction of a general business of a particular kind.[23] For the reasons given earlier, attempts to distinguish joint ventures from partnerships in Australian law on bases such as those adopted in America will very likely fail. The unincorporated joint venture as it has been widely used in the mining and petroleum industries in this country 'is a vehicle based on Australian law and practice. It is not a slavish adoption of the United States joint venture'.[24]

The common thread that runs through joint venture agreements and the discussion of the features that distinguish joint ventures from partnerships in Australian law is what has been referred to above as the preservation of the several nature of the participation of the venturers. It is for this reason that the venturers take the fruits of the venture separately, and in kind. What each does with the product it obtains is a matter for it. It explains why the agreement will provide that no participant is to be agent of the others; why each participant is to be free to borrow on the security of a charge given by it over its own interest in the project assets; why the property used in the venture is owned either separately or if co-owned is owned as tenants in common in prescribed shares. Each participant will make its own elections under taxation legislation. Each participant will treat its participation in its own accounts according to its own decision. Rather than conduct the activities of the venture together, an operator or manager is appointed, although of course that operator or manager is generally subject to the directions of a management committee. So far as possible, the agreement will strive to achieve the result that liability of the participants to outsiders will be several liability.

If then the underlying thread that runs through joint ventures is that the venturers seek to maintain their participation in the venture as separate as is possible, and by doing so seek to establish a relationship which is not that of partners, how should a legislature approach the question of defining a joint venture? Without there being a satisfactory definition of the subject matter of the legislation, there is no point in enacting any code.

Many definitions have been put forward. Some were collected by R.A. Ladbury in his 1984 essay on mining joint ventures.[25] The definitions there collected differ in a number of ways. Perhaps two features can be seen as more common than others. Some emphasise the taking of product in kind; many include as part of the definition the proposition that the association is not that of partnership. Both of these matters are very helpful in describing a joint venture but neither is satisfactory as a means of defining the relationship.

Defining a joint venture by reference to what it is not, namely, a partnership, may be logically sufficient but it may be doubted that it is a particularly useful way of defining the relationship. It leaves very great scope for debate about the application of the definition in any particular case.

23 Ibid., para. 4, 26 and para. 10, 32; and 138 ALR 968, 975.
24 Ladbury Commentary in Finn, op. cit. 38.
25 R.A. Ladbury, 'Mining Joint Ventures' (1984) 12 *Australian Business Law Review* 312, 313–4.

If the definition is to proceed by identifying what a joint venture is, rather than what it is not, what features are necessary to the relationship for it to be described as a 'joint venture'? What features are sufficient to show the existence of that relationship?

Taking the three features identified by Merralls and referred to above, which of the three elements is a necessary element? Which of the three is a sufficient element?

No doubt cases can be constructed in which there is no operator or manager interposed between participants and the operation and yet the arrangement may properly be described as a joint venture. Likewise cases can be constructed in which the fruits of the venture are not to be distributed between the participants in any form, whether in kind or otherwise. If that is so, the second and third elements so commonly found in mining and petroleum joint ventures of the interposition of an operator and the taking of product in kind, may not be necessary features of a joint venture. Moreover, neither of those elements may be sufficient to show that the relationship is not that of partnership.[26]

As for the first of the three elements,the ownership in common of property used in the venture seems not to be a necessary indication that the relationship is that of joint venture rather than partnership, and it would seem hardly sufficient to lead to that result.

Thus, what is to be the definition of joint venture that is to be adopted in any code or legislation? No doubt the question is at one level nothing more than a challenge to the ingenuity of parliamentary counsel, and no doubt a collection of words could be gathered that would meet the task of providing a useful definition of what, after all, is generally accepted as being a form of association in common use in Australia. But the point to be made is not whether the technical drafting problem can be solved. The point to be made is that joint ventures take their being and their legal significance from what they are not, rather than from what they are. They are not partnerships. They are associations for particular business purposes which so far as is necessary, and in some cases so far as is possible, maintain the separate participation of those who associate in the venture.

RELATIONS BETWEEN PARTICIPANTS

It must be borne steadily in mind that the primary statement of the nature of the relationship which the participants intend to create is in their agreement. Intending participants in a joint venture have the opportunity to write their own code regulating the relations between them, and commonly the joint venture agreement will attempt to do just that. No doubt it would be possible to provide by legislation for a standard set of provisions regulating the relations between joint venturers just as has been done in the case of companies since the first model articles of association were enacted in the Joint Stock Companies Act 1856 (UK).

26 See e.g. as to taking product in kind, *Holderness v. Shackels* (1828) 108 ER 1170 where the part owners of a whaling vessel were entitled to receive part of the proceeds of the adventure in the form of whale oil.

However any such model provisions must be capable of exclusion or variation according to the agreement of the parties and there seems little benefit in undertaking the task of prescribing model rules when the numbers of joint ventures negotiated each year is so much smaller than the number of companies that are incorporated and the needs for the internal regulation of joint ventures so varied.

Thus it is the participants' agreement that is the primary source of the regulation of the rights and duties between the participants. That agreement should, if properly drawn, deal with the interests of the participants, whether those interests can be assigned and, if so, in what circumstances, how the venture is to be managed and controlled, and the consequences that follow if a participant breaches its obligations or fails to exercise rights conferred under the agreement. Each of these matters, and the ways in which they may be dealt with by agreement, has been considered extensively elsewhere[27] and it is not intended to travel over that ground now.

However, the question which arose to a limited extent in the *United Dominions Corporation* case[28] and which is of general application is the question of the extent to which the rights and obligations prescribed by the parties' agreement are affected by equitable principles.[29]

In *Hospital Products Ltd v. United States Surgical Corporation*, Gibbs CJ said:

> The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established. The archetype of a fiduciary is of course the trustee, but it is recognized by the decisions of the courts that there are other classes of persons who normally stand in a fiduciary relationship to one another — e.g. partners, principal and agent, director and company, master and servant, solicitor and client, tenant-for-life and remainderman. There is no reason to suppose that these categories are closed. However, the difficulty is to suggest a test by which it may be determined whether a relationship, not within one of the accepted categories, is a fiduciary one.[30]

It will be recalled that the High Court held in the *United Dominions Corporation* case[31] that the parties there owed fiduciary obligations one to another and that United Dominions Corporation had acted in breach of its fiduciary duty to Brian Pty Ltd. However, the Court concluded that the relationship between those parties was that of partners and that the limiting of the partnership to one joint undertaking did not prevent the relationship from being a partnership and thus a fiduciary one. The Court held further that a fiduciary relationship with its attendant obligations may, and ordinarily will, exist between prospective partners before its express definition by formal agreement. In their joint judgment, Mason, Brennan and Deane JJ said:

> One would need a more confined and precise notion of what constitutes a 'joint venture' than that which the term bears as a matter of ordinary language before it could be said by

27 See e.g. Merralls, (1988) 62 *Australian Law Journal* 907, 920; and Ladbury, (1984) 12 *Australian Business Law Review* 312, 333.
28 Supra fn.3.
29 See McPherson Essay in Finn, op. cit. 26 et seq.
30 (1984) 156 CLR 41, 68.
31 Supra fn.3.

> way of general proposition that the relationship between joint venturers is necessarily a fiduciary one: but cf. per Cardozo CJ, *Meinhard v. Salmon.* The most that can be said is that whether or not the relationship between joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken. If the joint venture takes the form of a partnership, the fact that it is confined to one joint undertaking as distinct from being a continuing relationship will not prevent the relationship between the joint venturers from being a fiduciary one. In such a case, the joint venturers will be under fiduciary duties to one another, including fiduciary duties in relation to property the subject of the joint venture, which are the ordinary incidents of the partnership relationship, though those fiduciary duties will be moulded to the character of the particular relationship: see, generally, *Birtchnell v. Equity Trustees, Executors & Agency Co. Ltd.*[32]

Assuming then that 'joint venture' is to be understood as being a relationship of the kind generally under discussion here, and assuming further that that is in truth a 'more confined and precise notion of what constitutes a "joint venture" than that which the term bears as a matter of ordinary language'[33] can it be said by way of general proposition that the relationship between joint venturers is necessarily a fiduciary one? Is this an addition to those classes of persons who normally stand in such a relationship to one another that it warrants inclusion in the list given by Gibbs CJ in the *Hospital Products* case.[34]

As Gibbs CJ went on to say in the *Hospital Products* case, 'the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this Court as important, if not decisive, in indicating that no fiduciary duty arose'.[35] There seems little doubt that in most joint ventures it can be said that the arrangement between the parties is of a purely commercial kind and that the participants have dealt with each other at arm's length and on an equal footing. However, the commercial nature of the arrangement may not be conclusive. First, fiduciary relations are of different types, carrying different obligations, and 'a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose ... Moreover, different fiduciary relationships may entail different consequences, as is shown by the discussion of the respective positions of a trustee and a partner in relation to the renewal of a lease.'[36] If, viewed objectively, the relationship between the participants in a joint venture is one dependent upon mutual trust and confidence, then it may be said that there is room for the operation of fiduciary obligation.

The question is one that admits of argument. However, it is suggested that the better view is that joint venture participants do not owe fiduciary obligations one to another. That view proceeds from a consideration of the nature of the relationship that exists between joint venturers

32 (1985) 157 CLR 1, 10–11 (citations omitted).
33 Ibid., 10.
34 Supra fn.30.
35 (1984) 156 CLR 41, 70 citing *Jones v. Bouffier* (1911) 12 CLR 579, 599–600, 605; *Dowsett v. Reid* (1912) 15 CLR 695, 705; *Para Wirra Gold and Bismuth Mining Syndicate NL v. Mather* (1934) 51 CLR 582, 592; *Keith Henry & Co. Pty Ltd v. Stuart Walker & Co. Pty Ltd* (1958) 100 CLR 342, 351, and referring also to *Jirna Ltd v. Mister Donut of Canada Ltd* (1971) 22 DLR (3d) 639; affd (1973) 40 DLR (3d) 303.
36 *Hospital Products* case (1984) 156 CLR 41, 69 per Gibbs CJ.

and also from consideration of the nature of the duties that would be imposed if the contrary argument were accepted.

If the essence of a joint venture is that the venturers participate severally and that their relationship is the creature of the contract that they have made, these considerations taken together run directly contrary to the proposition that the participants repose in each other that mutual trust and confidence which is the hallmark of partnership. In a joint venture agreement, the parties will go to considerable lengths to ensure, so far as they are able, that one participant cannot pledge the credit of the others, that one participant is not the agent of the others. Where then is the reposing of trust and confidence in the other participants?

Further, how would the fiduciary duties, if they existed, apply? What is the field in which there could be a conflict between a duty of a participant to his co-venturers and the individual interest of that participant if the only obligations that have been undertaken by the participants are to contribute specified property and money to the furtherance of the commercial objective regulated by the joint venture agreement?

This is not to say that there are no limitations on the exercise of the parties' powers set out in the joint venture agreement. Thus, parties could not call for contributions from their co-venturers which are set at a level designed simply to embarrass one co-venturer financially and force a default. The power to call for contributions must be exercised for the purpose for which it is given, namely, the purposes of the furtherance of the commercial objectives of the venture. But this conclusion follows not from any application of fiduciary obligations but from ordinary canons of construction of contracts. Likewise, joint venturers will be bound to co-operate in the doing of those acts which are necessary to the performance by them (or any of them) of fundamental obligations under their joint venture agreement, not because they stand in any fiduciary relationship one to another but because that is their contractual obligation when the contract is construed according to ordinary canons including the well known rule in *Mackay v. Dick*.[37]

Thus, while many joint venture agreements will provide expressly that the parties agree to be 'just and faithful' one to another, it is to be doubted that joint venture participants stand in a fiduciary relationship one to the other.

Different considerations apply in the case of the operator or manager of the joint venture. While the joint venture participants may assert in their agreement that the operator is not the agent of any of them, and commonly will require the operator to make all contracts with third parties as principal, it seems clear that the operator does stand in a fiduciary relationship to the joint venture participants. In some respects it may be that the proper characterisation of the relationship between operator and joint venture participants is that of agency, but whether or not this is so, the relationship is one dependent upon mutual trust and confidence.[38]

37 (1881) 6 App. Cas. 251; *Secured Income Real Estate (Australia) Ltd v. St. Martins Investments Pty Ltd* (1979) 144 CLR 596.

38 See generally Merralls, (1988) 62 *Australian Law Journal* 907, 919–920.

What then would a joint venture code say about these matters of fiduciary obligation? The Partnership Act obliges partners to render true accounts and full information about the partnership;[39] it obliges partners to account to the firm for private profits made from partnership property;[40] it obliges partners not to compete with the firm without the consent of their partners;[41] but otherwise it leaves the content and applicability of fiduciary obligations to general equitable principles as developed judicially. Given the several nature of participation in a joint venture, there seems no occasion to deal with questions of competition between participants and the activities of the joint venture, or to deal with participants making a private profit from the assets committed to the venture, and the obligation to account one to another can be prescribed entirely by the joint venture agreement.

In the case of the operator it would be possible to declare that the operator owes obligations 'not to make personal profit from the use of property committed to the venture, [and] not to take personal advantage of information received or opportunities presented in the course of the venture's activities',[42] but those duties are imposed by law now. The question that may not yet be answered with any certainty is the extent of the application of the more general proposition that the operator, as a fiduciary, must not 'engage in conduct in which he may have a personal interest in conflict with those of the other participants'.[43] If the operator is itself a participant, that general rule could not be given unbridled application. The extent to which it should be given application in a particular context will depend so much upon the terms of the joint venture agreement that it seems unlikely that any real advantage is to be obtained by stating a general rule which necessarily would have to be stated in terms requiring consideration of the particular terms of the joint venture in question. Why should the development of this principle not be left to the ordinary processes of judge made law?

RELATIONS WITH THIRD PARTIES

Participants in a joint venture cannot, by their agreement, directly affect the nature of the rights which third parties may obtain against them. The rights of the third parties will depend upon the nature of the transaction in which those third parties are engaged and that effect will be determined by application of the general law. However, of course, the way in which participants deal with their property interests and generally conduct their affairs will necessarily affect the rights which third parties may obtain.

Since 'the joint venture' does not have separate legal personality (and given the several nature of the venturers' participation in it there seems no occasion to countenance giving it a separate legal personality) the questions of whether individual participants or the operator can bind

39 Partnership Act 1890 (UK), s.28.
40 Ibid., s.29.
41 Ibid., s.30.
42 Merralls, (1988) 62 *Australian Law Journal* 907, 919.
43 Ibid.,

contractually any, and which of the other participants by dealings with third parties will be determined by application of the ordinary principles of agency. Thus, if the operator enters contracts with third parties as principal, those third parties obtain no rights against the participants and are not liable to the participants whatever may be the true relationship between operator and participants.[44] There are not matters which require the enactment of any special law. The problems that arise in this respect in connection with joint ventures are not in any relevant respect peculiar to joint ventures and thus they are matters that are suitably left to disposition according to the general law.

Similarly, although this paper does not attempt to look again at the topic of the financing of joint ventures, a topic extensively dealt with elsewhere,[45] the problems arising out of securities given by joint venturers are problems better dealt with by the application of the general law as developed in the cases, than by any attempt to deal with them by legislation.

TORTIOUS LIABILITY

While the parties may order their affairs in a way that leads to their several liability in contractual dealings, it may well be that their liability in tort is effectively a joint liability, even if the relationship between operator and participants is such as not to lead to the participants being vicariously liable for the torts of the operator. If, as is often the case, the operator is entitled to indemnity from the participants for all liabilities it incurs, including liability in negligence (but excluding liabilities incurred through a gross breach of its duty), then each participant may be liable under the joint venture agreement to indemnify the operator to the full extent of the operator's liability, leaving any participant who pays more than its share to recover that excess from the others. At first sight this seems an area in which it would be useful to have legislation to reinforce the several nature of a joint venture, especially when the consequences of a negligent act in a large project can be so very large. However, it may be doubted whether legislation which effectively limited the liability of joint venture participants to their proportionate share of any damage would be politically practical. It is precisely because the amounts involved may be as large as they are, that politics would very likely defeat any move to reinforce in this respect the several liability of venturers. Moreover, is it necessary to have leglisation to achieve this end? If the joint venture agreement and any operating agreement provide clearly that the operator is truly independent in its day to day operation of the project, and in the way it gives effect to the policy direction given it by the management committee, the chance of a finding that the participants are vicariously liable for its negligent acts is much reduced, and if the participants and operator so agree, the liability of each participant to indemnify the operator can be limited to the share appropriate to each. If the parties do not order their agreements in these ways, why should the Legislature choose to impose some other regime?

44 Ibid., 917.
45 See e.g. Austin and Vann, op. cit., chs 18, 19 and 20.

DISPUTE RESOLUTION

Finally, in this consideration of some aspects of the content of a joint venture code, what of dispute resolution? Again the question must be posed what is it about joint ventures that suggest that some special provision must be made about resolution of disputes between participants? It is suggested that again the question should be answered by saying that there is nothing that sets disputes between joint venture participants apart from any other dispute between commercial enterprises.

THE NEED FOR A CODE?

The matters that have been dealt with above in relation to the content of a possible joint venture code suggest that the preparation of any such code is unlikely to be useful. First, there is no body of law having unique or special application to joint ventures. Secondly, the very nature of the arrangement is one that takes its significance from what it is not, rather than from what it is, and thirdly it is of the essence of the arrangement that its features are those prescribed by the agreement of the parties. The proposition that it would be useful to enact a joint venture code assumes that it is useful to enact laws which will govern a relationship in which two or more, usually corporate and well advised, enterprises agree to associate to the extent limited by their agreement. The nature and extent of the association of the participants will vary from joint venture to joint venture. In truth, does any attraction to the enactment of a joint venture code proceed from a fear that the joint venture may yet be judicially rejected as a species of association separate from partnership? It may be doubted that any such fear is well based, but the point is still controversial. If this is the fear, then it is that problem which should be addressed, rather than any broader task of enacting rules of general application to what should properly be seen as a series of unique agreements which have in common only that the association that each creates is not of such a kind as to deny the essentially several nature of the businesses being conducted by the participants.

The Partnership Act 1890 (UK) has long been an accepted part of the legal scenery and there have been few amendments made to it since it was enacted. It may be tempting to think that a joint venture code could emulate the Partnership Act in these respects. However, the Partnership Act was, in essence, the codification of already well developed and accepted common law principles. It cannot be said of joint ventures that there are yet well developed or accepted principles which apply to them.

Moreover, when looking to the Partnership Acts as a model, sight must not be lost of the fact that in every edition of *Lindley on Partnership* from the sixth edition published in 1893, immediately after the enactment of the Partnership Act 1890, to the eleventh edition published in 1950, successive editors said:

> Opinions will naturally differ as to the utility of statutes which deal with important branches of law, but which do not profess to deal with them exhaustively. No doubt an incomplete piece of work is unsatisfactory; but it does not follow that such a work is not worth executing; if it is well done as far as it goes, it may be a great boon; and the Part-

> nership Act, 1890, although imperfect, has the merit of reducing a mass of law, previously undigested except by private authors, into a series of propositions authoritatively expressed and as carefully considered as any Act of Parliament is likely to be.
>
> The Parliament of this country is very ill adapted to the work of codification. It is matter of amazement that Englishmen should be content to have the laws by which they are governed in such an inaccessible shape as they are; but, no doubt, one explanation of this state of things is the hopelessness of passing through Parliament, without mutilation, any carefully considered exposition of any great branch of law. Such an exposition must introduce amendments, for anomalies and irrational rules, though they may exist for centuries if only occasionally brought to light by judicial decision, will inevitably disappear if any attempt is made to formulate and perpetuate them in a legislative enactment. Necessary amendment, however, ought to be carefully considered by men who understand the subjects to which they relate and ought to be adopted by those who do not; but amendments laid before Parliament are very likely to be dealt with by incompetent persons, if not, by opposing political parties acting on political party lines; and rather than run such a risk many earnest law reformers prefer to leave things as they are, or at all events not bring forward measures calculated to arouse opposition.[46]

The criticisms of the United Kingdom Parliament from the 1890s to the 1950s seem every bit as applicable to the State Parliaments of Australia in the 1990s, and if, contrary to the views expressed in this paper, it were thought appropriate to seek the enactment of joint venture legislation in Australia, the difficulty of the task simply could not be overestimated. There seems no doubt that the Parliament of the Commonwealth has no legislative power in this field, and that it would be for the individual States and Territories to enact such a law. While it would be hoped that individual States would take up a single model just as they have with the Commercial Arbitration legislation, the examples of the so called Uniform Companies legislation of the 1960s and, even worse, the Co-operative Companies legislation of the 1980s, do not inspire unwavering confidence. These are practical problems the importance of which should not be overlooked. Nevertheless, the basic question is not can such a code be enacted. The basic questions are whether such a code is necessary or desirable. Because these two questions should each be answered no, the practical difficulties of procuring such legislation need not be confronted.

46 Lindley on Partnership (6th ed) 2 and (11th ed) 2–3.