INCORPORATED JOINT VENTURES

By Ralph B. Pliner*

INTRODUCTION

Tax considerations, as in so many other areas, usually determine the type of vehicle which will be utilised for the conduct of the joint venture. It is primarily for this reason that very few exploration and mining joint ventures, either in the hard rock or the oil and gas area, have utilised an incorporated joint venture for the conduct of the project.

The benefits to individual joint venturers of each having access to separate allowable tax deductions from exploration expenditure, mining or other capital expenditure, depreciation and other allowances have resulted almost entirely in these joint ventures being structured in an unincorporated form. The joint venturers and their legal advisers will devote a great deal of time and effort to ensuring that the unincorporated structure preserves these tax benefits, even at the cost of having to operate within the awkward confines of a welter of somewhat artificial documentation. This trend has continued unabated, despite the introduction of the franking system in relation to dividend distributions — which eliminated the double taxation of corporate profits — and the existence of certain major tangible advantages of utilising a corporate structure in the operation of a mining joint venture.

In the case of an exploration project, the requirement for the joint venturers to carry on prescribed mining operations in Australia in order to ensure the tax deductibility of exploration expenditure,[1] coupled with their need for maximum flexibility to dilute their interests in the joint venture, reduces significantly the utility of an incorporated vehicle for the conduct of the joint venture. A detailed consideration of the tax implications in the choice of any appropriate joint venture structure is beyond the purview of this paper.

As a result, the use of corporate entities by joint venturers has been confined mainly to special-purpose entities utilised to perform various functions for the joint venture, such as a management and operating company, a sales or marketing company, and perhaps a financing company in the case of a project-financed joint venture and a leasing company to take advantage of leasing tax allowances.

There has also been some limited use of non-profit downstream processing companies by unincorporated mining joint ventures. Major examples include the aluminium refinery owned and operated by Queensland Alumina Limited at Gladstone, as well as the refinery at Boyne Islands between Comalco, several Japanese parties and Kaiser. Such companies are mostly tolling companies and are run on a non-profit basis for the main purpose of carrying out the downstream refining processes on

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1 S.122J of the Income Tax Assessment Act 1936 (Cth).

behalf of the joint venturers.[2] Joint venturers have also chosen to conduct the provision of loading and port facilities in a separate corporate vehicle — for example, the facilities at Kooragang Island, which is a joint venture between a company acting on behalf of the Tomago aluminium joint venturers and Alcan Australia Limited, and the joint venture company itself, Kooragang Bulk Facilities Pty Limited. The joint venturers operate an aluminium smelter and the company jointly owned by them provides access to port and conveyor facilities for unloading from ships and the handling of certain materials.

Also in New South Wales, in the coal industry, a number of companies have been formed to give access to joint venturers to port and conveyor facilities, including Port Waratah Coal Services Limited which recently acquired the neighbouring Kooragang Coal Loaders Limited, both being located in the port of Newcastle. Port Waratah Coal Services Limited is now owned by Coal & Allied Industries Limited, RW Miller Holdings Limited, Bloomfield Collieries Limited, certain Japanese coal-buyers and Newcastle Coal Shippers Limited.

One of the largest mining joint ventures to be conducted in a corporate structure is Ok Tedi in Papua New Guinea. Ok Tedi Mining Limited is a jointly owned company which developed and now mines the Ok Tedi copper and gold deposits. Its shareholders are the State of Papua New Guinea, BHP Limited, Metallsgesellschaft DG, De Gussa AG and DEG. The project is in fact managed by BHP pursuant to separate management arrangements and the legal relationship between the joint venture company and the PNG government is governed by a special statute.[3]

Against this background of a rather limited use of incorporated vehicles in the mining industry, one can contrast the major advantages that a corporate structure may provide. These advantages have been canvassed many times before and I only wish to highlight them.[4] They are:

(a) The project is conducted in a separate entity and the shareholders have only limited liability. By contrast, an unincorporated joint venture carries with it the major risk which is unresolved that it could possibly be considered a partnership in law in certain contexts, thereby imposing joint and several liability on the joint venturers.

(b) The comparative ease with which the joint venturers can transfer their interests, that is, their shares in the joint venture company, as compared with the difficulties associated with the transferring of an interest in the unincorporated mining joint venture. Since the joint venturers enter into most of the major agreements of the project individually, including financing, leasing, acquisition of plant and machinery, etc., the transfer of an interest requires a novation using deeds of assumption entered into by the assigning party in relation to all the project agreements to which the assignor is party. This is

2 J.L. Armstrong, 'The Organisation of Mineral Processing Joint Ventures — Tolling Companies and other Corporate Vehicles' (1982) 4(2) *AMPLJ* 399–418.

3 Mining (Ok Tedi Agreement) Act 1980.

4 See M. Ahrens, 'Incorporated Joint Ventures', in Austin R.P. & Van, R. (eds), *The Law of Public Company Finance*, (1st edn 1986) 450, 458–464.

not only legally cumbersome, but gives the other joint venturers scope to prevent a party assigning its interest. By contrast, the transfer and allotment of shares is relatively simple, although some areas of potential difficulty are discussed later in this paper.

(c) The interest in the mining tenements will be held by the joint venture company and the transfer of an interest in the joint venture will not entail a transfer of the underlying interest in the mining tenements, avoiding the need in most cases for ministerial consent. Mining legislation in the States that provide for the requirement of ministerial consent to the transfer of an interest in mining tenements does not in the main extend this requirement to the transfer of shares in a company which holds the title in the mining tenements.

(d) It is far easier to arrange project financing through a corporate vehicle, which avoids the cumbersome and often artificial structuring of agreements entered into in an unincorporated joint venture to ensure that the joint venturers are not in receipt of joint income. An unincorporated joint venture also requires complicated cross-charges to be given by the joint venturers to each other, and then in addition separate charges and deeds of priority in favour of the bankers to the project. The income stream of the project in an incorporated joint venture can easily be secured in favour of the project lenders through fixed and floating charges over the company. Furthermore, a corporation has the ability to accumulate working capital for the purposes of the project.

(e) A corporate entity provides an efficient and ready-made structure for the management of a joint venture through the board of directors. However, it should be borne in mind that management control in the case of a company will be based at the outset on the principle of ordinary or, in certain limited circumstances, special majorities, as enshrined in the Corporations Law. In an unincorporated joint venture, the parties at the outset are negotiating on a contractual basis which requires unanimity. This may make it more difficult for the smaller participants in an incorporated joint venture in the initial stages of the negotiations, as they will bear the onus of convincing the major participants to modify the generally applicable voting majorities in the company. The statutory liabilities imposed on the directors of the company may also discourage the use of the corporate entity, and this will be discussed at length later in this paper. Unincorporated mining joint ventures often use a corporate vehicle for management purposes in order to secure a degree of permanency in the provision of management services and the availability of operational personnel, even though the joint venturers may change.

(f) The administration and accounting required for the project can be far more efficiently and practically maintained through a corporate entity. The project is conducted through a separate entity and the company accounts will therefore cover the project in its entirety, whereas in the case of an unincorporated joint venture each party accounts for its own share of production, contributions to capital

and other expenses and the provision of services, which can be fairly complicated. One practical difficulty that arises with the use of non-profit downstream processing companies is that, in order to keep the company tax neutral, the joint venturers are required to fund through the fee structure not only actual expenditure but also depreciation, which can result in an unwarranted build-up of cash resources in the downstream company.

Another problem may arise as a result of the proposed extension of the notion of 'subsidiary', which could mean that a joint venturer may have to consolidate into its financial statements the accounts of the joint venture company. This may create difficult problems for the joint venturer if the company has significant borrowings.

(g) The use of a corporate entity may give the joint venturers greater certainty as to the application of the fundraising provisions of the Corporations Law to the transfer of interests in the joint venture. In most cases they will be able to avail themselves of the exemption contained in s.66(3)(d) of the Corporations Law which excludes offers or invitations in relation to securities issued personally to no more than 20 persons in the preceding 12 months. This exemption does not apply to prescribed interests, in which category an interest in an unincorporated joint venture usually falls. However, reg. 7.12.04(b) of the Corporations Regulations exempts rights or interests in a joint venture agreement from the definition of prescribed interests in s.9 of the Corporations Law, but this exemption only applies in relation to Joint Ventures established on or after 5 July 1991, where there are no more than 15 parties to the joint venture. This should not be a major restriction.

However, the fact that the joint venturers in an incorporated joint venture are excluded from having to lodge and register a prospectus if they wish to sell their shareholdings through the exemption in s.66(3)(d) does not appear to exclude them from the operation of the civil liability provisions set out in Part 7.11 of the Corporations Law, although it does exclude them from criminal liability. In the case of an unincorporated joint venture, provided the joint venture comes within the ambit of the exclusion from the definition of prescribed interest under reg.7.12.04(b) of the Corporations Regulations, liability under Part 7.11 and all other provisions of the Corporations Law will not apply to any offer of sale of a joint venturer's interest.

The major difficulty, however, in utilising the corporate structure is that one is attempting to mould a relationship which is entirely contractual into an entity which is governed by a superstructure of statutory rules. It is on this potential tension between the statutory nature of the corporate entity in which the joint venture is housed and the essential contractual nature of the joint venture that I wish to focus in this paper.

It is important to note that the Australian Securities Commission ('the ASC') was formed to preside over all companies, irrespective of their size or nature, so that all might be governed by a single body of rules. The

proposed Close Corporation Act, which would have provided special rules for tightly owned and operated companies, had to be shelved after the successful constitutional challenge to the proposed Federal corporations legislation. In fact, the ASC now boasts of a corporate database in the Latrobe valley covering more than 800 000 companies. This can be contrasted with the position of the Securities Exchange Commission in the United States, which in fact has jurisdiction only over approximately 14 000 companies, the balance being governed by state law.

In an address to the Institute of Directors in Sydney in April 1991 the Chairman of the ASC, Mr Hartnell, emphasised that the major purposes of the Corporations Law were to ensure the operation of an efficient and honest securities market and to protect the interest of minority shareholders. Clearly these are not matters of primary importance to an incorporated joint venture. On the contrary, the joint venturers as shareholders wish to govern their relationship contractually with a minimum of extraneous interference from the Corporation Law. In these incorporated joint ventures there is generally no public shareholder interest to protect and the parties are usually all sophisticated, well-advised and quite capable of establishing the groundrules for their relationship.

Directors of the joint venture shareholders are aware that they represent particular, and perhaps divergent, interests. The reality of the joint venture relationship was explicitly recognised in respect of an unincorporated joint venture in the recent case in New South Wales of *Noranda Australia Ltd v. Lachlan Resources NL.*[5] In relation to the question of fiduciary obligations of the joint venturers, Bryson J states:

> However, in my opinion it would not be right to impose on the parties fiduciary obligations wider or different to those which in careful terms they imposed on themselves. The parties' agreement is the prime source for discerning the existence of a fiduciary obligation.

The question arises as to what extent the statutory rules in the Corporations Law impose requirements on the joint venture which extend beyond the contractual arrangements of the joint venturers.

I would now like to explore the more significant areas of tension between the statutory rules of the Corporations Law and the contractual basis of the joint venture, and also to examine whether the parties to the joint venture are able to minimise the impact of the statutory rules. These considerations relate mainly to areas of conflict between the shareholders, and in particular to directors' duties and the rights of minority shareholders.

ARTICLES OF ASSOCIATION AND SHAREHOLDERS' AGREEMENT

In terms of s.180(1) of the Corporations Law the constitution of the company as reflected in the memorandum and articles of association of the company constitutes a contract under seal between the company and each member, between the company and the officers of the company, and between the members *inter se*. It is, therefore, imperative to ensure that

5 (1988) 14 NSWLR 1, 17.

the articles of association comprehensively reflect the terms of agreement between the joint venturers.

Each joint venturer wishes to be in a position to take action against the others under the joint venture agreement. In a corporate joint venture the rule in *Foss v. Harbottle*[6] restricts the rights of shareholders to sue the company as well as to sue directors for wrongs done by them to the company. This limitation may to some extent be ameliorated by making the company a party to the shareholders' agreement and attempting to sue the company in contract under that agreement.

A significant change brought about by the Corporations Law is that the articles of association of a proprietary company will not require to be lodged (see s.118(3)). Consequently, it is now possible to embody in the articles most of the terms of the agreement between the shareholders without concern for public disclosure. The previous practice was to have fairly standardised articles which would include the special rights attaching to the different classes of shares, particularly in respect of the appointment of directors, voting rights and rights of pre-emption on the transfer of the shares. It would be left up to the shareholders' agreement to deal in greater detail with the individual obligations of the shareholders, particularly in relation to management, the provision of equity capital and the financing of the project, as well as any requirements for the joint venturers to provide materials or services to the joint venture company. The terms of the shareholders' agreement would expressly be given precedence in any conflict with the articles of association. However, as the articles will now not be a public document, it may be possible to incorporate the provisions of the shareholders' agreement into the articles and to limit the majorities required for amendment.

Concerns regarding the publication of joint venture agreements through the requirement of lodgement with the Commission under the previous provision, s.251 of the Companies Codes,[7] have been removed in that section's equivalent, s.256 of the Corporations Law. The requirement to lodge with the ASC documents or resolutions attaching rights to shares no longer applies to a proprietary company.

Whilst a company has the legal capacity of a natural person in terms of s.161(1) of the Corporations Law, it is possible to place restrictions on the powers of the company in the memorandum or the articles of association under s.162. This may be useful to ensure that the company operates only in the restricted areas agreed upon by the joint venturers and does not extend its operations to businesses potentially in conflict with a joint venturer's business. Although this does not give any rights in respect of liabilities to third parties, in terms of s.162(7) it may be relied upon by a shareholder in obtaining an injunction under s.1324 of the Corporations Law to restrain the company from entering into an agreement, as well as in taking proceedings against the directors of the company or in an application for the winding up of the company.

The articles of association and the shareholders' agreement should

6 (1843) 2 HARE, 460; 67 ER 189.

7 W.M. Blanshard, 'Comment on the Organization of Mineral Processing Joint Ventures — Tolling Companies and Other Corporate Vehicles' (1982) 4(2) *AMPLJ* 419.

govern the management of the company as well as set out all the rights and obligations of the shareholders in relation to the project. These constituent documents should focus on:

(a) The issue of shares and the special class rights attaching to the shares. In particular, the joint venturer's rights as to the appointment and removal of directors, as well as in respect of the issue of new shares, should be clearly stated.
(b) The sale and transfer of shares and rights of pre-emption, compulsory buy-out provisions and put or call options between the joint venturers which may be used in the case of deadlock or irretrievable breakdown in the mutual trust between the joint venturers.
(c) The precise extent of management to be vested in the board and the decision-making powers vested in the shareholders as opposed to the board.
(d) Elaborate provisions to deal with default by a joint venturer, particularly of an obligation to contribute to the funding of the project. Careful consideration should also be given to the precise circumstances in which the joint venturers will be deemed to have breached their fiduciary duties to each other, and to mechanisms for dealing with such breaches — for example, put and call options over the joint venturers' shareholding. This is discussed more fully later in this paper.
(e) The voting powers of shareholders. This is very important as most of the conflicts between the joint venturers can be resolved at this level. It is important to bear in mind that the Corporations Law does stipulate what majorities are required in certain matters which are in some cases mandatory. The joint venturers should carefully consider these requirements, their impact on their relationship and whether to modify them expressly if possible. Principally, these statutory majorities include the following:
    (i) A special resolution is required to amend or alter the articles of association. However, s.176(3) does allow provision to be made in the articles of association that a special resolution must be passed by a majority in excess of the statutory requirement of 75 per cent of members voting in person or by proxy at the meeting (see s.253). This enables the joint venturers to protect the minority by requiring perhaps unanimous approval of changes to the articles of association, particularly if the articles contain the entire agreement between the joint venturers.
    (ii) Notwithstanding anything in the articles of association of the company, shareholders representing 5 per cent of the total voting rights of all shareholders may in terms of s.246 of the Corporations Law convene a general meeting of shareholders. The shareholders by agreement cannot prevent such a meeting from being requisitioned. In this case the statutory rules override any agreement to the contrary. This may be irksome to the

major participants in the corporate joint venture, but it appears that these minority rights cannot be avoided.

(iii) The shareholders by special resolution may reduce the company's share capital subject to confirmation by the court in terms of s.195. However, this applies only if authorised by the articles of association and in order to prevent this shareholders by agreement can provide that no such reduction can take place unless all shareholders unanimously agree.

(iv) In terms of s.491 of the Corporations Law the company may be voluntarily wound up if the company so resolves by special resolution. This does not appear to be limited in any way by the reference to the articles of association of the company, which may place the minority participants at risk in certain circumstances. One way to deal with this, perhaps, is to provide in the articles that in the event of such resolution being passed the dissenting minority would have the right to put their shares to the majority shareholders at an agreed value or a value capable of determination on the basis of the company as a going concern.

It may also be possible for the joint venturers expressly to waive this statutory right by agreement. There is authority which supports the ability of persons to waive statutory rights by agreement. In unincorporated joint ventures, the joint venture agreement usually contains a provision that the joint venturers as co-owners waive their rights under s.66G of the Conveyancing Act 1919 (NSW) to partition the joint venture property.[8] This waiver could be extended to apply to the members' rights under s.491 of the Corporations Law to voluntarily wind up the company by special resolution. This could be done either as a waiver of voting rights or as an agreement to desist from exercising voting rights to effect a voluntary winding up. The minority shareholder may then have grounds to seek an injunction preventing an attempted voluntary winding up.

Other areas which will require special consideration as to voting majorities in the shareholders' agreement and/or the articles of association include:

(A) the joint venturers' rights to dividend distributions, how they will be determined and by whom;

(B) the right of the shareholders to include additional shareholders by issuing new shares to third parties; and

(C) areas where unanimity might be required, such as major capital expenditure, disposal of major assets, major borrowings, reduction of share capital, etc.

In the case of tolling companies and companies providing common facilities to the joint venture, as discussed at the beginning of this paper, the shareholders' agreement also usually includes provisions as to the rights and obligations of the com-

8 *Re McNamara and the Conveyancing Act* (1961) 78 WN (NSW) 1068.

pany regarding the design, construction, acquisition, commissioning and operation of the project facilities, as well as the special obligations upon shareholders, such as to construct their own storage facilities and to ensure that the project operates on a break-even basis. The obligation to operate on a break-even basis is also normally entrenched in the participants' agreement.

POSITION OF DIRECTORS

The articles of association and the shareholders' agreement in a corporate joint venture will usually provide for special class rights relating to shares held by the various joint venturers, and in particular will enshrine the right of each joint venturer through its shareholding to appoint and remove a director it nominates. Whilst in respect of a management or operating committee of an unincorporated joint venture this is clearly anticipated and provided for, for a corporation such provisions give rise to complex issues relating to the fiduciary duties of directors. This is perhaps one of the major areas in which this tension between the contractual arrangements of the joint venturers and the statutory and common law rules arises in relation to the company. In summary, the obligations of directors may be divided into two categories:

Common Law Duties

The duties required of a director under the common law include:

(a) to act in good faith in the interests of the company as a whole;
(b) to exercise his powers for a proper purpose and shareholders have a personal right to be protected against dilution of their rights by the improper action of directors;[9]
(c) to avoid being placed in a position of conflict of interest; and
(d) to act with reasonable care and skill.

Statutory Duties

To some extent these duties are also embodied in the Corporations Law under s.232, which requires a director to act honestly; to exercise a reasonable degree of care and diligence; not to make improper use of his position or of information acquired by virtue of his position for his or another's advantage; and not to cause detriment to the company. The statutory requirement to exercise a reasonable degree of care and diligence may in fact be a higher standard than the common law duty relating to reasonable care and skill.

Also and most importantly, a director faces the risk of personal liability for a debt incurred as long as there are reasonable grounds to expect that the company will not be able to pay its debts as and when they become due (see s.592 of the Corporations Law). This fiduciary duty of the director is owed:

9 *Residues Treatment and Trading Co Ltd v. Southern Resources Limited* (1988) 14 ACLR 375; 6 ACLC 1160.

(a) to the company as a whole;[10]
(b) to the general body of shareholders;[11] and,
(c) when the company is facing severe financial strain, the directors will have an obligation to creditors.[12]

The central issue that arises in relation to an incorporated joint venture is the potential conflict of interest which the nominee directors may have in serving on the joint venture company board. Whilst case law in Australia has not been consistent in its approach, there is a respectable line of authority which diverges from the strict view generally adopted by the English courts whereby a director must be completely unhindered by any requirement to act in accordance with directions of his nominator in being able to act in the best interests of the company of which he is a director.[13] This more stringent approach of the English courts has been followed in a number of cases in Australia. In *Bennetts v. Board of Fire Commissioners of New South Wales*[14] it was suggested that a person who had been elected to a statutory board of members of a union was subject to the overriding and predominant duty to serve the interest of the board in preference on every occasion to serving the interests of the group that appointed him. Young J in *Morgan v. 45 Flers Avenue Pty Ltd.*[15] also adopted this restrictive approach and noted that:

> In general where a person is serving on a board of directors he is dealing with the affairs of the company that is being controlled by the board and whilst he is so acting he is not, and should not, be also involved in the affairs of some other entity . . .

This stringent approach would make the position of the directors who are nominated by the joint venturers legally untenable.

In contrast, there are Australian decisions which do give legal recognition to the position of the nominee director, and allow in particular that the articles of association of a company may be constructed so as to recognise the existence of nominee directors and the interests of their appointors and to specifically provide for a modification of the fiduciary responsibility to the company on whose board they serve. In *Levin v. Clarke*[16] Jacobs J states:

> It may be in the interests of the company that there be upon its board of directors one who will represent these other interests and who will be acting solely in the interests of such a third party and who may in that way be properly regarded as acting in the interests of the company as a whole. To argue that a director particularly appointed for the purpose of representing the interests of a third party, cannot lawfully act solely in the interests of that third party, is in my view to apply the broad principle, governing the fiduciary duty of directors, to a particular situation, where the breadth of the fiduciary duty has been narrowed, by agreement amongst the body of the shareholders.

A similar approach was adopted by Jacobs J in *Re Broadcasting Station*

10 *Percival v. Wright* [1902] 2 Ch 421.
11 *Coleman v. Myers* [1977] 2 NZLR 298 and *Darvall v. North Sydney Brick and Tile Co. Ltd* (1989) 16 NSWLR 260; 15 ACLR 230; 7 ACLC 659.
12 *Kinsela v. Russell L. Kinsela Pty Ltd (in liq.)* (1986) 4 NSWLR 722; 4 ACLC 215.
13 *Scottish Co-operative Wholesale Society Ltd v. Meyer* [1959] AC 324, 366–367.
14 (1967) 87 WN (Pt 1) (NSW) 307.
15 (1986) 10 ACLR 692, 705; 5 ACLC 222.
16 (1962) 80 WN (NSW) 485; [1962] NSWR 686, 700.

2GB Pty Ltd.[17] In that case he held that compliance with the appointors' wishes would not be objectionable unless it could be inferred that the directors would still have acted in that way while knowing that their acts were not in the best interests of the company as a whole. He states:

> I realise that, upon this approach, I deny any right in the company as a whole to have each director approach each company problem with a completely open mind, but I think that to require this of each director of a company is to ignore the realities of company organisation. Also, such a requirement would, in effect, make the position of a nominee or representative director an impossibility.

These two cases are reviewed and approved by Mahon J in *Berlei Hestia (NZ) Ltd v. Fernyhough*,[18] in which he states:

> As a matter of legal theory, as opposed to judicial precedent, it seems not unreasonable for all the corporators to be able to agree upon an adjusted form of fiduciary liability, limited to circumstances where the rights of third parties vis-a-vis the company will not be prejudiced. The stage has already been reached, according to some commentators, where nominee directors will be absolved from suggested breach of duty to the company merely because they act in furtherance of the interests of their appointors, provided that their conduct accords with the bona fide belief that the interests of the corporate entity are likewise being advanced.

In the more recent decision of the High Court in *Whitehouse v. Carlton Hotel Pty Ltd*[19] the majority of the court appeared to accept that the articles of the company could be framed so as to remove the restrictions which would otherwise apply when the fiduciary power was exercised. However, on the facts before them, which involved the allotment of unissued shares, the majority found otherwise.

It is quite clear that with an incorporated joint venture the reality of the company organisation is that each of the directors will represent the interests of a particular joint venturer and this is contemplated by the shareholders in creating and structuring the company. In other words, it is recognised that the interests of the company as a whole may be served by the directors acting in a bona fide manner taking into account the interests of their appointors. It would be prudent, therefore, for the articles of association and the shareholders' agreement expressly to recognise this reality and to provide for the directors to take into account the interest of their appointors in exercising their duties for the company. However, care must be taken in drafting such a provision not to fall foul of s.241 of the Corporations Law, which voids a provision in the articles of association exempting an officer of the company from any liability in respect of a breach of duty or breach of trust of which the officer may be guilty. In other words, it is important to ensure that the nominee directors are still required to act in the bona fide belief that they are acting in the interests of the company as a whole.[20]

To address the problem, the Companies and Securities Law Review

17 [1964] NSWLR 1648, 1663.
18 (1980) 2 NZLR 150, 166.
19 (1987) 162 CLR 285; 61 ALJR 216; 5 ACLC 421.
20 R.E. Ricker, 'Commentary on the Organisation of Mineral Processing Joint Ventures' (1982) 4(2)*AMPLJ* 425, 427.

Committee in their report of 8 March 1989,[21] recommended, *inter alia*, that the rights and duties of nominee directors be expressly recognised by statute.

The Committee specifically recommended that in the case of an unlisted company the equivalent of s.232 of the Corporations Law, which sets out the duties of directors, should be amended to the effect that a director will not be in breach of this section or otherwise in breach of his duty to act for the benefit of the company as a whole provided that:

(i) either the members have given their prior and full consent to the particular exercise of the power or performance of the duty in that way; or

(ii) the company is being managed in accordance with an agreement or arrangement to which all members are parties and which authorises the director to take into account the interests of one or more of the members in the particular exercise of a power or performance of a duty.

The Committee also recommended that the legislation should be amended to allow an exempt proprietary company to include in its memorandum and articles of association provisions which relieve directors of their normal duty to consider the benefit of the company as a whole, so long as the company is solvent.

In conclusion, therefore, whilst the law at present does create some uncertainties for nominee directors, their position is not legally untenable if the articles of association and the shareholders' agreement expressly recognise the realities of the company's organisation and specifically provide that the nominee directors should be able to take into account the interests of their appointors provided that in so doing they consider and act bona fide in the interests of the company as a whole.

Similarly, to avoid a potential breach of confidence, express provisions should also be included in the articles of association and the shareholders' agreement to permit the dissemination of confidential information concerning the operation of the joint venture to all board members and their appointors. Any limitations should be expressly recognised in the articles of association and the shareholders' agreement. Furthermore, the articles of association should also permit all directors to vote even though a potential conflict of interest may exist between the interests of the company and that of one or more of the joint venturers, provided such potential conflicts are fully disclosed.

POSITION OF MINORITIES

Another way of minimising the considerable risk for directors[22] is to restrict the powers of the Board to dealing only with limited administrative matters and to vest the decision making powers directly in the shareholders by general meeting. Shareholder meetings of a company with a

21 See Companies and Securities Law Review Committee Report No.8, 'Nominee Directors and Alternate Directors', 8 Mar. 1989.

22 *Commonwealth Bank v. Friedrich* (1991) 5 ASCR 115. In this case a $97 m. liability was imposed upon a non-executive, honorary and part-time director.

limited number of shareholders may be convened expeditiously and shareholders owe no fiduciary duties to the company or to each other (as shareholders).

The remedy against minority oppression is principally contained in s.260 of the Corporations Law, which provides that oppressive conduct occurs when the affairs of the company, or an act or omission by or on behalf of the company, or a resolution or proposed resolution, is 'oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or is contrary to the interest of members as a whole'. A court under s.260(2) has wide powers to make orders it thinks fit, including regulating the conduct of the affairs of the company, ordering the purchase of shares of any member or requiring the company to be wound up.

The terms of s.260 are reflected in s.461, which deals with winding up by the court, although this section also extends to directors acting in the affairs of the company in their own interests rather than the interest of members as a whole, or in any manner which appears to be unfair or unjust to other members (see sub-s.(e)), as well as to the general just and equitable ground contained in sub-s.(k). Whilst under s.461 the range of possible applicants to court is much wider, including a creditor, contributory, liquidator or the Commission, the court under that section may only order the winding up of the company. Hence, if a shareholder fails under s.260, the only remedy under s.461 is winding up.

A critical question for determining whether the use of a corporate vehicle will be less favourable to the joint venturers is to what extent the oppression remedy in ss.260 and 461 as well as the winding up on the just and equitable basis in s.461(k) have the effect of imposing greater obligations upon the joint venturers than would exist under an unincorporated joint venture and which they expressly bargain for in terms of their joint venture agreement. As mentioned earlier, the Corporations Law itself does not attempt to distinguish among the wide range of companies which may fall within its ambit of application. It is, therefore, up to the courts to refine the application of these broad principles to particular types of companies and to develop appropriate tests. Professor Austin made this point at the time when s.320 of the Companies Codes was introduced.[23]

Minority shareholders of a public listed company may need to rely on a far higher degree of protection in respect of the actions of the majority than the minority in an incorporated joint venture, where the underlying relationship has been well documented and carefully agreed upon prior to operations commencing. As mentioned earlier in this paper, the courts will recognise the agreement between the joint venturers in an unincorporated joint venture as being the primary source for discerning the existence of fiduciary obligations.[24] Of course, this presupposes the absence of unconscionability or of terms which may be struck down as

23 R. Austin, 'Protection of Minority Shareholders: Changes to Section 320', 1983 Committee for Postgraduate Studies in the Department of Law, University of Sydney, 102.

24 *Supra* n.5.

penalties. The problem is exacerbated in an incorporated joint venture by the fact that the directors will normally be nominated by the different joint venturers to represent their separate interests. Hence, at the threshold there is a potential conflict of interest. In fact, the Companies and Securities Law Review Committee in its report on nominee directors, mentioned earlier, stressed that the likelihood of attracting the operation of the equivalent of s.260 of the Corporations Law will be higher in cases where nominee directors have been appointed than in other cases.

I will now briefly examine the approach of the court to s.461(k), the just and equitable basis for winding up, and consider to what extent it will apply to incorporated joint ventures.

In the leading English case of *Ebrahimi v. Westbourne Galleries*[25] Lord Wilberforce stressed that the court would normally require a finding of the existence of a 'quasi partnership' relationship with the following elements:

(i) the shareholders are associated on the basis of mutual confidence;
(ii) there is an agreement or understanding that some or all of the shareholders will participate in the conduct of the business; and
(iii) there are restrictions upon the transfer of shares.

Whilst the elements of this test may appear in an incorporated mining joint venture, in essence the entire nature of the relationship is not one of quasi-partnership. Ahrens in his analysis[26] makes the points succinctly:

> The present thesis is that since most commercial joint ventures vary remarkably from those in the quasi partnership category, there must be considerable force in the argument that any party who has been independently advised should be largely consigned to its remedies for breach of contract and in situations not directly contemplated by the shareholders' agreement the court should not be sympathetic to claims of deadlock and lock in and generally not be ready to supplement the express terms of the arrangements by intervening under either s.320 or s.364 [equivalent to ss.260 and 461 of the Corporations Law].

The approach of Young J in *Morgan v. 45 Flers Avenue Pty Ltd*[27] is also instructive. He states:

> However, merely because these three elements may exist in a particular case does not mean that the court will draw the inference that there were superimposed equitable obligations on the company law rights and duties, nor will the court assume that just because that once was the case, that it is so for all time because it is always competent for the parties to alter their relationship.

It seems, therefore, that in the absence of extreme circumstances it is unlikely that a court would grant a winding-up order under the just and equitable ground in the case of a well-documented incorporated mining joint venture.

However, the remedies for minority oppression under s.260 of the Corporations Law are much wider and it is therefore critical to analyse to

25 [1973] AC 360. See also *In re A & B. C. Chewing Gum* [1975] 1 WLR 579 in which Plowman J applied the just and equitable doctrine to commercial arm's length arrangements between shareholders.

26 Ahrens, op. cit., n.4, 479.

27 *Supra* n.15, 707.

what extent the joint venturers may be exposed to court orders which go beyond what they contemplated in the provisions of the shareholders' agreement or the articles of association. The following may be observed:

(1) The purpose of the proceedings for oppression is not punitive but remedial. In the recent case of *Re Enterprise Gold Mines NL*,[28] which involved a public listed company, Murray J made this point quite clear and also indicated that where there are grounds to intervene a court should choose the least intrusive remedy. In fact, the court refused to appoint a receiver and manager, which was the relief sought, and instead restricted the company's freedom to enter into certain transactions relating to the sale of its assets to associated parties without the approval of shareholders in general meeting.

(2) If the company is merely acting as an agent in an unincorporated structure, which is the more usual form of incorporation in a mining joint venture, the conduct of the corporate entities will not be central to the determination of the existence of fiduciary duties; these will apply mainly to the principals, namely the joint venturers.[29]

(3) In assessing unfairness, the courts have tended towards an examination of whether standards of fair dealing have been departed from in the light of the history and structure of a particular company and the reasonable expectations of the members. The New South Wales Court of Appeal in *NSW Rugby League Limited v. Wayde*[30] adopted the approach of the New Zealand Court of Appeal in relation to a similar section in the New Zealand companies legislation in the case of *Thomas v. H.W. Thomas Ltd*,[31] in which it was stated:

> . . . sec.209 is a remedial provision designed to allow the Court to intervene where there is a visible departure from the standards of fair dealing; and in the light of the history and structure of the particular company and the reasonable expectations of the members to determine whether the detriment occasioned to the complaining member's interests arising from the acts or conduct of the company in that way is justifiable.

Ahrens in his discussion of incorporated joint ventures[32] concludes in relation to the oppression remedy that:

> . . . the courts ought not rush to supplement whatever bargain has been struck by allowing that shareholder easily to extricate its investment unless it is able to show egregious misconduct or objectively determined bad faith in terms of the particular standard referred to above. . . . it would mean that the court will look at all elements of the total bargain under the "reasonable expectations" standard and more importantly weigh all elements of the conduct of both parties (except management standards) to determine who precipitated the deadlock or breakdown of relations and how far the conduct of the defendants might be
> This approach favours the practice of the US courts, which apply the business judgment rule in terms of which they display a reluctance to substitute their judgment for that of the majority of the board of directors unless it can be shown that the board acted in bad faith or

28 (1990) 3 ACSR 531; 8 ACLC 758.
29 Ahrens, op. cit., n.4, 472.
30 (1985) 1 NSWLR 86; 9 ACLR 465; 3 ACLC 177.
31 (1984) 2 ACLC 610, 616–618.
32 Ahrens, op. cit., n.4, 490.

unreasonably or its actions involved a conflict of interest.[33] In fact, the Minnesota companies legislation of 1983 specifically provides, in determining whether to grant relief in disputes between shareholders in closely held corporations, that the courts should take into account:

> the reasonable expectations of the shareholders as they exist at inception and as they develop during the course of the shareholders' relationship with the corporation and with each other.[34]

A note of caution needs to be sounded at this point. Whilst Australian courts have often stated that they will avoid an unwarranted assumption of the responsibility for management of the company,[35] they do not in most cases require the complainant to prove that the majority have acted in bad faith or improperly or have been involved in misconduct. In this way they are clearly more interventionist than the US courts. The High Court in *Wayde & Another v. NSW Rugby League Ltd*[36] made it clear that it may be appropriate to examine the conduct of the directors even though they may have exercised general powers of management in a bona fide manner.

In the light of the above, it becomes critical for the joint venturers to provide detailed guidelines in the articles of association or the shareholders' agreement as to what their 'reasonable expectations' are in regard to the management of the joint venture company, including remedies in the case of deadlock or dispute. In so doing the joint venturers will be able to limit the risk that the court, in examining whether management has acted unfairly to the minority, will make findings that were not contemplated by the joint venturers when they established the company.

From the above discussion it can be concluded that the courts, in applying the common law fiduciary duties in the case of an unincorporated joint venture and the statutory oppression rules in ss.260 and 461 of the Corporations Law in the case of a joint venture company, will in most cases permit the joint venturers to provide their own remedies in their joint venture agreement in respect of any disputes or deadlock between them. It is only if the agreement is inadequate or ambiguous, or if the circumstances of the joint venture have materially changed, that the courts may superimpose their own remedies. It seems that the courts may intervene to protect the minority more readily in the case of an incorporated joint venture on the basis of unfairness, whilst with an unincorporated joint venture the courts will intervene only if bad faith or a conflict of interest can be proved. This is an important additional risk for the joint venturers in adopting a corporate form for the venture.

A further major complicating factor, from the point of view of an incorporated joint venture, is the fact that the directors are usually nominated by the joint venturers to represent their interests and as such are potentially in a state of conflict of interest. However, if the recommen-

33 See for example *Johnson v. Trueblood* (1980) 629 F. 2d 287 (United States Court of Appeals, 3rd Circuit).
34 Ahrens, op. cit., n.4, 483 fn.88.
35 See for example *Re Enterprise Gold Mines NL* (1990) 3 ACSR 531; 8 ACLC 758.
36 (1985) 61 ALR 225; 59 ALJR 798.

dations of the Companies and Securities Law Review Committee are adopted and reflected in new legislation, this risk could be minimised.

CONCLUSION

It is, therefore, imperative that the joint venturers turn their minds very carefully to situations of possible dispute, deadlock and default, and attempt to provide detailed remedies in the shareholders' agreement and the articles of association. Clearly, one major potential area of dispute is the precise scope of the joint venture as opposed to the separate activities of the joint venturers. It should be made quite clear in the articles of association precisely what the limits of the operations of the joint venture company are and will in the future be. The inclusion of a detailed objects clause in the memorandum of association may assist in avoiding uncertainty. The joint venturers should also be counselled to keep their agreements under review on a regular basis to ensure that they continue to reflect any changes in the terms of their relationship as time passes and do not become historic testaments.

In a recent decision in Queensland, *In re Northstate Carpet Mills Pty Limited*,[37] the Queensland Supreme Court dealt with a joint venture which manufactured carpets and whose business operations had been expanded into retail distribution at the behest of the majority shareholder, which was in competition with the retailing operations of the minority shareholder. The court held that this conduct was oppressive and unfairly prejudicial to the minority and ordered that the majority shareholder purchase the shares of the minority at a particular valuation.

If the shareholders' agreement or articles of association make clear the precise ambit of operation of the mining joint venture, such disputes could be dealt with on the basis of breach of contract.

One of the most important remedies to deal with deadlock, major disputes or an irretrievable breakdown in the joint venture is the use of put and call options in the shareholders' agreement. The precise formulation of these options will need judiciously to take account of the necessity to end the deadlock or dispute as against preventing a party from engineering a default in order to avoid its liability to contribute to the funding requirements of the joint venture. It was recently held in *CRA Limited v. N.Z. Goldfields Investments Limited*[38] that a call option in favour of one joint venturer on the default of the other joint venturer in making a contribution which provided for the payment of fair market value less 5 per cent was not unenforceable as a penalty.

In a corporate joint venture the effectiveness of these options may be frustrated by the articles of association if the directors are given the absolute discretion to approve share transfers, which is the normal case with proprietary companies (see Table A). Whilst s.116 of the Corporations Law requires that the articles of association contain a restriction on the right to transfer the shares of the company, such right of the board could

37 Unreported, Supreme Crt Qld, 27 Nov. 1989 (Ambrose J).
38 [1989] VR 873.

be made subject to the exercise by the joint venturers of their rights under any express put or call option. If this is not provided the only remedy a joint venturer may have is under s.1094 of the Corporations Law, but this section permits the transferee or transmittee to apply to court for an order transferring the shares only on the basis that the refusal by the board was without just cause.

Tax considerations aside, the advantages of utilising a corporate entity to conduct a mining joint venture may be accessed with limited risk of the statutory rules of the Corporations Law being superimposed on the commercial arrangements between the joint venturers, if the latter carefully construct their joint venture agreement as reflected in the articles of association and the shareholders' agreement to provide for and take account of the operation of various statutory provisions, in particular in relation to directors' duties and minority oppression.